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MARK TUSHNET ON WHY THE CONSTITUTION DOESN'T MATTER

Amanda Frost

Reviewing

MARK TUSHNET, *WHY THE CONSTITUTION MATTERS*
(Yale University Press 2010)

MARK TUSHNET'S BOOK, *Why the Constitution Matters*, is poorly titled – though that is not Tushnet's fault. The book is published by Yale University Press as part of its "Why X Matters" series, in which the authors defend the relevance of their chosen subject. Presumably, then, Tushnet lacked discretion to alter the title, but happily that didn't stop him from ignoring it. Tushnet argues that constitutional law is really politics by another name and that the Constitution's text and judicial doctrine expounding on it have little effect on our lives. The Constitution matters, Tushnet concludes, only to the degree that it provides a "structure for our politics" (p. 1) – though in the end he doesn't think the Constitution does much of that either. A more accurate title of his book, then, would have been "Why the Constitution Doesn't Matter Much, at Least Not in the Way You Thought it Did."

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Tushnet wrote the book for the curious “non-specialist” in constitutional law, and one of his primary goals is to debunk the popular misperception that the Constitution contains a set of immutable fundamental rights faithfully guarded by the Supreme Court. He then lays out the minor ways in which he thinks the Constitution *does* matter by creating a structure for the political process. Finally, he concludes in a normative vein, by describing how we can “make the Constitution matter more (or differently)” by reforming structural flaws in our current political system (p. 1). In short, Tushnet seeks to dethrone “Constitutional Law,” transforming it from a doctrinally complex subject reserved for legal experts into an accessible debate over policy choices and the ways in which the political structure affects those choices.

Tushnet has written a number of scholarly books and articles in which he rejects the notion that judges dominate constitutional interpretation, arguing that constitutional interpretation is (and should be) infused with politics.¹ In this new book he shares the news with lay people as well. The book is an enjoyable read, written in conversational style and filled with interesting snippets of legal history, constitutional theory, and political science. It summarizes academics debates about constitutional interpretation and the role of the Court in a way that is both comprehensible to non-academics and yet not overly simplistic. By publishing a concise and accessible book on this subject, he may succeed in communicating with those outside the small tribe of law professors and political scientists who have been having this conversation among themselves.

I agree with Tushnet that America’s cherished “fundamental rights” are shaped by politics, not constitutional text or doctrine. And I admire his message that it doesn’t take a law degree, a judgeship, or an endowed chair to change the meaning and application of the Constitution. Doctrinal complexity and Supreme Court argument are beside the point once we recognize that conflicts over the content of constitutional rights are really policy debates in disguise.

¹ See, e.g., Tushnet, *Taking the Constitution Away from the Courts* (1999).

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I differ with Tushnet, however, in that I think the courts play a more important role in our political process than Tushnet acknowledges here. Courts are well aware of their position relative to the other branches of government, and they use their power of judicial review to set the political agenda, shape the debate, and fill the vacuum when the political process is stuck in gridlock.² True, the judiciary will eventually come into line with sustained majority preferences, but it has a great deal of influence before those preferences jell and gain support in other political institutions. Although my disagreement with Tushnet is one of degree, not of kind, it makes me doubt whether advocates for change will exchange constitutional arguments before courts in favor of policy debates in the political arena anytime soon.

I. OVERVIEW

Chapter One, entitled “How the Constitution Matters,” is more political science than law. Tushnet asserts that important policy choices are determined by politics, and not by constitutional text or judicial pronouncements. Policy is influenced in large part by the political parties and Congress’s internal procedural rules – neither of which is constitutionally-based. Tushnet summarizes of the development of the two-party system and describes how that system shapes policy at both the national and state levels. He also discusses the effect of the internal rules of the U.S. House and Senate on the legislative process, with a special emphasis on this year’s most infamous procedural rule, the filibuster. In a few dozen pages, he conveys how these political structures control policymaking in the United States.

What does all this have to do with the Constitution? Not much, Tushnet admits. The Constitution does not mention political parties, and leaves it to the House and Senate to create their own governing rules within a broad framework. Indeed, the Framers of the

² William Eskridge, Jr. & Philip Frickey, *The Supreme Court, 1993 Term – Foreward: Law as Equilibrium*, 108 Harv. L. Rev. 26 (1994).

Constitution thought they had designed a system to prevent the formation of parties, or “factions,” as they described them (pp. 2-29). As we all know, they were unsuccessful – an active two-party system was in place within twenty years of the Constitution’s ratification – but it is hard to celebrate the Constitution for inadvertently permitting the dominance of the two-party system. Of course, the Constitution is not entirely irrelevant. After all, it creates the institutions responsible for setting federal policy: The House of Representatives, Senate, and the Presidency. And by separating the elections for each, the Constitution allows for divided government that affects their work product. The constitutional principles of separation of powers and federalism further serve to shape the formation of political parties and the interactions between the three branches. On the whole, however, Tushnet concludes that the constitutional role is minimal.

Chapter two, entitled “How the Supreme Court Matters,” continues with Tushnet’s theme that it is politics, and not the Constitution, that deserves our attention. Tushnet argues that the Supreme Court rarely is at odds for long with public opinion. The Court keeps busy striking down laws that are “geographic outliers” (because only a few states retain them), or “temporal outliers” (because the majority no longer supports them) (p. 101). Rarely does the Court make decisions at odds with the current majority’s preferences. As Tushnet explains, the Justices vote the way that the public and elected official prefer *not* because they are trying to please majorities, but rather because they are appointed and confirmed through a political process that, generally speaking, ensures that their decisions will reflect mainstream values³:

When things work well, the justices simply interpret the Constitution as they understand it – which is how the president wanted them to understand it. From their own

³ Although this chapter contains some interesting discussions of how social movements and even life experience can inspire sitting justices to alter their views on the Constitution, Tushnet makes clear that he thinks these are minor influences, taking a backseat to the selection and confirmation process (pp. 139-49).

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point of view, that is, from the inside, the justices are entirely sincere in saying that they are doing no more than interpreting the Constitution and that they pay no attention whatever to politics. There's something to admire about a constitutional design that so seamlessly integrates law and politics . . . (p. 118).

In chapter three, Tushnet turns normative. He asserts that if we will finally acknowledge that it is politics, and not the Constitution or judicial doctrine, that controls the contents of our rights, we can improve our national conversation about what those fundamental rights should be:

How can we deal with deep and persisting disagreement about what our fundamental rights are? By coming to grips with the fact that these disagreements are reasonable, no different in principle from our disagreements about how to finance a national health care policy or about the proper tax rate for capital gains. If we stop arguing over the words in the Constitution – or the doctrines expounding them – we can have a better conversation about our nation's values (pp. 152-53).

Tushnet hopes the change in rhetoric will improve the quality of debate. More important, he hopes that it will transform arguments about constitutional text and doctrine, typically decided by judges, into discussions about policy choices that will ultimately resolved by the people and their representatives.

As Tushnet recognizes, however, people are loathe to concede that a right they consider “fundamental” is up for grabs in the political process, particularly when the political process is stacked against them (p. 154). In the last twenty pages of the book Tushnet addresses the problem of perennial losers who fail to achieve change through politics because of flaws in the structure of the political process itself. This is where the Constitution *does* matter, since it is the Constitution that establishes that structure. Drawing on the work of Larry Sabato and Sanford Levinson, Tushnet argues for reform of “hardwired” features of the Constitution, such as the electoral college, the overrepresentation of small states, and the life-

tenure of federal judges. Acknowledging that constitutional amendment is unlikely, Tushnet proposes a series of procedural reforms that can be implemented without actually amending the constitution itself (pp. 155-72) – a fitting conclusion to a book whose central theme is the Constitution’s irrelevance.

II.

THE CONSTITUTION *DOES* MATTER (AT LEAST IN THE SHORT TERM)

For Tushnet, law is politics. If the Supreme Court upholds a right you care about, watch out – your opponents will mobilize politically to populate the courts with judges who see things their way, or to find legislative end runs around the decision, or both. That is why Tushnet declares on the very first page of his book: “It’s politics, not ‘the Constitution,’ that is the ultimate – and sometimes the proximate – source for whatever protection we have for our fundamental rights” (p. 1).

Tushnet is clearly correct that in the long run our rights are at the mercy of political forces, regardless of what the text of the Constitution or the courts have to say about it. But the long run can be very long indeed, and in the meantime judicial decisions can change the status quo, establishing new rules that will govern unless and until the political branches muster the will to overcome them.⁴ As Tushnet’s book makes clear, the political process is slow and unwieldy. Political parties, divided government, and congressional rules of procedure are all recipes for gridlock, making it difficult for the political branches to counter even unpopular judicial decisions. For all these reasons, I think Tushnet gives short shrift to the way in which courts can define and protect constitutional rights for generations, even when the political branches are incapable of doing so.

Tushnet repeatedly uses the abortion debate to support his conclusion that the Constitution does not protect so-called “fundamental rights.”⁵ Yet in many ways the Supreme Court’s decision in *Roe*

⁴ See, e.g., Eskridge & Frickey, *supra* note 2.

⁵ See, e.g., *id.* at 1-2, 93-94

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*v. Wade*⁶ undercuts the arguments in his book. Of course, Tushnet is correct that reasonable people can disagree about whether the Constitution protects the right to have an abortion, and it is certainly possible to imagine the Court having decided *Roe* the other way. For these reasons, *Roe* well illustrates Tushnet's point that the text of the Constitution does not supply the content of our so-called rights. Yet *Roe* demonstrates that the Court, acting in the name of the Constitution, has the power to change lives. Consider for a moment that one-third of all women in the United States will have an abortion during their lifetime.⁷ Without *Roe*, some of these women would have been forced to carry unwanted pregnancies to term (or, if you prefer, some of these unwanted fetuses would now be American citizens). However you characterize it, *Roe's* declaration that women have a constitutional right to obtain an abortion *matters* to many people.

Tushnet's argument that all law is politics does not apply easily to *Roe*. The nation is conflicted about abortion, making it difficult to achieve change through the political process. And the record on abortion bears this out. Since *Roe* was decided in 1973, Democrats and Republicans have traded control of the Presidency and Congress – giving each party an opportunity to appoint judges and enact legislation on the issue – and yet the core of *Roe* has remained unchanged. Although the pro-life movement has succeeded in chipping away at the margins, it has not altered *Roe's* guarantee that abortions are available in the first trimester of pregnancy. That is a long time in our young nation's history for a constitutionally-based judicial decision to control the law of the land.

Tushnet dismisses *Roe*, and all the other cases in which the Supreme Court protects a right that would go unrecognized by the political branches, as politics playing out in the courts. He points out that *Roe* did not put an end to the debate, and that if enough

⁶ 410 U.S. 113 (1973).

⁷ Emily Bazelon, *The New Abortion Providers*, N.Y. Times Magazine, July 14, 2010 www.nytimes.com/2010/07/18/magazine/18abortion-t.html?_r=3&ref=magazine&pagewanted=all.

people oppose the right to abortion over a long enough time, *Roe* will be overturned (pp. 152-53). All true. But even if *Roe* is reversed tomorrow, that will not change the fact that for the last thirty-seven years the Supreme Court has required that abortions be available in states that would not have allowed them, citing the U.S. Constitution as its grounds for doing so.

And *Roe* is just one example of many. As a result of the Supreme Court's most recent constitutional rulings, corporations have the right to fund political advertising,⁸ pornographers have the right to make movies depicting the torture of small animals,⁹ and citizens have the right to own guns.¹⁰ Whatever one thinks about these decisions, they do change the course of people's lives in large and small ways, and they all used the Constitution to reverse policies enacted by popularly elected officials. The Court has forced the opponents of these decisions to fight them in the political arena, and to live in the meantime with the Court's preferred outcome. So while Tushnet's point about all law being politics is well taken in the long term, I nonetheless think that the Constitution and the courts that interpret it matter greatly in the short term – that is, the here and now in which we all go about our daily lives.

III.

PREFERRING THE COURTS TO CONGRESS

Regrettable, for the same reason that decisions like *Roe* have staying power, it is unlikely Tushnet will succeed in his mission to replace debates about fundamental constitutional rights with debates about policy in the political branches. Tushnet argues persuasively that we could improve the national dialogue about our fundamental rights if we acknowledged that they are just another set of political choices. He contends that discussions framed as conflicting policy preferences rather than as disagreements over fundamental rights will be less heated and more productive, with each

⁸ *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

⁹ *United States v. Stevens*, 130 S. Ct. 1577 (2010).

¹⁰ *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

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side recognizing that reasonable people can disagree about these things (pp. 153-54). More importantly, Tushnet's conception of rights-as-policy-choices democratizes the Constitution by enabling the public to affect constitutional interpretation through political action. Once fights about fundamental rights are properly identified as policy differences, rather than conflicting interpretations of the Constitution, those who fail to get courts to rule in their favor can better assess where they went wrong, and can identify political (as opposed to legal) strategies for future success.

This last observation leads Tushnet to conclude that perennial losers should think about whether the political process is stacked against them, and if so, how to go about making some fundamental procedural changes. Building on the work of Larry Sabato and Sanford Levinson, Tushnet suggests a few structural reforms: congressional re-districting should be done by non-partisan commissions; states should agree to commit their electors to vote for the Presidential candidate who wins the national popular vote; lame-duck legislative sessions should be eliminated entirely; and Supreme Court justices should serve for fixed terms, after which they can retire or serve as lower court judges (pp. 155-66). These sorts of structural changes would eliminate some of the most-criticized aspects of our current political system by creating closer connections between the voters and those who make decisions on their behalf. Most brilliantly of all, all these reforms could be accomplished through the political process, without the need for constitutional amendment.

As Tushnet observes, however, it is hard to mobilize the public behind good government reforms, even when those reforms are desperately needed. The ordinary citizen cares more about substantive outcomes than the procedures that led to those outcomes, and so it is an uphill battle to convince the public that procedural reform is the essential first step to achieving their ultimate substantive goals. For instance, it is easier to inspire advocates for same-sex marriage to fight for the recognition of that right before courts and legislatures than to seek term limits for the justices, even if term limits would eventually produce a more progressive Court. Tushnet

hopes this book will convince those who seek substantive change to work for procedural change first by supporting candidates and organizations that share their vision of a better political process (pp. 151-74).

Unfortunately, however, advocates for structural reform face the same obstacles to success that bar them from obtaining the substantive outcomes they prefer. This is the catch-22 of any attempt to reform the political process *using* that same political process. Many of the procedural changes that Tushnet advocates are opposed by politically powerful institutions and officeholders that gained that power because of the current procedural arrangements. For that reason, members of Congress have little reason to change the method for drawing congressional districts; after all, the current process succeeded in getting them elected in the first place. Changing the rules governing the electoral college, or eliminating lame-duck congressional sessions, or establishing term limits for justices are all neutral on their face, but these reforms would clearly be at odds with the interests of those currently in power, and thus would be even harder to accomplish than any change to substantive law.

Take, for example, the Supreme Court's recent decision in *Citizens United v. Federal Election Commission*.¹¹ The Court held that the First Amendment protects corporate speech, and thus struck down federal laws that barred corporations from supporting specific candidates in upcoming elections. The 5-4 decision divided the Court along the usual conservative-liberal lines, and was criticized by the Democratic President and many members of the Democratically-controlled Congress. As Tushnet says, the Court's constitutional decisions are really just policy choices in disguise, and *Citizens United* is as good example of that phenomenon as any.

It does not follow, however, that a decision like *Citizens United* can easily be reversed through the political process. Indeed, Congress's feeble response thus far demonstrates just how difficult it is to reverse a constitutionally-based decision supported by the politically powerful. The bill introduced in Congress would, at best, only

¹¹ 558 U.S. 50 (2010).

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blunt the effect of the decision by requiring corporations and unions to publicly disclose their campaign expenditures.¹² Moreover, the bill exempts from its disclosure requirement a few influential special interest groups – most notably, the National Rifle Association, which has made known that it would target for defeat any Representative who supported a version of the law without such a carve-out.¹³ Accordingly, even though opinion polls show that a vast majority of the public disagrees with the decision,¹⁴ and even though both the executive and legislative branches are controlled by politicians who oppose it, *Citizens United* is likely to remain good law for a long time to come.

Indeed, *Citizens United* will likely entrench itself. Like it or not, money is essential to electoral success. The corporate structure, which allows for limited liability and perpetual life, is an especially effective method accumulating money. As a result of the decision in *Citizens United*, corporations will spend some of that money to elect their preferred candidates. Once elected, those candidates are unlikely to enact legislation undermining the decision, or to appoint and confirm judicial nominees who would reverse it. In short, the decision will promote the election of candidates and the appointment of judges who support it, securing its place in our political structure.

As previously discussed, judicial decisions establish the status quo against which the political branches react, and our political process makes it very difficult to change the status quo even when there is popular and political support for doing so¹⁵: A few powerful

¹² H.R. 5175 (2010).

¹³ David M. Herszenhorn, *House Approves Legislation that Mandates the Disclosure of Political Spending*, N.Y. Times at A24, Jun. 25, 2010.

¹⁴ Dan Eggen, *Poll: Large majority opposes Supreme Court's decision on campaign financing*, Washington Post, Feb. 17, 2010.

¹⁵ See Eskridge & Frickey, *supra* note 2. See also William N. Eskridge, Jr., et al., *Cases and Materials on Legislation*, 4th ed. (2007), at 828 (speculating that the Court's decision holding that FDA lacked the authority to regulate tobacco may have been due, in part, to its knowledge that the decision would not be overridden by a Republican-controlled Congress).

members of Congress can derail even widely-supported legislation; the President can successfully veto a bill supported by a majority of Congress; or the issue may simply fail to win a place on Congress's crowded agenda, despite a consensus that the Court got it wrong. The savvy Supreme Court is well aware of political alignments that determine whether its decisions will be undermined or overruled by legislation, and acts accordingly.¹⁶ For all these reasons, unpopular judicial decisions remain on the books for years as long as they do not create a sustained and strongly-held opposition. *Citizens United* looks well on its way to becoming one of these unpopular-yet-long-lasting decisions.

In other words, we have come full circle. Tushnet argues that constitutional "rights" are really political questions. Thus, he believes that the politically powerless cannot rely on the Supreme Court to protect their interests, since even if they persuade the justices to side with them in the short-term, in the long-term they are sure to lose out. He suggests that these same relatively powerless groups work for procedural reforms that will enable them to compete more successfully in the political arena. And yet enacting procedural reforms take the same kind of political clout that such groups by definition lack. Moreover, it is easier, and far quicker, to win in court on a question of substantive law than push through the legislative process procedural changes that undercut the power of entrenched interests groups. Accordingly, even though I think Tushnet is correct that the content of our Constitutional rights is ultimately a political question, the courts remain an attractive forum for those without political power.



¹⁶ Eskridge, et al., *supra* note 15, at 828. See also Eskridge & Frickey, *supra* note 2, at 29 ("To achieve its goals, each branch also acts strategically, calibrating its actions in anticipation of how other institutions would respond.").