2008

Constitutional Hardball and Constitutional Crises

Jack M. Balkin

Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Recommended Citation
https://digitalcommons.law.yale.edu/fss_papers/226

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
CONSTITUTIONAL HARDBALL AND CONSTITUTIONAL CRISSES

Jack M. Balkin*

INTRODUCTION

This is the second time I have had the pleasure of honoring Mark Tushnet's life and work. In this Essay, as in the previous one I wrote with Sandy Levinson,¹ I will focus on a theme that is central to both Tushnet's work and mine. I call it constitutional historicism, the idea that the conventions that determine what makes an argument about the Constitution good or bad, what legal claims are plausible, and which are "off the wall," change over time in response to changing political, social, and historical conditions. Historicists assume that legal materials and the internal conventions of legal argument are not infinitely malleable and, at any point in time, are genuinely constraining on practitioners of legal argument. Nevertheless, they are sufficiently flexible to allow law to become an important site for political and social struggle. Indeed, these legal materials and conventions of legal argument are themselves gradually changing in response to the political and social struggles that are waged through them. As a result, the internal norms of good legal argument are a moving target; they are constantly in the process of changing in response to political, social, and historical forces in ways that norms of legal reasoning do not always directly acknowledge.

Anyone who is a constitutional historicist must be interested in the processes of constitutional change. And so Tushnet is; he has offered an interesting theory of constitutional orders, and within that theory, a very useful concept of how political actors move from one constitutional order to a new one. He calls it "constitutional hardball."² The purpose of this Essay is to discuss Tushnet's account of constitutional hardball

* Knight Professor of Constitutional Law and the First Amendment, Yale Law School.
and to connect it to Sandy Levinson's and my typology of constitutional crises.

I. CONSTITUTIONAL HARDBALL: A REDEFINITION

Tushnet defines constitutional hardball as political claims and practices devised by a political party or movement that are high stakes and designed to alter the existing order's power relations. They are designed to "play for keeps" in the sense that, if successful, they will shift political power to the victors and entrench it for some considerable period of time. Thus, constitutional hardball refers to tactics or strategies designed to entrench a party or movement's power into the future. Conversely, if the purveyors of constitutional hardball lose, they will suffer a serious setback to their political ambitions for some unspecified time.

Tushnet's theory of constitutional hardball arises out of his larger theory of constitutional orders. He argues that American history consists of a sequence of constitutional orders that feature basic institutional arrangements and assumptions about the relative power and authority of different parts of the government, basic assumptions about the goals of governance, key policies that are bones of contention, and key rights and interests protected. Constitutional hardball describes the way in which different parties or movements try to transform an existing constitutional order into a modified or new one. As Tushnet puts it, the concept of "constitutional hardball singles out constitutional practices associated with constitutional transformation." Hence, "one should not be able to observe episodes of constitutional hardball during periods of ordinary politics."

Tushnet argues that a key characteristic of constitutional hardball is that at least one of the participants in the struggle makes claims or engages in practices that the other side believes violate "pre-

3. Id. at 523.
4. Id.
5. Id. at 532. See also MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003). Tushnet's theory owes much to Bruce Ackerman's theory of constitutional moments, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991), but emphasizes that transformations need not occur over a relatively compressed period, but may occur over extended periods of time, Tushnet, supra note 2, at 532 n.40.
6. Tushnet, supra note 2, at 532.
7. Id.
8. Id.
The latter term is deliberately under-theorized: it refers to things that "go without saying" in "working systems of constitutional government. They are hard to identify outside of times of crisis precisely because they go without saying." In constitutional hardball, things that once went without saying are brought to the foreground and made bones of contention, with one side arguing that they were settled in one way and the other denying it heatedly. As soon as one side begins to play constitutional hardball, the other usually will quickly follow with a defensive version, because both sides recognize that a great deal is at stake, and because underlying assumptions are no longer taken for granted, but are now strongly contested. At that point, not only are these underlying assumptions contested, but also the question of who started the fight.

Because the parties fight over pre-constitutional understandings, claims and practices of constitutional hardball have a curious feature. They are at least plausible or "within the bounds of existing constitutional doctrine." Opponents probably think they are importantly wrong in some way—they violate the "spirit" of the Constitution or its deep principles as they understand them. That is precisely what makes these tactics, which Tushnet stipulates must have at least surface plausibility, appear as "hardball."

In this Section, I will note a few theoretical ambiguities and potential difficulties in Tushnet's account, and suggest how one might improve the theory. In particular, I would redefine constitutional hardball as attempts by political actors to make significant changes to the constitutional order or to extend and further entrench an existing one. I consider these remarks as a friendly amendment, although the new version of the theory looks a little different than Tushnet's original conception. Nevertheless, I believe that the basic elements remain unaltered.

A. Tactics and Goals

First, we must make a distinction between tactics and goals. Constitutional hardball may be a tactic of an ascendant party or movement designed to achieve a political goal, it may be a political goal

9. Id. at 523 n.2.
10. Tushnet, supra note 2, at 523 n.2.
11. Id. at 524 n.4.
12. Id. at 523.
of the party or movement, or it may be both a tactic and a goal. Similarly, the constitutional status of the tactic may be contested, only the goals may be contested, or both.

Take Franklin Roosevelt’s Court packing plan. The Court packing plan was only a means to an end: Roosevelt wanted to legitimize the New Deal, and court packing was one way to do it. As it turned out, Roosevelt’s Court packing plan was defeated, but he still won the larger war through a strategy of partisan entrenchment of his allies in the judiciary. As Tushnet astutely points out, partisan entrenchment in the judiciary can sometimes be a tactic of constitutional hardball; it is a special case of a larger set of related tactics for entrenching one’s allies in the government. But Roosevelt was not trying to establish the legitimacy of partisan entrenchment when he made nine successive appointments of his allies to the Supreme Court; the legitimacy of that practice was not seriously contested. People did not object to the President’s right to stock the Court with his allies, but to what those allies would do to constitutional law once he appointed them. If Roosevelt’s partisan entrenchment was constitutional hardball, as Tushnet suggests, it was not because the tactic violated constitutional pre-understandings. Rather, it was because the goal of the entrenchment was to alter constitutional pre-understandings.

B. Establishing Your Principles versus Entrenching Your Party

Second, Tushnet’s concept of “constitutional hardball” tends to blur the distinction between gaining changes in constitutional practices and entrenching a party or movement’s political power. Tushnet’s account of constitutional hardball focuses on two distinct elements: the strategy of partisan entrenchment and the creation of a new constitutional order. He assumes that people fight for changes in constitutional practices because these changes will benefit the party that fought for the changes, and will help keep that party in power. But the two goals can come apart. There can be struggles to win changes in constitutional arrangements that actually harm a party’s prospects. Conversely, there can be methods of entrenching a party that do not significantly alter existing constitutional arrangements.

13. Id.
15. Id.
The presidency of George W. Bush offers a possible example where politicians can succeed at changing constitutional practices but not succeed in entrenching their party or movement. President Bush pushed hard for an increase in presidential power, greater secrecy, and limited accountability for the Executive, arguing that these changes were necessary to fight the global war on terror.\footnote{16} Republicans have generally assumed that gaining these powers would help the Republican Party's political interests, because fighting the war on terror is likely to be a central part of their political program for the foreseeable future. However, the Republicans may lose the 2008 election due to Bush's unpopularity, so that the next President will be of the opposite party. As Sandy Levinson and I have pointed out,\footnote{17} the next President—of either party—will likely try to retain many of Bush's innovations precisely because it gives him or her more power and reduces accountability and oversight. The next President need only appear a little less authoritarian than Bush to be perceived as acting appropriately. Thus, the Republicans might have altered the powers of the Presidency—bringing us into what Levinson and I have called the National Surveillance State—while failing to entrench themselves politically.

In Bush's case, Republicans probably hoped that changes in the constitutional order that accompanied their promotion of the war on terror would benefit them politically. They may simply have misjudged the political effects of their policies. In some cases, however, we can imagine that politicians care enough about a principle or a reform in institutional practices that they are willing to cede power temporarily in order to ensure that their desired changes are entrenched. One example might be pro-life Republicans' desire to use partisan entrenchment in the judiciary to overturn \textit{Roe v. Wade}.\footnote{18} There is some evidence that overturning \textit{Roe} would be a disaster for the Republican Party's electoral prospects for many years, even if pro-life Republicans continued to control the judiciary. The reason is that if criminalization of abortion were possible, it would split the party's coalition of pro-life conservatives and moderates, business conservatives, defense hawks,
and libertarians. Some Republicans would deny that these consequences would occur, while others might counsel for limiting and hollowing out Roe instead of overturning it. But still others might support the strategy because they believe that overturning Roe is more important than ensuring Republican victories in the future.

Similarly, President Lyndon B. Johnson’s support for civil rights legislation might have brought more blacks into the Democratic Party, and the Voting Rights Act would help ensure that they could in fact vote. In that sense, the civil rights revolution might have helped Democratic electoral prospects. But liberal Democrats, including Johnson himself, might also have recognized that they were helping to turn white Southerners into Republicans, thus losing more votes than they gained. Even so, they might have believed that the success of civil rights legislation was worth the expense of creating a more difficult electoral environment for Democrats.

Thus, we need to recognize that political actors might play constitutional hardball for two reasons. First, they want to establish that the Constitution means one thing rather than another. Second, they want to stay in power and keep those who agree with them in power as long as possible. Tushnet’s basic assumption, which I think is correct, is that for most political actors, the second reason dominates the first. That does not mean that the first goal is merely a byproduct of the second. Rather, political actors sometimes fool themselves into believing that if they change the Constitution through hardball tactics, the public will reward them by keeping them in office. Sometimes that does happen, but sometimes a significant constitutional change has the opposite effect. It leads to a reaction that undermines the political forces that brought about constitutional transformation.

C. Playing Hardball for Political Survival

Third, Tushnet notes that people can play constitutional hardball offensively, to change the constitutional regime, or defensively, to resist the other side’s incursions. But there is another option: a defensive version of constitutional hardball that occurs when a movement or party fails at its attempts to change the constitutional order, and fears retribution. This is defensive constitutional hardball for purposes of political survival. The Nixon and Bush Administrations offer useful examples. Nixon’s refusal to give up the Watergate tapes was not an

attempt to change the constitutional order or entrench Republicans, it was an attempt to stave off impeachment. After George W. Bush lost most of his political capital in 2005, and the Democrats won Congress in 2006, Bush sought to avoid legal and political accountability at all costs, making expansive claims of executive privilege and state secrets. The reasons are mixed: on the one hand, Bush believes in a strong presidency, but, as noted above, those tools may well be employed by members of the opposite party in the future. More importantly, members of the Bush Administration may wish to prevent other people from finding out what its officials did in order to avoid prosecution or other legal problems later on. As the Administration draws to an end, Bush’s use of constitutional hardball will be increasingly devoted to protecting himself and his aides from investigation by the present Congress and the next Administration.

D. Playing Hardball when there is No Consensus about Constitutional Understandings

Fourth, Tushnet argues that constitutional hardball occurs when one side or the other no longer respects pre-existing conventions or pre-constitutional understandings. That is, one side violates pre-constitutional understandings, and the other responds to defend them. He notes that the case of *Marbury v. Madison* and the struggle between Federalists and Republicans is special, because the country was new and there were very few pre-constitutional understandings. The two sides were not fighting over whether to continue existing conventions, but over whose understandings would become entrenched. Tushnet’s special case, I think, is actually the general case. Much depends on what people believe is fixed and what remains open—and therefore a source of differing opinions—in existing conventions. When one side engages in constitutional hardball, they may not view their actions as a change in existing conventions at all, but rather as the best interpretation of existing conventions with respect to a question that has never been clearly decided, or an issue that has never arisen before in precisely the same way.

Take the question of whether non-government employees may be criminally prosecuted for revealing secrets that are either embarrassing

20. *Id.* at 524.
to the government or may adversely affect national security. One might think this question had been settled by the *Pentagon Papers* case. But *Pentagon Papers* only spoke to limits on injunctive relief where Congress had not specifically given the President authority to enjoin disclosures. It did not rule out criminal prosecutions against the *New York Times* and the *Washington Post*, or, for that matter, against Daniel Ellsberg. The reason why the Justice Department does not prosecute most leaks involving matters of national security is that there are strong political reasons against doing so. But if the Justice Department began to prosecute leakers, the Administration could claim that it was merely invoking an authority it always had. There would be a dispute about pre-constitutional understandings instead of a clear case of one side abandoning them.

Lack of consensus over constitutional understandings may also occur when the Supreme Court changes the law, and the two sides fight over how to make sense of the ruling. *Brown v. Board of Education* is one example; *Roe v. Wade* is another. Neither *Brown* nor *Roe* were central to the constitutional order when they were decided, but the struggles over them soon became central to the debates within that constitutional order. In the case of *Brown*, the illegality of Jim Crow eventually became a widely accepted assumption of the constitutional order. Fights over desegregation—like massive resistance in the South—certainly seem like constitutional hardball. But that requires that we expand the concept to include fights over contested understandings that do not yet “go without saying,” but which might eventually become basic assumptions of the constitutional order, depending on which side wins or loses. I would expand the definition of constitutional hardball to include fights within a constitutional order about new controversies that arise within that order. The constitutional order may not fundamentally shift, but it may look quite different depending on how those struggles are resolved.

E. Playing Hardball in Times of Ordinary Politics

Fifth, Tushnet seeks to limit constitutional hardball to periods of constitutional transformation. But not all attempts at constitutional

---

transformation succeed. In fact, most do not. Ordinary politics continues even though people have used hardball tactics. If so, then, as Tushnet himself says, "the concept fails to differentiate between ordinary forms of politics and extraordinary ones, [even though] doing so is precisely what the concept is designed for." Tushnet argues that during stable periods in the constitutional order, we do not see political leaders in the party out of power attempting to play constitutional hardball. Instead, they try to work through the existing "order's institutions and organizing principles, . . . claiming only that they would be better at running those institutions and implementing those principles than the current incumbents."29

This leaves out two situations. The first is where a non-dominant or subordinate party in the constitutional order tries to transform the order and ultimately fails. Tushnet himself suggests that the Nixon Administration might be an example, although it was unclear whether Nixon's goal was the entrenchment of the Republican Party or a shift in the basic constitutional principles of the New Deal/Great Society regime.30 A better example involves conflicts between local or regional powers and the national government where the localists ultimately fail to transform the constitutional order, even if they win some concessions. Tushnet's examples are drawn primarily from conflicts between national parties, but regional-national conflicts are just as relevant, and equally if not more salient in the country's early history. A good example is the South Carolina Nullification Crisis of 1828.31 This was a conflict between a political majority in South Carolina (not everyone supported nullification) and a national majority in the federal government over the constitutional limits on tariffs and on the nature of the federal system. A clear victory for South Carolina on the constitutional issue (it ultimately obtained some concessions) might have weakened the Union significantly. South Carolina's loss meant that the theory of nullification was discredited for a generation. The crisis clearly involved

27. Id. at 547.
28. Id. at 547-48.
29. Id. at 548.
30. Tushnet, supra note 2, at 548-49.
"hardball"—there was even a Force Bill passed by Congress.\textsuperscript{32} It was also constitutional hardball because of the consequences for the Union. But it occurred during a period of "normal" politics, a period Tushnet calls normal only because South Carolina ultimately failed. (I shall return to this definition of "normal" momentarily.)

The second and more interesting case of constitutional hardball in periods of "normal" politics is where the relatively dominant party in an existing constitutional order attempts further entrenchment and fails. This is actually a more frequent case in American history: winners usually have more resources than losers do, and they naturally tend to try to increase their advantages when they can, and to make hay while the constitutional sun shines. The best example might be the various tactics of the Republican Party since 1994. The Republicans already had dominated the Presidency since 1968, and had essentially stalled the liberal constitutional order of the New Deal/Great Society, leading to what Tushnet calls an era of "chastened" aspirations.\textsuperscript{33} But the conservative movements that dominated the party wanted far more. They wanted to establish conservative principles and the political dominance of the Republican Party for the foreseeable future. Following the 1994 landslide election, Republicans fought with President Clinton over the budget, ultimately leading to a government shutdown. Then they impeached Clinton. Then came the disputed election of 2000, the decision in \textit{Bush v. Gore},\textsuperscript{34} the fights over judicial filibusters in the Senate, the threat of invoking the "nuclear option" to eliminate them, the increased politicization of the Justice Department, and, finally, President Bush's aggressive positions on secrecy, domestic surveillance, and presidential power. Taken together, these examples show a systematic attempt by Republicans to promote an alternative vision of constitutional meaning and entrench their political allies.

It is worth noting that during this period Democrats were not always doormats; sometimes they played defensive constitutional hardball, particularly in the filibusters over circuit court appointees. It is my sense, however, that these defensive examples of constitutional hardball have arisen largely out of the Republican Party's desire to cement a lasting conservative political order. The Democrats have mostly behaved as defenders of the old order, attempting to hold the Republicans back.

\textsuperscript{32} See Act of Mar. 2, 1833, ch. 57, 4 Stat. 632.
\textsuperscript{33} TUSHNET, THE NEW CONSTITUTIONAL ORDER, \textit{supra} note 5, at 34.
\textsuperscript{34} Bush \textit{v.} Gore, 531 U.S. 98 (2000).
Tushnet suggests that the period following 1980 might be an extended period of constitutional transformation, in which case constitutional hardball would seem to be the normal mode of politics. I think this may prove too much. Under that account, we might also identify the period from 1820-1860, which Tushnet regards as a period of normal politics within the Jeffersonian/Jacksonian constitutional order, as a period of extended constitutional transformation. During this period, the Democrats repeatedly tried to lock in state’s rights and the protection of the slaveocracy, while first the Whigs and later the Republicans resisted, and political peace almost broke down several times, leading ultimately to the Civil War. However, if we count both 1820-1860 and 1980-2007 as periods of extraordinary politics, the number and length of periods of “normal politics” start to shrink rapidly.

Instead, it might be better to recognize that Tushnet’s initial surmise was too confined. Constitutional hardball is not limited to periods of extraordinary politics, but rather occurs throughout American history. Tushnet is correct that constitutional hardball occurs during periods when one constitutional order is transformed into another. But it also occurs during periods between the emergence of new constitutional orders because attempts at transformative politics are always bubbling up. Ascendant political movements may try to change the existing order and fail. More likely, given the evidence of American history, dominant political parties and political movements within the existing constitutional order may try to extend and further entrench their power, leading to defensive maneuvers by the other side. Winners try to extend their advantages over losers, first, because they believe that they are right, and second, because they think they can. This may be the best account of the conservative movement in recent U.S. history, which, after having dominated presidential politics, repeatedly tried for the whole bag of marbles. If it eventually does transform the constitutional order, then we will look back on the period from 1980-2007 as part of a long transformative period. But if it fails, we will view this period as one of “normal politics.”

This brings me to my central point. Tushnet originally wanted to define constitutional hardball in terms of the period in which it occurred. He wanted to connect it with periods of constitutional transformation. However, as the events of the past three decades demonstrate, we can know when a period of constitutional politics is transformative or normal.

35. Tushnet, supra note 2, at 549.
36. Id. at 552.
only in hindsight. Hence, it might be better to try to detach the concept of constitutional hardball from the nature of the period in which it occurs. Instead, we might try to focus on what people are trying to do rather than when they are doing it. And we should remember that people are most likely to push the envelope when they are already most empowered within the existing constitutional order. Thus, we should say that constitutional hardball involves attempts to change the constitutional order or to extend and further entrench it. Implicit in this account is the assumption that many, if not most, of these attempts will fail, and so, in hindsight, we will describe the period in which they occurred as one of “normal politics.”

II. CONSTITUTIONAL HARDBALL AS A CONSTITUTIONAL CRISIS

This brings me to a comparison between Tushnet’s model of constitutional hardball and Levinson’s and my typology of constitutional crises. Levinson and I define a constitutional crisis as a significant turning point in the constitutional order. Assume that one goal of a constitution is to preserve political stability and make ordinary forms of democratic politics possible in order to meet the challenges of government in changing times. A constitutional crisis occurs when the constitutional system can no longer perform this important function. It cannot meet existing challenges, or it cannot keep people from going outside of the Constitution or outside of the normal forms of politics. The crisis may be averted, leading back to something like the status quo. It may lead to an important transformation in constitutional practices and understandings. And sometimes it may lead to the dissolution of the old order and the erection of a new order. Levinson and I believe that many so-called “constitutional crises” are not real crises at all, but rather heated disagreements about the Constitution in which people fear (whether reasonably or unreasonably) that the system will spin out of control into a real constitutional crisis.

We argue that genuine constitutional crises fall into three basic categories. In Type One crises, political actors publicly assert that they have the right to suspend features of the Constitution (or disregard features of the constitutional order) to meet the exigencies of the moment. They justify going outside the Constitution because of

---

38. Id.
extraordinary events. There are almost no examples of Type One crises in American history—at least since the 1787 Convention. The most likely person to make such a claim would be the President, and Presidents almost always claim that what they are doing is fully within the Constitution as they understand it. The other likely entity would be a state that sought to resist federal power. Since the adoption of the 1787 Constitution, however, states that have asserted rights of interposition and nullification, or even secession, have generally claimed that they had the right to do so under the terms of the Constitution. (In the case of secession, of course, the effect of asserting that constitutional right is to take themselves beyond the control of the Constitution thereafter).

Type One crises involve a failure of constitutionalism that leads one party or another publicly to go outside the Constitution. Type Two crises involve a different sort of constitutional failure. They are failures of constitutional structures that the relevant actors do not dispute or attempt to escape. In Type Two crises, all of the relevant actors believe that they are complying with the Constitution, but they do not believe that the Constitution allows them to respond to a political crisis or emergency. A Type Two crisis is a situation where fidelity to the Constitution drives the parties off of a cliff; indeed, they may not even recognize that their problem is caused by the Constitution’s design. Type Two crises are comparatively rare; the most well known example is the secession winter of 1860-61. Although President Buchanan believed that secession was illegal, both he and the Southern States agreed that there was nothing the federal government could do to prevent the Southern states from leaving. 39

Finally, in Type Three crises, nobody claims that they must go outside the Constitution. Everyone claims to be faithful to the Constitution. Instead, the parties disagree about what the Constitution requires and who holds the power to act. Each side claims that the other is violating the Constitution or the law, in effect accusing the other side of fomenting a Type One crisis. What distinguishes Type Three crises from ordinary (and even heated) political disagreement about the Constitution is that one side or the other goes outside the ordinary features of politics. A good indicator that we face a Type Three crisis is that large numbers of people take to the streets in displays of civil

disobedience or violence; or conversely, that governments send out troops (or threaten to send out troops) to preserve social order. Just as in Type One and Type Two crises, Type Three crises involve a failure of the Constitution to make politics possible, although in this case it is the failure to keep politics within normal bounds.\footnote{One might argue that when citizens engage in civil disobedience in a Type Three crisis, this reduces it to a Type One crisis because, presumably, by violating the law the citizenry goes outside of the Constitution. (Obviously, there is a Type One crisis if government officials deliberately announce that they are going outside their constitutionally assigned powers.) However, citizens can violate the law without violating the Constitution. For example, citizens might believe that ordinary law enforced by government officials is unconstitutional. More interestingly, they might believe that the Constitution (including, most notably, the Second Amendment) reserves to the people the right to revolt and throw off tyrannical government.}

When Levinson and I argue that Type Three crises involve people going outside the boundaries of “normal” politics and making extraordinary efforts, we are referring to something quite different than Tushnet’s distinction between “normal” and “transformative” periods of politics.\footnote{Tushnet, supra note 2, at 532.} Riots, massive protests, and threats to deploy troops can occur within a single constitutional order, and, therefore, would be part of a “normal” period of politics in Tushnet’s terms; conversely, transformative moments can occur through elections and amendments without people taking to the streets or the federal government calling out the National Guard.

Like most ordinary forms of constitutional disagreement, Type Three crises end when the two sides reach a compromise or one side backs down and accepts, however grudgingly, the practical legality of the new legal status quo. In Type Three crises, as in many lesser forms of constitutional disagreement, different sides of a constitutional controversy struggle both for political dominance and over whose vision of the Constitution will prevail. The winner’s interpretation becomes the accepted conventional wisdom about the meaning of the Constitution, thus producing what we might call a “Winner’s Constitution.”\footnote{Jack M. Balkin, “Winner’s Constitutions,” Balkinization, http://balkin.blogspot.com/2007/06/winners-constitutions.html (June 7, 2007).} Future generations are told that the losers held the “wrong” view of the Constitution, and the winners held the “correct” view.

Levinson and I distinguish these three types of crises for analytical clarity, but we also argue that each type of crisis can turn into the others, depending on people’s attitudes and beliefs about what the Constitution permits and does not permit, and their views about what is a plausible
interpretation. Types One and Two are particularly unstable, and
generally devolve into the ordinary forms of constitutional disagreement
within ordinary politics, or in exceptional cases, become a Type Three
crisis. That is, instead of claiming authority to act outside the
Constitution, Presidents usually insist that there is a good faith dispute
over the right way to interpret the Constitution, and normally Presidents
can find any number of able lawyers (for example, those in the Justice
Department's Office of Legal Counsel) to explain why that is so. Similarly,
even if at one point everyone believes that the Constitution
gives them no way out of a political crisis or emergency, it is likely that
somebody will eventually adopt a more flexible interpretation that
allows some set of political actors to meet the needs of the time, and
then the two competing interpretations will fight it out.

To the extent that Tushnet's category of constitutional hardball
involves a constitutional crisis, it would fall into what Levinson and I
call Type Three constitutional crises, those in which both sides claim to
be faithful to the Constitution and argue over its proper interpretation.
Constitutional conflicts generated by constitutional hardball are not Type
Two crises because the cause of the conflict is not the constitutional
system as agreed to by both sides. And they are not Type One crises
because, by hypothesis, constitutional hardball makes claims that are
arguably consistent with the Constitution and are believed to be so by
those who practice it.

Is Tushnet's notion of constitutional hardball simply the same as a
Type Three crisis? Are all examples of constitutional hardball also Type
Three crises? Are all Type Three crises examples of constitutional
hardball? The answer in both cases is no. The two categories overlap,
but they are not coextensive.

Many Type Three crises are not examples of constitutional hardball
in Tushnet's sense. Earlier I noted that these crises can occur during
periods of what Tushnet calls normal or ordinary politics. Perhaps more
important, Type Three crises may not involve political actors who are
trying to change the fundamental presuppositions and arrangements of
the constitutional order, and/or entrench their party in power for the
foreseeable future. Some political actors in a crisis may simply be trying
to win particular political victories, and they provoke a Type Three crisis
in the process. Two examples from the 1950's are the Steel Seizure
Crisis\textsuperscript{43} (which may or may not have been a genuine constitutional crisis

\textsuperscript{43} Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579 (1952).
at all) and the Little Rock Crisis. When Harry Truman seized the steel mills, he was not attempting to change basic principles of the New Deal and the National Security State. Truman had no quarrel with either set of principles or arrangements. Rather, he was trying to avoid invoking the Taft-Hartley Act to settle a labor dispute that he believed would undermine his conduct of the Korean War.

The best argument that Truman had engaged in constitutional hardball would be that Truman was trying to gain even greater advantages for a particular conception of the New Deal, by creating an end-run around Taft-Hartley (which Democratic supporters of labor—like Truman himself—abhorred). Even so, it is not clear whether Truman believed that winning the struggle would significantly entrench the Democrats in the long term. Indeed, Truman was quite unpopular in the final years of his presidency.

Similarly, the Little Rock Crisis of 1957 was not an attempt by Arkansas Governor Orval Faubus to shift the terms of New Deal politics, although he did seek to prevent desegregation and preserve states’ rights. The crisis might have been at most a way for Faubus to entrench himself and his supporters in the Arkansas state government. Nor was Eisenhower’s response—deploying federal troops to Little Rock—an attempt to entrench the principles of the Republican Party or to cement the New Deal order.

The Little Rock crisis might have been constitutional hardball in Tushnet’s sense if Brown v. Board of Education had become a central feature of the constitutional order by 1957 and both sides fought over whether it would continue to be so. But Brown was not yet central in that way; its centrality was not established until the 1964 Civil Rights Act and Lyndon Johnson’s landslide election of the same year.

A better interpretation is that Faubus and other Southern politicians were fighting over whether Brown would become central, and, if so, what it would mean. This is consistent with the Southern Manifesto and the strategy of massive resistance. Put another way, from the perspective of the white South, Brown itself was a provocation. In the South’s view (but not necessarily the rest of the country’s), the Supreme Court had changed the assumptions of racial politics that had characterized the New Deal coalition up to that point. Moreover, the Court had effectively placed the forces of the federal government behind that change. If Eisenhower had not responded to the Little Rock crisis

---

44. See Cooper v. Aaron, 358 U.S. 1 (1958) (holding that Arkansas state officials must obey federal court desegregation orders).
with strong action supporting the Court, he would have weakened the federal government's enforcement of its own laws in the future. Thus, the Little Rock crisis was not constitutional hardball but a different kind of constitutional conflict. One party—in this case the Supreme Court—created a Type Three crisis by altering existing understandings and provoking a conflict between other parties. This led to a situation where government officials and citizens engaged in extraordinary methods of politics while the federal government responded with military force.

Just as not all Type Three crises are examples of constitutional hardball, not all examples of constitutional hardball are Type Three crises. That is because not all constitutional hardball generates a sense of urgency that the country has reached a turning point in the future direction or the health of the state. In addition, not all constitutional hardball drives parties to go outside the boundaries of ordinary political methods of disagreement, for example, through massive displays of civil disobedience, or threats of violence or military mobilization. Indeed, although there is always some form of political or legal struggle between opposed actors in a Type Three constitutional crisis, there may be no such struggle in cases of constitutional hardball.

The best example of these points is one Tushnet himself offers: strategies of partisan entrenchment. He bases his argument on Levinson's and my work on constitutional change through partisan entrenchment in the judiciary. Tushnet points out that our examples of entrenchment in the judiciary are just a special case of many other possible forms of partisan entrenchment in other parts of the government. For example, the executive can try to entrench ideological allies (and neutralize ideological opponents) in the ranks of the civil service. Congressional majorities can defund institutions and government programs, such as the Legal Services Corporation, that are likely to support causes hostile to the congressional majority's ideology, while funding programs and institutions that are likely to support the majority's views. None of these examples of constitutional hardball may generate a constitutional crisis. By now, the idea that Presidents deliberately stock the courts with their ideological allies has become so commonplace that few would regard the practice as precipitating a sense of urgency or crisis. Although particular nominations of particular

45. Tushnet, supra note 2, at 529-31.
47. Tushnet, supra note 2, at 530.
judges or Justices may generate very heated political fights, we would not call these controversies constitutional crises. Robert Bork's nomination to the Supreme Court did not generate a constitutional crisis, although a great deal turned on it. Finding new ways to control the bureaucracy and shape the civil service can do much to promote the President's ideological vision, which is why a number of Presidents have tried it. But we would not call such an attempt a constitutional crisis, first, because it does not usually generate a significant public controversy, and second, because Congress and the courts usually do little to try to stop it.

These examples suggest that there may be many examples of stealth constitutional hardball; that is, practices of entrenchment that fly below the radar of public recognition. Political opponents either do not notice them (until it is too late) or they are unwilling to devote substantial political resources to combating them. In fact, almost every example of constitutional hardball that meets with little or no opposition can reshape constitutional practices, but it does not, by itself, generate a constitutional crisis.

Finally, there are a whole species of actions of dubious constitutionality that are neither constitutional hardball nor Type Three constitutional crises. An example is President Roosevelt's relocation order of Japanese-American citizens and Japanese resident aliens.\(^{48}\) It is not constitutional hardball because it did not seek, nor did it cause, a significant change in the constitutional order. It was not a Type Three constitutional crisis because very few people in the government or the mass media objected at the time. The people most likely to object—the actual victims of the internment—had no power to stop it.

**CONCLUSION: THE NORMAL AND THE TRANSFORMATIVE**

Tushnet offered his concept of constitutional hardball as an adjunct to his theory that American constitutional history is marked by periods that he calls constitutional orders. The concept of hardball demarcates political activity in periods of constitutional transformation from political activity in relatively longer periods of normal politics. This characterization of alternation between normalcy and transformative

---

\(^{48}\) See *Korematsu v. United States*, 323 U.S. 214 (1944).
politics, in turn, is part of Tushnet's intellectual debt to Bruce Ackerman's important work on constitutional moments.\(^4\)

I think that the concept of constitutional hardball remains quite useful, but for somewhat different reasons than Tushnet originally proposed. Constitutional hardball occurs both in times of transformative politics, when one order turns into another, and in times of what we, in hindsight, would call normal politics, periods between these great transformations. That is because hardball also occurs when political actors try to extend and further entrench an existing constitutional order, as well as when they attempt to make significant changes to the constitutional order but fail. Both of these attempts occur during periods of what Tushnet would call constitutional normalcy.\(^5\)

If constitutional hardball does not help us separate transformative periods from normal periods, why is the concept useful? It is useful, I think, precisely because it suggests aspects of constitutional history that both Tushnet's and Ackerman's models of change do not capture particularly well. In particular, it helps us understand how periods of constitutional normalcy are actually special cases of periods of constitutional transformation.

Constitutional hardball, at least the offensive variety, is characteristic of ascendant political parties and social movements that are trying to gain power or to cement power. The notion of a constitutional order, although a helpful analytical tool for many purposes, tends to mask the fact that parties and movements to a certain extent are always trying to challenge aspects of existing constitutional orders and understandings, and modify them to their liking. It is simply that most of these efforts fail for various reasons. In the alternative, they occur with little public recognition, so that people do not notice their relative degree of success until much later. And, of course, if the opposition to hardball tactics is supine or non-existent, changes in constitutional understandings can occur without much public debate or public scrutiny. One might well define periods of normal politics as periods of constitutional politics in which attempts at constitutional

---


50. Tushnet also assumed that constitutional hardball involved challenging existing preconstitutional understandings characteristic of a constitutional order. That is an additional way in which the concept helped demarcate periods of constitutional normalcy from periods of transformation. But I have argued that constitutional hardball can occur when there are no settled understandings on a question, or, at least, when there is some dispute about whether those understandings exist.
hardball do not generate significant public awareness and opposition, or, if they do, they simply do not get very far. Thus, what Tushnet sees as transformative periods in constitutional politics actually involve a combination of two separate characteristics. First, the proponents of constitutional hardball must successfully manage a transformation of constitutional norms; and second, both political actors and the public must also recognize that something significant is at stake that is worth fighting about.5

The concept of constitutional hardball, then, is important not because it separates constitutional history into distinctive periods of normalcy, punctuated by periods of revolutionary change, but because it helps us see how transformation is always occurring in the constitutional system. It helps us see how what we call normal politics always contains resemblances to and possibilities for the revolutionary.

51. This is consistent with Ackerman's view that periods of normal politics feature relative public indifference. 1 ACKERMAN, supra note 5, at 230-65.