

# Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of *Bush v. Gore*

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## INTRODUCTION

Mark Tushnet, whose many contributions to legal scholarship we celebrate at this symposium, has been a role model for law professors in general and for us in particular. The concept of role model has two meanings. First, it means that someone is exemplary. That Mark certainly is. He has been a central—we would say seminal—figure in constitutional law, in legal theory, and in legal history. If Mark had never written a word about constitutional law, he would still be remembered for his contributions to legal history, first as a historian of the law of slavery, and later as a historian of the civil rights movement. If he had never written a word of legal history, he would still be renowned for the stream of articles and books of the highest quality he has produced on virtually every facet of constitutional theory and constitutional doctrine. Finally, even putting his status in those fields to one side, he remains a central figure in the creation and development of one of the most important twentieth century jurisprudential movements: critical legal studies.

However, the term “role model” has a second, equally important, meaning. To say that someone is a role model means that the person serves as a model for a certain type of role. The person embodies the role and shows how to fulfill it properly through their example. Mark is that kind of role model too. He embodies a certain understanding of what a professor of law should be—what law professors should do and what they should say, both in their writing for fellow law professors and in their comments before the general public. We think that Mark has served this function admirably as well. To a very large extent his example has influenced the way that we imagine our roles as law professors and what we should be doing in our scholarship.

The role of legal academic has been subjected to considerable stresses and strains in recent years in the wake of the decisions of the Rehnquist Court, no doubt because much of the academy—which is quite liberal—does not like the direction in which the Court has been moving. If one no longer feels comfortable engaging in the internalist game of rationalizing existing precedents, there are two natural alternatives. The first is to disregard the stream of recent precedents and create an elaborate set of counter-doctrines that have no current basis in official legal decisionmaking.<sup>1</sup> This is a daunting enterprise precisely because most internal legal argument tries to take as much of the existing doctrinal scheme as possible as a given and allows itself to vary only a few parameters. For this reason, the second and more likely

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<sup>1</sup> Akhil Amar’s approach is an excellent example. See Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000). Amar’s approach remains normative and internalist, but he does not give recent precedents any special weight if they conflict with his understanding of the best reading of text, history, and precedent.

alternative is to abandon the internal program of doctrinal rationalization and critique and pursue a different approach to academic writing. Hence, disaffection with the work of the Rehnquist Court has led many—though by no means most—left and liberal academics in constitutional law to abandon a normative and internalist approach to constitutional theory, and instead focus on constitutional law from externalist, sociological, and historical perspectives.<sup>2</sup>

Most recently, the Supreme Court's decision in *Bush v. Gore*,<sup>3</sup> which handed the presidential election to the Republican candidate, George W. Bush, has served to highlight conflicting notions of the academic role, and perhaps even stretch them to the breaking point. To what extent can or should legal academics be interested participants in legal argument as opposed to disinterested analysts? To what extent can their criticisms of the work of courts be internal to the conventions of legal argument, and to what extent must they be overtly political and external to those conventions? Our Essay explores some of those tensions.

## I. THE LAW PROFESSOR AS ANTIJURIST

In the course of his career, Mark has staked out a distinctive position on how legal academics should approach the study of law, and how they should discuss a case like *Bush v. Gore*. His view is that it is not his job as a law professor to pronounce legal decisions as right or wrong, or as correctly or incorrectly decided, although he is certainly free to criticize them on political grounds.<sup>4</sup>

Many, if not most, law professors are completely invested in the internal practice of law, and nothing that Mark says should have much relevance for them. However, we share with Mark a distinctive approach to constitutional theory, which we call legal historicism. Briefly put, legal historicism holds that the conventions determining what is a good or bad legal argument are not fixed, but change over time in response to changing social, political, and historical conditions. The interpenetration of legal norms and historical forces continually reshapes the boundaries of what people in the enterprise of legal argument recognize as the better and the worse legal argument, as well as their sense of what is a plausible legal claim and what is totally off the wall. Mark's legal historicism drives his view that he has nothing to say about whether cases are correctly decided from an internal perspective and that he can only take a critical stance from outside the enterprise of legal argument.

For us the question is whether Mark is right, and whether legal historicists can and should hold a very different view of the academic's role. Precisely because Mark is a role model, and precisely because he has influenced our own conceptions of what it means to be an academic constitutional lawyer or an academic constitutional theorist, we view this Essay as a form of self-interrogation and soul-searching about what law professors should be doing during this very troubled and complicated time in American constitutional history.<sup>5</sup>

Perhaps the best way of illustrating Mark's influence is in terms of the relationship between law professors and judges. The postmodern legal theorist Pierre Schlag once famously described most law professors as "clerks in the maze."<sup>6</sup> Such professors, Schlag suggested, were

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<sup>2</sup> The historical turn in recent left liberal legal scholarship is a good example. See, e.g., LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996).

<sup>3</sup> 531 U.S. 98 (2000) (per curiam).

<sup>4</sup> Mark Tushnet, *Renormalizing Bush v. Gore: An Anticipatory Intellectual History*, 90 GEO. L.J. \_\_, \_\_ (2001)

<sup>5</sup> This Essay was written for a conference in Mark's honor in March 2001, long before the events of September 11, 2001. Since then, the times have become even more troubled and complicated, to put it mildly.

<sup>6</sup> Pierre Schlag, *Clerks in the Maze*, 91 MICH. L. REV. 2053, 2053 (1993).

bright young men and women who, having done very well at prestigious law schools and then, as a reward, clerked for similarly prestigious judges and Justices, thereafter spent their lives in an endless (and fruitless) imitation of the judicial role,<sup>7</sup> auditioning in the back (and sometimes the front) of their minds for the chance to take their own places on the bench.

If anyone might have had reason to enter that maze, it would be Mark, who after a very successful career at the Yale Law School obtained a plum clerkship with Justice Thurgood Marshall, a jurist who was not only a liberal avatar but probably the greatest lawyer of the twentieth century.<sup>8</sup> To be sure, Mark has been influenced by Marshall's legacy. He has produced a history of the NAACP's legal strategy and two volumes on the life and career of Thurgood Marshall.<sup>9</sup> Much of his work has been deeply concerned with civil rights and the history of race relations. But from almost the beginning of his academic career, Mark resisted the temptation to write normative legal scholarship in the style of an advisor to or imitator of the judiciary.<sup>10</sup>

Through the example of his scholarship, Mark has encouraged us and other law professors to move away from the model of scholars as judges manqué. No longer do many of us define the role of the law professor as mimicking the behavior of judges. Nor do we see our role primarily as advising judges about how to perform their roles by writing law review articles that are often indistinguishable from legal briefs and that argue vigorously on behalf of one or another "correct" solution to a legal or political issue of the day.<sup>11</sup> Instead, the role for legal academics that Mark championed was much more as a detached analyst of the enterprise of legal decisionmaking and argument, with little or no pretense that this analysis must aim at determining what the law, "correctly understood," requires.

Indeed, Mark and many others at this conference<sup>12</sup> have taught law professors to recognize that the very notion of the "correctness" of any given example of legal decisionmaking is imbedded in complex political and ideological structures that must themselves be subjected to careful analysis and scrutiny. This approach to legal decisionmaking was grounded in a long tradition in American jurisprudence that dates back at least as far as American legal realism in

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<sup>7</sup> *Id.* at 2056–58.

<sup>8</sup> Mark stopped off in Detroit along the way to clerk for Judge George Edwards on the Sixth Circuit Court of Appeals.

<sup>9</sup> See MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–1961* (1994); MARK V. TUSHNET, *MAKING CONSTITUTIONAL LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1961–1991* (1997); MARK V. TUSHNET, *THE NAACP'S STRATEGY AGAINST SEGREGATED EDUCATION* (1987).

<sup>10</sup> Indeed, his famous (and controversial) critique of the first edition of LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978), seems motivated in part by a determined refusal to kowtow to the structure of constitutional doctrine as it had been explicated by judges. See Mark V. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694 (1980). Tribe's mistake, Mark seemed to be saying, was that he was trying altogether too hard to make his own interpretations of the Constitution, creative as they often were, mesh with the doctrinal pronouncements of the Burger Court, so that Tribe would not seem too far out of the mainstream. This, Mark argued, was a mistake; trying to play the same game as judges play would only lead to intellectual compromise. See *id.* at 710.

<sup>11</sup> This shift of role has scarcely gone unrecognized (or without condemnation) by judges, who no doubt feel a measure of rebuff in law professors' withdrawal from their accustomed role as servants of and advisors to the judiciary. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) [hereinafter Edwards, *Growing Disjunction I*]; Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191 (1993).

<sup>12</sup> E.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

the 1920s and 1930s, and its insights were deepened by Mark and other scholars identified with the critical legal studies movement in the 1970s and 1980s. If Schlag derides most law professors as wannabe judges, Mark Tushnet has comfortably adopted an alternative role for law professors. It is the role of the “antijurist,” who approaches law externally and who refrains from passing judgment on what the norms of law necessarily require. The antijurist studies legal doctrine in part to understand it as the jurist sees it, but nonetheless refrains from praising some judges or condemning others in terms of their fidelity to the internal norms of the law. That is because understanding the law as the jurist understands it is ancillary to the antijurist’s particular goal of understanding law in its political, social, and historical context.

However, perhaps equally accurately, we may call such people “nonjurists,” because they are simply engaged in a different task from that of the judge. After all, the choice between the terms “antijurist” and “nonjurist” reflects a baseline of expectations about the legal academic’s role. To someone like Judge Harry Edwards, who has famously criticized the interdisciplinary turn among legal academics,<sup>13</sup> Mark would clearly be an antijurist because he is not performing his traditional role as unpaid advisor (or, more tendentiously, as unpaid clerk) to the judiciary. But if one does not accept this traditional role, Mark is not particularly “anti” judge. He does not wish the judiciary ill, but neither is he particularly interested in their problems. Like Holmes’s dog, Harry Edwards believes that he has been kicked by scholars like Mark, whereas to Mark and others like him, Edwards has at most been tripped over.<sup>14</sup> Indeed, one may say that he has not even been touched, for Edwards’s real complaint is that he has been ignored by law professors like Mark who believe that they have better things to do with their time than to provide free research for judges like Edwards.

Two anecdotes illustrate Mark’s distinctive attitude toward the role of the law professor. Levinson recalls a conversation that took place many years ago after Mark had just written an interesting article (one of several, in fact) on state regulation of interstate commerce. Levinson was preparing to teach his class about the mysteries of the dormant Commerce Clause. He called Mark (this was long before the advent of e-mail) and asked him what he thought the Constitution, best interpreted, required with regard to some hypothetical that Levinson was going to put before his class. Mark responded in effect that Levinson had misunderstood what he was about, and that he (Mark) just did not have views as to what the Constitution “really” meant.

The second anecdote is not, strictly speaking, an anecdote at all. It is the quotation for which Mark may be most famous. He once said that in the unlikely event he were appointed to the federal bench, he would decide cases in the way that would be most “likely to advance the cause of socialism.”<sup>15</sup> (Like the previous anecdote, this one not only predates the advent of e-mail but also the fall of the Berlin Wall).

Together the quote and the story explain much of Mark’s attitude about law and about its relationship to politics. A consistent feature of Mark’s work on constitutional interpretation—and, we suspect, of the rest of his vast oeuvre of legal writing—is that it is analytical without being normative. It analyzes the political, sociological, and logical features of legal doctrine without taking a normative stand on whether particular examples of reasoning are good or bad, or rightly or wrongly decided, at least by reference to ostensibly “internal” norms of the law or of good legal craft.<sup>16</sup>

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<sup>13</sup> Edwards, *Growing Disjunction I*, *supra* note 11.

<sup>14</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 7 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1884).

<sup>15</sup> See Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L. J. 411, 424 (1981).

<sup>16</sup> This attitude developed over time. Some of Mark’s early work is more internalist although it also clearly offers

At the same time, Mark is decidedly *not* nonnormative with respect to politics. No one who knows him is unaware that he has distinct views about public policies and political outcomes. Furthermore, as the above quote indicates, he is not hesitant to argue that law should move in one political direction rather than another. Indeed, in his 1999 book, *Taking the Constitution Away from the Courts*, he explicitly argues that the development of constitutional norms should largely be left to politics and not to internal legal development of doctrine.<sup>17</sup> Americans should pledge faith in the aims of the “thin Constitution” whose principles are outlined in the American Declaration of Independence and the Preamble to the Constitution.<sup>18</sup> However, they should work out the meaning of the Constitutional text not through the processes of judicial review but through political debate, social movements, and the institutions of representative government.<sup>19</sup> He endorses this in part because he rejects the commonly held view that progressive political goals are well served by continued acceptance of judicial review.<sup>20</sup>

The clear line that Mark draws between talking about what is right and wrong in politics and talking about what is right and wrong in law is connected to his distinctive view about the relationship between law and politics, or more generally, between law and the historical development of American life and thought. Mark, like us, believes that you can understand and analyze Supreme Court decisionmaking largely in terms of social, historical, and political trends—what Duncan Kennedy calls “the ideological stakes” of decision.<sup>21</sup> These ideological stakes include but are not limited to the ideological tenor of the principles of law that a decision will establish, the status enhancement and ideological benefits that political and social groups will enjoy from judicial vindication of their favored principles, coherence between the result obtained and the nonlegal common sense of social and political groups, the likely consequences for social and political groups that may be affected by a decision, and even the short-run benefits that the decision will offer the particular plaintiff or defendant in a case. Finally, the ideological stakes of decision include the comparative status and reputation of the judiciary itself, the legal profession, and the legal system; these are not only important forms of constraint on judicial behavior—they are also sources of ideological bias in their own right.

The influence that historical and political trends have on legal development is possible because many legal doctrines, and especially those in the area of constitutional law, are relatively open-ended and malleable. Thus, Mark’s separation of legal normativity from political normativity is related to his views about legal indeterminacy. That indeterminacy is genuine but also genuinely constrained, and it is constrained by many of the same social and political forces that create it. Given an existing political and social situation, the existing conventions of lawyers and judges, and their abiding interests in the preservation of their own status and reputation, lawyers and judges cannot read existing constitutional precedents to mean just anything, nor can they read anything into any patch of constitutional text. Thus, Mark does not hold a position of

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externalist critiques from the political left. See, e.g., Mark V. Tushnet, “. . . And Only Wealth Will Buy You Justice”—*Some Notes on the Supreme Court, 1972 Term*, 1974 WIS. L. REV. 177 (arguing that a majority of the Court during the 1972 Term was only willing to find constitutional violations when middle class values were implicated or when persons like themselves would be adversely affected by a government policy). We are referring primarily to his mature scholarship.

<sup>17</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 186 (1999).

<sup>18</sup> *Id.* at 181.

<sup>19</sup> *Id.* at 185.

<sup>20</sup> *Id.* at 152.

<sup>21</sup> DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 109–11 (1997).

“radical indeterminacy”—a position, we may add, that was often associated with critical legal studies by its opponents but in fact was not actually held by any of its members.

Imagine, for example, that during oral argument in *Bush v. Gore*, Theodore Olson tells the Supreme Court that his client, George W. Bush, should prevail because the Constitution guarantees the states a republican form of government,<sup>22</sup> and Governor Bush is a Republican. He then attempts to clinch the argument by facing the Justices and stating pointedly, “What part of the word ‘republican’ don’t you understand?” Although the word “Republican” is certainly susceptible to different meanings,<sup>23</sup> well-educated American lawyers, regardless of their political inclinations, would join in describing Olson’s hypothetical argument as a mere play on words and would conclude that such an argument is simply not within the realm of current possibility.<sup>24</sup>

Mark’s view on legal indeterminacy, as best we can derive it from his many and various writings on constitutional law and legal theory, is a claim of relative indeterminacy in “important” cases. His position seems to be that for any case important enough to appear in front of the Supreme Court, it is possible that it could come out in more than one way, and those different ways are more or less hospitable to different ideological projects.<sup>25</sup> This does not mean that any result is possible in any situation, but that given an important political controversy, legal norms are sufficiently flexible to allow the pursuit of different ideological projects through the language of constitutional and legal argument. The flexibility of legal norms bestows legal decisionmaking with ideological stakes worth fighting over and fighting for, and hence it permits the shaping of legal decisionmaking by larger political and historical trends.

We note in passing that Mark’s views on law and politics, when announced thirty years ago, might have led to shock, scandal, and denials of tenure. It is no small measure of Mark’s influence, and that of critical legal studies, that such views are now comfortably mainstream, and are endorsed not only by mainstream liberals but by distinguished conservative jurists like Richard Posner.<sup>26</sup>

Thinking about law as a historical product of past (or contemporary) political struggles inevitably leads scholars to distance themselves from law’s internal logic and internal justifications. Evaluating the past, one no longer focuses on whether, for example, *Plessy v. Ferguson*<sup>27</sup> was rightly or wrongly decided as a matter of internal legal norms, but what political and historical forces accounted for the fact that most of the well-trained elite lawyers on the Court had no trouble producing the arguments offered in *Plessy*. To be sure, legal resources

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<sup>22</sup> U.S. CONST. art. IV, § 4.

<sup>23</sup> For example, did states have a “republican” form of government when they protected chattel slavery, during the time of property qualifications for the franchise, or in the period before the ratification of the 19th amendment, when fully half of the adult population lacked the right to vote? Under one vision of “civic republicanism” the states surely did, for republican households presupposed dependents, like slaves, servants, and wives, who could not vote. But under another, more egalitarian interpretation, the past was decidedly antirepublican. In like fashion we can wonder whether even today the states have been guaranteed a republican form of government.

<sup>24</sup> As we discuss *infra* Part III, it is a separate question whether Mark would simply note that most lawyers would regard this as a bad legal argument or whether he himself would insist that it is legally incorrect.

<sup>25</sup> Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 819 (1983).

<sup>26</sup> See RICHARD A. POSNER, *OVERCOMING LAW* 230–33 (1995); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 37–39, 202–03, 296 (1990) [hereinafter POSNER, *PROBLEMS*]; see also Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1228–35 (1991) (reviewing POSNER, *PROBLEMS*, *supra*).

<sup>27</sup> 163 U.S. 537 (1896).

were presumably available to decide the case in either direction.<sup>28</sup> The best evidence of this is Justice Harlan's famous dissent.<sup>29</sup> But for many legal academics these days it is more important to learn why Harlan, in *Plessy* as well as in the equally egregious *Civil Rights Cases*,<sup>30</sup> was so much the outlier in terms of the conventional legal culture of the time, and why he would be vindicated only many years later with the arrival of a distinctly different set of legal conventions.

Once the past is treated in this way, it is not difficult to see how similar considerations could apply to the present. It is obvious that the current Supreme Court is divided, often bitterly so, about a number of quite basic constitutional issues, including federalism, civil rights, and even how we should go about selecting our Presidents. Those divisions seem every bit as political as those that divided the Justices in the 1840s (when the issues were federalism, property rights, and slavery) or the 1950s (when the issue was freedom of speech). Law professors who view law as a historical product may think it more important to explain why well-trained lawyers with particular political views find one or another set of arguments persuasive in the current political and social context than to try to prove that contemporary legal norms decisively support one side or the other in the reigning controversies of the day.

## II. LEGAL AND CONSTITUTIONAL HISTORICISM

We call the various forms of legal study that examine legal decisionmaking as the product of political, social, and (especially) historical forces "legal historicism." By extension, we call those forms of legal study that examine constitutional decisionmaking as the product of political, social, and historical forces "constitutional historicism." There are many different varieties of legal (or constitutional) historicism, but each is premised on two basic assumptions about the legal system. The first assumption is that legal materials and the internal conventions of legal argument are, at any point in time, genuinely constraining on practitioners of legal argument and not infinitely malleable. Nevertheless, at the same point in time, they are sufficiently flexible to allow law to become an important site for political and social struggle. The second assumption is that legal materials and conventions of legal argument are themselves gradually changing in response to the political and social struggles that are waged through them. Therefore the internal norms of good legal argument are always changing; they are being changed by political, social, and historical forces in ways that the internal norms of legal reasoning do not always directly acknowledge or sufficiently recognize.

One of the most interesting features of legal historicism is its view regarding "frivolous" legal argument.<sup>31</sup> Legal conventions necessarily require that, at any point in time, well-trained lawyers be able to distinguish more plausible arguments from less plausible ones and, more to the point, plausible legal arguments from frivolous ones. However, it follows from the basic premises of legal historicism that what makes a good legal argument a good legal argument changes historically. The judgments of well-socialized lawyers about what is more plausible and less plausible, and even between what is "on the wall" and what is totally "off the wall," are not fixed; rather, they evolve over time in response to historical and political forces in addition to the

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<sup>28</sup> Michael J. Klarman, *The Plessy Era*, 1998 SUP. CT. REV. 303, 305; see also Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271 (1997) (showing how the result in *Dred Scott* made sense given then-existing norms of constitutional argument).

<sup>29</sup> *Plessy*, 163 U.S. at 552 (Harlan, J., dissenting).

<sup>30</sup> 109 U.S. 3 (1883).

<sup>31</sup> See Sanford Levinson, *Frivolous Cases: Do Lawyers Really Know Anything at All?*, 24 OSGOODE HALL L.J. 353 (1986).

inevitable internal changes in legal doctrine. There is, therefore, no such thing as an inherently “frivolous” legal argument considered transhistorically, although at any point in time there are plenty of “frivolous” legal arguments, and well-trained lawyers are defined in part by their ability to spot and denounce them. Indeed one of the most remarkable features of any study of American legal history is watching arguments migrate from the category of “frivolous” or “unthinkable” to “reasonable, albeit, all things considered, unpersuasive” to “reasonable, and on the whole the better argument,” to being so overwhelmingly persuasive that to criticize them is to be tarred with the brush of “frivolity” and, possibly, subjected to legal sanctions under Rule 11.<sup>32</sup> The study of law is, therefore, the study of changing structures of legal consciousness and the ways in which they serve, at any given time, to socialize lawyers into the “proper” performance of their roles—including, obviously, knowing which kinds of sentences count as well-formed examples of “law-talk” and which are, alas, evidence of a certain linguistic incompetence.<sup>33</sup>

This version of legal historicism appears, appropriately enough, in the preface to the most recent edition of our casebook, *Processes of Constitutional Decisionmaking*:

Arguments that seem to have been written off for good (like the compact theory of state sovereignty) uncannily reemerge in new guises a century later. Visionary claims of social movements that would be rejected by all right-thinking lawyers of the period become the accepted orthodoxy of later eras. The ideological valance of arguments—as “liberal” or “conservative,” moderate or radical—also drifts as arguments are introduced or repeated in new social and legal contexts. Finally, the popularity and persuasiveness of different styles of constitutional argument—for example, textualism or originalism—wax and wane with historical and social change and with concomitant changes in the legal profession.

There is, in short, no transhistorical criterion for “thinking like a constitutional lawyer,” other than an abiding faith in the basic constitutional enterprise. . . .

One of the reasons why constitutional argument changes as it does is that the practice of constitutional reasoning is deeply connected to changes in political and social life. . . . Our understandings of the American Constitution would have been very different without Jacksonianism, abolitionism, the Civil War, the feminist movement, the New Deal, and the Civil Rights movement. . . .

Finally, we continue to emphasize a historical approach to understand our debt to the past, both in terms of our moral successes and our moral failures. . . . We think that, as a doctrinal matter, the question of slavery haunts the whole of antebellum constitutional law and that the legacy of slavery affects the great issues of federalism and equality that came later. . . . [I]t is . . . important for law students to confront slavery precisely because everyone now recognizes it to have been a great evil. It was a great evil that was sustained and perpetuated through law and, in particular, through constitutional law as interpreted by the finest legal minds America had to offer. Law students must come to understand how well-trained lawyers acting in good faith could have participated in such a system and rationalized it according to well-accepted modes of legal argument, justifying their work in the name of America’s great charter of democracy, liberty, and

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<sup>32</sup> FED. R. CIV. P. 11.

<sup>33</sup> See J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771 (1994).



equality. We think that if they can recognize this use of law in America's constitutional past, they will be better equipped to ask themselves the much more difficult question of whether well-trained lawyers in our own era could be similarly engaged in the rationalization of great injustices in the name of our Constitution, even though there may be great disagreement about what these are. The goal of a historically informed approach is not merely to see the achievements and injustices of the past through our own eyes, but to remind us to consider how our present interpretations of the Constitution might look to future generations.<sup>34</sup>

Implicit in legal and constitutional historicism, then, is the assumption that we can criticize the past (and hence the present) on political grounds for many of the legal choices that it makes, when those choices are contingent given existing legal materials. Legal actors cannot hide behind the internal conventions of legal argument, because those conventions are flexible enough to offer legal actors the potential to do justice—or at least a greater degree of justice—through the forms of legal argument. The defenders of slavery did not defend it simply because law compelled them; rather, they fought out the constitutional parameters and protections of slavery through law and justified slavery through claims of doctrinal necessity. It is worth noting, incidentally, that the same is true of those whom we now regard as having fought on the side of justice and for the destruction of slavery. One political vision confronts another, each claiming that it expresses the true meaning of the Constitution; it is never simply a confrontation between those who are “faithful to the law” and those with purely “political” ends.<sup>35</sup> In the same way, the legal controversies of our own day provide legal decisionmakers with more room to maneuver than they may care to admit. And with that room to maneuver comes moral responsibility, not only to our own time, but to future generations as well.

Defined in this way, Mark Tushnet is clearly a constitutional historicist. It is also not surprising that other scholars who focus on political and historical explanations of constitutional law—Scot Powe and Michael Klarman come most readily to mind—could also be described as constitutional historicists. Like Mark, Klarman and Powe generally pay more attention to political forces than doctrinal consistency. Indeed, both generally take a strongly detached (and sometimes even ironic) stance toward internal legal reasoning.<sup>36</sup>

Nevertheless, constitutional historicists do not have to be externalists. They can also be deeply committed to the internal normative project of law. But that commitment creates a certain degree of theoretical tension. Consider Bruce Ackerman's constitutional theory, which is both an excellent example of sophisticated constitutional historicism in action and, for that same reason, an excellent example of the potential pitfalls that historicism offers for normative

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<sup>34</sup> PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL AMAR REED, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS, at xxxi–xxxii (4th ed. 2000).

<sup>35</sup> See J.M. Balkin & Sanford Levinson, *Getting Serious About “Taking Legal Reasoning Seriously,”* 74 CHI.-KENT L. REV. 543, 554–58 (1999).

<sup>36</sup> See, e.g., LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145 (1998); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996). Nevertheless, Klarman's recent attack on *Bush v. Gore* is as internalist as it could possibly be in denouncing the Supreme Court's decision as a travesty of legal analysis. See Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. (forthcoming Dec. 2001). As we shall discuss *infra* Part III, Klarman's example suggests that few law professors can maintain a completely agnostic perspective about the integrity of internal forms of legal argument

constitutional argument.<sup>37</sup>

By our above definition, Ackerman's project is strongly historicist. Changes in constitutional regimes change the conditions of plausibility of constitutional arguments. What is plausible before Reconstruction becomes implausible afterwards. The reason for the change in the plausibility of constitutional arguments is politics—in particular, the special form of mobilized politics that Ackerman calls “higher lawmaking.”<sup>38</sup> For Ackerman, the fact that *Lochner v. New York*<sup>39</sup> seems wrongly decided today tells us nothing about whether it was wrongly decided in 1905. In fact, Ackerman makes a point of arguing that *Lochner* was a coherent synthesis of a Founding-era commitment to individual rights and a Reconstruction-era commitment to protection of free labor as the key exemplar of individual liberty.<sup>40</sup>

Nevertheless, Ackerman's historicism is precisely what makes it difficult for him to offer normative advice to judges about how to decide cases in the present. If standards for deciding cases do change with great changes in politics, then how is one to know that great changes have or have not occurred? As Ackerman points out, potential constitutional moments are always brewing, but many if not most of them eventually fizzle out and go nowhere.<sup>41</sup> But at the time of decision, judges do not know the future.

Ackerman tries to solve the problem by offering special criteria and procedural conditions for determining when a constitutional moment has occurred. He looks to key elections and moments of illegality or, in his words “unconventional adaptation,” as signs that the constitutional regime has shifted.<sup>42</sup> But his theory works best in hindsight. Years after the struggle over the New Deal has been completed, one can recognize that the meaning of the Constitution has changed and so one is free to disregard pre-1937 precedents concerning national power and substantive due process. Once the Owl of Minerva has flown, it is much easier to understand what historical events may mean for constitutional interpretation. But Ackerman's theory is of little help during political events that may turn into a full-fledged constitutional moment or may fizzle out at some undetermined point in the future. It does not clearly explain to jurists in the midst of a constitutional controversy whether they should ally themselves with the forces of change or resist with all their might. It does not tell Justices in 1939 whether they should consolidate the New Deal revolution or continue to oppose it.

Nor does Ackerman's theory determine whether a judicial adventure like *Bush v. Gore* can justly be condemned if that judicial adventure might be the opening shot in a subsequent constitutional revolution.<sup>43</sup> For example, the conservative judicial activism of the Rehnquist Court—including its recent line of federalism decisions—may be lawless and indefensible from the standpoint of pre-1987 jurisprudence. But it remains to be seen whether it will be buttressed and supported by Republican electoral victories in the future. If the Republicans dominate the political landscape in the next decade and make sufficient appointments to the Supreme Court

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<sup>37</sup> 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

<sup>38</sup> See Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 63 (Sanford Levinson ed., 1995).

<sup>39</sup> 198 U.S. 45 (1905).

<sup>40</sup> 1 ACKERMAN, *supra* note 37, at 101.

<sup>41</sup> 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 20, 26, 359 (1998).

<sup>42</sup> *Id.* at 385; Ackerman, *supra* note 38, at 69.

<sup>43</sup> We may make a similar point about the Clinton impeachment, which might have precipitated a constitutional moment, and which, in hindsight, might still be a pivotal event in a conservative transformation of the American Constitution. Ackerman's theory cannot genuinely inform a troubled legislator who wondered, in 1998 to 1999, exactly what constituted an impeachable offense under Article II of the Constitution. See Sanford Levinson, *Transitions*, 108 *YALE L.J.* 2215, 2233–2235 (1999).

and the federal judiciary, it will be difficult to call decisions like *United States v. Lopez*,<sup>44</sup> *Seminole Tribe v. Florida*,<sup>45</sup> *Alden v. Maine*,<sup>46</sup> and *United States v. Morrison*<sup>47</sup> “lawless.” Quite the contrary: They will be the very foundations of the constitutional law of this new constitutional regime. Contrary decisions from the pre-1987 past will have the same status as *Adkins v. Children’s Hospital*<sup>48</sup> had after *West Coast Hotel v. Parrish*,<sup>49</sup> or *Carter v. Carter Coal*<sup>50</sup> had after *United States v. Darby*<sup>51</sup> and *Wickard v. Filburn*.<sup>52</sup>

Indeed, even *Bush v. Gore* may be justified in the long run under Ackerman’s version of constitutional historicism. Perhaps it counts as one of the quasi-illegal acts of “unconventional adaptation” that Ackerman is prone to celebrate as a signal that a new constitutional age is dawning.<sup>53</sup> If “We the People” keep returning the Republicans to office following this purported judicial usurpation, then the Court will have gambled and won in guessing the direction of history and constitutional change. Better still, it will have actively participated in making the new constitutional regime a reality.<sup>54</sup>

No doubt Mark Tushnet would find this criticism of Ackerman unremarkable.<sup>55</sup> That is why he has refused to engage in normative legal argument. But the problem is different for us. We consider ourselves constitutional historicists. At the same time, we are quite uncomfortable with the notion that we must completely surrender our ability to make internal criticisms of judicial decisions. We applaud Ackerman’s attempt at a normative constitutional historicism, even if we are not sure that he has succeeded. To be sure, we can always criticize judicial decisions from overtly political standpoints. But the question is whether our special expertise as law professors—that is, as experts in legal doctrine and legal reasoning—gives us any special grounds for criticizing the work of present day courts in terms of how well or how badly they have used the available materials of legal argument. Mark’s example as a role model—the model of the law professor as antijurist—suggests implicitly, if not explicitly, that this is a circle that cannot be squared.

The criticisms we have offered of Ackerman’s project can be made more generally of any historicist project that tries to offer internal normative criticisms of legal argument. If one is unwilling to say that *Lochner* was wrong in its own era, how can one say that *United States v. Morrison* is wrong in the present day? Perhaps one could take a more externalist attitude about the past but be strongly normative about legal reasoning in the present. We live in the present, after all, and so we are just as able as anyone else to judge what is plausible and what is not. The problem, however, is that constitutional argument relies to a very large degree on past precedents. In order to pass on the correctness of current law, one has to take a position on the correctness of past precedents that support that law, like the *Civil Rights Cases* or, perhaps more

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<sup>44</sup> 514 U.S. 549 (1995).

<sup>45</sup> 517 U.S. 44 (1996).

<sup>46</sup> 527 U.S. 706 (1999).

<sup>47</sup> 529 U.S. 598 (2000).

<sup>48</sup> 261 U.S. 525 (1923).

<sup>49</sup> 300 U.S. 379 (1937).

<sup>50</sup> 298 U.S. 238 (1936).

<sup>51</sup> 312 U.S. 100 (1941).

<sup>52</sup> 317 U.S. 111 (1942).

<sup>53</sup> 2 ACKERMAN, *supra* note 41, at 9, 119, 384.

<sup>54</sup> These issues are discussed in more detail in Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 85 VA. L. REV. 1045, 1076–80 (2001).

<sup>55</sup> See Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 845, 847–57 (1996).

to the point, *Roe v. Wade*.<sup>56</sup> Moreover, if one accepts that there is more than one plausible way to decide a controversial question of constitutional interpretation, it is not clear that one can make one's objections to a case like *United States v. Morrison* purely in internal terms of good or bad legal reasoning. Or so, we suspect, someone like Mark Tushnet might argue.

### III. LEGAL HISTORICISM AND *BUSH V. GORE*

So far, it seems that Mark's version of historicism—which strictly separates political judgments from judgments of legal correctness—has clear benefits, while Ackerman's aspirations to combine legal historicism with normative legal argument have distinct disadvantages.

However on December 12th, 2000 the Supreme Court of the United States did something that puts Mark's view squarely to the test. It decided *Bush v. Gore*,<sup>57</sup> handing the Presidency to George W. Bush on legal grounds that in the eyes of many observers seemed implausible and far-fetched. We think that *Bush v. Gore* offers an important challenge to Mark's brand of constitutional historicism. The question is whether someone who holds Mark's views must remain completely agnostic about whether the Court interpreted the Constitution correctly in *Bush v. Gore*, and therefore can only criticize the opinion on political grounds. In other words, we regard *Bush v. Gore* as an interesting test case of how "pure" descriptive analysts can be. The question is what Mark—or any of the rest of us who broadly share his perspectives on the role of the legal academic—can say about *Bush v. Gore*.

As it happens, Mark not only appeared on the December 12, 2000 telecast of *Nightline*, during which he offered Ted Koppel and the rest of the country some initial responses to the Court's decision issued, so memorably, just one-and-a-half hours before the 11:30 p.m. taping of that program. He also gave a bravura performance at a panel on *Bush v. Gore* at the 2001 gathering of the Association of American Law Schools just three weeks later in San Francisco. We were both there and can personally testify to its typical incisiveness. Mark, with his characteristic deadpan irony, detailed the various techniques by which *Bush v. Gore* was likely to become "normalized" within the standard corpus of constitutional law materials. We noted with wonder and delight that the other panelists seemed to be doing much of what Mark predicted they would.

One of the striking aspects of Mark's paper, however, is that it offers little that could count as criticism of the decision—and certainly nothing that could count as praise! At certain points, however, his attitude peeped out. Quoting Justice Robert Jackson, he noted the " 'mental reservations one has in teaching of Santa Claus or Uncle Sam or Easter bunnies or dispassionate judges.' "<sup>58</sup> "It is one thing," Mark explained, " to have those reservations, another to be reminded of them, and yet something else to be hit over the head with the realization that judges are not always dispassionate."<sup>59</sup> He then dryly observed:

One important criticism of critical legal studies was that its claim about the equivalence of law and politics could not be sustained unless the advocate of critical legal studies could identify a decision that exclusively served narrow

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<sup>56</sup> 410 U.S. 113 (1973).

<sup>57</sup> 531 U.S. 98 (2000) (per curiam).

<sup>58</sup> Tushnet, *supra* note 4, at \_\_\_\_ (quoting *United States v. Ballard*, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting)).

<sup>59</sup> *Id.* at \_\_\_\_.

partisan goals. In my view that criticism misunderstood the definitions of “law” and “politics” that critical legal studies (appropriately) used. But, in any event, *Bush v. Gore* makes this criticism unavailable today . . . .<sup>60</sup>

Of course, Mark pointed out, legal elites—which include legal academics, prominent lawyers, and journalists who cover legal issues—“are heavily invested in insisting that there is a real difference between law and politics.”<sup>61</sup> But he clearly did not mean to include himself in that august group. We may easily surmise that Mark prefers the politics of the Florida Supreme Court and the four dissenters in *Bush v. Gore*, but that does not mean he thinks the decision is wrong as a matter of law. As Tina Turner might say (if she had read her Tushnet), “What’s law got to do with it?”

To better understand the problem that *Bush v. Gore* poses for Mark’s vision of the legal academic, we ask you to engage in a thought experiment. Imagine that you are a law professor who is invited to a dinner party and that by a stroke of good fortune you find yourself seated next to an intellectually curious nonlawyer, who proceeds to ask you a number of questions about the legal system. “I recently read about the Supreme Court’s decision in *Bush v. Gore*,” she tells you, “and I have to say that I was pretty shocked by what the Court did, especially when it ordered an abrupt end to the recounts.” She then asks you directly, “Tell me, what did you think of that decision? Was it correct or incorrect? I’d appreciate your opinion as a teacher of law and a legal expert.”<sup>62</sup>

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<sup>60</sup> *Id.* at \_\_\_ n. \_\_\_.

<sup>61</sup> *Id.* at \_\_\_.

<sup>62</sup> In fact, we have no doubt that many, if not most professors of constitutional law have been asked this question during the days following the 2000 election. Moreover, various petitions circulated among law professors asking them to take a stand on the 2000 election and *Bush v. Gore*. For example, over 625 American law professors have (as of March 2001) signed the following statement about *Bush v. Gore*, which appeared, among other places, as an advertisement in the *New York Times*:

By Stopping the Vote Count in Florida,  
The U.S. Supreme Court Used Its Power  
To Act as Political Partisans,  
Not Judges of a Court of Law

We are Professors of Law at 120 American law schools, from every part of our country, of different political beliefs. But we all agree that when a bare majority of the U.S. Supreme Court halted the recount of ballots under Florida law, the five justices were acting as political proponents for candidate Bush, not as judges.

It is Not the Job of a Federal Court  
to Stop Votes From Being Counted

By stopping the recount in the middle, the five justices acted to suppress the facts. Justice Scalia argued that the justices had to interfere even before the Supreme Court heard the Bush team’s arguments because the recount might “cast a cloud upon what [Bush] claims to be the legitimacy of his election.” In other words, the conservative justices moved to avoid the “threat” that Americans might learn that in the recount, Gore got more votes than Bush. This is presumably “irreparable” harm because if the recount proceeded and the truth once became known, it would never again be possible to completely obscure the facts. But it is not the job of the courts to polish the image of legitimacy of the Bush presidency by preventing disturbing facts from being confirmed. Suppressing the facts to make the Bush government seem more legitimate is the job of propagandists, not judges.

The way one answers this question, we think, says a great deal—not only about one’s ideology or one’s jurisprudential philosophy, but also about one’s self-conception as a law professor. We offer a few possible replies.

*First Response:* “That’s easy. The Constitution requires whatever the Supreme Court says it does. As a great Chief Justice once said (though while he was still Governor of New York), ‘[T]he Constitution is what the judges say it is . . . .’<sup>63</sup> So if the majority in *Bush v. Gore* said that the Florida recounts violate equal protection and that the appropriate remedy is to stop the recounts because of the federal safe harbor provision, that’s the end of the matter for any well-trained legal professional. Sure, you can always say that the Supreme Court got it wrong or that they made a mistake, but that’s simply a political judgment. Once the Court speaks, it has declared what the law is,<sup>64</sup> which, in the case of the recent election, is that the Florida recount procedures were unconstitutional and that the correct remedy was simply to shut down the election.”

*Second Response:* “I don’t know what it would mean to say that Supreme Court decisions are correct or incorrect. I was hired to teach law primarily because I’m an experienced practicing lawyer, a role that I continue to play, though only one day a week. And my job as a lawyer is simply to make whatever arguments fit the needs of my clients.<sup>65</sup> Those needs have almost literally nothing to do with what I think the Constitution ‘really means.’ I do a lot of voting rights cases, and what’s most interesting to me as a practicing lawyer about *Bush v. Gore* is that it may make it easier for my clients to win cases in the future, given its expansion of the Equal Protection Clause. And that’s especially true in the district and appellate courts in which I actually litigate, where liberal judges are likely to seize the opportunity handed them by the case to protect people like my clients.”

*Third Response:* “Who knows what the Constitution ‘really’ means? I’m a law professor. My job is to train students to become lawyers who make arguments in front of courts and other legal decisionmakers. I want them to learn how to think like lawyers and respond to the kind of arguments their opponents are likely to make. So I focus on teaching them what Philip Bobbitt

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By taking power from the voters,  
the Supreme Court has tarnished its  
own legitimacy. As teachers whose lives  
have been dedicated to the rule of law, we protest.

N.Y. TIMES, Jan. 13, 2001, at A7. People sign (or refuse to sign) these petitions for many different reasons. However many of the same questions are implicated by the decision whether or not to add one’s name to such a petition. Not the least of these questions is whether the law professor in question can sincerely state that his or her life has “been dedicated to the rule of law,” and whether, even if so, this commitment says anything about his or her ability to pronounce the opinion wrongly decided.

<sup>63</sup> Charles Evans Hughes, Speech at Elmira, New York (May 3, 1907), *quoted in* FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 216 (1993).

<sup>64</sup> *See, e.g.,* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1387 (1997) (defending this view as the most desirable way of understanding the American constitutional order); *see also* Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 482 (2000) (same).

<sup>65</sup> *See* Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. PUB. POL’Y 495, 507 (1996), *reprinted in revised form, The Operational Irrelevance of Originalism*, in LIBERTY UNDER LAW: AMERICAN CONSTITUTIONALISM, YESTERDAY, TODAY AND TOMORROW 105, 113–14 (Kenneth L. Grasso & Cecelia Rodriguez Castillo eds., 1997).

calls the ‘modalities’ of legal argument—text, structure, consequences, and so on.<sup>66</sup> Think of me as a teacher of rhetoric. What I found interesting about *Bush v. Gore* is that the majority seemed to rely heavily on precedents from the Warren Court era instead of original intention or structural arguments. A lot of people were surprised that it was the conservative majority that used such arguments, but as I tell my students, the way the game is played is that the modalities provide a quiver of rhetorical arrows, and decisionmakers take out whichever one will best enable them to hit the target. Students never ask me if a decision was correct or incorrect, at least if the modalities have been used competently. After all, if I denounce a decision of the Supreme Court as incorrect, they look at me as a megalomaniac or a crank, and if I applaud a decision, what’s the point? Nor do I ask my students whether a decision is correct or incorrect,<sup>67</sup> though I spend a lot of time making sure they can recognize the thrust and parry of competing modalities or arguments within given modalities.

“I know a lot of judges—and even some professors—talk about fidelity to the Constitution and to their oaths and so on. But, honestly, I think that’s just a bunch of twaddle, though I guess if I were a judge I’d talk that way myself. It’s expected of them. They have to promise the Senate Judiciary Committee that they will only ‘find’ law and never ‘make’ it. But, of course, nobody believes it for a second. It’s ritualistic mumbo-jumbo, like killing a sheep for good luck before embarking on a journey or going into battle. In any case (and probably fortunately for the country), I’m not a judge and I don’t have to start thinking like one.”

*Fourth Response:* “You’re asking the wrong question. What explains the decision in *Bush v. Gore* is that the majority was trying to do what they thought was best for the country. The dissenters disagree and thought that the majority’s decision was positively bad for the country.<sup>68</sup> That’s the only way to understand what the Justices do. Sure I have my own opinion. But it’s just my opinion. Who knows whether the Constitution really requires one thing or another, especially when you’re talking about the kinds of cases that actually get to the Supreme Court? Maybe I could tell you with some confidence if a local judge is or is not following the Constitution, but by the time the cases get to the Supreme Court, it’s just naïve to believe that the Constitution has much (or, indeed, anything) to do with the outcome. It’s a political decision by people who are authorized to develop their political ideals through a practice called constitutional law.”

*Fifth Response:* “You know, I’ve been thinking a lot in the last day or two of how I’ll answer questions just like yours when I teach the case to my students next week. It’s my ‘job as a teacher to bring out both sides of the argument,’<sup>69</sup> even though I worry ‘about the cynicism that this case breeds.’<sup>70</sup> But if there really are two sides of the argument, then I’m not sure why students should be cynical, because the lesson they’ve learned from day one of law school is that almost every case has (at least) two sides to it. Even though I’ve criticized the case in public and been a public advocate for one side, I’ll probably make a special effort to present both sides fairly so that students don’t confuse my lecturing with advocacy. Representing clients is one thing; teaching and writing about law is quite another. When I teach the case, ‘I’ll try to present

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<sup>66</sup> See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991).

<sup>67</sup> See Sanford Levinson, *The Embarrassing Second Amendment*, 99 *YALE L.J.* 637, 642 (1989) (“It is not my style to offer ‘correct’ or ‘incorrect’ interpretations of the Constitution.”).

<sup>68</sup> See RICHARD A. POSNER, *BREAKING DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 4–5, 172 (2001).

<sup>69</sup> See David Abel, *Bush v. Gore Case Compels Scholars to Alter Courses at U.S. Law Schools*, *BOSTON GLOBE*, Feb. 3, 2001, at A1 (quoting Professor Heather Gerken of Harvard Law School).

<sup>70</sup> *Id.*

an even-handed view about how a justice could arrive at the decision of the majority without being completely corrupt.<sup>71</sup> So I think I won't give you a direct answer to your question. Instead I should try my best to give you both sides, because I don't want you to accept my view just because I'm a law professor or because I may have publicly advocated the correctness of one view and denounced the other."

*Sixth Response:* "*Bush v. Gore* was a disgrace. The Court just made up new doctrines out of whole cloth! The Article II argument is bonkers. And the equal protection argument? Quite a stretch, if you ask me. Imagine the nerve of those conservative Justices citing those Warren Court opinions like they believed in them. And don't get me started on the remedy. If you think there's an equal protection violation, then do something about it. Remand the case, don't stop the recounts completely. This was a terrible example of Justices who didn't have a legal leg to stand on passing off bad legal arguments in the hope that most people wouldn't notice. Well, I noticed and a lot of other law professors did too. And we are going to explain to our students how bad the reasoning was and how lawless the Court's holding was. You can bet on that."<sup>72</sup>

Obviously, someone with Mark's views about the role of the law professor could make several of these replies. But there is one reply that he could not make. That is the sixth and last response, which criticizes *Bush v. Gore* as a bad example of legal reasoning and wrongly decided. Is there anything particularly wrong with this? Does this suggest that his vision of the proper role of a law professor is in some way inadequate or defective?

We could raise the stakes by imagining that the Court had adopted our fanciful "Republican form of government" argument. Suppose the Court held that George W. Bush should win because he is a Republican and the federal government guarantees the states a republican form of government.<sup>73</sup> At this point would Mark concede that the decision was wrongly decided *legally*? Or would he merely pronounce it as "surprising" given his understanding of the operative conventions of legal argument and proceed to denounce it solely on political grounds? Again, if this would be his response, is there anything particularly troubling about it? Would his unwillingness to remark on the legal correctness of this argument reflect poorly in any way on his vision of the proper role of the legal academic?

For many, a sufficient response will be that Mark is just one person. His view of the law professor's role does not prevent anyone else from having a contrary view. However, we began this Essay with a very different ambition. We stated forthrightly that Mark's career was especially admirable and worthy of emulation. Moreover, we argued that he could and should serve as a role model for others, especially for young law professors who are just starting out and

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<sup>71</sup> *Id.* (quoting Professor Laurence Tribe of Harvard Law School, who represented Al Gore before the U.S. Supreme Court).

<sup>72</sup> See, e.g., David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 739 (2001); Ronald Dworkin, *A Badly Flawed Election*, N.Y. REV. BOOKS, Jan. 11, 2001, at 53, 53–55. This hardly exhausts the set of possible replies. Because we (and Mark) are deeply skeptical about *Bush v. Gore*, we naturally focus on whether one may criticize it internally or externally. But we emphasize that some law professors think the opinion was correctly decided—not simply because stopping the recounts was in the best interests of the country—but because the case was an example of good legal reasoning. See, e.g., Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. (forthcoming Feb. 2002) ("*Bush v. Gore* was a straightforward and legally correct decision."), available at [www.gmu.edu/departments/law/faculty/papers/docs/01-17.pdf](http://www.gmu.edu/departments/law/faculty/papers/docs/01-17.pdf). Both Strauss and Lund believe in the internal integrity of legal decisionmaking and in their ability to identify correct and incorrect examples of judicial reasoning. Thus, even though they disagree about *Bush v. Gore*, they have more in common with each other than with those lawyers and legal scholars who resist internalist assessments of the opinion.

<sup>73</sup> No doubt some critics of the decision would probably say that the actual holding was not much better, but we assume that this argument is even more off the wall.



are trying to decide exactly what their professional role should be. Put in those terms, does Mark's (presumed) inability to offer the sixth response pose any difficulties?

It is not flattery made up for the occasion to say that Mark has served for both of us, and many others, as a model of how to understand constitutional debates and how to analyze, with consistent insight, their structures. However, it may be, of course, that there are costs as well as benefits attached to that model. It should be clear by now that although we raise them in terms of Mark's own views, we are also offering a very public set of reflections about our own conceptions of professing law at the present time, when the occupant of 1600 Pennsylvania Avenue got there not as the result of the American electoral process, as flawed as it may be, but rather as the result of a gift made by the United States Supreme Court. At the very least, it feels awkward if one cannot, as a law professor, say something distinctive about why that decision is so objectionable. Perhaps this awkwardness merely reflects simple nostalgia for an earlier era of constitutional jurisprudence (or rhetoric) that is unavailable to those of us who have drunk from the well of American legal realism, much less critical legal studies. But we think more is at stake.

Here the positions of the two authors diverge. In an earlier draft of this Essay, Balkin wrote in a concluding paragraph that

we continue to hold out the view that, no matter how much we admire Mark's example, we do have a distinctive normative role as professors of law, and that we do have not only the right but the duty to take normative stands on what is the better and the worse legal argument.

Reading the draft, Levinson persuaded him to remove it, and the two of us have decided instead to explain individually how we understand our roles as law professors who are also legal historicists.

Both of us agree that the problem is not whether a legal historicist can say that an argument is frivolous. A scholar like Mark, whose historicism is unalloyed, can still say that particular legal arguments are frivolous as he understands existing community norms. Rather, the question is whether one believes that the argument is frivolous from one's own standpoint and one's own internal commitment to the enterprise of legal argument. That distinction is important precisely because one may be the first to make a new legal argument that one fervently believes in, while recognizing that other people in the relevant community regard it as frivolous. When one is committed to law internally, what one believes and what the community believes are two different things. To take two examples, Lysander Spooner believed that slavery was unconstitutional before the Thirteenth Amendment.<sup>74</sup> In our own era, Catharine MacKinnon believed that sexual harassment was a form of sex discrimination prohibited by Title VII long before many other legal professionals did.<sup>75</sup> She also believed (and still believes) that regulation

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<sup>74</sup> See Randy E. Barnett, *Was Slavery Unconstitutional Before the Thirteenth Amendment?: Lysander Spooner's Theory of Interpretation*, 28 PAC. L.J. 977, 977–78 (1997); Lysander Spooner, *The Unconstitutionality of Slavery* 28 PAC. L.J. 1015 (1997) (reprinting excerpts of LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* (rev. ed. 1860)).

<sup>75</sup> See CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979). Similarly, one suspects that her arguments that rape is a war crime or a crime against humanity struck many well-trained international lawyers as implausible, see Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59, 59 (1993); Catharine MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 HARV. WOMEN'S L.J. 5, 6–7 (1994), though now it is in fact the basis of a conviction by the International War Crimes Court at the Hague for war crimes

of pornography is consistent with the First Amendment.<sup>76</sup> MacKinnon is an excellent example of a person who takes highly controversial (her opponents would say highly unpersuasive) legal stands, but who talks and speaks as if she is fully invested in the rightness and wrongness of legal arguments within the legal system.

Is this internal attitude possible for someone who is a historicist? For Balkin, the answer is clear. His view is that he lives in the present, not the past. He is a member of contemporary legal culture, and he feels that he has as much right to offer an opinion as to what is a good legal argument and what is a bad legal argument as anyone else. Indeed, having devoted much of his adult life to the study of the American Constitution, he sees no reason why he should not be able to express such opinions when called upon. Although he is happy to discuss the present from the standpoint of a detached anthropologist of contemporary legal culture or as a legal semiotician and rhetorician who studies the evolving thrusts and parries of contending forms of legal argument,<sup>77</sup> he also understands that he is very much invested in contemporary legal culture and that analytical detachment is not the only attitude he has about the American legal system. Sometimes he is harshly critical of the system<sup>78</sup> (itself another kind of investment); while sometimes he thinks that the ideals latent within the American Constitution promote particular readings to the exclusion of others.<sup>79</sup> For him there is no necessary conflict between inhabiting the multiple roles of detached analyst, external critic, and invested participant. One simply needs to be clear about which role one is playing and in which capacities one is being consulted.

For Levinson the question is differently posed. Although he has said that in many contexts, he is simply not interested in arguing for what the Constitution really means,<sup>80</sup> he nevertheless confesses that he does not hold a fully external view. He does agree with Mark that in constitutional law, the relevant materials are so open-ended that it is usually impossible to profess genuine dismay, as a lawyer, about the different uses that lawyers and judges make of them. The materials are rich and flexible. Most cases that appear before the Supreme Court could go either way, and so one's objections to court decisions must, in the main, be political ones. Moreover, even if a particular judge's performance is rather shoddy, some bright young legal scholar can often come along later to rewrite the opinion to make the result more plausible. Nevertheless, the relevant legal materials and the conventions of law-talk, although flexible and open-ended, are not infinitely so. At some point, a litigant or a judge can burst the bounds of reasonableness. Levinson is sufficiently invested in the practice of legal argument that he finds something objectionable—indeed deeply objectionable—to this practice.

For example, he has said in several conversations that he regards the Article II, Section 1 argument—which treats the Florida legislature as basically a classical sovereign, capable of acting however it wishes free of all but the most minimal constitutional constraint<sup>81</sup>—that the

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that occurred in Bosnia. See Barbara Crossette, *Ideas & Trends: Crimes Against Humanity; A New Legal Weapon to Deter Rape*, N.Y. TIMES, Mar. 4, 2001, § 4, at 5.

<sup>76</sup> See CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 177–97 (1987); CATHARINE A. MACKINNON, ONLY WORDS 22–41 (1986).

<sup>77</sup> See J.M. Balkin, *The Crystalline Structure of Legal Argument*, 39 RUTGERS L. REV. 1 (1986); J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831 (1991).

<sup>78</sup> See J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1737–38 (1997).

<sup>79</sup> See J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2342–45 (1997). It is worth noting that this internalist article and the externalist one cited in the previous footnote were written in the same year.

<sup>80</sup> See Levinson, *supra* note 67, at 642 (“It is not my style to offer ‘correct’ or ‘incorrect’ interpretations of the Constitution.”).

<sup>81</sup> And the only constraining Constitution is that of the United States, for the Florida Constitution that itself gives life

Bush forces offered in *Bush v. Gore*, as “crazy.” He regards it as crazy even though the Chief Justice of the United States, William Rehnquist, and two Associate Justices accept it, at the urging, among others, of two members of the Harvard Law School faculty, one of them a former Solicitor General of the United States.<sup>82</sup> All of this being recognized, Levinson continues to believe that it is “really and truly” a bad legal interpretation of the Constitution and that self-respecting lawyers, whether they are members of the Harvard faculty or Justices of the United States Supreme Court, should be ashamed of themselves for offering it, in just the same way they would be ashamed to offer the hypothetical argument sketched out above about the meaning of the Republican Form of Government Clause.

One may forgive “meritless” legal arguments when they are presented by political dissidents, who are given little respect by the legal system and are trying their best to change it.<sup>83</sup> One should be less forgiving, Levinson thinks, of the most powerful and influential members of the legal establishment, like the Chief Justice of the United States or members of the Harvard Law School faculty, who continually mouth pious homilies about their devotion to the rule of law. Given that the doctrines are already so flexible, and the materials already so rich in possibilities, why should it be necessary for those people to stoop to such means? This view does presuppose a certain degree of investment in the legal system and the conventions of legal argument. It is not a complete and positive faith in the legal system as a purveyor of justice—for Levinson, faith is always fraught and ambiguous.<sup>84</sup> Rather, it is a moral attitude that carries with it a sufficient faith in the integrity of the conventions of legal practice to allow one to identify and condemn hypocrisy in their misuse.

This being acknowledged, Levinson also confesses to continuing second thoughts about having added his own signature to an advertisement that condemned *Bush v. Gore* in the posture of someone “dedicated to the rule of law.”<sup>85</sup> For a variety of reasons, he is uncomfortable professing that position, not least because, like Morton Horwitz (another signatory, incidentally), he does not regard “the rule of law” as an “unqualified human good.”<sup>86</sup> The importance of

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to the Florida Legislature is deemed of no consequence at all, in this interpretation of Article II.

<sup>82</sup> One may think that the very fact that the Article II argument gained the imprimatur of such a distinguished group inoculates it against the charge that it is “frivolous” as well as “without merit.” But the flip side of the point that a person viewing the law internally can see arguments as meritorious that others think utterly frivolous is that one can recognize and proclaim arguments as frivolous that others think are entirely meritorious. For example, see *Hughes v. Rowe*, 449 U.S. 5 (1980), in which a prisoner alleged unconstitutional mistreatment at the hands of the Illinois penitentiary system. After dismissing the petition, the lower courts awarded the State of Illinois \$400 damages in attorney’s fees against the prisoner, presumably indicating their view that the petitioner’s claims went beyond the pale. *Id.* at 6. On appeal, however, the Supreme Court reversed, finding that at least one of the prisoner’s claims stated a potential claim. *Id.* at 10–12. Yet this did not stop Chief Justice Rehnquist from issuing a dissent describing the prisoner’s claims as sufficiently “meritless” to justify the award of attorney’s fees. *Id.* at 23. Levinson takes special pleasure in noting that Mark Tushnet wrote him about this case many years ago, saying, “It seems that, in Justice Rehnquist’s view, a claim can be ‘meritless’ even though six members of the Supreme Court found that it stated a claim on which relief could be granted.” See Levinson, *supra* note 31, at 377 (citing Letter from Mark Tushnet to Sanford Levinson (June 13, 1986)). Levinson takes equal pleasure in citing the now-Chief Justice for the proposition that a view that gains the assent of several Justices (and denizens of the Harvard Law School) can, nonetheless, be utterly without merit.

<sup>83</sup> Though, of course, it may very much depend who the “dissidents” are. Those who argue against the constitutionality of the income tax are, from one perspective, very much “dissidents,” but in Levinson’s view that does not license their frivolous arguments.

<sup>84</sup> See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 87–89 (1989).

<sup>85</sup> See *supra* note 62.

<sup>86</sup> See Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 *YALE L.J.* 561, 566 (1977) (quoting E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 266 (1975)).

recognizing the many ways that rule of law ideology can promote injustice is a major reason, one suspects, why Mark was initially drawn to study how chattel slavery was fully integrated into the operating American legal system, and it certainly explains why Levinson has always insisted on emphasizing that point in the casebook that he coedits.<sup>87</sup>

The difference between Balkin and Levinson is not really a disagreement about law's relation to politics or even about the possible dangers of an unthinking worship of law and legal reason that mystifies and promotes injustice. Rather, it reflects a difference in conceptions of the self. Balkin is more comfortable with a postmodern vision of multiple roles inhabited by the self and by which the self is in turn constituted. Levinson, on the other hand, feels much more pointedly a sort of modernist anxiety<sup>88</sup> about conflicting roles simultaneously pressing their conflicting demands on a single self.

## CONCLUSION

Unreflective worship of the rule of law or of the American Constitution is idolatry. But dedicating one's life to law is not, especially if we do so with some degree of caution and aware of the dangers of idolatry. All of us, as law professors, have dedicated ourselves not only to the detached study of the law, but also—far more problematically, perhaps—to training the young to follow the path of the law themselves. As we walk along that path, we must necessarily accept the duty, at least on occasion, to offer some guidance to those who feel even less sure-footed than we do by indicating to our fellow citizens what truly counts as achievement of our shared project, found in the Preamble to the Constitution and written in stone on the Supreme Court building itself respectively, to “establish justice”<sup>89</sup> and to bring about “Equal Justice Under Law.”

In many of Justice Oliver Wendell Holmes's essays—perhaps most notably his monumental *The Path of the Law*—Holmes subjects his audience to a decidedly realist and unsentimental take on the legal system, washing pious legal homilies in a bath of “cynical acid,”<sup>90</sup> only to conclude in his final paragraphs with a mystical reaffirmation of law and the legal enterprise. We note the irony and (the problem) of ending this essay in a similar, Holmesian fashion. Neither of us shares (or wishes to acknowledge that we may share) the monumental complacency about the uses of law and legal power that undergirded many of Holmes's pronouncements. Mark Tushnet has been an exemplary guide to all of us in many ways, but not least through his courage in maintaining a resolute intellectual independence. He has steadfastly refused to see the American legal system through the rose-colored glasses that seem to be virtually a professional accoutrement of a legal scholar working in the world's most powerful and successful democracy. Through his intellectual courage and his devotion to the truth Mark has staked out his own distinctive “path of the law.” We honor him for that today, and are all the more eager to discover what guidance he would offer about the law professor's role after *Bush v. Gore*.

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<sup>87</sup> See *supra* note 34 and accompanying text.

<sup>88</sup> See Sanford Levinson & J.M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597, 1627, 1637, 1639 (1991) (describing concept of “modernist anxiety”).

<sup>89</sup> U.S. CONST. pmbl.

<sup>90</sup> OLIVER WENDELL HOLMES, *The Path of the Law*, in 3 THE COLLECTED WORKS OF JUSTICE HOLMES 391 (Sheldon Novick ed., 1995). See generally Sanford Levinson, *Emerson and Holmes: Serene Sceptics*, in THE PATH OF THE LAW AND ITS INFLUENCE 231 (Steven J. Burton ed., 2000).