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# The Interactive Constitution: An Essay on Clothing Emperors and Searching for Constitutional Truth

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## BOOK REVIEW

### The Interactive Constitution: An Essay on Clothing Emperors and Searching for Constitutional Truth

REMNANTS OF BELIEF. By Louis Michael Seidman and Mark V. Tushnet. (New York: Oxford University Press, 1996) Pp. vii, 218. \$35.00.

REVIEWED BY NEAL DEVINS\*

#### INTRODUCTION

Did the New Deal kill constitutional discourse? Michael Seidman and Mark Tushnet think so, and their book, *Remnants of Belief*,<sup>1</sup> is an attempt to explain why and to suggest ways that this New Deal devil can be exorcised from constitutional argument.

Seidman and Tushnet's tract is at once pessimistic and romantic. Boldly proclaiming that the New Deal revolution made it "apparent to everyone" that all constitutional arguments can and will be "manipulated to advance the particular policy goal of the advocate who makes them,"<sup>2</sup> *Remnants* contends that constitutional discourse does not matter because it fails to persuade. Seidman and Tushnet then, have written a book that taps into the "cynical disengagement that is said to mark the 'X Generation.'"<sup>3</sup>

*Remnants*, however, also waxes poetic about the "glory days" of New Deal and Great Society liberalism<sup>4</sup> as well as its judicial embodiment—the Warren Court—which "restored the good name of active judicial review."<sup>5</sup> Along these lines, Seidman and Tushnet, who came of age in the 1960s,<sup>6</sup> embrace reform proposals that "satisfy liberal nostalgia for the lost youth of constitutional argument."<sup>7</sup> Specifically, they trumpet the "promise" of narrative jurisprudence and implore lawyers to "maintain sympathy and understanding for the positions they oppose."<sup>8</sup> By calling upon constitutional advocates to "maintain[ ] a sense

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1. L. MICHAEL SEIDMAN & MARK V. TUSHNET, *REMNANTS OF BELIEF* (1996).

2. *Id.* at 90.

3. *Id.* at 194.

4. *Id.* at 176.

5. *Id.* at 43.

6. Seidman was born in 1947, graduated from law school in 1971, and clerked for Justice Thurgood Marshall in 1972. Tushnet was born in 1945, graduated from law school in 1971, and also clerked for Justice Marshall in 1972.

7. SEIDMAN & TUSHNET, *supra* note 1, at 191.

8. *Id.* at 195-96.

of political community" with their opponents,<sup>9</sup> Seidman and Tushnet hope that intrinsically politicized constitutional discourse may be conducted with a more explicit, honest focus on public policy tradeoffs.

In this book review, I argue that *Remnants* is provocative, important, and unconvincing. While Seidman and Tushnet expertly demonstrate the limits of modern constitutional argument, they either ignore or undervalue the virtues of the current system. In particular, by making legal academics and Supreme Court Justices the focus of their analysis and recommendations, Seidman and Tushnet never take stock of the vital role that nonjudicial actors play in shaping constitutional values. The constitutionalization of political discourse, instead, is discounted as the trivialization of constitutional analysis. This assessment misses the mark. Constitutional dialogues both among elected officials and between the courts and elected government are inevitable and, at least sometimes, healthy. On abortion, school desegregation, and other deeply divisive topics, these exchanges have made the Constitution more relevant and enduring. As such, rather than erect a wall separating crass political discourse from intellectually rigorous constitutional analysis, there is reason to recognize that some good can come from the political practice of "reflexively transform[ing] policy controversies into constitutional problems."<sup>10</sup>

Before serving up a celebration of the status quo, I will examine Seidman and Tushnet's proof of the failings of post-New Deal constitutional analysis, highlighting some of their book's ample teachings, but also casting doubt on its central claim that constitutional discourse is at once flawed and vital. Specifically, Seidman and Tushnet never explain why, if all constitutional discourse is ultimately political, legal elites should engage in "constitutionalized" public policy analysis. By not examining what gives the Constitution independent force and why legal elites should perform quintessentially political cost-benefit analysis, *Remnants* provides no foundation for its reform proposals. Furthermore, by ignoring nonjudicial political actors, Seidman and Tushnet imply that it should be legal elites alone who conduct this policy-driven constitutional discourse.

In this way, *Remnants* appears as value-laden as the theories of constitutional interpretation it criticizes. Indeed, by calling attention to the myriad ways in which Seidman and Tushnet embrace activist, progressive judicial review, I suggest that a skeptical reader can spin the book's generalist critique of post-New Deal constitutional argument into a condemnation of the conservative handiwork of the Burger and Rehnquist Courts. This is unfortunate; Seidman and Tushnet's commitment to making constitutional discourse more honest, civil, and believable is commendable and almost certainly sincere. Furthermore, had Seidman and Tushnet forthrightly incorporated nonjudicial actors into their analysis, their call for activist judicial review would appear more sensible and

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9. *Id.* at 196.

10. *Id.* at 3.

more principled. Differences in the ways that courts and political actors reward and punish interest groups necessitate that all branches and levels of government participate in the shaping of public policy.

#### I. THE DECLINE AND FALL OF CONSTITUTIONAL ANALYSIS

On March 29, 1937, America's constitutional landscape was changed forever. A series of Supreme Court decisions upholding state and federal efforts to combat the Depression lowered structural and substantive barriers to New Deal reforms.<sup>11</sup> This constitutional revolution eviscerated the *Lochner* era,<sup>12</sup> a period from 1905 to 1937 during which the Court infused laissez-faire economics into its constitutional analysis in order to strike down roughly two hundred social and economic laws. Universally condemned as a symbol of unprincipled judicial overreaching, the *Lochner* era helped prompt populist, political, and academic attacks against the Court.<sup>13</sup> Although FDR's Court-packing plan is the best known of these attacks, the most devastating attack came from legal realist academics.

Claiming that the baseline principles underlying judicial decisionmaking were both arbitrary and susceptible to manipulation, legal realists suggested that courts are fundamentally political organs, putting into place the normative values that judges find desirable. In particular, legal realists of the 1920s and 1930s savaged the *Lochner* Court's free market philosophy "with a degree of insight, brilliance, and social passion that has never been equaled since."<sup>14</sup> Emphasizing that the market was a social rather than a natural construct, legal realism provided New Dealers with an intellectual framework that justified government intrusions into the Depression-plagued marketplace.<sup>15</sup>

Legal realism did more than justify the repudiation of the *Lochner* Court, however. For proponents of the administrative state, the legal realist attack explained why expert administrators were better suited than judges "to promote justice or efficiency in economic regulation."<sup>16</sup> For Seidman and Tushnet, this New Deal innovation revealed a larger truth about the judicial role—that constitutional interpretation is inescapably value-laden and, as such, constitutional analysis will always be driven by "a particular set of policy preferences

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11. The structural barriers were federalism and the nondelegation doctrine, and the substantive barrier was liberty to contract. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Sonzinsky v. United States*, 300 U.S. 506 (1937); *Virginian Ry. v. System Fed'n No. 40*, 300 U.S. 515 (1937); *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440 (1937).

12. See *Lochner v. New York*, 198 U.S. 45 (1905).

13. See generally HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993); MORTON J. HOROWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* (1995).

14. HOROWITZ, *supra* note 13, at 195.

15. See *id.* at 194-98; SEIDMAN & TUSHNET, *supra* note 1, at 32-33. See generally ROBERT J. GLENNON, *THE ICONOCLAST AS REFORMER* (1985).

16. HOROWITZ, *supra* note 13, at 215. See generally JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

that cannot be distinguished from the preferences expressed in other political forums."<sup>17</sup>

The New Deal revolution, according to this account, was directly at odds with "the great hope of constitutional law," which was to provide a "common language" that would allow for the discussion of contested political issues "on a higher level of generality."<sup>18</sup> By "destroy[ing]" the "predicates" of constitutional argument, "the possibility of genteel discussion within an elite that agreed on a common set of premises"<sup>19</sup> was forever lost. As a result, at least for Seidman and Tushnet, the line separating constitutional from base political discourse has been eviscerated, and constitutional argument has become another form of "the language of American politics."<sup>20</sup>

*Remnants* does not mince words here. It details what Seidman and Tushnet consider to be the horrifying fallout from this New Deal revolution. The quality of constitutional argument, we are told, "has been very poor indeed."<sup>21</sup> Rather than recognize that constitutional questions are "hard," commentators "persistent[ly]" treat them as if they were "easy" and characterize those who disagree as "foolish, or evil, or dangerous."<sup>22</sup> As a result, although "Americans are preoccupied with constitutional argument, . . . very few people are actually persuaded by the tendentiousness . . . [that] has become a hallmark of our constitutional debate."<sup>23</sup>

Seidman and Tushnet's attack on sound bite constitutional analysis extends well beyond the usual suspects of politicians, policy wonks, and newspaper columnists. They also find legal academics and judges guilty of oversimplified, single-minded, and sometimes self-contradictory constitutional analysis. Indeed, the focus of Seidman and Tushnet's analysis is the failure of legal elites to engage in nuanced, evenhanded constitutional discourse.

To illustrate the sorry state of contemporary constitutional discourse, Seidman and Tushnet highlight similar failings in the constitutional arguments of both "liberal[s]"<sup>24</sup> and "[r]ight-wing[ers]."<sup>25</sup> For example, conservative Robert Bork and progressive Laurence Tribe share the disagreeable "habit of demonizing [their] opponents and presenting [their] own views as if they were the only conclusions a fair-minded person could reach."<sup>26</sup> Worse still, Bork and Tribe conceal their biases "ineptly and transparently," adjusting their constitutional

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17. SEIDMAN & TUSHNET, *supra* note 1, at 42.

18. *Id.* at 166.

19. *Id.* at vii, 165.

20. *Id.* at 3.

21. *Id.* at 4.

22. *Id.* at 4-5.

23. *Id.* at vii, 9.

24. *Id.* at 12.

25. *Id.* at 18.

26. *Id.* at 13. In addition to the Bork-Tribe pairing, Seidman and Tushnet also pair newspaper columnists George Will (from the right) and Nat Hentoff (from the left), as well as an article written by conservative academic Michael McConnell with an article written by liberal academics Cass Sunstein and David Strauss. *Id.* at 5-9, 15-20.



theories to reach their desired outcomes.<sup>27</sup> For Seidman and Tushnet, this failing underscores why constitutional discourse is unpersuasive and thus, irrelevant. Specifically, rather than "assume direct responsibility" for heartfelt personal beliefs,<sup>28</sup> constitutional advocates pretend to engage in principled academic discourse while wearing their biases on their sleeves. Combusting with this hypocrisy, constitutional advocates, by refusing to appreciate their opponents' counterarguments, "rarely reach out to the uncommitted and virtually never throw new or interesting light on [a particular constitutional] problem."<sup>29</sup> This practice, according to Seidman and Tushnet, is pervasive, extending to "virtually all modern constitutional advocacy, including [their] own."<sup>30</sup>

Seidman and Tushnet's mea culpa sets the stage for their extended analysis of Supreme Court decisionmaking over a range of controversial issues, including racial equality, pornography, the death penalty, and the state action requirement. This often compelling analysis repeatedly and, most often, convincingly demonstrates that constitutional questions are hard and that attempts to simplify them are unpersuasive. Moreover, *Remnants* makes a second claim that anchors much of the book's attack against post-New Deal constitutional analysis. By showing that Supreme Court Justices often use constitutional theory to support desired policy outcomes,<sup>31</sup> Seidman and Tushnet contend that constitutional theory is not about some generalized search for constitutional truth, but instead, operates as a funnel, eliminating from consideration alternative realities.<sup>32</sup> In this way, constitutional theory has the effect of making constitutional argument oversimplified and one-sided: "Instead of a technique for settling disputes by resort to reason," constitutional theory is a mechanism "of asserting power over others" and, consequently, "will not succeed in bridging disagreement over the things we care about the most."<sup>33</sup>

Witness *DeShaney v. Winnebago County Department of Social Services*.<sup>34</sup> Holding that local governmental authorities do not have an affirmative duty to prevent child abuse, the Supreme Court refused to hold Winnebago County

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27. *Id.* at 21. Bork's desire to put the Framers' intent into effect, according to Seidman and Tushnet, varies from issue to issue. When it comes to the death penalty, "judges ought not to apply their own evolving morality"; on questions of gender equality, however, Bork recognizes that it is appropriate for constitutional doctrine to evolve when "society has changed." *Id.* at 10-12 (quoting Robert Bork). Tribe commits a similar error. His due process and equal protection jurisprudence, as revealed in his attacks on Bork's judicial philosophy, "are at war with each other." *Id.* at 14. In particular, while Tribe embraces judicial discretion when it comes to abortion and other privacy rights, he condemns Bork's embrace of a "reasonable basis" test to evaluate classifications involving women and the poor because judges should not have "discretion in enforcing equal protection rights." *Id.* at 15.

28. *Id.* at 20.

29. *Id.* at 21.

30. *Id.* at 24-25.

31. Seidman and Tushnet make this point by contrasting inconsistencies in the decisionmaking of Justices Scalia and Brennan on speech and property rights cases decided in 1987. *See id.* at 75-76.

32. *Id.* at 20-21.

33. *Id.* at 189.

34. 489 U.S. 189 (1989).

responsible for the gross negligence of one of its social service workers.<sup>35</sup> For Seidman and Tushnet, *DeShaney* is a hard case. On the one hand, social workers now know that they are shielded from liability when they do not do their jobs and, consequently, are less likely to play an affirmative pro-active role.<sup>36</sup> On the other hand, had the Court found the county liable, social workers would have incentive to intervene "where it is unwarranted as well as where it is appropriate."<sup>37</sup> Furthermore, to finance more frequent intervention, taxes would have to be increased or competing social service programs would have to be scaled back.<sup>38</sup>

The *DeShaney* decision, as Seidman and Tushnet insightfully explain, does not reveal these competing social policy concerns. Chief Justice William Rehnquist cloaks his majority opinion with a supposedly neutral action-inaction distinction—a distinction that, for Seidman and Tushnet, finds support neither in constitutional history nor in Supreme Court decisionmaking.<sup>39</sup> This opprobrium is not limited to the majority opinion; Seidman and Tushnet savage Justice Harry Blackmun's emotional dissent for its failure to consider the question that supposedly animates it, namely, whether "[d]oing justice" supports the state or "poor Joshua."<sup>40</sup> By not considering which outcome "will make social workers more careful in the future and prevent more such tragedies,"<sup>41</sup> Seidman and Tushnet find Blackmun's analysis a simplistic knee-jerk reaction to a difficult social policy issue.<sup>42</sup>

*DeShaney* underscores the failure of both conservatives and progressives to seriously examine the policy outcomes of the decisions they render, and is thus, for Seidman and Tushnet, emblematic of the failings of contemporary constitutional argument.<sup>43</sup> To "escape from this cycle,"<sup>44</sup> they propose that we replace the search for constitutional truth with an open-ended dialogue of competing values. For them, one mechanism that "holds some promise for reconstructing constitutional discourse" is to "explore storytelling as a means of improving

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35. See *id.* at 196-97. As a result, Joshua DeShaney, severely beaten and permanently disabled by his abusive father, could not challenge the county's repeated and knowing failure to intercede in a clearly abusive relationship.

36. SEIDMAN & TUSHNET, *supra* note 1, at 54.

37. *Id.* at 59.

38. *Id.*

39. *Id.* at 52-55.

40. *Id.* at 58.

41. *Id.*

42. Tushnet earlier described Justice Blackmun's dissent as reflecting "nothing other than compassion, no awareness that Joshua's case stands for a broader set of circumstances that will inevitably be regulated by the rule the Court adopts." Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251, 302 (1992) (footnotes omitted).

43. Six of the book's nine chapters are case study illustrations of the complexity of constitutional controversies. Each of these illustrations succeeds in demonstrating that competing normative visions and indeterminate evidence cloud the resolution of constitutional disputes.

44. SEIDMAN & TUSHNET, *supra* note 1, at 189.

our understanding of law."<sup>45</sup> Recognizing, however, that narrative jurisprudence might be "just as tendentious" as existing styles of argument,<sup>46</sup> Seidman and Tushnet ultimately seek shelter in Anthony Kronman's *The Lost Lawyer*,<sup>47</sup> a book that claims there is a nexus between the quality of public decisionmaking and an advocate's ability "to maintain sympathy and understanding for the positions they oppose."<sup>48</sup>

In advancing this argument, Seidman and Tushnet do not seriously consider the possibility that there is a right approach to solving constitutional problems. Pointing to the sophistry of constitutional advocates and the difficulties posed by constitutional questions, they assume that the political triumph of legal realism was deserved. For Seidman and Tushnet, this means that constitutionalists must develop "a kind of dual consciousness"—not forgetting "their hard-won knowledge of the emptiness of constitutional arguments" while "somehow authentically" acting as if constitutional arguments "were not empty."<sup>49</sup>

## II. THE CONSTITUTION IS DEAD! LONG LIVE CONSTITUTIONAL INTERPRETATION!

*Remnants*, while portraying itself as a reformist manifesto, cannot free itself from the shackles of its doom and gloom assessment of the failure of contemporary constitutional discourse. Describing their proposal as a plea for a "kind of maturity, self-knowledge, and tolerance for contradiction that no society in history has been able to muster,"<sup>50</sup> Seidman and Tushnet recognize that their attempt to resuscitate constitutional interpretation will almost certainly fail.

Why then write this book? Seidman and Tushnet contend that *Remnants* is a last gasp attempt to bring together competing factions in today's constitutional interpretation wars,<sup>51</sup> presumably so that all sides can admit that their work is biased and incomplete. By admitting to weaknesses in their own work and by

45. *Id.* at 195.

46. *Id.* at 201. For a more detailed treatment of the limits of narrative jurisprudence, see generally Daniel A. Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narrative*, 45 STAN. L. REV. 807 (1993); Tushnet, *supra* note 42. For responses to these articles, see generally William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313 (1992).

47. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

48. SEIDMAN & TUSHNET, *supra* note 1, at 196. Like Seidman and Tushnet, Kronman finds fault with the triumph of winner-take-all advocacy over truth-seeking. See KRONMAN, *supra* note 47, at 133 (maintaining that lawyers must deliberate with their clients "about the wisdom of their clients' ends"). For a provocative critique of Kronman's book and a more optimistic assessment of the possible moral virtues of contemporary law practice, see generally David B. Wilkins, *Practical Wisdom for Practicing Lawyers: Separating Ideals from Ideology in Legal Ethics*, 108 HARV. L. REV. 458 (1994).

49. SEIDMAN & TUSHNET, *supra* note 1, at 201. Tushnet has previously repudiated grand theories of constitutional decisionmaking, and in so doing, disavowed the relevance of the Constitution as well as judicial review. MARK V. TUSHNET, *RED, WHITE, AND BLUE* (1988); see also Michael J. Gerhardt, *Critical Legal Studies and Constitutional Law*, 67 TEX. L. REV. 393, 403 (1988) ("Tushnet maintains that the republican tradition requires neither constitutional theory nor a constitution.").

50. SEIDMAN & TUSHNET, *supra* note 1, at 201.

51. *Id.* at 198-99.



underscoring the complexity of constitutional controversies, Seidman and Tushnet profess hope that constitutionalists of all stripes will consider the sound arguments of their opponents so that their own arguments can be more honest, forthright, nuanced, and accepting.

*Remnants*, however, may be as much an example of the ills of values-based constitutional discourse as it is an antidote to the disease Seidman and Tushnet describe. In particular, *Remnants* never explains why, if constitutional interpretation is inherently political, legal elites should engage in "constitutional" cost-benefit public policy analysis.<sup>52</sup> Moreover, Seidman and Tushnet's claims about the political triumph of legal realism, and with it the New Deal origins of politicized one-sided constitutional interpretation, are problematic. Although legal realist scholarship may have fundamentally affected the content of legal academic discourse, politicized constitutional debate dates back to the nation's founding. For example, several significant pre-New Deal political challenges to Supreme Court decisionmaking make clear that both judges and elected officials have always understood that politics plays a role in shaping constitutional decisionmaking. By speaking of the legal realist origins of politicized constitutional interpretation, Seidman and Tushnet implicitly discount the relevance of these pre-New Deal challenges.<sup>53</sup> As a result, *Remnants* seems more like a book about legal elite interpretation than a book dedicated to the larger enterprise of improving the quality of constitutional interpretation.<sup>54</sup>

Correspondingly, by focusing their sights on legal elite discourse, Seidman and Tushnet never let on to what role, if any, elected officials should play in shaping constitutional values. Consequently, although they may well believe that pre-New Deal constitutional argument was politicized, and although they never express disapproval of joint political-judicial resolutions of disputed policy questions, *Remnants* nevertheless elevates—perhaps unintentionally—legal elite constitutional discourse. At the very least, by isolating legal elite discourse, Seidman and Tushnet suggest that legal academics and judges are better positioned than politicians to follow their call for "dual consciousness."<sup>55</sup> As such, their description of the problem *Remnants* is intended to address is far too narrow. Legal elite constitutional interpretation, while certainly important, is but a part of the broader enterprise of constitutional decisionmaking.

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52. Specifically, Seidman and Tushnet call for constitutionalists to examine the policy outcomes of the decisions they render, to take seriously the arguments of individuals whose values they disagree with, and to engage in an open-ended dialogue of competing values. An example of this type of cost-benefit analysis is *Remnants*'s insightful critique of *DeShaney*. See *supra* notes 34-42 and accompanying text.

53. See *infra* notes 56-66 and accompanying text.

54. Seidman and Tushnet make clear that their concern relates to academic discourse by describing "[t]he New Deal revolution [as] destroy[ing] forever the possibility of genteel discussion within an elite that agreed on a common set of premises." SEIDMAN & TUSHNET, *supra* note 1, at 165.

55. *Id.* at 201. *Remnants* thereby suggests that "constitutionalized" policy solutions crafted by legal elites (or, at least, legal elites who practice "skeptical tolerance and an ironic self-awareness") are superior to solutions crafted by politicians. *Id.*

## A. THE LAW-POLITICS NEXUS

The politicization of constitutional decisionmaking dates back to the nation's founding. John Marshall, by placing politics ahead of the search for constitutional truth, has been dubbed "the great Nietzschean judge of our tradition."<sup>56</sup> For example, Marshall advanced his Federalist Party agenda for a strong national government through *Marbury v. Madison*,<sup>57</sup> *McCulloch v. Maryland*,<sup>58</sup> and other landmark rulings. This fact was not lost on Marshall's political opponents, including Thomas Jefferson and Andrew Jackson, who denounced these decisions.<sup>59</sup> More importantly, Jefferson and Jackson were willing to act on this disagreement. Jefferson, outraged that Federalist judges failed to strike down the Alien and Sedition Acts,<sup>60</sup> pardoned all individuals convicted under the statute;<sup>61</sup> Jackson, claiming that he was not bound to follow *McCulloch*, vetoed as unconstitutional a bill that sought to recharter the Bank of the United States.<sup>62</sup>

This intermingling of law and politics, of course, is not limited to Marshall, Jefferson, and Jackson. Immediately before the Court's ruling in *Dred Scott*,<sup>63</sup> Justices Catron and Grier, "contrary to [their] usual practice," wrote President-elect James Buchanan of their intent to invalidate the Missouri Compromise and thereby "settle a controversy which has so long and seriously agitated this country."<sup>64</sup> Following the Civil War, despite the efforts of late-nineteenth-century classical legal thinkers to "create an autonomous legal culture,"<sup>65</sup> President Ulysses Grant used his appointments power to promote Republican Party policies; this included obtaining the Court's approval of legislation that treated paper money as legal tender for the purpose of discharging prior debts. Although the Court had just invalidated the statute, Grant engineered a five-to-four reversal of the earlier decision by appointing two Republican Justices to join the three already on the Court.<sup>66</sup>

56. Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 389 (1982).

57. 5 U.S. (1 Cranch) 137 (1803).

58. 17 U.S. (4 Wheat.) 316 (1819).

59. Jefferson condemned "the impropriety of [the Court's] gratuitous interference" in *Marbury*. 15 THE WRITINGS OF THOMAS JEFFERSON 447 (Albert Bergh ed., 1907). For descriptions of the politics surrounding Marshall's landmark rulings in *Marbury* and *McCulloch*, see LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 25-44 (2d ed. 1996). For a discussion of the circumstances surrounding Jackson's veto, see *id.* at 18.

60. Sedition Act of 1798, 1 Stat. 596 (prohibiting activities and writings opposing federal government measures).

61. Jefferson believed "the law to be a nullity, as absolute and palpable as if Congress had ordered us to fall down and worship a golden image," 1 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 59, at 43.

62. A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 581-87 (James D. Richardson ed., 1896).

63. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

64. 10 THE WORKS OF JAMES BUCHANAN 106-08 (James B. Moore ed., 1910). Prior to this correspondence, Catron wrote Buchanan urging him to pressure Grier to sign the opinion. *Id.* at 106 n.1.

65. See HOROWITZ, *supra* note 13, at 9-31 (describing structure of classical legal thought).

66. *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), *overruled by Legal Tender Cases*, 79 U.S.

The prevalence and visibility of these constitutional conflicts—all of which occurred during this nation's first century—suggest that legal realism's principal achievement was its repudiation of *Lochner's* free market philosophy, not the destruction of the ideal that law and politics can and should be separated. Although classical legal thought dominated judicial rhetoric from the end of the Civil War until the turn of the century,<sup>67</sup> persistent constitutional dialogues between courts and elected officials have always stood as a vivid reminder of the nexus between law and politics.

Along these lines, the advent of legal realist scholarship had very little to do with Franklin Delano Roosevelt's attempt to dethrone the *Lochner* Court. For example, notwithstanding the power of legal realist attacks against the conception of a self-executing market economy, the Roosevelt administration's efforts to pressure the Court were silenced by adverse public reaction to FDR's 1935 denouncement of the Court's "horse and buggy definition of interstate commerce."<sup>68</sup> Two years later, emboldened by his landslide 1936 victory, Roosevelt launched his ill-fated proposal to pack the Court with Justices sympathetic to the New Deal agenda. Given his belief that the only way to affect Supreme Court decisionmaking was through purely political means,<sup>69</sup> Roosevelt undoubtedly saw the Supreme Court as a political institution. Unlike the legal realists, however, the question of whether law was inherently political did not matter to Roosevelt. Rather, believing that the only way to advance his reformist agenda was to bring down the *Lochner* Court, Roosevelt set out to accomplish that task through brute force, not academic critique.

Roosevelt ultimately placed his imprimatur on the Court. From 1937 to 1940, he appointed five close associates to the Court.<sup>70</sup> The Roosevelt Revolution,

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(12 Wall.) 457, 553 (1871). But see Charles Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 HARV. L. REV. 1128, 1142 (1941) (questioning whether Justice Bradley promised Grant that he would vote in favor of legislation that treated paper money as legal tender).

67. Starting with Oliver Wendell Holmes's "The Path of the Law" address in 1897, O.W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897), claims within the legal profession that judges found, rather than made, the law gave way to the progressive belief that law cannot be separated from politics and social reality. See HOROWITZ, *supra* note 13, at 142, 193-212; see also SEIDMAN & TUSHNET, *supra* note 1, at 32-35. In 1908, for example, Louis Brandeis introduced sociological studies to support maximum hours legislation to protect working women from the physiological and psychological effects of long hours. *Muller v. Oregon*, 208 U.S. 412, 419 (1908).

68. Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 267, 276-78 (1988) (detailing public opinion polls and press coverage of FDR's attacks on *Lochner* Court decisionmaking).

69. See Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 250-56 (1996) (describing President Roosevelt's Court-packing plan in review of LEUCHTENBURG, *supra* note 13).

70. Roosevelt appointed Hugo Black in 1937; Stanley Reed and Felix Frankfurter in 1938; and William O. Douglas and Frank Murphy in 1939. See FISHER & DEVINS, *supra* note 59, at 79. Roosevelt's landslide victory in 1936 also convinced Justice Owen Roberts to uphold some New Deal reforms. In Roberts's own words: "Looking back, it is difficult to see how the Court could have resisted the popular urge for uniform standards throughout the country—for what in effect was a unified economy." OWEN J. ROBERTS, JR., *THE COURT AND THE CONSTITUTION* 61 (1951).

however, did not fundamentally change the ways in which the Supreme Court and the elected branches of government interact with each other. Attempts to change the direction of legal doctrine through judicial appointments, for example, were well established before Roosevelt.<sup>71</sup> Indeed, Congress's repudiation of Court-packing specifically embraced the use of appointments as an "orderly" way to transform the judiciary.<sup>72</sup> Consequently, by calling attention to the political nature of constitutional interpretation, the New Deal reinforced that which had come before it.<sup>73</sup>

This is not to say that the New Deal did not alter constitutional discourse. In particular, the New Deal signalled the rise of the administrative state and, with it, the increasing importance of constitutional interpretation to American life. From the end of the Civil War until 1929, the nation's economic substructure was radically transformed by the Industrial Revolution.<sup>74</sup> By 1932, with the Great Depression firmly under way, Roosevelt promised to reinvigorate government and "meet the urgent needs of a twentieth-century community."<sup>75</sup> The ensuing fight between FDR and the *Lochner* Court both made constitutional interpretation more visible and increased awareness of the Court's vulnerability to political attack. Moreover, once FDR prevailed, the importance of constitutional interpretation was not lost on a nation now subject to increasing regulation by a rapidly growing administrative bureaucracy. Furthermore, with Court-packing and other Roosevelt initiatives confirming the law-politics nexus, constitutional interpretation became a more pervasive part of American political life.<sup>76</sup>

#### B. THE EMPTINESS OF (LEGAL ELITE) CONSTITUTIONAL DISCOURSE

The New Deal changed our conception of government and, in so doing, further politicized constitutional decisionmaking. Thus, there is force to Seidman and Tushnet's claims about the New Deal altering the face of constitutional

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71. See generally HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (2d ed. 1985).

72. See FISHER & DEVINS, *supra* note 59, at 85.

73. Legal realism proved useful here; it offered a scathing criticism of values-based *Lochner* Court decisionmaking thereby putting into focus what had come before—that politics and ideology figure prominently in constitutional decisionmaking. As such, classical legal thought could not be reconciled with the New Deal revolution.

74. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 454 (1995) (noting that during this period "the total value of manufactured products increased nearly twenty times; railroad track mileage went from under 40,000 miles nationwide to over 260,000; [and] the urban population increased from 16.1 percent to 49.1 percent").

75. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 175 (1941). See generally WILLIAM E. LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940 (1963); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

76. See generally LEUCHTENBERG; *supra* note 13. Unlike legal realist claims, however, this *realpolitik* approach to constitutional interpretation does not deny the possibility that there is a correct way to interpret the Constitution. Rather, by emphasizing the ways in which the elected branches of government shape constitutional doctrine, the possible correctness of an interpretation seems somewhat irrelevant.



interpretation. Nevertheless, by making no mention of constitutional controversies that preceded the New Deal, their claims about legal realism's triumph and the ensuing decline of constitutional discourse seem overblown.<sup>77</sup> Furthermore, by not considering the pivotal role that social and political forces play in constitutional discourse—thereby making judges and legal academics the exclusive focus of their analysis—Seidman and Tushnet's reform proposals are too narrowly focused. With that said, their presentation fits their recommendations: by targeting legal elites and treating legal realism's triumph as a *fait accompli*, Seidman and Tushnet quite rightly advocate that judicial opinions and legal scholarship be more open about underlying values and more far-ranging in assessing competing policy considerations.

As it turns out, this style of decisionmaking replicates the type of cost-benefit analysis associated with public policy analysis. For Seidman and Tushnet, of course, the inevitable politicization of constitutional discourse explains why constitutional interpretation should replicate public policy analysis. This assertion, however, begs a fundamental question: Why have constitutional analysis at all? *Remnants* is silent on this question. Although imploring constitutionalists to act as if "[constitutional] arguments were not empty . . . all the while knowing on a different level of consciousness that [they] . . . most assuredly [are],"<sup>78</sup> Seidman and Tushnet never explain why we should engage in this charade.

Why not simply say that everything is political and the Constitution—or, at least, constitutional interpretation—is a nullity? Much in *Remnants* supports this conclusion. In particular, the kind of dual consciousness that Seidman and Tushnet propose is almost certainly unworkable; once you commit to constitutional argumentation to achieve your political preferences, you *are* going to forget to give an appreciative hearing to the other side. Seidman and Tushnet recognize this, lamenting "that no society in history" has been able to engage in the type of "skeptical commitment" that they embrace.<sup>79</sup> Nevertheless, after "argu[ing] that constitutional argument in the modern context divides rather than unites,"<sup>80</sup> and that this pattern is likely to persist,<sup>81</sup> Seidman and Tushnet proclaim that "[for] all its deficiencies, constitutional argument would not have played such a prominent role in American public debate for so many years if it were not serving important purposes."<sup>82</sup> Moreover, they assert that "a world

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77. This is not to say that legal realist scholarship did not affect academic discourse. It did. Rather than focus on the categorization of legal doctrine through treatises, post-New Deal academic discourse critically evaluated the normative presumptions underlying such doctrine. See HOROWITZ, *supra* note 13, at 247-68 (discussing post-World War II legal thought).

78. SEIDMAN & TUSHNET, *supra* note 1, at 200.

79. *Id.* at 201. In calling for "skeptical commitment," Seidman and Tushnet hope that constitutionalists will link "an ironic self-awareness of the contingency of one's own beliefs" with a recognition that "constitutional rhetoric provides the only vocabulary we have for reaching beyond ourselves." *Id.* at 200, 201.

80. *Id.* at 194.

81. *Id.* at 201.

82. *Id.* at 193.



without constitutional rhetoric" would be dominated by "narrow interest groups" that care more about "raw power" than "the public good."<sup>83</sup>

Seidman and Tushnet never defend these sweeping claims. Instead, they take for granted that "raw power" matters more to the popularly-elected leviathan than it does to values-driven legal elites.<sup>84</sup> Accordingly, Seidman and Tushnet do not blink when they suggest that thorough cost-benefit analysis is best accomplished by elites with life tenure—judges and academics—rather than by politicians beholden to "narrow interest groups." Under this approach, moreover, there is no need to consider claims that courts should not make social policy because the adjudicative process is ill-adapted to ascertain social facts or because adjudication makes no provision for policy review.<sup>85</sup>

*Remnants*'s condemnation of interest group politics and political argument explains Seidman and Tushnet's belief that legal elites should matter and that constitutional interpretation legitimates their participation in shaping public policy. It also explains the book's nearly exclusive focus on Supreme Court decisions and legal academic analysis. When Seidman and Tushnet talk about the general culture, their real concern seems to be that corner of the world dominated by judges and legal academics. In this way, *Remnants* is as values-based and incomplete as the process-based theories it criticizes. Seidman and Tushnet fence out political discourse, including nonjudicial constitutional interpretation, because they believe that legal elites are more capable of considering both sides of an issue than politicians or other governmental actors.

Seidman and Tushnet's distaste for political decisionmaking begs the question as to what types of policy decisions would be made by legal elites who wistfully pursue the superhuman task of skeptical commitment. Aside from suggesting that legal elites are shielded from the interest group pressures that doom politicians, Seidman and Tushnet make no attempt to assess the policy ramifications of their call for dual consciousness. Their explanation for this is that their sole concern relates to improving the quality of constitutional discourse, not to advancing a particular political agenda. Along these lines, and to Seidman and Tushnet's credit, *Remnants* goes to great lengths to suggest that progressives and conservatives are equally guilty of making simplistic, misleading, and unpersuasive constitutional arguments. They pair conservative judges and scholars with liberal judges and scholars. They demonstrate the difficulties associated with constitutional interpretation by highlighting weaknesses in both

83. *Id.* at 193-94.

84. There is something very strange about this argument. After relentlessly trashing judges and legal academics for engaging in biased and incomplete analysis, Seidman and Tushnet hail legal elites as the best available bulwark for liberty and deliberative process.

85. See, e.g., DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* (1983); JEREMY RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989). Seidman and Tushnet's condemnation of interest-group politics, however, does not extend to claims that courts are as susceptible as elected officials to interest group capture. See, e.g., RABKIN, *supra*, at 147-81 (revealing capture of district and appeals courts in the District of Columbia by civil rights interests).

liberal and conservative arguments. They explain that, because their book is about the style of constitutional argument, "[they] will spare the reader [their] own efforts to manipulate constitutional argument."<sup>86</sup> These herculean efforts, it would seem, are intended to convince the reader that *Remnants*, in fact, is about improving constitutional interpretation by underscoring a shared failing of all constitutional advocates.

Theoretically, at least, *Remnants*'s process-oriented approach is neither liberal nor conservative. For example, although Seidman and Tushnet are left-leaning, their call for dual consciousness could produce conservative results.<sup>87</sup> Consider the potential for narrative-based jurisprudence: Environmentalists will put themselves in the position of hardy rural property owners; feminists will imagine the (short) life of a fetus; and card-carrying members of the American Civil Liberties Union will think about the victim before they suggest that the criminal must go free because the constable has blundered.<sup>88</sup>

What is theoretically possible and what is likely to occur, however, are two quite different things. When Seidman and Tushnet finished working on *Remnants* in May 1995,<sup>89</sup> the Republican takeover of Congress was in full swing. Moreover, with two Supreme Court appointments under his belt, President Bill Clinton demonstrated that he "was unwilling to undertake even moderate risk" to select a nominee willing "to depart from conventional wisdom."<sup>90</sup> As such, the political process offered little hope of "radical[izing]" a Supreme Court dominated by moderate and conservative Republican appointees.<sup>91</sup> In contrast to the Republican Congress, legal elites, especially the legal academics who are *Remnants*'s principal audience, are politically left of center.<sup>92</sup> Not surprisingly, legal elite-dominated policy analysis will almost certainly be to the left of elected government preferences.<sup>93</sup> For example, it is hard to imagine legal elite

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86. SEIDMAN & TUSHNET, *supra* note 1, at 25.

87. For this very reason, Suzanna Sherry criticized Mark Tushnet's "unremitting attack on judicial review" in *Red, White, and Blue*, *supra* note 49. Suzanna Sherry, *Outlaw Blues*, 87 MICH. L. REV. 1418, 1437 (1989). For Sherry, "[I]t is dangerously utopian to assume that if one destroys the status quo it will be replaced by the political agenda of the left rather than of the right." *Id.*

88. Thanks to Alan Meese for these examples.

89. SEIDMAN & TUSHNET, *supra* note 1, at viii.

90. *Id.* at 192.

91. *Id.*

92. The representation of demographic groups at the top 100 law schools reveals that law professors are far more liberal than the general population. For example, although 46.2% of the full-time working population are Democrats, 80.4% of law faculty are Democrats. James Lindgren, *Measuring Diversity*, Speech to the National Association of Scholars (Jan. 5, 1997) (transcript on file with *The Georgetown Law Journal*). More striking, although 14.9% of full-time working women are Republicans, 0.5% of women law faculty are Republicans. *Id.*; see also Earl M. Maltz, *The Court, the Academy, and the Constitution: A Comment on Bowers v. Hardwick and Its Critics*, 1989 B.Y.U. L. REV. 59 (reviewing academic writings on privacy questions and concluding that academic commentary on constitutional law reveals a "general commitment to left-center political values").

93. At other times, however, political discourse may yield more progressive outcomes than Court-dominated discourse. See *infra* note 110. Nonetheless, legal academic discourse almost always yields left-center outcomes. See Maltz, *supra* note 92, at 92. Furthermore, during the heyday of the Warren Court, when Seidman and Tushnet came of age, legal elite discourse was more "radical" than political

discourse resulting in a massive overhaul of welfare, the repudiation of same sex marriage, the denial of antidiscrimination protections to gays and lesbians, the reenactment of abortion funding restrictions, or the elimination of certain affirmative action programs.<sup>94</sup>

Along these lines, a skeptical reading of *Remnants* suggests that Seidman and Tushnet's personal commitment to compassionate, progressive, activist jurisprudence influences both their explication of why constitutional questions are hard and their analysis of Supreme Court decisionmaking.<sup>95</sup> Most striking, in demonstrating the complexity of constitutional issues, *Remnants* implicitly calls into question the correctness of decisions almost certainly at odds with Seidman and Tushnet's personal preferences. No progressive Warren Court decision is put under its microscope. The focal point, instead, is the conservative decisionmaking of the Burger and Rehnquist Courts. In addition to *DeShaney*, *Remnants* examines the Court's approval of the death penalty,<sup>96</sup> its rejection of impact-based proofs of discrimination,<sup>97</sup> and its resurrection of federalism-based limits on congressional authority.<sup>98</sup> While these analyses highlight both the strengths and weaknesses of conservative and progressive positions, Seidman and Tushnet invest substantially more effort in proving that conservative arguments do not take into account progres-

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discourse. SEIDMAN & TUSHNET, *supra* note 1, at 192. For this reason, Seidman and Tushnet's embrace of legal elite discourse may reflect a "liberal nostalgia for the[ir] lost youth." *Id.* at 191. See *infra* note 110 and accompanying text.

94. A recent Association of American Law Schools (AALS) newsletter is emblematic of legal educators' left-leaning tendencies. Spread out over 16 pages of the March 1996 AALS newsletter were two articles concerning minority hiring and retention at law schools; an article on the experiences of women in legal education; an announcement of an AALS workshop on gay and lesbian legal issues; an essay by AALS President Wallace Loh calling for a "commitment to broadening the boundaries of inclusiveness of our profession, especially at a time when that commitment is under assault nationwide"; and, most significant, an AALS Executive Committee statement embracing race- and gender-based affirmative action. See THE NEWSLETTER (Ass'n of Am. Law Sch., Wash., D.C.), Mar. 1996, at 1, 5, 6, 7, 9, 16.

95. Seidman and Tushnet's approval of progressive, activist decisionmaking is clear. They applaud the Warren Court for its "idealism and moral drama," SEIDMAN & TUSHNET, *supra* note 1, at 190, attack President Clinton for not "desir[ing] a return to Warren Court activism," *id.* at 190, and condemn New Deal judges for failing to "chang[e] the distribution of social and economic power." *Id.* at 135. Correspondingly, they lament the fact that New Dealers "[i]ronically . . . put in place a conservative judicial ideology because at the time it seemed the best way to open up the space for promising possibilities of liberal legislative action." *Id.* at 138. The New Deal Supreme Court, for example, was far less likely to strike down state and federal laws than the *Lochner* Court before it or the Warren Court after it. See Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 167 n.131 (charting patterns in Supreme Court's invalidation of state and federal law).

96. SEIDMAN & TUSHNET, *supra* note 1, at 140-65.

97. *Id.* at 99-116.

98. *Id.* at 182-89. This inventory is representative but incomplete. Seidman and Tushnet make brief mention of several other Supreme Court decisions. They also consider, in greater detail, the Supreme Court's conditional offer doctrine as well as its resistance to government efforts to regulate pornography and to set limits on the financing of political campaigns. *Id.* at 72-90, 117-39. These analyses, however, confirm Seidman and Tushnet's penchant for dissecting that with which they disagree. For example, their chapter on pornography and the financing of political campaigns emphasizes the sensibility of government regulation to protect women and candidates who do not appeal to the political mainstream. *Id.* at 117-39.

sive counterarguments than in revealing similar limits of progressive arguments.<sup>99</sup> Furthermore, they speak approvingly of progressives committed to "social justice"<sup>100</sup> and critically of "polemical,"<sup>101</sup> "right wing scholars."<sup>102</sup>

Seidman and Tushnet err in their choice of targets. By focusing their analysis on that with which they disagree and by lauding their friends while mocking their enemies, Seidman and Tushnet make it too easy for conservatives to dismiss their work as yet another leftist attack on the Rehnquist Court.<sup>103</sup> Without question, a cynic can easily conclude that Seidman and Tushnet's real interest is to encourage a return to the Warren-era judicial activism they applaud. This is unfortunate, for *Remnants* is an important book. It highlights the complexity of social policy issues that animate constitutional interpretation. It offers lucid and often devastating criticism of Court doctrine and academic writings. In so doing, it convincingly argues that constitutional interpretation is often incomplete, if not a smoke screen for some political agenda. Furthermore, its recommendation that advocates open themselves up to competing positions seems heartfelt and desirable. For these reasons, it is important to consider *Remnants*'s central claim that the politicization of constitutional advocacy has made the Constitution irrelevant. The remainder of this review considers and ultimately rejects this claim, arguing instead that there is something healthy as well as inevitable about the current state of affairs.

### III. TWO CHEERS FOR THE STATUS QUO

Ten years ago, then United States Attorney General Edwin Meese sparked controversy by arguing that the executive and legislative branches have a duty

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99. For example, weaknesses in the policy arguments advanced by death penalty proponents receive at least twice as much attention as Seidman and Tushnet's dissection of abolitionist policy arguments. *Id.* at 147-52. Even more revealing, Seidman and Tushnet lambast the Court's rejection of disparate impact proofs in *Washington v. Davis*, 426 U.S. 229 (1976), condemning the decision as "fundamentally incompatible" with "one of the most famous and celebrated decisions in constitutional law—*Brown v. Board of Education*," 347 U.S. 483 (1954) (*Brown I*). SEIDMAN & TUSHNET, *supra* note 1, at 104-05. Contrary to this characterization, I have argued elsewhere that *Brown* and *Davis* are compatible. See Neal Devins, *The Rhetoric of Equality*, 44 VAND. L. REV. 15 (1991). Nevertheless, despite their unbalanced treatment of conservative and progressive positions, I found much of Seidman and Tushnet's critique persuasive.

100. SEIDMAN & TUSHNET, *supra* note 1, at 12.

101. *Id.*

102. *Id.* at 18. In particular, Laurence Tribe is celebrated for devoting his "not inconsiderable energy and ingenuity to . . . further the cause of social justice," while Robert Bork is dissed for "producing polemical writings seemingly designed to curry favor with his conservative patrons." *Id.* at 12. Moreover, *Remnants* pays far more attention to progressive scholarship than it does to conservative scholarship. Sources cited in the book's bibliographic essay tend to advance progressive values. For example, with only one or two exceptions, sources cited in the chapter on race—"limited to a few of the most influential works"—embrace progressive values. *Id.* at 210.

103. Seidman and Tushnet are their own worst enemies. After telling us that most constitutional interpreters, including themselves, shield their policy preferences behind ostensibly neutral constitutional analysis, they invite a skeptical reading of their book. To establish credibility, Seidman and Tushnet should bend over backwards to call attention to the failings of leftist academics and judges, rather than highlight their admiration of their compatriots.



to interpret the Constitution and, consequently, Supreme Court decisions are not forever "binding on all . . . parts of government."<sup>104</sup> Although castigated as a "jurisprudential stink bomb" by the *New Republic*'s Michael Kinsley<sup>105</sup> and condemned for "invit[ing] anarchy" by the *New York Times*'s Anthony Lewis,<sup>106</sup> the Meese speech triggered renewed interest in the study of how courts and political actors communicate with each other. Over the past decade, political scientists and legal academics have written a spate of books and articles assessing the quality of constitutional interpretation by elected government and the consequences of interchanges with the judiciary.<sup>107</sup> Even Clinton Supreme Court appointee Ruth Bader Ginsburg has entered this fray, emphasizing the importance of three-branch constitutional dialogues and arguing that judges "do not alone shape legal doctrine."<sup>108</sup>

For Seidman and Tushnet, however, this topic holds little interest. Perceiving that the politicization of constitutional interpretation has been its downfall, they appear to have written off political actors altogether.<sup>109</sup> Although never committing to one view or another on the appropriate role of the political branches in constitutional dispute resolution, *Remnants* nowhere suggests that its lessons of openness and honesty are relevant to political actors.<sup>110</sup> Moreover, by assuming

104. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 986 (1987).

105. Michael Kinsley, *Meese's Stink Bomb*, WASH. POST, Oct. 29, 1986, at A19.

106. Anthony Lewis, *Law of Power?*, N.Y. TIMES, Oct. 27, 1986, at A23.

107. See generally LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988); JUDGES AND LEGISLATORS (Robert A. Katzmann ed., 1988); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Symposium, *Elected Branch Influences in Constitutional Decisionmaking*, LAW & CONTEMP. PROBS., Autumn 1993, at 1.

108. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992).

109. For example, although recognizing that "[c]onstitutional rhetoric is the language of American politics," SEIDMAN & TUSHNET, *supra* note 1, at 3, and that "we are stuck with a system in which constitutional argument will continue to play a central role in political debate," *id.* at 4, they never consider what politicians have done or should do. Their effort "to focus on the quality of [constitutional] argument," *id.*, examines only the opinions of judges and the writings of legal academics. Along these lines, they are disappointed that legal academics, like politicians, make partisan, closed-minded arguments in their academic writings and elsewhere. *Id.* at 9, 15. Yet, by focusing on the work of academics with close ties to the world of politics, Seidman and Tushnet make politicized academic writings seem more prevalent than they in fact are. For example, all five legal academics highlighted in their introductory chapter—Robert Bork, Michael McConnell, David Strauss, Cass Sunstein, and Laurence Tribe—have close ties to political interests. Bork served as, among other things, Solicitor General and Acting Attorney General for Presidents Nixon and Ford. McConnell, a Reagan administration political appointee, represents religious conservatives both in court and before Congress. Strauss ran much of the Senate Judiciary Committee's Supreme Court confirmation hearing for David Souter and helped draft the President's Supreme Court brief in the Paula Jones lawsuit. Sunstein worked with the Clinton transition team in 1992 and has testified before Congress on several occasions. And Tribe represents progressive interests in court and before Congress.

110. In fact, Seidman and Tushnet's decision to make legal academic discourse the focus of their analysis and recommendations suggests just the opposite. Interestingly, Seidman and Tushnet do not consider the possibility, advanced by many left-leaning academics, that the progressive agenda is best served through political actors, not courts. See, e.g., ROSENBERG, *supra* note 108, at 342-43; ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM 290-318 (1994); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7-18 (1996). This choice of emphasis may



the worst about the sound bite adversarial quality of politics, Seidman and Tushnet never examine the possible virtues of the politicization of constitutional discourse, which is certainly more relevant and may be more enduring than legal elite constitutional discourse.

Without question, constitutional interpretation by the elected branches makes constitutional discourse more relevant. Through television, newspapers, and other media outlets, the public is made aware of constitutional controversies through elected government action, including the efforts of interest groups to pressure political actors. In fact, Americans are far more aware of elected government action that has constitutional ramifications than they are of Supreme Court decisionmaking. Media coverage plays a large role here; because Court decisions are episodic, media attention to Court action pales in comparison to the coverage given to the ongoing political and cultural battles over abortion, affirmative action, school prayer, and other divisive issues.<sup>111</sup>

Seidman and Tushnet do not deny that the constitutionalization of American politics profoundly affects public awareness of, and interest in, constitutional interpretation.<sup>112</sup> In many respects, this is their principal complaint about contemporary constitutional discourse—that it is rhetorically divisive, inconsistent, and closed-minded, precisely because it is too much like politics.<sup>113</sup> At the same time, their model of activist, compassionate judicial review will only exacerbate the politicization of constitutional discourse. Politicians seeking reelection are drawn to those constitutional issues that affect the lives of their

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well be generational. Seidman and Tushnet are part of a "generation of commentators [who were] born late enough to . . . build upon the New Deal's egalitarianism." Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in *THE BURGER COURT: THE COUNTERREVOLUTION THAT WASN'T* 218, 237 (Vincent Blasi ed., 1983). More precisely, they came of age "at the very time the New Deal's welfarism had faltered in the legislative and executive arenas" while, thanks to the Warren Court, "it had moved forward persistently in the judicial arena." *Id.* at 220. As a result, Seidman and Tushnet simultaneously embrace the New Deal's commitment to social justice and disavow its repudiation of activist judicial review. SEIDMAN & TUSHNET, *supra* note 1, at 135. For identical reasons, as Martin Shapiro aptly observes, Seidman and Tushnet are part of a generation that "can love the Warren Court . . . [but] cannot love the Burger Court . . . because the Burger Court is responsive to, and a victim of, the breakdown of the New Deal consensus." Shapiro, *supra*, at 237 (emphasis omitted). Accordingly, Seidman and Tushnet's Court-centered approach may well be rooted in their need "to satisfy liberal nostalgia" for times gone but not forgotten. SEIDMAN & TUSHNET, *supra* note 1, at 191.

111. See Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in *CONTEMPLATING COURTS* 356-57, 370 (Lee Epstein ed., 1995).

112. *Remnants*, moreover, does not dispute that political action influences constitutional decisionmaking. In fact, Tushnet has suggested that a nexus may well exist between the 1994 Republican takeover of Congress and the Supreme Court's increasing recognition of federalism-based limits on congressional action. See Mark Tushnet, *Living in a Constitutional Moment?: Lopez and Constitutional Theory*, 46 CASE W. RES. L. REV. 846 (1996).

113. Seidman and Tushnet have reason to see the language of politics as directly contradictory to their proposal for honest, broadly focused constitutional analysis. Politicians are partisan. Their public pronouncements are one-sided, not soul-searching. They manipulate doctrine, theory, and facts to support their positions. Their fact-finding hearings are filled with witnesses who will say what the politicians want to hear. Indeed, they will only invoke the Constitution when it suits their purposes, typically to bring down proposals they dislike.

constituents.<sup>114</sup> Activist judicial review undoubtedly will increase the impact of constitutional interpretation and, with it, political interest in constitutional decisionmaking. Witness, for example, FDR's political campaign against the *Lochner* Court, Richard Nixon's attack against progressive Warren Court decisions, and Ronald Reagan's pledge to appoint judges "who share our commitment to judicial restraint."<sup>115</sup>

Politics, however, is not simply the price paid for activist judicial review. Politics also informs legal elites about what matters to the American public. For committed legal realists like Seidman and Tushnet, an understanding of what animates social and political forces should be critical. For this reason, legal elites should not be shielded from the hurly-burly of politics. Instead, to ensure "that law serves the *community's* purposes, and that these purposes are the prerogative of common citizenship and not the preserve of academic expertise,"<sup>116</sup> the words and deeds of legal elites are properly subject to the tugs and pulls of politics.

Take the case of Lani Guinier, whose nomination to head the Justice Department's Civil Rights Division was pulled in the midst of a political firestorm about her academic writings. Seidman and Tushnet, who admire Guinier's "fairminded and qualified" arguments, lament her rough treatment in "the world of sound bites and op-ed articles."<sup>117</sup> No doubt, Guinier was shabbily treated, especially by her Democratic sponsors. But, in important respects, Guinier's rough treatment was salutary. It informed legal academics, interest groups, and others about the political saliency of Guinier's writings (or, at least, the saliency of the ideas attributed to Guinier). In effect, social and political forces have made Guinier's writings more textured and more revealing.<sup>118</sup>

The politicization of constitutional discourse informs constitutional interpretation in other important ways. Hydraulic pressures within the political system may well make the Constitution more enduring as well as more relevant. In particular, constitutional dialogues between the courts and elected government often result in more vibrant and durable constitutional interpretation. Abortion and school desegregation are two prime examples of this phenomenon. In both instances, courts and elected officials influenced each other, resulting in a constitutional standard that successfully (if not perfectly) balances competing interests.

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114. See generally DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974) (arguing that re-election is principal motivation driving behavior of members of Congress).

115. Text of 1984 Republican Party Platform, *reprinted in* 40 CONG. Q. ALMANAC, vol. XL, 41-B, 55-B (1984).

116. Robert Post, *Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship*, 11 CONST. COMMENTARY 185, 193 (1994).

117. SEIDMAN & TUSHNET, *supra* note 1, at 15.

118. In the case of Guinier, this is particularly important. Her controversial writings were about ways to enhance the political power of the minority community. As a result, political reaction to her writings is instructive in evaluating her claims about political power. Another example of political discourse improving the thinking of legal elites is the conflagration over Robert Bork's Supreme Court nomination. See ROBERT F. NAGEL, *JUDICIAL POWER AND AMERICAN CHARACTER: CENSORING OURSELVES IN AN ANXIOUS AGE* 27-43 (1994).

The saga of abortion rights underscores the interactive nature of constitutional decisionmaking. *Roe v. Wade*<sup>119</sup> served as a critical trigger to the judicial recognition of abortion rights, overcoming politically potent pro-life interests that have always stood in the way of populist abortion reform.<sup>120</sup> *Roe* also prompted the elected branches of government into action. From 1973 to 1989, 306 abortion-restricting measures were passed by forty-eight states.<sup>121</sup> In 1992, after decades of elected government resistance as well as the appointment of new Supreme Court Justices, the Court responded to these pressures and returned much of the decisionmaking power relating to this divisive issue back to the states. Repudiating *Roe*'s stringent trimester test in favor of a more deferential "undue burden" standard, *Planned Parenthood v. Casey*,<sup>122</sup> while reaffirming "the central holding of *Roe*," signalled the Court's increased willingness to uphold state regulation of abortion.<sup>123</sup>

*Casey*, however, did not trigger an antiabortion revolution. According to Alan Guttmacher Institute studies, "antiabortion legislators [have] heeded [*Casey*] . . . and curtailed their attempts to make abortion illegal."<sup>124</sup> In 1994, for example, no legislation was introduced to outlaw abortion. Furthermore, in the two years following *Casey*, one-third of abortion-related legislative initiatives would have guaranteed the right to abortion. Finally, of the handful of abortion-restricting regulations adopted since *Casey*, all involve restrictions approved by the Court—waiting periods, informed consent, and parental notification.

*Casey* appears to have stabilized, if not resolved, the abortion dispute. While the Supreme Court eviscerated *Roe*'s trimester standard, the post-*Casey* calm reveals that *Roe* shaped elected government attitudes. Contrary to the pre-*Roe* period, during which forty-six states either prohibited or severely limited abortion access,<sup>125</sup> abortion rights are now a secure feature of our constitutional landscape.

Without question, to a pro-choice advocate, *Casey*'s balance sells out important interests of women, and, to a pro-lifer, it permits moral outrages to continue. But there is no realistic alternative to *Casey*'s balancing act. The political upheaval that followed *Roe* reveals the unworkability of a strident pro-choice jurisprudence. But a jurisprudence allowing the prohibition of abor-

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119. 410 U.S. 113 (1973).

120. See DAVID J. GARROW, *LIBERTY AND SEXUALITY* 359, 374 (1993) (explaining that when *Roe* was decided pro-choice activists had abandoned efforts to seek legislative repeal of criminal abortion statutes). For a competing, but in my opinion incorrect, perspective, see Ginsburg, *supra* note 109, at 1208 (suggesting that early 1970s legislative reform efforts had set the stage for more far-reaching legislative reforms).

121. See Glen Halva-Neubauer, *Abortion Policy in the Post-Webster Age*, 20 *PUBLIUS* 27, 43 (1990).

122. 505 U.S. 833 (1992) (plurality opinion).

123. *Id.* at 878 (plurality opinion).

124. STATE REPROD. HEALTH MONITOR (Alan Guttmacher Inst., New York, N.Y.), May 1994, at ii.

125. There is good reason to think that politically potent pro-life interests, at least at the time of *Roe*, would have successfully blocked the efforts of pro-choice advocates to repeal or modify abortion restrictions in state legislatures. See Neal Devins, *The Countermajoritarian Paradox*, 93 *MICH. L. REV.* 1433, 1445-48 (1995).

tions is equally unworkable. In the years before *Roe*, when nontherapeutic abortions were prohibited in nearly every state, abortions were almost as common as they are today.<sup>126</sup> Ultimately, abortion is too divisive for either pro-choice or pro-life absolutism to rule the day. Absent the constitutional dialogue that followed *Roe*, however, the politically unworkable trimester standard would have remained in place.

Supreme Court efforts to end racial segregation in education likewise exemplify the reaches and limits of the judiciary's ability to transform society. On the one hand, *Brown v. Board of Education*<sup>127</sup> proved critical to the eradication of dual school systems in southern states. In particular, *Brown* can be linked to a series of 1960s legislative and regulatory initiatives.<sup>128</sup> The 1964 Civil Rights Act, for example, authorized Justice Department participation in school desegregation litigation and demanded that federal grant recipients, such as school systems, operate in a nondiscriminatory manner.<sup>129</sup>

On the other hand, beginning with *Brown*, the Supreme Court allowed its perception of elected government preferences to shape its decisionmaking in this area. In an effort to temper southern hostility to its decision, the Court did not issue a remedy in the first *Brown* decision. One year later, while declaring that desegregation must proceed with "all deliberate speed,"<sup>130</sup> the Court recognized that "varied local school problems" were best solved by "[s]chool authorities" and that delays associated with "problems related to administration" were to be expected.<sup>131</sup> By taking into account potential resistance to its decision, the Court in *Brown* engaged in the type of interest-balancing that has set political parameters on judicial intervention in equal educational opportunity. Noting that "some achievable remedial effectiveness may be sacrificed because of other social interests" and that "a limited remedy" may be chosen "when a more effective one is too costly to other interests,"<sup>132</sup> the Court recognized that the rights of victims of discrimination must be balanced against a broad spectrum of competing policy concerns. Specifically, aside from victims' rights, the Court in *Brown* valued local control of public school systems and judicial restraint.<sup>133</sup>

126. See ROSENBERG, *supra* note 108, at 178-80. For critiques of this claim, see Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1777-80 (1993) (suggesting that abortion rates could have declined if *Roe* had been decided the other way); Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027, 1057-58 (1992) (arguing that *Roe* prompted the opening of abortion clinics throughout the country, making abortion safer and more readily available).

127. 347 U.S. 483 (1954) (*Brown I*).

128. See Devins, *supra* note 126, at 1039-46.

129. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.). For further discussion of the role that elected government played in advancing the *Brown* mandate, see FISHER & DEVINS, *supra* note 59, at 242-56.

130. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*).

131. *Id.* at 299-300.

132. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 599 (1983).

133. For this reason, I disagree with Seidman and Tushnet's conclusion that "*Brown* implies that the government has an affirmative obligation to take whatever measures are required to end the subjugation of African-Americans as a group." SEIDMAN & TUSHNET, *supra* note 1, at 107.



Social and political forces, especially federal government efforts to enforce *Brown* during the 1960s, also figured prominently in the Supreme Court's approval of mandatory busing remedies in *Swann v. Charlotte-Mecklenburg Board of Education*.<sup>134</sup> *Swann*, however, went well beyond elected government preferences. During the Nixon and Reagan administrations, the Court and the elected branches of government fought a pitched battle over busing, a battle that has now abated. In 1991 and again in 1992, the Supreme Court, as it did with abortion, recognized greater state and local control over public schools<sup>135</sup> and limited a controversial hard-line position rather than disavowing it. Thus, an equilibrium of sorts has been achieved. Specifically, by empowering district court judges to take local circumstances into account in deciding whether a school system has satisfied its desegregation obligations,<sup>136</sup> the Rehnquist Court has emphasized concerns for local control and judicial restraint at the expense of victims' rights. At the same time, these rulings neither require nor encourage district court judges to terminate school desegregation injunctions. Consequently, although rejecting district court efforts to include suburban school systems in a Kansas City, Missouri desegregation order,<sup>137</sup> the Court did not interfere with intrusive district court orders requiring state-subsidized housing construction in Yonkers, New York<sup>138</sup> and imposing a statewide tax levy to support desegregation in Kansas City.<sup>139</sup>

Attaining an equilibrium with regard to school desegregation and abortion required all branches and all levels of government to do battle with one another. This dynamic process yielded a very nuanced, very delicate (if not very deliberate) compromise. That this interactive process may too closely resemble the making of sausage helps to explain Barbara Craig and David O'Brien's characterization of the abortion dispute as an "illustrative . . . [and] disappointing reflection" of the American system.<sup>140</sup> Nevertheless, as Justice Ginsburg rightly observed at her confirmation hearing, our system is one in which courts "do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the [P]resident, the states, and the people."<sup>141</sup>

That courts sometimes initiate these constitutional dialogues is indisputable. For that reason, although judicially created "rights talk" sometimes stands as a

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134. 402 U.S. 1 (1970).

135. *Freeman v. Pitts*, 503 U.S. 467, 485-92 (1992) (identifying several factors that supervising district courts should consider when relinquishing control over implementation of desegregation plan to school districts); *Board of Educ. v. Dowell*, 498 U.S. 237, 250 (1991) (recognizing that once school district complies with desegregation decree, federal courts no longer retain regulatory control over school policies and rules).

136. *Dowell*, 498 U.S. at 248-49.

137. *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995).

138. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

139. *Missouri v. Jenkins*, 495 U.S. 33 (1990).

140. BARBARA H. CRAIG & DAVID M. O'BRIEN, *ABORTION AND AMERICAN POLITICS* 15 (1993).

141. Joan Biskupic, *Ginsburg Stresses Value of Incremental Change*, WASH. POST, July 21, 1993, at A6.



roadblock to innovative public policy,<sup>142</sup> courts often play an indispensable role in prompting elected government action. For example, without *Brown* or *Roe*, equal educational opportunity and abortion rights might well have meant very different things today. *But*, it is equally indisputable that workable approaches to school desegregation and abortion rights required elected government participation, sometimes supporting and at other times opposing Court action.<sup>143</sup> Thus, although there may be "a magnetic attraction to the notion of an ultimate constitutional interpreter,"<sup>144</sup> complex social policy issues are better resolved through "the sweaty intimacy of creatures locked in combat."<sup>145</sup>

### CONCLUSION

Constitutional decisionmaking is a never-ending process involving all branches and all levels of government. *Remnants*, by not considering how nonjudicial actors participate in shaping constitutional values, implicitly embraces a faulty vision of constitutional decisionmaking. As a result, the book's supposedly neutral process-based reform proposals appear grounded in a normative vision of judicial supremacy.<sup>146</sup> Making matters worse, Seidman and Tushnet's proof of the ways that political preferences drive constitutional interpretation begs the question of why courts should shape public policy through values-based constitutional interpretation.

Ironically, had Seidman and Tushnet considered nonjudicial influences, they would have had a much easier time defending activist judicial review. Let me explain. Courts, as school desegregation and abortion make clear, sometimes trigger a national dialogue about both the power of government and the rights of individuals. Moreover, as underscored by the Supreme Court's willingness to disrupt prevailing elected government norms in *Brown* and *Roe*, judges and

142. Bob Nagel, for example, contends that "[t]he judiciary's frequent intervention in ordinary political affairs works against both the preservation and healthy growth of our constitutional traditions." ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* 3 (1989); see also Jeremy Rabkin, *Racial Progress and Constitutional Roadblocks*, 34 WM. & MARY L. REV. 75 (1992).

143. The evolution of school desegregation and abortion decisionmaking is a testament to the profound role political actors play in shaping constitutional doctrine. Accordingly, the distinction between theory and practice or implementation does not explain Seidman and Tushnet's failure to consider political influences.

144. Walter F. Murphy, *Who Shall Interpret: The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401, 417 (1981).

145. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 261 (2d ed. 1986); see also JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 167 (1984) ("The genius of the system lies in the very tension itself, and in our ability to combine an active democracy, constitutional principles, and judicial judgment."). Whether or not "the day-to-day job of upholding the Constitution . . . rests . . . on the shoulders of every citizen," Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 202 (1962), "[w]e reject Supremacy in all three branches because of the value placed upon freedom, discourse, democracy, and limited government." FISHER, *supra* note 108, at 279.

146. This assertion is also supported by Seidman and Tushnet's embrace of activist judicial review as well as their sympathetic portrayal of the pre-New Deal period as an era when "genteel discussion within an elite" was possible. SEIDMAN & TUSHNET, *supra* note 1, at 165.

politicians sometimes react differently to social and political forces. Accordingly, because special interest group pressures affect courts and elected officials in different ways, a full-ranging consideration of the costs and benefits of different policy outcomes is best accomplished by a government-wide decision-making process. For this reason, courts and elected officials should both be activist in shaping government policy.

Seidman and Tushnet's disdain for the language of politics, however, makes it impossible for them to see the virtues of the current system. As a result, although their complaints about the politicization of constitutional discourse are well-founded, contemporary constitutional discourse may not be the horror show they describe. Seidman and Tushnet thus go too far in condemning "the New Deal revolution" for destroying "the possibility of genteel discussion within an elite."<sup>147</sup> True, at the turn of the century, constitutional debate was less fierce, less partisan, and more or less in the control of legal elites. Constitutional interpretation, however, also affected fewer lives. In other words, by embracing politically charged, activist, progressive judicial review, Seidman and Tushnet should be more accepting of the possibility that joint political and legal dialogue sometimes produces good results. Put another way: Seidman and Tushnet should follow their own advice and explicitly take into account the perspectives and counterarguments of individuals, such as myself, who see virtues in the current system.

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147. *Id.*