

# RED, WHITE, and BLUE



A Critical Analysis of Constitutional Law

**MARK TUSHNET**

With a New Foreword by Sanford Levinson  
and a New Afterword by the Author

# Red White And Blue A Critical Analysis Of Constitutional Law

**Eric Ghosh**



## **Red White And Blue A Critical Analysis Of Constitutional Law:**

**Red, White, and Blue** Mark V. Tushnet, 1986      *Red, White, and Blue* Mark V. Tushnet, 1988      **Red, White, and Blue** Mark V. Tushnet, 2015-06-12 The first paperback edition of a classic of American constitutional theory The book is divided into two parts In Part I Professor Tushnet appraises the five major competing grand theories of constitutional law and interpretation and argues that none of them satisfy their own requirements for coherence and judicial constraint In Part II the author offers a descriptive sociology of constitutional doctrine and raises critical questions as to whether a grand theory is necessary is it possible to construct a coherent useful grand theory and is construction of an uncontroversial grand theory possible Professor Tushnet's new Afterword is organized in parallel fashion to the original text Part I offers a new survey of the contemporary terrain of constitutional interpretation Part II provides an extended discussion of the most prominent of contemporary efforts to provide an external analysis of constitutional law the idea of regime politics This includes discussion of major court decisions including *Bush v Gore* and *Citizens United*      *The Constitution and the Flag: The flag salute cases* Michael Kent Curtis, 1993 First Published in 1993 Routledge is an imprint of Taylor Francis an informa company      **Legal Hermeneutics** Gregory Leyh, 2021-01-08 This title is part of UC Press's Voices Revived program which commemorates University of California Press's mission to seek out and cultivate the brightest minds and give them voice reach and impact Drawing on a backlist dating to 1893 Voices Revived makes high quality peer reviewed scholarship accessible once again using print on demand technology This title was originally published in 1992      **Creating the Constitution** Thornton Anderson, 2011-09-30 Creating the Constitution presents a different interpretation of the Convention and the First Congress derived largely from a close reading of Farrand's Records and the Annals of Congress Among its special features are a critical perspective on the Framers an examination of Court Whig influence on the Federalists the identification of a third group the state Federalists between the nationalists and states righters and a view of the First Congress as distorting the aims of the Convention      The Supreme Court and Constitutional Theory, 1953-1993 Ronald Kahn, 1994 Combining theoretical sophistication with a fundamental comprehension of the political institutions of the USA this study aims to demystify the workings of the United States Supreme Court and its place in democracy      **Our Republican Constitution** Adam Tomkins, 2005-02 This new book by Adam Tomkins sets out a radical vision of the British constitution It argues that despite its outwardly monarchic form the constitution is profoundly informed and indeed shaped by values and practices of republicanism The republican reading of the constitution presented in this book places political accountability at the core of the constitutional order As such Our Republican Constitution offers a powerful rejoinder to the current trend in legal scholarship that sees the common law and the courts rather than Parliament as the central players in holding government to account The book further contends that while the constitution should be understood as having republican foundations current constitutional practice is in a number of respects insufficiently republican in character The book closes by outlining a

programme of republican constitutional reform that is designed to secure genuinely responsible government This is an original and provocative reinterpretation of the central themes of the British constitution drawing on constitutional history especially of the seventeenth century political theory and public law In Defense of a Political Court Terri Jennings Peretti, 2001-10-29 Can the Supreme Court be free of politics Do we want it to be Normative constitutional theory has long concerned itself with the legitimate scope and limits of judicial review Too often theorists seek to resolve that issue by eliminating politics from constitutional decisionmaking In contrast Terri Peretti argues for an openly political role for the Supreme Court Peretti asserts that politically motivated constitutional decisionmaking is not only inevitable it is legitimate and desirable as well When Supreme Court justices decide in accordance with their ideological values or consider the likely political reaction to the Court's decisions a number of benefits result The Court's performance of political representation and consensus building functions is enhanced and the effectiveness of political checks on the Court is increased Thus political motive in constitutional decision making does not lead to judicial tyranny as many claim but goes far to prevent it Using pluralist theory Peretti further argues that a political Court possesses instrumental value in American democracy As one of many diverse and redundant political institutions the Court enhances both system stability and the quality of policymaking particularly regarding the breadth of interests represented

**Progressive Constitutionalism** Robin West, 1994 The Fourteenth Amendment guarantees all citizens equal protection under the law as well as immunity from laws that deprive them of life liberty or property without due process of law In *Progressive Constitutionalism* Robin West develops an interpretation of this amendment that contrasts with the views conservative and liberal of the Rehnquist Burger and Warren Courts and with the radical antisubordinationist account provided by the critical legal studies movement and many prominent feminist and critical race theorists Her interpretation consists of a substantive argument regarding the Amendment's core meaning and a jurisprudential argument regarding the role of the courts and Congress in fulfilling the Amendment's progressive promise West shows how the equal protection clause far from insulating the private spheres of culture market and home life as is commonly held directly targets abuses of power within those spheres She develops a number of arguments for the modern relevance of this understanding from the failure of the state to provide equal protection against private domestic violence permitting a private sovereignty of patriarchal power within the home to the state's failure to provide equal protection against material deprivation allowing private sovereignty between economically privileged and desperate people in private markets West's argument extends to the liberty prong of the due process clause seen here as a protection of the positive not negative liberty of citizens covering rights in such typically controversial areas as welfare education and domestic safety This interpretation recasts a number of contemporary constitutional issues such as affirmative action and hate speech and points to very different problems notably private unchecked criminal violence and extreme economic deprivation as the central constitutional dilemmas of our day *Progressive Constitutionalism* urges a substantive

institutional and jurisprudential reorientation of our understanding of the Fourteenth Amendment one that would necessarily be pursued through Congressional rather than judicial channels In doing so with attention to history and both feminist and critical race scholarship it should reinvigorate our politics and our constitutional conversations and perhaps point us toward a more just society

**Political Constitutionalism** Richard Bellamy, 2007-09-13 Judicial review by constitutional courts is often presented as a necessary supplement to democracy This book questions its effectiveness and legitimacy Drawing on the republican tradition Richard Bellamy argues that the democratic mechanisms of open elections between competing parties and decision making by majority rule offer superior and sufficient methods for upholding rights and the rule of law The absence of popular accountability renders judicial review a form of arbitrary rule which lacks the incentive structure democracy provides to ensure rulers treat the ruled with equal concern and respect Rights based judicial review undermines the constitutionality of democracy Its counter majoritarian bias promotes privileged against unprivileged minorities while its legalism and focus on individual cases distort public debate Rather than constraining democracy with written constitutions and greater judicial oversight attention should be paid to improving democratic processes through such measures as reformed electoral systems and enhanced parliamentary scrutiny

**The Oxford Handbook of the Australian Constitution** Cheryl Saunders, Adrienne Stone, 2018-03-01 Constitutional law provides the legal framework for the Australian political and legal systems and thus touches almost every aspect of Australian life The Handbook offers a critical analysis of some of the most significant aspects of Australian constitutional arrangements setting them against the historical legal political and social contexts in which Australia's constitutional system has developed It takes care to highlight the distinctive features of the Australian constitutional system by placing the Australian system where possible in global perspective The chapters of the Handbook are arranged in seven thematically grouped parts The first Foundations deals with aspects of Australian history which have influenced constitutional arrangements The second Constitutional Domain addresses the interaction between the constitution and other relevant legal systems and orders including the common law international law and state constitutions The third Themes identifies themes of special constitutional significance including the legitimacy of the constitution citizenship and republicanism The fourth Practice and Process deals with practical issues relevant to constitutional litigation including the processes techniques and authority of the High Court of Australia The final three parts deal with the structural building blocks of the Australian Constitutional system Separation of Powers Federalism and the Protection of Rights Written by a team of experts drawn from academia and practice the Handbook provides Australian and international readers alike with a reliable source of knowledge understanding and insight into the Australian Constitution

**Governing with Judges** Alec Stone Sweet, 2000 Constitutional Politics in Europe Governing with Judges elaborates a theory of constitutional politics the process through which the discursive practices and techniques of constitutional adjudication come to structure the work of governments parliaments judges and administrators Focusing on the cases of

France Germany Italy Spain and the European Union the book examines the sources and consequences of the pan European movement to confer constitutional review authority on a new governmental institution the constitutional court Detailed case studies illustrate how and to what extent legislative processes have been placed under the influence of constitutional judges In a growing number of policy domains these judges function as powerful adjunct legislators As constitutional courts have consolidated their position as authoritative interpreters of the constitutional law and especially of human rights provisions the work of the judiciary too has gradually been constitutionalised Today ordinary judges seek to detect violations of the constitution in their application of the various codes and to rewrite statutes that they deem unconstitutional Constitutional politics have not only provoked the demise of traditional notions of parliamentary sovereignty they have organized profound transformations in the very nature of European governance Stone Sweet argues that constitutional adjudication constructs complex causal linkages between rule systems and normativity on the one hand and the strategic behaviour of individuals on the other The theory constitutes a novel synthesis of normative and rational approaches to politics The book also addresses central questions raised by a wide range of ongoing theory projects including the new institutionalism rational choice principal agent theories of delegation and the new constitutionalism in Continental legal theory

**Liberty, Property, and the Future of Constitutional Development** Howard Dickman, Ellen Frankel Paul, 1990-07-05 This book is a discussion of current trends in the constitutional protection of economic liberties Since the mid 1930s the Supreme Court has been reluctant to replace legislative judgements on matters of economic regulation with its own While the Court permits wide legislative experimentation in the economic realm it scrutinizes governmental attempts to regulate or abridge other civil liberties quite closely This state of affairs is known as the double standard The question of the appropriateness of this unequal treatment by the Court of these two classes of liberties generates much of the controversy in this volume Other topics dealt with include the current trends in and relevance of constitutional law for welfare rights labor unions and labor law Recent Supreme Court decisions on property rights also receive much attention

Origins of the Federal Judiciary Maeva Marcus, 1992-05-21 The Judiciary Act of 1789 established a federal court system an experiment that became one of the outstanding features of American democracy Yet little has been written about the origins of the Act This volume of essays analyzes the Act from political and legal perspectives while enhancing our understanding of the history of the judiciary and its role in the constitutional interpretation

**Interpreting Constitutions** Jeffrey Denys Goldsworthy, 2006-02-09 This book describes the constitutions of six major federations and how they have been interpreted by their highest courts compares the interpretive methods and underlying principles that have guided the courts and explores the reasons for major differences between these methods and principles Among the interpretive methods discussed are textualism purposivism structuralism and originalism Each of the six federations is the subject of a separate chapter written by a leading authority in the field Jeffrey Goldsworthy Australia Peter Hogg Canada Donald Kommers Germany S P Sathe India Heinz Klug South Africa and

Mark Tushnet United States Each chapter describes not only the interpretive methodology currently used by the courts but the evolution of that methodology since the constitution was first enacted The book also includes a concluding chapter which compares these methodologies and attempts to explain variations by reference to different social historical institutional and political circumstances Judiciaries in Comparative Perspective H. P. Lee, 2011-08-11 An independent and impartial judiciary is fundamental to the existence and operation of a liberal democracy Focussing on Australia Canada New Zealand South Africa the United Kingdom and the United States this comparative 2011 study explores four major issues affecting the judicial institution These issues relate to the appointment and discipline of judges judges and freedom of speech the performance of non judicial functions by judges and judicial bias and recusal and each is set within the context of the importance of maintaining public confidence in the judiciary The essays highlight important episodes or controversies affecting members of the judiciary to illustrate relevant principles **Taking the Constitution Away from the Courts** Mark Tushnet, 2000-08-13 Content Description Includes bibliographical references and index **Beyond the Republican Revival** Eric Ghosh, 2020-10-29 This is the first book length treatment of both the non positive and the positive liberty strands of the republican revival in political and constitutional theory The republican revival pursued especially over the last few decades has presented republicanism as an exciting alternative to the dominant tradition of liberalism The book provides a sharply different interpretation of liberty from that found in the republican revival and it argues that this different interpretation is not only historically more faithful to some prominent writers identified with the republican tradition but is also normatively more attractive The normative advantages are revealed through discussion of some central concerns relating to democracy and constitutionalism including the justification for democracy and the interpretation of constitutional rights The book also looks beyond republican liberty by drawing on the republican device of sortition selection by lot It proposes the use of large juries to decide bill of rights matters This novel proposal indicates how democracy might be reconciled with constitutional review based on a bill of rights Republicanism is not pitted against liberalism the favoured values and institutions fit with liberal commitments *The Fate of Law* Austin Sarat, Thomas R. Kearns, 2009-11-10 Assesses the impact of intellectual and political movements of the late twentieth century on law and legal theory

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