

Michael Avery

HOW POLITICS INFORM LAW

Book Review: Jack Jackson, *Law Without Future: Anti-Constitutional Politics and the American Right* (U. Penn. Press, 2019).

In *Law Without Future*, Jack Jackson explores a broad set of legal and political developments to support his analysis that we now live in a world where legal decisions have less fealty to precedent and less commitment to regulating future behavior than ever before. He leads with President Trump's pardon of Sheriff Joe Arpaio of Arizona, who had been convicted of criminal contempt for refusing to obey court orders enjoining him from engaging in discriminatory anti-immigrant practices—racial profiling and violations of the Fourth Amendment. The pardon demonstrated Trump's disdain for constitutional government and the principle of equality. At the same time, Arpaio “represents the ethos and energy of the political movement that ushered [Trump] into power.”

In subsequent chapters, Jackson explores the habeas corpus ruling by the Supreme Court in *Teague v. Lane* (1989, the “torture memos” promulgated by the Office of Legal Counsel in the Bush Administration (and President Obama's failure to hold the authors responsible, the Court's decision in *Bush v. Gore*, Congress's legislation with respect to Terry Schiavo's life support, and the Senate's refusal to hold hearings on President Obama's nomination of Merrick Garland to the Supreme Court.

Teague v. Lane is a good example of Jackson's thesis. The Court expanded the definition of “new” legal rules, which provide no relief to a convicted prisoner through habeas corpus, and limited the universe of rules dictated by precedent, thus making it more difficult for prisoners held in violation of the Constitution to be released. The politically motivated ruling both narrowed the impact of previous decisions and limited the effect that current decisions would have on future cases. Jackson labels this sort of “self-destructive legal analysis” as “anti-constitutionalism.” This notion of law without future was manifest in *Bush v. Gore*, where the Court explicitly limited the impact of its ruling to the case before it. As Jackson puts it, the “Court issued a landmark decision that marked the land not at all.” Jackson explains how the same dynamic in *Teague v. Lane* and *Bush v. Gore* is found in the other matters he analyzes.

Michael Avery is Emeritus Professor, Suffolk Law School, and a former president of the National Lawyers Guild.

Jackson develops a secondary theme as well, the relationship between law and politics. He cautions that the criticism of political decisions emanating from the War on Terror as “lawless” is misplaced. He argues that politics have always influenced and been integral to legal theory and developments. In response to *Bush v. Gore*, liberals called for a return to the “rule of law” to protect democracy. Jackson finds the criticism misguided, convincingly arguing that “the power of the law had long been waging war against democracy.” Consider the Electoral College, it is an institution that allows the election of a president rejected by a majority of the popular vote. The nondemocratic Senate, per the Constitution, serves as a brake on the more popularly representative House, due to less frequent elections and the structural rejection of the one person/one vote principle. Indeed, one could argue that with respect to the recent acquittal of President Trump in impeachment proceedings, the Senate operated as designed. Legal rulings and state laws that outlaw fusion voting, which would allow a candidate to be the nominee of more than one party, limit the influence of minor parties. Privatized debates are legally beyond regulation by the First Amendment, which requires state action, and can exclude minor parties and less well-known candidates. The law restricts access to the ballot through felon disenfranchisement and measures requiring stricter proof of identity.

The book is strongest when discussing individual examples of legal and political decisions. This reviewer is a professor of constitutional law, not a philosopher, so perhaps my impatience with frequent forays by the author into philosophical matters merely reflects my interests. Nonetheless, I believe the book would have been improved by more discussion of legal cases and specific political decisions and fewer flights into abstract debates involving St. Augustine, Alexis de Tocqueville, Karl Marx and others. In the same vein, I found Jackson’s fondness for expressing ideas in paradoxical terms to be occasionally enlightening, but too frequently unnecessarily confusing. Having said that, this book provides many productive insights into the conservative rejection of fundamental constitutional principles that currently tears at the fabric of political society.

