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Review of *Red, White, And Blue: A Critical Analysis of Constitutional Law* by Mark Tushnet

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Red, White, And Blue: A Critical Analysis of Constitutional Law. By Mark Tushnet. Cambridge, Massachusetts, and London, England: Harvard University Press, 1988. Pp. xiii, 328.

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Constitutional theory offers guidance for judicial review, usually by defending or attacking an approach to constitutional interpretation. John Hart Ely's defense of "representation-reinforcing" review[1] exemplifies the affirmative mode of interpretative advocacy. H. Jefferson Powell's commentaries on originalism[2] illustrate the negative mode. Theorists sometimes recommend that cases raising constitutional questions be disposed of without recourse to constitutional meaning. James Bradley Thayer's call for extreme deference to the federal legislature[3] and Alexander Bickel's praise for "passive [judicial] virtues"[4] are sample products of noninterpretative theorizing.

Mark Tushnet's new book[5] offers no such counsel. Mainly a critique of interpretative theories,[6] its conclusions are profoundly skeptical. Tushnet's central claim is that judicial review and constitutional theory cannot possibly perform their assigned functions, and that liberalism is to blame. This review will focus on those facets of the book.

I. THE CENTRAL ARGUMENT

Tushnet contends that "the aim of the Constitution is to prevent tyranny."[7] Judicial review is supposed to prevent "the tyranny of the

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1. J.H. ELY, DEMOCRACY AND DISTRUST (1980).

2. *See, e.g.*, Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

3. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

4. A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

5. M. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

6. Despite the subtitle, only the last third of the book considers constitutional doctrine. *Id.* at 191-312. The rest of the book deals with general theory.

7. *Id.* at 179.

majority" by constraining the legislature.[8] This arrangement does not solve but relocates the problem, by giving considerable power to unelected judges. Constitutional theory is assigned the task of preventing "the tyranny of the judges."[9] To achieve this end, theory must provide criteria of constitutional meaning to "guide and constrain judicial discretion"[10] and to monitor judicial performance. Tushnet argues, however, that such theories cannot succeed: "no available approach to constitutional law can effectively restrain both legislators and judges: If we restrain the judges we leave legislators unconstrained; if we restrain the legislators we let the judges do what they want."[11] Tushnet makes his case mainly by examining "grand theories," which seek interpretative guidance in the Constitution's history,[12] in principles of "representative democracy,"[13] or in "moral philosophy."[14]

Tushnet places within the "liberal tradition" all the theories of judicial review that he examines.[15] He understands this tradition to provide the basic framework for American political thought. However, the liberal tradition generates concern about legislative tyranny as well as the dilemma of constraint. But the tradition has never exhausted American political thought. A distinct tradition of "civic republicanism" persists. Though far weaker than liberalism, its influence can be detected in the Constitution.[16]

It should be noted that in referring to political traditions, Tushnet is concerned not with "systematic, well-organized bodies of thought" but rather with "amateur political theory," which provides "general frameworks for orienting [everyday] thought about political life."[17]

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8. *Id.* at 16.

9. *Id.* at 16-17.

10. *Id.* at 112.

11. *Id.* at 313.

12. *Id.* at 21-69.

13. *Id.* at 70-107; *see also* J.H. ELY, *supra* note 1.

14. M. TUSHNET, *supra* note 5, at 108-46; *see also* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); R. DWORKIN, A MATTER OF PRINCIPLE (1985); R. DWORKIN, LAW'S EMPIRE (1986).

In the remainder of Part I, Tushnet considers abortive "anti-formalist" attempts to cope with the "counter-majoritarian difficulty," M. TUSHNET, *supra* note 5, at 147-68, and eclectic "little" theories, whose strategy of "balancing" inevitably fails to provide constraints upon the judiciary. *Id.* at 179-87. In Part II, Tushnet examines several areas of constitutional doctrine and associated theories, including "structural review," *id.* at 199-213, regulation of the welfare bureaucracy, *id.* at 214-46, religion, *id.* at 247-76, commercial speech, *id.* at 289-93, and pornography, *id.* at 293-311.

15. M. TUSHNET, *supra* note 5, at 17.

16. *Id.* at 274.

17. *Compare id.* at 5-6 (if this does not represent a change in focus from Tushnet's

Throughout the book, Tushnet contrasts these two traditions.[18] To mention just a few relevant points: liberalism regards people as predominantly self-interested, political life as a competition for power, and public institutions as threats to the individual. Republicanism stresses our capacity for civic-minded motivation, envisions a greater scope for cooperation and solidarity, and is less fearful of government. For our purposes, the most significant contrast concerns the effect of these traditions upon judicial review. Tushnet argues that liberalism makes judicial review and its theory *necessary but impossible*, whereas republicanism makes them *possible but unnecessary*.[19]

The argument goes something like this. Shared meanings and civic-mindedness are needed to make judicial review work properly, but they cannot endure under the conditions that sustain a liberal political outlook. Because of this, liberalism generates reasonable concern about the abuse of public power and thus perceives the need for judicial review. But as judges and legislators lack a common conception of the public good and a shared understanding of the Constitution, judicial review cannot be expected to constrain legislators, and constitutional theory cannot be expected to constrain judges to the degree required.

Judicial tyranny could be prevented, however, if judges shared a conception of the public good, were capable of applying it in decisions, and were determined to do so. This would be possible in a republican community, for Tushnet understands republicanism in such terms. Constitutional theory—that is, an effectively constraining approach to constitutional interpretation—would then be possible. For Tushnet assumes that a constitution would be interpreted so that it served the public good as mutually conceived. But judicial review would then be virtually unnecessary, because legislators would likewise share the same understanding of the public good, and they too would be sufficiently motivated to serve it.[20]

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earlier articles, it is at least a welcome clarification and a kinder, gentler tone) *with* Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980) [hereinafter *Darkness on the Edge*]; Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694 (1980); Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

18. *See, e.g.*, M. TUSHNET, *supra* note 5, at 4-17, 313-18.

19. *Id.* at viii, 146, 313, 317.

20. For Tushnet's discussion of a "culture of mutual forbearance," see *id.* at 275-76. Tushnet seems to understand republican political culture as including whatever is necessary to achieve genuine consensus.

II. GRAND THEORIES

Of all the theories considered by Tushnet, original intent is the one most often defended by its partisans as capable of constraining the judiciary.[21] Tushnet's primary complaint is that it fails to do so. As a consequence of "historical ambiguity, inference from limited evidence, and social change," what the framers intended is at best unclear.[22] Reasonable disagreement about original intent is inevitable, and it cannot be eliminated. Under this criterion, we should expect persisting disagreement about what the Constitution means. As competing interpretations will be defensible, it will be easy for judges to decide in accordance with their predilections. Tushnet concludes that originalism cannot prevent judicial tyranny.[23]

Tushnet provides an excellent summary of and commentary on Ely's proposal that we interpret the Constitution so that it serves its commitment to effective representation. Tushnet argues that courts using this theory can prevent one kind of tyranny "only by creating the risk of the other."[24] If courts attack only "formal" obstacles to representation, they will not constrain the legislature. But courts cannot attack "informal" obstacles without making complex judgments of fact, about which reasonable people can disagree. That approach would leave the judges unconstrained.

Tushnet provides a less sympathetic account of judicial review involving the application of moral principles. Because abstract principles have unclear implications, interpretation based upon them would generate reasonable disagreement and would thus fail to constrain the judges.

A striking feature of this book is Tushnet's lack of concern about the soundness of the theories he examines. He devotes little space to the question whether any of them are correct about constitutional meaning.[25] That is not his point. He is concerned with a theory's capacity for keeping judges in check while enabling them to constrain the legislators. That is not the sole basis on which he criticizes the various theories he considers, but it is the crucial, central line of argument in Part I of his book.

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21. *See* R. BERGER, GOVERNMENT BY JUDICIARY (1977).

22. M. TUSHNET, *supra* note 5, at 34.

23. *Id.* at 35.

24. *Id.* at 73.

25. Tushnet does not ignore the issue entirely. For example, he entertains the notion that we have agreed to be guided by the intentions of the framers, and proceeds quickly to discredit it. *Id.* at 25-26. He notes that a moral theory used in constitutional interpretation cannot effectively constrain unless it is "rule-oriented," and he appears to agree with the objection that "rule-oriented moral philosophies are not good ones no matter what the rules are." *Id.* at 112-13.

It may be relevant here that Tushnet draws from Legal Realism the lesson that "judicial review doesn't matter. . . . If law is only power dressed up in ways that satisfy our demand for neutrality, ultimately the powerful will prevail no matter what a few eccentric judges occasionally say."[26] Tushnet does not explicitly endorse these claims, but he appears to accept them.[27] Given that "realistic" way of thinking, it does not matter very much whether law even has enough determinate meaning to provide raw material for unique, sound interpretation. What the law requires and allows cannot be determined with certainty, so it is readily interpreted according to the predisposition of its interpreter. If constitutional theories cannot prevent this, that is the important point, not whether one theory or another might tell us what the Constitution truly means.

III. EFFECTIVE CONSTRAINT

Tushnet assumes that, in order to provide adequate constraint, a constitutional theory must have crystal-clear implications about constitutional meaning. It must provide interpretative rules that leave little room for the exercise of judgment.

It seems unlikely that any theory meeting such stringent specifications could gain wide acceptance. Plausible guidelines for constitutional interpretation are unlikely to be mechanical. If theorists aim at sound interpretation, we should expect continued disagreement about the proper reading of the Constitution. What then is the point of Tushnet's critique?

Tushnet believes that our political community is more like that assumed by liberalism than like that of the republican ideal. His reasoning yields the conclusion that our political community cannot have mechanical review or corresponding interpretive guidelines. But he is not yet in a position to conclude that effective constraint on judicial review is impossible. To reach that conclusion, he must assume that effective constraint requires mechanical review. Why should that be necessary?

How could one defend the claim that judicial review and constitutional theory require mechanical guidelines? One possible strategy of argument is to show that judicial review does not in fact reliably enforce constitutional limits on governmental actions. To attempt this, one would have to determine what those limits are, which would require a criterion of constitutional meaning that has been verified as sound.

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26. *Id.* at 198.

27. *Id.* at 213 ("The remainder of this book tries to develop [the Realist] perception by examining the processes by which power operates to shape our understanding of the social world.").

Tushnet does not pretend to have any interpretative theory, sound or otherwise. Does his argument then fail?

Tushnet's argument could be developed further. Consider Tushnet's reference to legislative and judicial tyranny. The term "tyranny" might easily be misconstrued. Here it has a standard but limited reference to the unwarranted appropriation of political power. This is what happens when the legislature violates limits on its constitutional authority—what judicial review is supposed to prevent. Moreover, this is what happens when the judiciary fails to discharge its responsibility to enforce constitutional limits on legislative authority—what constitutional theory is supposed to prevent. Tushnet can be understood to hold that, in our political culture, constitutional theory *cannot be relied upon* to prevent decision making in the judicial branch that breaches its responsibility to enforce the Constitution—in other words, it cannot be relied upon to prevent legislative tyranny—and that, partly for this reason, judicial review *cannot be relied upon* to prevent decision making by the legislative branch that abuses its authority—in other words, it also cannot be relied upon to prevent legislative tyranny.[28]

IV. WHAT IS TO BE DONE?

Tushnet may be said to favor republicanism,[29] but he does not propose that the dilemma of judicial review be resolved by reviving that political outlook. For one thing, republicanism by itself is an inadequate social theory. "Each tradition captures important and valuable aspects of life that no sound understanding of political activity can ignore."[30] "[J]ust as the republican tradition correctly emphasizes our mutual dependence, the liberal tradition correctly emphasizes our individuality and the threats we pose to one another."[31] Second, republicanism could not be revived without transforming society,[32] e.g., equalizing wealth. Third, the social changes that are necessary to prevent tyranny in the broadest sense, e.g.,

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28. *Darkness on the Edge*, *supra* note 17, at 1061 ("the tyranny that can result when someone motivated by arbitrary desire occupies a position of power").

29. *Id.* at 17, 275. However, Tushnet does not favor its conservative version, which restricts political power to a limited class of propertied citizens. *Id.*

30. *Id.* at 7.

31. *Id.* at 23. Liberalism and republicanism resemble the conflicting moral positions, usually called "individualism" and "altruism," that some Critical Legal Scholars have perceived underlying conflicting sets of rules and precedents in every branch of law. *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

32. M. TUSHNET, *supra* note 5, at 145, 148.

by securing a truly democratic distribution of political power, would solve greater and more pressing problems than those of judicial review. Tushnet believes that the solutions to such problems are to be found, not in better constitutional theory, but in a transformed society that exemplifies the best of the republican ideals.[33] This requires political organization and action.

All that may be true and is important. I am concerned, however, with an inference that might be drawn, especially given Tushnet's agnosticism about constitutional interpretation and his apparent skepticism regarding determinate constitutional meaning.[34] His argument might be seen as discouraging efforts to secure constitutional rights, both because he might be taken as doubting that propositions regarding constitutional law can be true or as holding that pressing claims of constitutional rights detract from the work that is required to transform society.

Today, as often in the past, it would be foolish to regard the federal courts as reliable trustees of constitutional rights, just as it would be foolish to suppose that mere judicial acknowledgement of them would solve the most pressing problems of our society. Nevertheless, it would be a serious error to waive constitutional rights. Experience provides us with reason to believe that the struggle to secure important rights can be instrumental for solving the problems of injustice, cruelty, and domination in our society. Tushnet's agnosticism about constitutional interpretation and his apparent skepticism about constitutional rights unfortunately might encourage the opposite view.

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33. *Id.* at 145.

34. *Id.* at 7, 23. Tushnet's comments on liberalism and republicanism imply his concern about the soundness of such theories, thus his contrasting attitude toward theories of constitutional interpretation would seem to indicate skepticism about the determinacy of the constitutional meaning or the possibility of sound interpretation.