Red, White, and Blue: A Critical Analysis of Constitutional Law by Mark Tushnet

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BOOK REVIEW


Reviewed by Raymond B. Marcin**

Mark Tushnet's newest book provides a look at constitutional theory from the vantage point of the Critical Legal Studies movement.¹ As one might expect of works produced out of the movement, it is unsettling and provocative. As one might expect of works by Mark Tushnet, it is a very good read.

Tushnet has a dual theme in his introduction: (1) grand theories and (2) the grand traditions that underlie our attitudes toward the United States Constitution. There has been a significant interest in "comprehensive normative theories" of constitutional law in the past several years, largely because of what has occurred on the United States Supreme Court itself. In the Warren years, those who stood in the great liberal tradition did little else but wax confident in the fresh breezes and sunlight of the judicial activism of an entrenched liberal majority on the Court. But 1972 changed all that.

Four supposedly conservative appointments to the Court not only threatened the liberal majority but also raised visions of the ghosts of the Lochner era when judicial activism served, of all things, nonliberal ends.² These appointments set the constitutional theorists scurrying to find some theory of judicial review—some "grand" theory—that simultaneously would defend judicial activism and limit it to relentlessly liberal goals.

The appointments of 1972 may have been the catalyst for a new interest in comprehensive normative theories of constitutional review, but Tushnet sees

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that interest at a deeper level, as symptomatic of the crisis of contemporary liberal theory which itself signifies a deeper crisis in Western society:

[II]t is a commonplace of contemporary social thought that Western society is currently experiencing a crisis of legitimacy. "The system" is not delivering the goods, and all the ideological structures designed to explain why the shortfall is defensible, indeed is inevitable, have broken down. Grand theory and its problems are just constitutional law's version of this general crisis of legitimacy.

The crisis of grand theory is the form that the failure of liberal political theory has taken in constitutional law.3

The so-called grand theories of constitutional interpretation or review usually find their basis in, or at least must contend with, two grand traditions undergirding the Constitution: the liberal tradition and the civic republican tradition. Although the two traditions share some of the same ideals and allegiances to the same mechanisms of government, they usually do so for divergent reasons. The liberal tradition (as its root word "liberty" suggests) stresses the individualism of people acting in society, while the civic republican tradition stresses the social nature of human beings, the communitarian ideal. The fact that both traditions converge on some important matters probably represents the enabling factor that preserved unity of thought among the founding fathers long enough for the Constitution to emerge as it did. Tushnet contends that the liberal tradition has won out, becoming so dominant in today's thinking that it is now difficult to appreciate the force of the civic republican tradition. The reasons for the emergent dominance of the liberal tradition may have less to do with its merits than with the historical flaws in the civic republican tradition, which made sense only in a society with a restricted franchise and a policy of substantial equality of wealth. The decline of the civic republican tradition, of course, left the liberal tradition unchallenged, and there lies the root of our present dilemma. Tushnet sees us as being "left with a choice of dictatorships. . . . Judicial review is often defended as the only way to escape the potential tyranny of the majority, but it simultaneously creates the potential for the tyranny of the judges."4 Somewhat surprisingly, Tushnet does not advocate an effort to revitalize the civic republican tradition, and in fact he suggests that doing so will likely fail to solve the crisis that besets us in constitutional law.

In chapter one, under the heading, "The Jurisprudence of History," Tushnet critiques several suggested jurisprudential solutions to the problem

4. Id. at 16.
of activist judicial review. Originalist theory, which may be thought of as the conventional wisdom, purports to derive the meaning of the Constitution from the original intent of its makers. It is an approach which instantly and almost instinctively recommends itself. Did the Founding Fathers not intend that their writing be read the way they intended it to be read? The very proposition compels itself as a tautological truism. Nor is it a static or unrealistic approach. The makers of our Constitution knew that the document could not speak in its original version for all time, and so they inserted an amendment mechanism. As society changed, the Constitution could change too, but slowly and deliberately—certainly not by the simple fiat of the shifting majority of legislative representatives, and still less desirably by the simple fiat of a handful of nonelected justices.

But as compelling as the arguments for originalist interpretation are, Tushnet’s arguments against the theory will place the staunchest originalist on the defensive. Originalism’s “grand theory” does seek to curtail the potential for raw judicial constitutionmaking, and superficially it seems to be an excellent, perhaps the best, tool for doing so. But Tushnet suggests that, in order to serve its purpose, originalist theory must presuppose a determinate intention on the part of the framers. We must know what the framers intended with respect to what they wrote. Original intent may be discoverable but, much more often than not, efforts to pinpoint it meet with historical ambiguity, changes in society or technology, the need to draw inferences from limited evidence, or most often combinations of these factors. In resolving historical ambiguities, in choosing among logical inferences that can be drawn from limited or conflicting evidence of original intent, or in taking account of social or technological change, the “originalist” has quite a bit of room within which to maneuver, probably as much as the non-originalist. Tushnet also gives originalists who “bite the bullet” and insist that the process of discerning original intent itself constrains judicial tyranny much to ponder. The process they advocate usually is described as imaginative reconstruction.\(^5\) We mentally reconstruct the historical setting, the value system, the mind-set of the framers, and that process, they say, sufficiently constrains the justices. Yet, Tushnet argues,

our understanding makes it impossible to claim that any one recon-
struction is uniquely correct.\footnote{6}{M. TUSHNET, supra note 3, at 43.}

To suggest that Tushnet's arguments might give even the staunchest
originalists pause is not to suggest that he will convert them. A small bit of
what Tushnet has to say about originalist theory seems ad hominem.\footnote{7}{For example, as in his treatment of Raoul Berger's work. \textit{See id.} at 37 n.55.} To some extent what he says is based on an inference which, perhaps necessarily, begs the question. The principle of judicial review itself is not free from
historical ambiguity.\footnote{8}{\textit{Id.} at 35-38.} This very ambiguity may cause most originalists to
stay very close to the text of the Constitution and remain quite deferential to
legislative assessments of constitutional impact, usually to a greater degree
than nonoriginalists.

The next approach that Tushnet critiques is the neutral principles theory,
developed and advocated principally by Herbert Wechsler.\footnote{9}{\textit{See Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev.} 1 (1959).} "Neutral principles," not unlike Kant's categorical imperative,\footnote{10}{I. \textsc{Kant}, \textit{Foundations of the Metaphysics of Morals} 39 (Library of Liberal Arts ed. 1959).} demand that the judicial
process be principled in such a way that its analysis and reasoning rest on
forms that transcend the immediate result. While the neutral principles the-
ory purports to impose constraints on arbitrary judicial activism, it does so,
Tushnet reasons, by presupposing a shared societal understanding and ac-
ceptance of those constraints. Such a shared understanding and acceptance
do not exist within the liberal tradition, where each of us is an autonomous
chooser and valuer. In setting the "neutral" principles, a judge possesses an
extensive creative power.

In a legal system with a relatively extensive body of precedent and
well-developed techniques of legal reasoning, it will always be pos-
sible to show how today's decision is consistent with the relevant
past ones, but, conversely, it will also be possible to show how to-
day's decision is inconsistent with the precedents. This symmetry,
of course, drains "consistency" of any normative content.\footnote{11}{M. TUSHNET, \textit{supra} note 3, at 51.}

As the quote above suggests, the neutral principles theory may be thought
of from two vantage points: content and technique. If the neutral principles
theory violates the liberal tradition in the "content" of the principles estab-
lished, then what of the validity of neutral principles viewed as a "tech-
nique?" Can a consistent, neutrally principled \textit{technique} of judging not
supply the necessary constraints? Tushnet, with a sense of practical reality, believes not:

The craft interpretation [i.e., viewing neutral principles theory from the technique perspective] . . . fails to constrain the results that a reasonably skilled judge can reach and leaves the judge free to enforce his or her personal values, as long as the opinions supporting those values are well written. . . . Craft limitations make sense only if we agree on what the craft is.\textsuperscript{12}

It was, perhaps, thoughts like these that motivated the great American legal realist, Jerome Frank, to suggest the all judges be psychoanalyzed prior to assuming the bench.\textsuperscript{13} We do not agree on what the craft of judging is.

Next, Tushnet takes on textualism as a purported solution to the problem posed by judicial review. He divides textualism into unsophisticated and sophisticated varieties, based largely on the extent to which the textualist indulges in an assumption that a community of understanding exists among the readers of the Constitution. Judge Easterbrook, himself a textualist, well recognized the distinction in the context of interpreting statutes: “If the meaning of language depends on a community of understanding among readers, none is ‘right.’”\textsuperscript{14} Sophisticated textualism, on the other hand, rests not on a community of understanding, but rather on a community of experience, a common experience that breeds habit, familiarity, and a sense of normalcy in meaning. We are a historical community; we share something. Unsophisticated textualism, Tushnet argues, is not soundly based. Sophisticated textualism, while more soundly based, fails to constrain judges to the degree needed in order to prevent abuses of judicial review. And textualism in all its forms, Tushnet concludes, is defective because it gives us a Constitution with the politics left out.\textsuperscript{15}

In chapter two, Tushnet deals with John Hart Ely’s theory of representation-reinforcing review.\textsuperscript{16} Originally based in the famous “footnote 4” of the \textit{United States v. Carolene Products Co.} opinion,\textsuperscript{17} representation-reinforcing

\textsuperscript{12} Id. at 52, 54.
\textsuperscript{13} J. FRANK, COURTS ON TRIAL 203, 251 (1949).
\textsuperscript{15} M. TUSHNET, \textit{supra} note 3, at 68.
\textsuperscript{16} See J. ELY, DEMOCRACY AND DISTRUST (1980).
\textsuperscript{17} 304 U.S. 144, 152 n.4 (1938). The Court said:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legis-
review focuses on access to political processes. It justifies judicial intervention on the basis of a need either to eliminate the causes of deficiencies in access to the political processes, or to mandate corrective action, by creating the situation which would have existed if all had been afforded full and fair access to political processes. It is a liberal "market" type theory, based on majoritarianism. It is not a "fundamental rights" type theory, except insofar as purported fundamental rights have something to do with the political processes.

The problem with the theory of representation-reinforcing review, according to Tushnet, is that it simply doesn't constrain judges enough. If, using the theory, one confines its application to the formal, official avenues of access to the political processes, then the theory's reach is too limited to be effective. Every oppressed individual has, for example, the formal, official right to ask his government representative to get a law passed to relieve the oppression, has the right to testify at the hearing, and other rights. The courts need to focus on the informal, unofficial obstacles. If they do adopt this emphasis, however, little or nothing exists to constrain their assessments of the political realities inherent in such obstacles. Tushnet says: "If representation consists in formal mechanisms, the theory appears to be inadequate to guard against tyranny by a congressional majority; but if representation occurs through informal mechanisms as well, the theory loses its force as a guard against tyranny by the judiciary." Tushnet's critique of representation-reinforcing review is thorough, both analytically and thematically. He confronts the themes that gave rise to the famed Carolene Products footnote as well as the main themes dealt with in Ely's work: exclusions from the vote, antigovernment speech, and categorical discrimination based on race, gender, and other characteristics, concluding the critique with an account of the erosion of moral support for capitalism and democracy that has resulted from the complexities of American politics and federalism. His conclusion, each step of the way, is that representation-reinforcing review yields situations in which judges are empowered to impose their own value schemes and even their own economic theories.

Cited in J. Ely, supra note 16, at 75-76 (citations omitted).

18. M. Tushnet, supra note 3, at 75.
In chapter three, under the heading "The Jurisprudence of Philosophy," Tushnet examines what perhaps is the prevailing approach to judicial review in the popular mind: the notion that judges decide what is constitutional or unconstitutional on the basis of moral philosophy. Tushnet identifies the problem as "metaethical skepticism." Others might think of it as ideological pluralism, the point being "the liberal tradition’s insistence that in ordering our public institutions we may not give one person’s view of the good more weight than another person’s." That argument would seem to be a fair response to those who would press for a "deontological" approach, that is, one based on some a priori code of moral philosophy that governs conduct regardless of context. But there are other approaches in moral philosophy to which the metaethical skepticism of classical liberalism is only a partial barrier, and Tushnet tackles them as well.

Tushnet divides the moral-philosophy approaches into two categories: systematic and communitarian. He defines systematic moral philosophy as "the application of the tools of reason and analysis to a set of relatively abstract principles, which are themselves defended in relatively abstract ways, from which conclusions are drawn about the moral status of particular laws or conduct." This definition seems to fit the concept of a deontological approach to ethical decisionmaking: the notion that there are moral truths, discoverable by human reason, which govern human conduct. At first blush, this systematic moral philosophy approach seems well suited to the liberal tradition, which Tushnet acknowledges is committed "to a rule-oriented moral philosophy, in which relatively general rules are stated and applied to individual cases." Against this systematic approach, Tushnet posits the "competing tradition in moral philosophy" which may be described as the "teleological" or "situational" approach and which he identifies as a "holistic," "contextualized" approach. The latter he sees as a refutation of the former. And the latter, in turn, he refutes:

Whichever way we approach the question of deciding what moral truth is in a real setting, we get lost. If we start with a general truth we cannot identify the particular truth that the general one is supposed to encompass. If we start with a judgment about truth in a particular setting—a situation ethics—we are met imme-
diately with plausible redescriptions of the setting that shake our confidence in our initial judgment.26

The other type of moral philosophy identified by Tushnet is the communitarian approach. While systematic moral philosophy, when used as a justification for an activist judicial review, may falter on the shoals of ideological pluralism and metaethical skepticism, a "communitarian" approach might have a better fate, as it ordinarily is based on some understanding of a philosophy of justice implicit in the community itself. The trouble lies in the difficulty of identifying these communitarian values. It is in the process of identification that communitarian moral theory fails us. Can we identify common values deeply-rooted in our nation's history and traditions? Of course we can, and many of our most cherished Supreme Court precedents appear to be based on this communitarian notion of morality. Yet the approach has its limits. Tushnet suggests that the "appeal to common values . . . would seem unable to justify the invalidation of . . . statutes . . . restricting the availability of abortion."27 Moreover, the communitarian-values approach is quite obviously subject to manipulation, especially in terms of the level of generality chosen by the judge. We can, of course, agree that domestic privacy is one of our cherished, deeply-rooted community values. But can we say the same of private, consensual homosexual sodomy? Yet both considerations may exist in the same case. In the final analysis, because what is or is not a common value must be decided upon by someone, it is not obvious why the courts should rely on their own ideas rather than those of the elected representatives of the people.

Tushnet's critique of a communitarian-moral-theory approach toward justifying activist judicial review is strong and informative, but there is one very recent formulation of a communitarian approach with which he seems to have greater difficulty: Ronald Dworkin's famous "serial-novel" metaphor.28 Dworkin has suggested that judicial review be understood as part of a collaborative enterprise in the writing of a novel. Legislators, administrators, and courts are all collaborators in the writing of the novel of the law. Each is both empowered and delimited: empowered, because each is truly an author; delimited, because each must hold faith with what the prior author or authors have written. This metaphor, Tushnet recognizes, "has a normative component—the obligation to make the novel the best possible one—and a historical component—the prior chapters."29 Tushnet's critique is that the metaphor becomes less workable if we choose to accept the view

26. Id. at 119.
27. Id. at 134.
29. M. TUSHNET, supra note 3, at 141.
of the literary and artistic "de-constructionists," a view which Tushnet calls, with a disturbing amount of generalization and overinclusiveness, "modernism." The fact is that Dworkin's metaphor makes good sense in terms of "traditional" literary theory. Moreover, "de-constructionism" has a long way to go before it can transcend the appellation of a trendy fad.

There is a strength in the community-values approach to activist judicial review, and one senses that Tushnet, though critical of the approach, appreciates its grounding. Indeed, he recognizes it as "a contemporary version of the republican tradition." Why, then does he not embrace it? He explains:

The vision of community that animates the appeal to community values is simultaneously pernicious and inspiring. It is pernicious because it imagines that community now exists, that we simply have to reach for the brotherhood of man in the fatherhood of God. It is inspiring because it tells us that even if community does not now exist, we can begin to create it. We need not await the revolution that will transform society, for by acting on our vision of community we make society different.

One might wish that Tushnet had devoted more space to what he refers to as the pragmatic defense of the theory of judicial review, i.e., the notion that "all things considered, it is good to have judges thinking that they should do the right thing." Unfortunately, Tushnet seems to confine his analysis of the "pragmatic defense" to a critique of the simplistic thesis that somehow, regardless of its merits or defeats, the theory of judicial review "works." His argument is that it doesn't necessarily "work" and he sustains it by examining the actual operation of the theory in the context of free speech. What Tushnet says, in his refutation of the pragmatic defense, is true and important, and hence well worth reading, but it is not a refutation of pragmatism in general.

Tushnet's main point in this rebuttal is that "judicial review entrenches the repressive urges that it then must attempt to control." It is because judicial review is available, strong, and predictably thorough that legislatures feel justified in going over the edge a bit, in erring on the side of majoritarian oppression. The courts, they know, will bail them out if they go too far. It is this very phenomenon that allows us to be somewhat careless in the selection of our legislators—we do not really have to rely on them in the final analysis. In truth, Tushnet is only refuting the defenders of pragmatic judicial review and not pragmatism itself, as indicated by his admoni-

30. Id. at 145.
31. Id.
32. Id. at 123.
33. Id. at 128.
tion that a “pragmatic liberal ought to remember that courts can invalidate affirmative action programs as well as segregation.”

In the final analysis, Tushnet’s attitude toward a moral philosophy of judicial review rings negative not so much because he opposes the idealism and the inspiring elements in the various ethical theory approaches, but because he seems to be looking for something deeper—something that, at base, will obviate the problem of judicial review itself. His cryptic conclusion is that “the ideas behind the republican tradition may make judicial review based on the values of a true community both possible and unnecessary.” If we base a theory of judicial review on community values, it founders as a theory, because we are not a community. If we somehow become a community—a true community—we won’t need a theory justifying activist judicial review. Whereas the Marxist might see radical social upheaval as the route to true “community-ness,” the republicanist might view activist judicial review as one means to the goal of communal cohesiveness. But Tushnet perceives no more value in grasping for theoretical “universal” truths than he does in awaiting a revolutionary transformation of society, concluding that, “[i]nevitably we will have to abandon the false security of theory and open ourselves to the risk of tragic error as we take political action.”

In chapter four, Tushnet continues his analysis of republicanist thought, as he evaluates antiformalism. Antiformalists, in one way or another, reject the search for constraints on judicial activism. Most antiformalists draw on the republicanist tradition in their acceptance of the notion of communitarian values, but they do not recognize a formal coerciveness in their understanding of judicial review. Judicial decisions are thought of as rhetorical activity, components in a social dialogue. Tushnet finds some of their arguments, especially those of the anarchist antiformalists, “disquieting” in that their rhetoric seems “conservative.”

More interesting is his treatment of “intuitionist” antiformalism. This approach reveals what may be the quintessential “solution” to the problem of the judicial review power, one suggested by Aristotle and re-echoed in the writings of Jerome Frank and many others. Perhaps recognizing the folly of trying to find theoretical constraints on the power of judicial review in

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34. Id. at 131.
35. Id. at 146.
36. Id. at 145.
40. J. Frank, supra note 13, at 203, 251.
situations of ideological pluralism, Aristotle suggested, in Book VI of his Nicomachean Ethics,\(^3\) that we ought to concentrate more on the judicial selection process, and look for judges who possess the correct character traits to be able to handle the responsibility of power. Aristotle honed the traits down to one particular virtue, which he called "gnomé,"\(^4\) and which Tushnet recognizes correctly as "practical reason."\(^5\) Aristotle recognized, as Tushnet reiterates, that "the faculty of practical reason, like all human faculties, depends for its sound exercise on appropriate training and discipline."\(^6\) Ancient Aristotelian thought is too easily criticizable as "hardly vibrant"\(^7\) and as grounded to some lesser or greater extent on Aristotle's acceptance of the institution of slavery, and Tushnet does not neglect the opportunity to raise those points.\(^8\) Mercifully, he does not deal with some of the modern but less contemporary echoes of Aristotle's gnomé theory,\(^9\) but his critique of the Aristotelian view seems strained and limited to associational considerations. For example, Tushnet gratuitously surmises that serious discussions of the relation between the Aristotelian tradition and law have occurred only in journals sponsored by Roman Catholic institutions.\(^10\) A reader's reaction is likely to vacillate between the extremes of "not so!" and "so what?" In either case the reader is left with a desire for a more serious refutation.

Of course the Aristotelian focus on the virtue of practical reason (or gnomé) has strong implications for the contemporary republicanist tradition. Practical reason is a human capacity that implies interconnections with other humans. It implies communitarian or public values, and that implication leads directly into the republicanist tradition in which public life is not simply the reflex of private interest, but rather something like a dialogue. In this view, adjudication is a social process by which judges give meaning to public values. Tushnet seems to see an incipient revival of the republicanist tradition,\(^11\) but he is not at all sanguine about it. One problem is that the focus on "public" values is occurring in a "process" milieu and the process rarely gives content to the public values.\(^12\) The process is such

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\(^3\) Aristotle, Nicomachean Ethics (M. Ostwald trans. 1962).
\(^4\) Id. at 165.
\(^5\) M. Tushnet, supra note 3, at 160.
\(^6\) Id. at 161.
\(^7\) Id.
\(^8\) Id. at 162.
\(^9\) For example, directly manifesting the Aristotelian quest for "good" judges, Jerome Frank suggested that all judicial candidates undergo psychoanalysis. J. Frank, supra note 13, at 203, 251.
\(^10\) M. Tushnet, supra note 3, at 161 n.53.
\(^11\) Id. at 162, 166-68.
\(^12\) Id. at 164.
that we use public values rather than seek them, and under current conditions the end result is more likely to be domination than dialogue. Tushnet, in his critique of the idea of a revival of the republicanist tradition, invokes a theme that appears again and again throughout his treatise. The system has to be changed drastically before society will have the kinds of judges who will promote a republicanist view; and with such a drastic social transformation, the need for an activist republicanist judiciary is lessened, perhaps even obviated: "[A] republican society does not need a vigorous judiciary. By the time judges were the kinds of people who would promote a jurisprudence of public values, the citizenry would have a politics of values and would therefore rarely generate the sort of legislation that republican judges would want to correct." 51 In an appendix to chapter four, Tushnet takes on conservative and neotraditionalist theories. He argues that the "original-intent" quest of the conservatives is a chimera, resting on the stability of language which in turn must rest on the stability of institutions and institutional arrangements. But "change" exists and occurs, and "the central weakness of conservative social theory [is] its inability to account for the coexistence of stability and change." 52 Political conservatives will not appreciate Tushnet's reduction of their social thought to "nostalgia," but they've heard those arguments many times. Nor will liberals like Michael Perry appreciate Tushnet's reduction of their "neotraditionalist" theory to roughly the same thing. Although Tushnet spares them the characterization of "nostalgia," he seems to equate their view of a community tradition with a retrospective aspiration for "the New Deal and its judicial embodiment, the Warren Court." 53

Tushnet's fifth chapter, which he calls "Intuitionism and Little Theory," is curiously named, for in it he tackles the question of a grand unified theory of constitutional law—a comprehensive metatheory which unites and allocates the various earlier-discussed theories. Of course he argues that no grand unified metatheory exists, and what we are left with is essentially ideological pluralism, a number of approaches each claiming validity and supremacy. This is a situation which, however realistic, is unacceptable in the judicial system: "The subjects of a liberal state . . . cannot accept pluralism in the courts. It is bad enough that legislatures can oppress them, but at least they may hope that judges will keep legislatures in check. Pluralism in constitutional theory makes it impossible to keep judges in check." 54

We miss the point if we keep looking to the judiciary for salvation and we

51. Id. at 167.
52. Id. at 172 (footnote omitted).
53. Id. at 175.
54. Id. at 185.
spin our wheels when we search for grand unified metatheories to justify or to rationalize progressive judicial activism. "The task of constitutional theory ought no longer be to rationalize the real in one way or another. It should be to contribute to a political movement that may begin to bring about a society in which civic virtue may flourish."55 With those sentences, Tushnet ends part one of his book, the critique part. It is a telling sentence, that final one. It sounds like a call for regeneration of republicanist thought in constitutional law: "[T]he issue is not how we should decide to live our own lives, or what a good metaethical theory is, but is instead a question of institutional design. How can we organize institutions that exercise power over us but do not oppress us?"56 Tushnet's answer is in the final four chapters of the book, under the "metaheading": The Constitution of Society.

Chapter six, under the heading "The Constitution of Government," treats, in part, American legal realism,57 a school of thought from which, as he acknowledges, Tushnet's critical arguments descend. Tushnet sees two strains in realist thought: critical analysis and policy analysis.58 As critical analysts, the realists "attacked the idea that legal doctrine provides an objective basis for decisions in specific instances."59 As critical analysts, the realists were expert debunkers. As policy analysts, however, the realists found themselves on the receiving end of the debunking process. Their insistence that correct legal decisions could be reached through "middle-level abstractions,"56 which would dictate or at least indicate the correct policy to be furthered in the given case, was problematic. At worst, if law is only policy, then the fight over which policy ought to be furthered would seem to be just another version of Hobbes's *bellum omnium contra omnes*. At best, a law-as-policy approach is simplistic. Policies, even admittedly progressive ones, often conflict. And finally, a law-as-policy approach is tolerable only so long as what is being furthered is a policy with which we agree. Policy analysis can become politicized, and this of course "threatens the liberal tradition,"61 both classical and contemporary.

The second part of Tushnet's chapter on "The Constitution of Government" introduces the main theme of the second part of his book. In it,
Tushnet treats "structural due process" or "structural review," a concept now emerging in such constitutional law decisions as *Hampton v. Mow Sun Wong*, in which the Supreme Court invalidated a United States Civil Service Commission regulation barring resident aliens from jobs with the federal government. The decisional theory seemed novel: The governmental interest in regulating the employment rights of aliens lay with Congress or the President, not with the Civil Service Commission.

A second branch of the theory of structural review is, perhaps, more relevant to Tushnet's main theme. It arises in equal protection cases quite regularly: the notion that not only must the proper agency make the decision in question, but also that the agency must use proper processes and articulate proper reasons. Courts often look for evidence in legislative-history materials that legislatures did indeed intend a particular classification and that legislators articulated permissible grounds for the classification in question. These two branches of "structural due process" or "structural review" seem otherwise unremarkable. Tushnet critiques them and concludes that they fail to accord with the demands of the "liberal tradition." He also, however, poses a question in connection with the equal-protection branch of the theory: If we were to write the articulated-reasons requirement large, by applying it in a generalized fashion to legislative acts, could the legislature survive? Tushnet's thought is that such a requirement "would destroy the legislative process as we know it." But he asks the question anyway, and explores it in succeeding chapters. The result, he suggests, would be a "judicialized legislature," which might be just as objectionable as a "legislative judiciary," and the liberal tradition would be suspicious of both. But one of the candid theses of the realists was that judges do make policy, that is, "legislate," and impose their will instead of merely their reason. Tushnet ends the chapter with another cryptic statement, curiously without citation to authority: "Some Realists . . . knew that judicial willfulness alone is not enough to explain the law, because they saw patterns of decision that could not arise unless something underlay them all. For the Realists this unseen

64. Id. at 115-16.
65. M. Tushnet, supra note 3, at 210. Tushnet maintains that:
   Much legislation is adopted by city councils and state legislatures which keep quite rudimentary records of what precedes formal enactment. . . . Moreover, frequently—perhaps usually—there are no reasons for legislation except that the legislators who voted for it thought that they would win votes by doing so or that this statute seemed a fair compromise between contending political forces.

Id.
66. Id. at 213.
force was social power.” It is that “social power,” the “unseen force,” that operates to shape our understanding of the social world, according to Tushnet.

What he means by “social power” becomes clearer in chapter seven, under the heading “The Constitution of the Bureaucratic State.” Chapter seven contains what will seem to some an astonishing thesis: that welfare-state bureaucracies ought to be “repoliticized.” Tushnet recognizes, of course, that the prototypical politicized bureaucracy is “the classic urban machine” with patronage and government largess distributed in exchange for votes. As things stand now, the Court has confronted that kind of politicized bureaucracy by, in effect, recognizing a new kind of property, the right of access to government benefits, most particularly welfare benefits. Goldberg v. Kelly signaled the ascendency of this “new property” by applying the due process clause to public-assistance termination decisions. The cases that followed Goldberg and the government activity that developed because of them is suggesting two types of bureaucracies: what Tushnet refers to as “rationalized bureaucracies,” typified by the Social Security Administration, with a somewhat rigid focus on rules and regulations, and “professional bureaucracies,” typified by child-welfare agencies, with more of an ad hoc focus on professionalized decisionmaking as to what is best for the recipient or beneficiary. The Court seems to be basing its analyses upon a presumption that only these two types of bureaucracies exist. Needed, suggests Tushnet, is a “repoliticized bureaucracy,” though not, of course, the kind of politicized bureaucracy that flourished in the ward-heeler days. Tushnet advocates “re-politicization” in the context of that “unseen force”: social power. Rationalized bureaucracies can have this unseen force injected into them with the insertion of such mechanisms as “community control.” Professional bureaucracies can be similarly repoliticized by “insisting on participation by clients in bureaucrats’ decisions.” But the control and participation, Tushnet urges, must be real, and not merely utilitarian in the sense that people will feel better or less dissatisfied for having participated. The control must be actual control. As an example, Tushnet suggests what he acknowledges to be the “utopian” idea of radically decentralizing and deprofessionalizing responsibility for domestic tranquility by establishing “neighborhood patrols

67. Id. (emphasis added).
68. Id.
69. Id. at 215.
71. M. TUSHNET, supra note 3, at 215-16.
72. Id. at 217.
Tushnet's ideal identifies direct empowerment of the clients of the bureaucratic state with real authority over decisions affecting them as "the best way to begin fulfilling the promise of due process."  

In chapter eight, entitled "The Constitution of Religion," Tushnet sagely acknowledges that the constitutional law of religion is in disarray and notes as a reason that it "is founded on a tradition that the courts no longer fully understand."  

As a consequence, "contemporary constitutional law just does not know how to handle problems of religion."  

Behind these observations and conclusions lies the event to which Tushnet refers repeatedly throughout the book: the historic victory of the liberal tradition over the republicanist tradition. The religion clauses spring from the republicanist tradition of the late eighteenth century. Religion, in that tradition, serves as an "intermediate" institution between the levels of individual and state, in which civic responsibility and a concern for public values can be fostered. But this view of religion is based on institutions which no longer exist. "The democratic revolutions of the eighteenth and nineteenth centuries . . . require that the republican vision be revitalized by large transformations of the social order."  

The chapter on religion may well be the best in the book. Not only does Tushnet acknowledge candidly "the indisputable fact that most framers explicitly understood that the religion clauses were designed to bar the national government from . . . interference with existing establishments of religion in the states" and that it is, in light of that fact "not entirely coherent to say that the amendment is now applicable to the states," (a fact and an implication usually overlooked by religion clauses analysts), but he fits the somewhat disordered and inconsistent modern Supreme Court precedents into a helpful set of principles. Some of the cases serve what Tushnet refers to as the reductionist principle, which reflects the underlying notion that religious belief is indistinguishable from other forms of belief, usually those forms inherent in the free-speech protections. Others serve the marginality principle, which "holds that the law must recognize religion only to the extent that religion has no socially significant consequences."

Both of these principles seem to diminish the significance of religion in

73. Id. at 245.
74. Id. at 246.
75. Id. at 274.
76. Id. at 248.
77. Id. at 275.
78. Id. at 252.
79. Id. at 253 n.19.
80. Id. at 249, 257-64.
81. Id. at 264.
public life, and such a diminution is certainly consistent with the liberal tradition. The trouble is that it is not consistent with what is perhaps the dominant nature of religious activity itself. Religion is necessarily a communal activity, and religious institutions, at least at that communal level, do not fit easily into the liberal tradition.82 The Constitution nonetheless recognizes them and separates them explicitly from the less communal, more individualistic forms of expression and belief that are protected in other clauses. The first amendment thus recognizes a nonindividualistic principle, a principle which fits quite nicely into the republicanist tradition.83 But again, the republicanist tradition is not fully understood by the courts, and changes in institutions over the centuries have made a completely originalist understanding of the tradition inappropriate anyway. On this point, Tushnet offers a suggestion. He cites with apparent approval a proposition made by Arthur Sutherland in the wake of the school prayer decisions: the possibility of mutual forebearance vis-a-vis government and religion.84 Citizens might forebear in the assertion of their religious claims upon society in the face of knowledge that civic actions that generate intense hostility are not likely to be in the overall public interest. On the other hand, they might forebear in challenging some civic actions which are designed to promote intensely held religious feelings. The suggestion is so obviously problematic that one wonders why Tushnet would find it so attractive. One cannot help but surmise that Tushnet bases his approval of this radical mutual-forebearance suggestion on a kind of faith or trust—perhaps on the concept of an “unseen force” mentioned earlier in the book85—the idea that there is some “social power” at work behind the scenes in the political equation, some sort of “Planck’s constant” that “affirms the impulses to connectedness that religious belief mobilizes” and will assure the proper recognition and development of the “nonindividualistic principle” that religion serves in our scheme of things.86 Moreover, few will be willing to cast the first stone at a principle as communally refreshing as that of mutual forebearance.

Tushnet deals with free speech issues in chapter nine, under the heading “The Constitution of the Market.” By analyzing the case law and argumentation involved in three specific free-speech issues—campaign finance, commercial speech, and pornography regulation from the feminist perspective—Tushnet uncovers what he sees as a preference in contemporary constitutional law for “instrumental rationality” at the expense of “nonrational de-

82. Id. at 269-72.
83. Id. at 272-75.
84. Sutherland, Establishment According to Engel, 76 Harv. L. Rev. 25, 52 (1962).
85. M. Tushnet, supra note 3, at 213.
86. Id. at 249.
liberative capacities.” The Supreme Court appears more inclined to protect types of speech which convey their message on straightforward, rational, means-to-end levels of communication, and to give less protection to types of speech which convey their message on what might be called a subliminal, emotional, and psychological level. Tushnet doesn’t define the terms in precisely those words; rather, he relies on illustrations to convey his meaning. For example, a familiar type of commercial advertising is that “designed to convey a noncognitive message about the attributes of the type of person who buys the advertised good not about the attributes of the good.” Tushnet sees pornography as appealing to this nonrational or noncognitive deliberative capacity. Under the republicanist perspective, he finds, such appeals are of less value to society than messages intended to provoke rational deliberation.

But both grand traditions, liberalism and republicanism, support the view that instrumental rationality, and not the noncognitive deliberative capacity, should govern public life. Liberalism bases its support on the notion that human beings possess sufficient rational evaluative capacities to accept or reject political or commercial claims on their merits. Republicanism, on the other hand, may harbor a doubt or two on that score, but accepts the capacity for instrumental rationality as at least an attainable ideal. This support, of course, affects constitutional doctrine, and speech regulation decisions seems to fit into a framework structured by instrumental rationality.

One might suspect that these observations would lead Tushnet toward an acceptance of, for example, pornography regulation, but this is manifestly not his point. Indeed, he contends that feminist arguments in favor of pornography regulation mix appeals to instrumental rationality with appeals to the noncognitive deliberative capacity. While Tushnet apparently argues for an expansion in the constitutional doctrine of free expression to cover appeals to capacities beyond merely instrumental rationality, his main point seems to be that prevailing constitutional doctrine in the area of free expression is severely problematic. His preferred solution is consistent with his prior themes, a form of politicization: “[T]he most effective way out of the difficulties posed in all three areas [campaign finance, commercial speech, and pornography] is by means of openly political evaluations of proposed institutional arrangements, including in that category the status quo and moderate reforms as well as fundamental alternatives.” In the end, he seems to identify these “openly political evaluations” with “nonreformist re-

87. Id. at 290.
88. Id. at 293.
89. Id. at 289-91.
90. Id. at 279.
forms," fairly accomplishable by political activists, but which have the potential to "set in train a larger transformation of the political system." One thinks—with either nostalgia or trepidation, depending on one's world view—of the progeny of the old and near-forgotten free speech movement at Berkeley.

Tushnet concludes his book with a reiteration of his themes and a view toward reform. The liberal tradition, now firmly in control, makes constitutional theory necessary. The tradition demands that those in power be restrained. But the liberal tradition also makes constitutional theory impossible, because restraints on those with legislative power cannot effectively coexist with restraints on those with judicial power. Tushnet's solution is not an alternative synthesis of the theories he critiques. Rather, he appears to invite us to settle on a focus different from the effort to restrain. We are to focus on political activity looking toward the vision of society as a commonwealth. There are several specifics in that vision: substantial equality in wealth, decentralization of authority, and a rethinking of the concept of property as the foundation of a citizen's independence toward a "new property" characterized by guaranteed jobs and tenure in private employment. Society as commonwealth looks to alternative methods of resolving conflicts, perhaps making use of our noncognitive deliberative capacities. It recognizes "community" as a joint public project.

Clearly, Tushnet is attracted by much in the republicanist tradition: "The republican tradition emphasizes experiences of love and connectedness that the liberal tradition places in the background; it places in the background experiences of threat, anger, and autonomy that the liberal tradition emphasizes." But in the end he refuses to embrace it, and with good reason. It does seem that one permanent feature of our constitutional landscape has been the grand debate—originally between the classical liberals and the republicans, today, of course, between the political liberals and conservatives. Our institutions have kept the debate as a debate, with the issues changing from time to time along with the names of the debaters, and each side sometimes scoring well and seeming to gain the upper hand only to lose it to the other. Tushnet is wise enough to know that what is needed is not victory for the republicans, but rather, to somehow turn the debate into a dialogue. "Human experience consists of connectedness and autonomy, love and hate, toleration of others and anger at their differences from an ever-changing 'us.'" Neither the liberal tradition nor the republican one can

91. Id. at 312.
92. Id. at 317-318.
accommodate the aspects of experience that the other takes as central. Critique is all there is." 93 Critique, perhaps, and that unseen force known as "social power." 94