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OUTLAW BLUES

*Suzanna Sherry**

RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW. By *Mark Tushnet*. Cambridge: Harvard University Press. 1988. Pp. x, 328. \$35.

I wish I was on some
Australian mountain range
I got no reason to be there, but I
Imagine it would be some kind of change¹

Mark Tushnet's new book is an example of how too many layers of theoretical detachment can obscure truly innovative scholarship. His fervent insistence that he can do no more than deconstruct existing constitutional jurisprudence detracts from the significant positive contributions of *Red, White, and Blue*. One purpose of this review is thus to rescue Tushnet from himself, and his optimism from his nihilism.

The fundamental thesis of *Red, White, and Blue* is that the liberal tradition, dominant in American political life, makes a theory of judicial review both necessary and impossible. This conclusion might be trite were it not for the undercurrents of neorepublicanism that sweep Tushnet's arguments and transform his avowed pure criticism into something constructive (heaven forbid!). Unfortunately, the republican undercurrents do remain largely below the surface, overshadowed by thoroughly familiar criticism of contemporary theories of constitutional interpretation.

The most recent battle over constitutional interpretation has been raging for well over a decade,² and it has been clear for quite some time that the best minds of a generation have been unable to describe a unified theory of constitutional interpretation that constrains both judges and legislators. Too much is indeterminate: if grand theory is all we have to protect us, we seem doomed to suffer under either legislative or judicial tyranny.

What Tushnet adds to this familiar litany is the recognition that

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1. Bob Dylan, *Outlaw Blues*, © 1965 Columbia Records.

2. Indeed, some of Tushnet's own earlier contributions to that battle are reworked in *Red, White, and Blue*. For example, the first chapter is a newer version of *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); the second chapter is a modified version of *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

the liberal tradition's dilemma is caused in major part by the decline of its once coequal partner, the American tradition of civic republicanism. Thus Tushnet — despite his disclaimer that the republican tradition cannot be revived — offers hope for those of us engaged in constitutional scholarship. Once we have grasped the fundamental notion that the liberal tradition cannot flourish in the absence of republicanism, we may begin constructing a modern version of the republican tradition that fills the gaps in our liberal constitution.

I

Tushnet devotes almost two thirds of the book to offering critiques of the current grand theories of judicial review. This should come as no surprise: Tushnet once described himself as a member of “the party in opposition to what exists,”³ and he closes *Red, White, and Blue* by proclaiming that “[c]ritique is all there is” (p. 318).

Each of the five chapters in Part One (“The Critique of Grand Theory”) is devoted to a careful examination of one or more of the currently popular grand theories of constitutional law. In each case, Tushnet deconstructs the grand theory in the best critical tradition. He shows how its precepts would allow judges to reach virtually any result, and how any version of the theory that truly constrained judicial discretion would leave legislators completely unconstrained. Its indeterminacy thus exposed, the theory is discarded. His is an equal opportunity dismissal: he rejects textualism, originalism, and neutral principles in chapter 1; representation-reinforcing review in chapter 2; abstract moral philosophy and community values in chapter 3; and practical reason and neotraditionalism in chapter 4.

Tushnet is very good at this form of deconstruction. His attack on the refined version of originalism — which incorporates a hermeneutical approach to history — was a masterpiece when it was originally written in 1983, and it remains worth repeating. He crafts a superb hermeneutical argument that *Brown v. Board of Education* reflects the original intent of the framers of the fourteenth amendment if one argues that education today plays the role that freedom of contract did in the mid-nineteenth century (pp. 41-42). Having persuaded the reader of the plausibility of the analogy, however, he then shows that the equivalence between education and contract is “only one of a great many possible reconstructions of that segment of the past” (p. 43). He thus successfully shows that this version of originalism cannot constrain judges.

The more refined version of neutral principles — which he calls “craft interpretation” — fares no better. “Craft interpretation,” on his definition, depends on the existence of shared professional stan-

3. Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363, 1398 (1984).

dards that guide judges in their determinations. Judging is thus a learned craft that incorporates widely shared values, neutral principles, and legitimate techniques of argument, all of which serve as a constraint on discretion. Tushnet argues that such a description does not tell us anything except that “skillful judges can do things, and can survive professional criticism, that less skillful ones cannot” (p. 53), and points out that there is “a cottage industry of constitutional law scholars who write revised opinions for controversial decisions” (pp. 53-54).

Further, he rejects outright the argument that neutral principles — in any version — can at least rule out some answers, by suggesting worlds in which apparently bizarre answers are acceptable.⁴ In short, here as elsewhere in the book, Tushnet argues that constitutional theory necessarily depends on the existence of a community of interpreters — a community that, in the absence of a vibrant republican tradition, cannot exist. I will return later to this question, for it lies at the heart of Tushnet’s thesis that a theory of judicial review is necessary only where it is impossible and possible only where it is unnecessary.

The other contemporary grand theories fail under the same type of analysis. Ely’s representation-reinforcing review, for example, founders on the problem of whether the adequacy of representation is measured in terms of formal (e.g., voting) or informal (access to power) mechanisms: “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” (p. 75). In particular, it is difficult to determine, without giving judges unlimited discretion, whether any given outcome “results from obstacles to representation rather than from lack of sufficiently intense concern on the part of those affected” (p. 80).

Tushnet seems particularly outraged by the suggestion that judges should decide cases on the basis of abstract moral norms, or natural law. Assuming that there are such norms, he argues that (1) they are socially and historically contingent, (2) important moral decisions

4. His particular example is the multiple choice question “Which pair of numbers comes next in the series 1, 3, 5, 7 . . . ?” P. 55. He notes that Fred Schauer suggested some “clearly incorrect” answers, such as “9, 11, 13” or “Cleveland, Newark.” Tushnet then defends these two answers:

[T]he test taker could reasonably think that the inclusion of [“Cleveland, Newark”] demonstrates that the test giver is a numerologist and would then convert the suggested answers to the corresponding number and develop an appropriate mathematical rule. . . . Or [the test taker could conclude that] . . . the test giver likes to play with words, notices that *pair* sounds like *pear*, and thinks that, as the numbers appear on a page, “9, 11, 13” looks like a pear.

P. 55 n.106. For a critique of Tushnet’s arguments, see *infra* text accompanying notes 22-27.

ought to be made individually and contextually while judicial review must proceed by following rules, (3) judges are no better than legislators at divining moral truth, and (4) imposing only some moral norms on a thoroughly immoral society might do more harm than good.⁵ His overall critique here seems too simplistic, largely because he neglects the effects of federalism. He may be right that state judges and state legislators are roughly equal in both the contingency of their beliefs and the clarity of their moral vision, especially since many state judges are elected. The selection process and life tenure for federal judges, however, may yield federal judges who are better able than either their state judicial counterparts or their federal legislative compatriots to perceive and implement broad moral norms. Moreover, where federal courts invalidate state statutes or state and federal non-legislative acts, there is an even stronger argument to be made for the superiority of judges in applying broader moral norms more steadfastly than do those whose actions they review.⁶

Despite these lapses, Tushnet is generally convincing in his attacks on each of the contemporary grand theories of judicial review. He persuasively argues that there can be no unified theory of interpretation that will absolutely constrain judges and still safeguard constitutional limits on legislative power. Whether such absolute guarantees are necessary in order to defend judicial review as it is currently practiced is another question, to which I shall return later.

Ultimately, however, Tushnet's deconstructive critique is repetitive and largely uninformative. It is repetitive in part because of its familiarity. Since at least 1980, when John Ely's *Democracy and Distrust* was published, we have been inundated with books and articles both proclaiming and discrediting every possible grand theory. Neutral principles and its critics go back to the 1950s, and criticism of natural law goes back at least as far as the beginning of this century.

Indeed, the debate in its various forms can be traced to the beginning of the republic itself. The purpose of Justice Story's rules for constitutional interpretation, writes historian G. Edward White, was neither to promote uniformity in constitutional adjudication nor to avoid "embarrassments" in construction, but to maintain an image of judges as being bound by professional conventions while at the same time affording judicial interpreters of the Constitution as much freedom as possible to draw on a range of extraconstitutional sources in the interpretation of

5. Pp. 108-23. Tushnet turns at this point to a more contextual "community values" theory, which I will discuss later. The subsequent two chapters, which focus on practical reason and "little theories," respectively, will also be discussed later, as they too involve a critique of "communities."

6. The classic elaboration of the judicial capacity for taking the long view, of course, is A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). For an interesting recent defense of federal judicial superiority in the context of the debate over the "parity" of the state and federal courts, see Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 *UCLA L. REV.* 329 (1988).

the constitutional text.⁷

Although White has the advantage of hindsight, the indeterminacy of the Supreme Court's rules for constitutional adjudication were equally transparent to Story's contemporaries. Thomas Jefferson wrote of John Marshall in 1810, "In [his] hands . . . the law is nothing more than an ambiguous text, to be explained by his sophistry into any meaning which may subserve his personal malice."⁸ It is not news that those who practice and defend judicial review maintain that it can be constrained in a meaningful way, nor that the constraints are perceived as (and often are) illusory.

Tushnet's basic critique of contemporary theory is also uninformative because even if it were wholly novel, it would not teach us much. As Paul Brest has pointed out, most critiques of constitutional theory are "rather like an aesthetic judgment issued from the Warsaw Palace of Culture": "Why is the best view of Warsaw from the Palace of Culture? . . . Because that's the only place in Warsaw where you can't see the Palace of Culture."⁹ No theory is immune from critique, including Tushnet's own. Tushnet suggests, for example, that all grand theories betray their political agendas by code words:

If one sees the key words "process values," for example, one knows that we are about to learn that the Constitution requires the implementation of the platform of the 1964 Democratic Party, and if one sees "equal concern and respect," one knows that we are about to learn that the Constitution requires the implementation of the 1972 Democratic platform.¹⁰

He might have added that if one sees the key words "critical analysis" one is likely to get some version of the SDS Port Huron Statement. So what?¹¹

7. 3-4 G. WHITE, *THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35*, at 117 (1988).

8. Jefferson to John Tyler, May 26, 1810, in 9 *THE WRITINGS OF THOMAS JEFFERSON* 276 n.1 (P. Ford ed. 1898). See also 2 N. SCHACHNER, *THOMAS JEFFERSON: A BIOGRAPHY* 898 (1951).

9. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 *YALE L.J.* 1063, 1096 & n.189 (1981).

10. P. 3. See also p. 144 n.125: "Another objection is that [Michael] Perry's religious vision is so conventional — everything converges on the left-liberal wing of the Democratic Party. It would be engaging to find out that God wants us to be vegetarians, or to disarm unilaterally, or to fire a preemptive nuclear first strike." Tushnet, too, is conventional. Except for an apparent flirtation with theocracy (see *infra* notes 13-16 and accompanying text), he advocates only positions taken by the radical left.

11. It is only fair to note that Tushnet does not claim to be producing recommendations either for courts or for those whose work is designed to influence the courts. Thus the fact that he is subject to his own criticisms is somewhat irrelevant; only those who claim to be making bounded, principled arguments — and not those arguing for radical societal changes — are truly harmed by deconstruction of their arguments. One is still left, however, with the rather puzzling question of who Tushnet is writing for: Those likely to force the sorts of radical changes he urges are not likely to be reading *Red, White, and Blue*.

After this negative excursion into theory, the last three chapters of the book extend the deconstructive project back to constitutional doctrine itself. Tushnet describes his own purpose as an attempt to “develop the [Legal Realist view] by examining the processes by which power operates to shape our understanding of the social world” (p. 213). Here the critical analysis is more directed and less familiar. For that reason, it makes very interesting reading, but it is nonetheless puzzling in its apparent purposelessness.

Tushnet explores three separate substantive areas. Chapter 7 (“The Constitution of the Bureaucratic State”) deals with procedural due process; chapter 8 (“The Constitution of Religion”) discusses religious liberty; and chapter 9 (“The Constitution of the Market”) covers commercial speech, campaign finance limitations, and pornography. In each case, he suggests that a particular — and incomplete — underlying vision of the world animates Supreme Court doctrine. As he puts it, “[t]he Court has . . . developed a constitutional law for an imaginary society and has sought to persuade us that the imaginary world is our own” (p. 240).

This “imaginary” world is the liberal world in which rationality is king. Tushnet is more or less successful in suggesting that a commitment to the primacy of the rational faculty underlies Supreme Court doctrine in each of the three areas. He is rather less successful in showing how such a world is imaginary, or in sketching a more “realistic” picture of the world. Moreover, he exhibits most clearly in these chapters his paradoxical combination of intellectual nihilism and social utopianism.

He shows quite convincingly that the Supreme Court’s procedural due process cases reward and protect “rationalized,” “professionalized” bureaucracies: those bureaucracies that have developed purportedly neutral, nonpolitical rules and norms. The most striking example he cites — roadblocks and other forms of police stops — is not within the traditional notion of procedural due process, but the analytic framework is analogous. He notes that the Court’s rulings on such stops have exhibited a marked preference for, and deference to, department-generated rules that deny discretion to officers on the streets. This shows, Tushnet suggests, that “the Court sees hierarchical control within the police agency as an alternative to hierarchical control by an external agency, the courts,” and “reinforces the argument that the Court envisions self-contained bureaucracies governed by internal rules and internalized professionalized norms” (p. 223). The same can be said, he argues, of such diverse bureaucracies as welfare agencies, universities, and prisons.

The liberal tradition’s commitment to the rational capacity is also apparent in the Court’s protection of commercial speech and campaign financing. According to Tushnet, liberals believe “that the citi-

zenry has sufficient rational evaluative capacities to accept or reject political and commercial claims on whatever the merits might be" (p. 279). Thus the Court strikes down — and the liberal tradition has difficulty defending — many attempts to interfere with the evaluative process by regulation. These attempts fail because they are motivated or justified by the discredited republican willingness to value noncognitive or nonrational thought as well as rational thought. The liberal privileging of instrumental rationality deprives would-be regulators of the underpinning for their arguments.

Tushnet's deconstruction of the debate over pornography is especially interesting, largely because both sides are vulnerable to his republican-based critique. Tushnet suggests that the radical feminist challenge to pornography rests primarily on noncognitive arguments.¹² By constantly manipulating the harm (varying from rape to social subordination) and the cause (varying from violent pornography to nonsexual depictions of women's subordination to nonviolent explicit sex), and by relying more on anecdotal evidence than on hard data, the radical feminist attack rhetorically evokes sympathy but "[does] not meet the usual standards applied when one appeals to cognitive deliberation" (p. 298). Moreover, Tushnet correctly identifies the radical feminists' fundamental complaint about pornography: pornography is itself "an argument for male domination of women that works by means of its appeal to men's noncognitive deliberative capacities" (p. 304; footnote omitted).

Ultimately, however, the radical feminist appeal to noncognitive capacities creates a paradox, as Tushnet recognizes. If noncognitive capacities are an important method of deliberation and decisionmaking — as the radical feminists suggest — then pornography should remain unregulated, because it is "itself an argument, appealing to noncognitive capacities, for a particular arrangement of power in soci-

12. Pp. 293-301. In the process, Tushnet devastates the radical feminists' so-called "empirical" evidence:

Social scientists would draw no conclusions about the connection between pornography and rape from evidence that a large proportion of rapists possessed pornography; they would need to know what proportion of nonrapists possessed it too, for if nonrapists possessed it about as often as rapists did, social scientists would not infer a causal connection. . . . Even evidence that all rapists possessed pornography might not be probative of a connection between pornography and rape, if, as some proponents of regulation argue, pornography is so pervasive that virtually all men possess it.

P. 298 & n.68. One could make an even sharper statement: Even if all rapists and no nonrapists possessed pornography, that would not show that pornography is a cause of rape. It is equally likely that some other, not-yet-known fact causes *both* a tendency toward rape and a taste for pornography. I am indebted to Steven Penrod for this insight.

Tushnet goes on to refute the radical feminist reliance on psychological studies:

Finally, a series of well-known psychological studies establishes some connection between some sorts of violent sexual material and attitudes supporting women's subordination. . . . The material used in those studies was not obviously pornographic, if pornography requires sexually explicit depictions, and the material is causally connected not to violence but to attitudes linked to women's subordination.

P. 298.

ety" (p. 305). Indeed, Tushnet's description of the paradox captures the central argument in the Seventh Circuit's invalidation of the Indianapolis anti-pornography ordinance. Judge Easterbrook, writing for the court, "accept[ed] the [empirical] premises of [the] legislation" that pornography causes attitude changes, but noted that "this simply demonstrates the power of pornography as speech."¹³ Although Tushnet appears to believe that at least some kinds of pornography ought to be regulated,¹⁴ he never explains how the paradox ought to be resolved.

Chapter Eight, on religious liberty, is perhaps the most interesting and innovative part of the book. In some ways, it is also the most troubling. Tushnet argues that the liberal tradition, lacking the "nonindividualist values" of a republican heritage, is incapable of dealing satisfactorily with problems involving religion. In the republican tradition, religious activities are both an important communal experience and an influence on individual values. The liberal tradition, on the other hand, because it is individualist and because it assumes that individual preferences are exogenously formed, is fundamentally incompatible with religion and thus "relegat[es] it to the sphere of private life" (p. 271).

Tushnet's theoretical and doctrinal talents shine in this chapter. He canvasses both Free Exercise and Establishment Clause cases to show how current doctrine marginalizes religion and makes it irrelevant in public life; current doctrine "rest[s] on a set of ideas that do not take religion seriously as a form of human endeavor."¹⁵ He suggests that modern puzzlement and "disarray" over the religion clauses arises because the clauses are founded on premises of the absent republican tradition,¹⁶ and cannot be sufficiently explained or accommodated in a liberal world. "[C]onstitutionalists in the liberal tradition," he argues, "are committed to developing a law of religion even though

13. *American Booksellers Assn. v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd.*, 475 U.S. 1001 (1986).

14. See pp. 306-09.

15. P. 257. See generally pp. 249-69.

16. The implication that Madison, the primary congressional drafter and advocate of the Bill of Rights, was a republican, is inaccurate but probably unintended. It was originally the Antifederalist opponents of the Constitution who urged the adoption of the Bill of Rights (including the religion clauses), and many historians have associated the Antifederalists with "Country" or republican tenets. See, e.g., L. BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* 92-272 (1978); Hutson, *Country, Court, and Constitution: Antifederalism and the Constitution*, 38 WM. & MARY Q. 337 (1981); Wren, *The Ideology of Court and Country in the Virginia Ratifying Convention of 1788*, 93 VA. MAG. HIST. & BIOG. 389 (1985). Moreover, the religion clauses derive from earlier documents — most notably the Virginia Declaration of Rights of 1776 — and republican sentiment was widespread during the 1770s. See, e.g., Sherry, *The Intellectual Origins of the Constitution: A Lawyers' Guide to Contemporary Historical Scholarship*, 5 CONST. COMMENTARY 323 (1988). Finally, some historians do identify Madison with the republican tradition. See G. WILLS, *EXPLAINING AMERICA: THE FEDERALIST* (1981); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

they do not understand why they have to do so" (p. 248). Both his doctrinal analysis and his historical and philosophical explanations seem indisputably accurate.

It is troubling, however, that religion seems to be one of the few issues on which Tushnet criticizes the liberal tradition only for its failure to live up to its own commitment. He argues that liberalism's historical commitment to religion as a worthwhile civic endeavor is unintelligible in a post-republican world, but he never suggests that the commitment is misplaced. In other words, he, like a growing number of left-leaning scholars, seems to believe that religion can and should play a significant role in public life.¹⁷ He bemoans the American "civil religion" because it prevents us from "deriv[ing] policy positions from religion" (p. 269); he derogates the Court's implication that "religion is not in itself terribly important" (p. 268); and he criticizes the effect of the post-republican liberal tradition for denying religion any "distinctive role to play in the shaping of public policy" (p. 272). In a decade in which the religious right has made unprecedented political gains — often at the expense of individual liberty and equality¹⁸ — it seems odd for a self-proclaimed leftist to advocate giving religion a more prominent role in public policymaking.

Tushnet's arguments, moreover, tend to undermine his general criticism of the liberal privileging of rationality. If he wants to convince readers that rationality should be replaced or supplemented by noncognitive capacities, the noncognitive deliberative process should be described in a sympathetic manner. Defining noncognitive appeals by reference to rhetoric or art, for example, is a persuasive illustration that an exclusive focus on rationality is misplaced. Tushnet's own description of the intuitive faculty of practical reason is promising: "[It] is not exercised by deductive reasoning from premises or by clearly articulated analogical reasoning from similar circumstances; it is exercised more directly, by responding to situations without the intervention of those modes of reason we now call logical or analytical."¹⁹ But

17. See, e.g., Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977; Peller, *Creation, Evolution, and the New South*, TIKKUN, Nov.-Dec. 1987, at 72.

18. See, e.g., D.C. Appropriations Act of 1989, Pub. L. No. 100-462, sec. 145, 1989 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2269-14 ("Nation's Capital Religious Liberty and Academic Freedom Act") (federal statute requiring D.C. City Council to exempt religious educational organizations from anti-discrimination provisions). This statute was successfully challenged in *Clark v. United States*, 1988 U.S. Dist. LEXIS 15, G11, 5 (D.D.C.) (holding that conditioning the city's funding on the Council's amending the D.C. Human Rights Act violates council members' freedom of speech). See also *Bowen v. Kendrick*, 108 S. Ct. 2562 (1988) (upholding federal statute funding "family planning" counseling by religious organizations). See generally WHOSE VALUES? THE BATTLE FOR MORALITY IN PLURALISTIC AMERICA (L. Horn ed. 1985) (fundamentalist Christian blueprint for reforming American society).

19. P. 161. For similarly sympathetic renderings of the importance of noncognitive faculties, see Farber, *From Plastic Trees to Arrow's Theorem*, 1986 U. ILL. L. REV. 337; Gewirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043 (1988); Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987).

such things as divine revelation and biblical literalism are irrational superstitious nonsense; if that is what Tushnet means by noncognitive capacities, then I — and probably many other readers — would encourage the liberal tradition of excluding nonrational modes of discourse.

This particular problem aside, Tushnet's doctrinal analysis and critique is intriguing but unsatisfying. His depiction of the Supreme Court's liberal vision in which rationality is the primary human mode of deliberation is plausible, but it does not take us very far. He does not describe how noncognitive modes of deliberation might work or what results they might reach, or even give evidence that such noncognitive processes play an important role in individuals' public or political decisions. These chapters thus have a strong nihilist streak, in that they deconstruct liberal rationality without even sketching a replacement (other than religious conviction, apparently). It is particularly unseemly for a legal academic to deprecate rational thinking, for rationality is at the heart of legal analysis and discourse — including the analysis in *Red, White, and Blue*.

Complementing the nihilistic cast of Tushnet's theory, his practical discussions are concrete but unrealistic. There are two difficulties with his practical framework, both of which suggest an ivory-tower isolation.

First, the problems he chooses to focus on are not the pressing societal issues of discrimination, poverty, education, or abortion. Instead, he dallies with procedural due process, which by his own admission cannot address the real problems of society, but only redistributes wealth "from the abysmally poor to the merely poor" (p. 246). He criticizes the liberal handling of religion, despite the fact that current doctrine regularly if uneasily protects dissident religions while denying them the power to impose their views on others.²⁰ His discussion of free speech is confined to the harmless doctrine of commercial speech, the hopeless problem of campaign reform, and the radical feminist obsession with pornography. Insofar as Tushnet reflects CLS views in his failure to admit the real gains that liberalism (and its theory of rights) have afforded minorities and women and his refusal to address the issues most important to them, it is not surprising that CLS maintains only a stormy and uneasy alliance with minority and women's groups.²¹

20. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 479 (1987); but see *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Lynch v. Donnelly*, 465 U.S. 668 (1984). Both of the latter cases primarily involve the role of a Jewish minority in a predominantly Christian country, while the other cases involve less visible and less threatening religions such as the Amish and fundamentalist Christians.

21. See, e.g., *FEMINISM AS CRITIQUE: ON THE POLITICS OF GENDER* (S. Benhabib & D. Cornell eds. 1987); *Minority Critiques of the Critical Legal Studies Movement* (Symposium), 22 HARV. C.R.-C.L. REV. 297 (1987); Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Menkel-

Finally, his proposed remedies — his attempts to re-inject the “real” world — are stunningly (and concededly) utopian. He wants to give students or their parents an absolute veto power over suspensions and to establish neighborhood patrols to replace police (pp. 244-45). He would explore “a comprehensive income maintenance scheme that would redistribute wealth in a way that would permanently eradicate large disparities between the rich and the poor” (p. 246). He suggests that a policy of “mutual forbearance” would diminish religious strife: schools might have “deliberated seriously about the religious contention [their] use of the prayer caused and might have forgone — as a matter of discretion not of constitutional command [sic] — the use of the prayer,” while “those offended by the prayer might have exercised a wise discretion to forgo the constitutional challenge they were in a strict sense entitled to bring” (p. 276).

These suggestions echo — whether intentionally or not — his basic critical point from Part One: if we need rules to constrain discretion, we will not be able to find any that do so successfully, and if we are able to find such rules, then we do not need them. That leaves us with only the critical project.

II

It is, then, Tushnet’s commitment to pure critique that makes the book less than satisfying. And it is his occasional betrayal of that commitment that offers the best opportunity for the reader to learn from the book.

Tushnet shows that each grand theory requires an underlying theory of community in order to constrain successfully the discretion of both judges and legislators; each constitutional doctrine also needs a theory of community if it is to be plausible and coherent.²² But a theory of community, inherent in the framers’ original amalgamation of the liberal and republican traditions, has been irretrievably lost with the decline of republicanism: “[O]ur communities have shattered around us” (p. 143). Moreover, if we did have an active republican tradition and viable community norms, then we would not need judicial review: The political branches would act in the interest of the community (pp. 59, 167). Having provided us with these insights, Tushnet himself explicitly refuses to carry forward the project: he concludes only that constitutional theory is impossible where it is necessary and unnecessary where it is possible.

Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School,”* 38 J. LEGAL EDUC. 61 (1988); West, *Deconstructing the CLS-FEM Split*, 2 WIS. WOMEN’S L.J. 85 (1986).

22. For example, originalism depends on a continuity between past and present communities, and neutral principles on a community of interpreters. Pp. 22, 46, 57. Only a theory of community-formed values, and of communities intermediary between the individual and the state, makes logical and historical sense of the religion clauses. Pp. 269-76.

What makes *Red, White, and Blue* an ultimately hopeful and helpful book is Tushnet's patent longing for the republican revival he denies can occur or endure. His denial of the transformative power of the republican vision is forthright. He views humans as inevitably and hopelessly conflicted by the fundamental contradiction between connection and autonomy. There is thus no possibility of either a liberal or a republican solution to the fundamental dilemmas of our society, but only a critique of both. His adherence to the purely critical stance is explicit, and his refusal to admit the possibility of successful constitutional reform frequent. He begins and ends by stating that no contemporary reconciliation between the liberal and republican traditions is possible.²³ Throughout these essays, he points to the rejection of Aristotelianism, the rise of egalitarian norms, and the concentration of wealth (pp. 161-62 & n.54; 59, 166, 315) to conclude that "the liberal tradition has so eroded republicanism that it is difficult to believe that the products of today's legislatures could actually revitalize republicanism" (p. 279).

But despite this flood of denials, Tushnet again and again shows us ways in which republican notions of community pervade our modern liberal world. His chapter on religion demonstrates that "the Constitution is not an entirely individualist document," but instead contains "communitarian commitments [in] the form of an implicit appeal to a tradition of civic republicanism" (p. 274). He sketches the direction that future scholarship might take to make explicit a republican constitutionalism: it might "offer a definition of citizenship consistent with the idea of a commonwealth," it might "discuss the social preconditions for ethical knowledge," or it might redefine principles of federalism based on existing "intentional communities" rather than geographic accidents (pp. 314-16).

Tushnet appears to be deliberately directing other scholars to avenues that *Red, White, and Blue* implicitly deems futile, perhaps in the hope that he is wrong. He is thus engaging in a tradition of dialogue that vies with radical criticism for pride of place in his own description of appropriate modes of constitutional scholarship.²⁴ The purpose of the dialogue is also clear: "The task of constitutional theory ought no

23. See pp. 23 & 318:

It may be that we live in a world of tension, in which no unified social theory but only a dialogue between the traditions is possible. Constitutional theory is then either impossible or unnecessary.

.....
Neither the liberal tradition nor the republican one can accommodate the aspects of experience that the other takes as central.

24. See, e.g., p. 23 (suggesting that only dialogue between traditions is possible); pp. 58-59 (discussing prerequisites for dialogue); pp. 149-53 (praising Robert Burt's notion of dialogue as a method of creating community); pp. 287-88 (suggesting that republican tradition encourages participation in public debate or dialogue); p. 302 (implying that "utopian" literature, while unrealistic, can still initiate a dialogue); p. 316 (suggesting that "face-to-face" dialogue might make dispute resolution easier).

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" (p. 187).

Additionally, Tushnet encourages a contemporary version of republicanism by demanding that we knowingly and deliberately constitute our communities. He states that a vision of community is "pernicious because it imagines that community now exists," but it is also "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" (p. 145). He suggests that the hermeneutic tradition is valuable because it forces us to think about which past is "our" past, and thus "to face questions about what kind of community we have and want" (p. 44). Thus despite his denial that a republican community is possible in a liberal world, he urges us to disregard his pessimism and to forge ahead to create communities.

Ironically, Tushnet's most adamant rejections of the transformative power of a theory of community offer the strongest support for a republican revival in constitutional law. His refutation of community values theories, practical reason, and "little theory" (essentially an amalgamation of the best parts of each of the grand theories) contains the heart of his argument, although specific examples are also scattered throughout the book.

The primary problem with all three of these theories, according to Tushnet, is that they assume an interpretive community, or "community of understanding," that does not exist. Whether judges are told to use practical reason, or to discover the underlying values of the community, or to choose among the various grand theories depending on the particular constitutional clause at issue ("little theory"), they will essentially be limited by nothing other than their own values. Tushnet denies that judges' values can ever truly reflect the community's values:

Attaching the general possessive *our* to the word *community* makes a false claim of fact. At most judges can interpret "their" community's values. That immediately directs our attention to who they are. Indeed, who they are and how they are selected are aspects of our legal culture that themselves deserve interpretation. [p. 144; footnote omitted]

Thus there is no community of interpretation that includes both judges and citizens.

Indeed, the larger implication of Tushnet's argument here seems to be that "we" cannot have any cohesive community large enough to encompass the entire citizenry, because there is insufficient homogeneity or consensus. Here and there he hints that some revitalized form of federalism, relying on communities smaller than the entire nation, might solve this dilemma (pp. 106-07, 272-73, 315). In general, however, he argues that we have no community that is "ours," and that if

we did we would need neither judicial review nor constitutional theory.

Tushnet's pessimistic assessment overlooks two ways in which a theory of community might be both possible and useful. First, he is too quick to reject the communities of interpretation that do exist. For example, he suggests that it is possible to generate and justify a virtually unlimited number of correct answers to questions such as "Which pair of numbers comes next in the series 1, 3, 5, 7 . . . ?" on an IQ test and "What is responsible for most automobile accidents?" on a driver's license test (pp. 55-56). He admits, however, that anyone taking the IQ test is likely to prefer "9, 11" to "Cleveland, Newark," and anyone taking the drivers' test is likely to choose "the driver" over "the car." His explanation is that "we know something about the rule to follow [in selecting a multiple choice answer] only because we are familiar with the social practices of intelligence testing and drivers' education" (p. 56). But this admission constitutes a recognition that a community of interpretation does exist, and it is a community over which there is very little controversy. Insignificant as that community of understanding may be, it provides a beginning.

Tushnet's use of bizarre multiple choices answers reminds me of the (probably apocryphal) story of the physics student who was asked on an examination how to use a barometer to determine the height of a building. He refused to give the "correct" answer, and instead suggested numerous equally useful — and equally learned — alternatives: measure the shadows cast by the barometer and the building and calculate the unknown height of the building from the known height of the barometer; drop the barometer off the roof, time its fall, and calculate the height according to the formula for acceleration; or, most ingeniously, bribe the building superintendent to provide the height of the building by offering her the barometer.²⁵

What makes the story clever is that every reader is a member of the community that is "familiar with the social practices" of both barometers and physics examinations. Occasional instances of nonmembership — whether deliberate (as is likely in the student's case) or not — do not undermine the existence of widespread communities. While it may be unfair to penalize the defiant student, even Tushnet would have difficulty denying credit to any student who explained how to calculate altitude from air pressure differences. And if the defiant student were in a position to determine which answer was "correct" for the whole class, almost everyone would agree that it would be somehow wrong for him to select one of his own answers over the air pressure answer.

The fact that there are many answers, and that in some other social

25. The way I have heard the story told (by critics of modern academia), the student failed the examination.

milieu (a Mensa meeting, for example) a more unusual answer would be thought most "correct," does not undermine our essential understanding that only one answer can be imposed on the community of physics students. The same may be said of judicial imposition of constitutional norms.

It is not difficult, for example, to elicit widespread — but not unanimous — agreement that, for example, *Brown v. Board of Education*²⁶ should not be reversed, a federal statute naming Christianity the official American religion would be unconstitutional, and the Supreme Court cannot take jurisdiction to decide a wager between two law professors about whether some proposed statute is constitutional.²⁷ Despite the occasional dissenter, a national community of understanding exists on these questions, and any Supreme Court decision to the contrary would be subject to the same massive criticism as the defiant student's selection of the acceleration answer as the only correct answer for the class.²⁸ Tushnet might respond that the Court's adherence to a widespread understanding illustrates his points that judicial review doesn't matter, and that a theory of constraints is unnecessary wherever it is possible. That argument, however, ignores the difference between unanimity and consensus: There are still racist school boards in a nation that generally finds racism intolerable, fundamentalist legislators in a nation that rejects a national religion, and so on. Dissenters from even a widespread community of understanding will wreak havoc if they are not restrained; that is one of the purposes of judicial review. Indeed, the public outcry at positions taken by Robert Bork suggests a fairly broad — but far from unanimous — consensus on some issues that were previously thought controversial.

Where does this get us? It does not demonstrate that there is only a single answer to society's most difficult constitutional dilemmas — it certainly doesn't tell us whether *Roe v. Wade* is correct, for example — nor even provide us with any grand theory to guide future constitutional interpretation. It does suggest that there are, as Fred Schauer has described, "easy cases," and wrong answers.²⁹ From there we can move forward.

This leads to my second disagreement with Tushnet's total rejection of community. Once we have demonstrated that there *are* com-

26. 347 U.S. 483 (1954).

27. *But see* *Nixon v. Fitzgerald*, 457 U.S. 731, 743-44 (1982); *cf.* H. FINK & M. TUSHNET, *FEDERAL JURISDICTION* 322 (2d ed. 1987) (suggesting that *Nixon v. Fitzgerald* did essentially decide a wager).

28. There is, of course, still the question of the doctrinal consequences of widespread consensus. The Supreme Court might ignore the consensus (as it did between 1930 and 1937). That would not undermine the basic thrust of my argument: that there are communities of understanding and that they can, if adhered to, constrain judicial action. Certainly the Supreme Court *can* do whatever it likes, but truly unconstrained acts will simply result in a constitutional crisis (as in 1937).

29. Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

munities of understanding, we can begin to construct a theory of the Constitution that recognizes and fosters such communities. Tushnet dismisses, I think properly, the likelihood that decisions by today's judges will create the preconditions for a general republican revival (pp. 165-67). But a more limited goal may be achievable: to create a broader and deeper community of understanding.³⁰

We might begin by demanding that constitutional decisions always foster rather than undermine a nationwide community of understanding. Where two results would have equal effect on the inclusiveness or stability of the national community, judges should attempt to foster smaller communities as well. We are, as Tushnet reminds us, constituted by our communities. Membership in intermediary communities is both inevitable and important to self-understanding, while membership in a broader community of understanding is a substitute for force in preventing internecine warfare among the smaller communities, and our only hope for national unity.³¹ A constitutional command that required judges to consider what impact their decisions would have on both types of communities would at least be a beginning. In several areas, moreover, a normative constitutional standard that sought to expand the inclusiveness of the community might have an observable positive effect on constitutional doctrine.

Justice O'Connor has essentially adopted such a standard in her interpretation of the Establishment Clause. She eschews the standard three-part test of *Lemon v. Kurtzman*,³² and instead suggests that the test should be "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."³³ Significantly, she bases this test on the need to create as broad a community as possible: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."³⁴ Thus O'Connor finds in the Establish-

30. Tushnet touches briefly on this goal. If I understand him correctly, he argues both that this is impossible, and that if it were possible, we would not need judicial review. Pp. 58-59. His analysis is flawed by his overly narrow suggestion of the "pre-requisites" for a community of understanding: either "substantial equality of power and of access to material resources" or "confrontations with scarcity or similar natural kinds of experiences." P. 59. If those are in fact necessary prerequisites, he is probably correct that a community of understanding is impossible. I argue in the text, however, that there are other ways to achieve a community of understanding (and to accommodate nonmembers).

31. See generally Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986).

32. 403 U.S. 602 (1971).

33. *Church of Jesus Christ of Latter-Day Saints v. Amos*, 107 S. Ct. 2862, 2874 (1987) (O'Connor, J., concurring), quoting *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

34. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). See also *Wallace v. Jaffree*, 472 U.S. at 69 (O'Connor, J., concurring): "[T]he religious liberty protected by

ment Clause a republican desire to minimize religious strife by encouraging political inclusion.

Education is another area where the republican tradition's focus on community might afford a guide to decisions. Amy Gutmann has pointed out that a democratic society is "a society whose adult members are, and continue to be, equipped by their education and authorized by political structures to share in ruling."³⁵ But participation in governance necessarily requires that one be a member of a shared community of understanding. Thus one can argue that educational structures must be such that they prepare children to become members of both the national community and smaller communities. As Gutmann puts it:

Democratic citizens are persons partially constituted by subcommunities (such as their family, their work, play, civic, and religious groups), yet free to choose a way of life compatible with their larger communal identity . . . because the larger community has equipped them for deliberating and thereby participating in the democratic processes by which choice among good lives and the chance to pursue them are politically structured.³⁶

As Gutmann suggests, the prerequisites for participation in the democratic polity — or, in our terms, membership in the community of understanding — include both a critical deliberative faculty and an understanding of and predisposition toward life in our democratic society. The latter of these prerequisites parallels what Tushnet finds "attractive" about the appeal to community values: such an appeal "implicitly assumes . . . that [community] values should be historically grounded in the experience of actual communities" (p. 145).

Since "our" community is an extremely heterogenous society, one of the values that must be inculcated is tolerance of difference.³⁷ This value also reinforces the notion of an inclusive community: to the extent that dissidents and outsiders are sincerely tolerated, they are welcomed into the community. And yet tolerance, accompanied by both a commitment to developing the critical faculty and an ultimate goal of creating a wider community of understanding, is not equivalent to moral (or educational) relativism. Those without understanding should be welcomed, but they should not be left in ignorance. To take one controversial example, non-English-speaking children should not be deprived of educational opportunities, but they should be required to learn English rather than being taught solely in their native lan-

the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community." For a discussion of how O'Connor's jurisprudence sometimes reflects a republican vision, see Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

35. A. GUTMANN, *DEMOCRATIC EDUCATION* xi (1987).

36. *Id.* at 45-46.

37. See generally L. BOLLINGER, *THE TOLERANT SOCIETY* (1986).

guage. Otherwise, they will never share in some aspects of a national community of understanding.

A very brief survey of some important Supreme Court decisions on education may illuminate some of the practical consequences of such a scheme. Different subcommunities may approach the prerequisites in different ways, and indeed it would send a message of exclusion to deny them that right. Thus parents should be permitted to enroll their children in schools that both approach education differently and preach the tenets of some smaller community. *Pierce v. Society of Sisters*,³⁸ denying the state the right to demand fealty to its own education system, was therefore correctly decided. To the extent that a subcommunity's unique approach to education and community deprives its children of the future ability to participate in the national community of understanding, however, the subcommunity is undermining the primary goal of encouraging membership in that community. Thus *Wisconsin v. Yoder*³⁹ was wrongly decided, because it allows the Amish to deprive their children of the knowledge and ability necessary to any future choice between the Amish community and the larger community.⁴⁰ *Edwards v. Aguillard*,⁴¹ by contrast, is right: not only does requiring the teaching of creationism send a message of exclusion to non-fundamentalists, it also — even if enacted by a community with no dissenters — stifles children's critical faculty by teaching authoritarian dogma rather than the scientific technique of constant questioning.⁴²

Finally, educational policies should not be permitted to deprive some children of adequate opportunity to acquire the prerequisites for membership in our community of understanding. Some cases are therefore truly easy, although they may be difficult to explain by means of any grand theory: *Brown v. Board of Education*⁴³ and *Plyler v. Doe*⁴⁴ must be right, but *San Antonio Indep. School Dist. v. Rodriguez*⁴⁵ cannot be.⁴⁶

38. 268 U.S. 510 (1925).

39. 406 U.S. 205 (1972).

40. Similarly, although *Meyer v. Nebraska*, 262 U.S. 390 (1923), correctly invalidated a statute prohibiting the teaching of foreign languages to young children, a state could validly prohibit elementary schools from instructing children *solely* in their native language, and failing to teach English at all. 262 U.S. at 402.

41. 482 U.S. 479 (1987).

42. See Sherry, *Republican Citizenship in a Democratic Society* (Book Review), 66 TEXAS L. REV. 1229, 1238-39 (1988); see also M. PERRY, MORALITY, POLITICS, AND LAW 20, 30, 138-39 (1988); West, *The Authoritarian Impulse In Constitutional Law*, 42 U. MIAMI L. REV. 531 (1988). Invalidating a creationist statute sends a message, not of exclusion but of inclusion: it tells fundamentalists that they cannot totally secede from the larger community.

43. 347 U.S. 483 (1954).

44. 457 U.S. 202 (1982).

45. 411 U.S. 1 (1973).

46. Tushnet would undoubtedly respond that my list mirrors some Democratic Party plat-

There are, of course, many harder cases. Is community fostered or undermined — is critical ability developed or stifled — by some censorship of school newspapers? Does searching school lockers without a warrant turn students into outsiders or teach the wrong lesson about how authority should work in America, or is it a valid way of teaching the consequences of irresponsibility? Perhaps most difficult is the question of affirmative action in education: does the deliberate and explicit creation of a more diverse educational community promote both greater tolerance among the dominant community and broader membership among the previously excluded minority, or does it merely foster resentment and greater intolerance against the minority? Whatever the empirical answer to this last question, there might also be a difference between affirmative action designed to provide role models for students,⁴⁷ and affirmative action designed to provide economic opportunities for adults⁴⁸ and the difference might not cut in the direction the Supreme Court has indicated.

These examples should make clear that the notion that constitutional decisions should foster community — at the national level first and at a local level only where it does not undermine a national community of understanding — is not a “grand theory.” It does not make constitutional decisions mechanical, nor is it intended to constrain judicial discretion. At best, it is a contribution to what Tushnet calls “little theory.” It is an approach that attempts to combine a variety of attractive and persuasive notions into a flexible standard that guides and directs but does not control. It is also an aspirational approach: to the extent that we treat law (especially constitutional law) as capable of creating community, it will move in that direction.⁴⁹

Tushnet criticizes “little theory” partly on the ground that it requires (but lacks) a meta-theory to determine which sort of theory to

form, although I doubt that most political liberals would agree that *Yoder* was incorrectly decided. *But see* Douglas' dissent in *Yoder*, 406 U.S. at 241-49 (Douglas, J., dissenting). Moreover, to the extent that education should turn children into “native speakers” of American culture, I would support both *Ambach v. Norwick*, 441 U.S. 68 (1979), and assimilationist goals; both are generally in disrepute in the left-liberal academy.

Finally, I believe that the general liberal acclaim for Stanford's decision to alter unrecognizably the “Western Culture” course is misplaced: While a (perhaps required) course on subcommunities and their cultures would be a worthwhile addition to the curriculum, the “Western Culture” course itself was also a vital educational tool for creating a nationally shared community of understanding. Abandoning it — especially for the popularly perceived reason of pressure from subcommunities — will simply hasten and reaffirm the fragmentation of whatever national community of understanding exists. *See White, Is Cultural Criticism Possible?*, 84 MICH. L. REV. 1373, 1382-83 (1986). Moreover, as a practical matter, a failure to educate students in Western culture is likely to lead to further incoherence rather than to beneficial transformations; as every good lawyer knows, you must understand your opponent's argument in order to refute it. A citizen who has read neither Locke nor Aristotle is in a poor position to choose between their visions.

47. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

48. *See Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

49. *See Nelson, Second Reply to Robert Gordon*, 6 LAW & HIST. REV. 184, 185 (1988).

apply in a given case. More fundamentally, he argues that, like all constitutional theory, it insufficiently restrains both judges and legislatures:

I propose the following test: determine the best and worst politically feasible outcomes you can imagine from legislatures in the ten years following the time that you are applying the test. An approach to constitutional law . . . is indefensible if it would allow judges to uphold the worst and invalidate the best politically feasible programs that legislatures are likely to devise in the near future. [p. 186]

Tushnet's vision of judges seems to be one of caged animals waiting to escape and wreak havoc. Absolute constraints are therefore vital.

If one views judges as human beings, steeped in American legal culture and all its biases but trying nevertheless to do justice, Tushnet's demand for perfection seems less urgent. I would therefore suggest an alternative test for judging the success of judicial review. Take any case you agree with and ask whether it would have been decided the same way fifty or a hundred years earlier. Constitutional law, with or without constitutional theory, is far from perfect, but it works and it *is* making progress.⁵⁰

Tushnet's unremitting attack on judicial review is much like the quip about the economist who saw something that worked in practice and asked whether it could work in theory. The most basic problem with Tushnet's critical stance is that by denying that the current haphazard (but functional, if sometimes misguided) system of judicial review can work, he is leaving it open to attack from either the left or the right. And it 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.

50. This is not to suggest that I subscribe to the Whiggish historical model of judging the past through the lens of the present. See M. Tushnet, *The American Law of Slavery, 1810-1860: A Study in the Persistence of Legal Autonomy*, 10 LAW & SOC'Y. REV. 119, 176 (1975) (suggesting that characterizing past judicial actors in modern political terms is misguided); Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 VAND. L. REV. 7, 30-32 (1979) (describing and criticizing Whig historiography). It is only to suggest that some of the substantive goals that Tushnet and I share can be, and have been, accomplished through judicial review in the face of legislative obduracy. Moreover, the judicial ability to wreak havoc — by invalidating “good” statutes — has, by and large, not been realized. See, e.g., *Mistretta v. United States*, 109 S. Ct. 647 (1989) (upholding Sentencing Guidelines); *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (upholding Independent Counsel Act); *Pennell v. City of San Jose*, 108 S. Ct. 849 (1988) (upholding rent control ordinance). But see *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating maximum work hours legislation); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).