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## Is Law Politics?

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# REVIEW ESSAYS

## Is Law Politics?

Philip Bobbitt\*

RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW.  
By Mark Tushnet. Cambridge: Harvard University Press. 1988. x +  
318 pp. \$35.00.

### I. INTRODUCTION

*Red, White, and Blue* addresses the pervasive presence of five general theories of American constitutional law. These theories reflect particular jurisprudential ideologies governing, among other things, the legitimacy of certain arguments, the appropriateness of certain occasions for judicial intervention and the constitutional basis for judicial review.<sup>1</sup> What makes this book interesting and important is that it provides an unwitting or at least unself-conscious example of the general theorizing it wishes to explain. For this reason, its descriptions of the particular family of theories that characterize American constitutional jurisprudence are distorted, while it disclaims any account of the particular *set* of objections that the author poses to these theories. Instead, Professor Tushnet relies on the most recent version of the reductionism of law to politics to explain the failure of these theories: "the crisis of contemporary liberal political theory."<sup>2</sup> But whatever its etiology, this current crisis can scarcely account for earlier occurrences of these fundamental general theories of constitutional argument. I hope the reader of this review will be able to see why this reduction, and why the array of arguments deployed by Professor Tushnet against the theories he presents (and even his own explanations of those theories), are largely dictated by the approach he has adopted—an approach that is as much a part of the traditional family of general theories as any of the

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1. Tushnet identifies these general approaches to the Constitution as "grand theories," pp. 1-3, and "unitary theories," p. 181, by which he means something like "ideology," in the sense of a complete, consistent system of interrelated ideas that depends upon a common set of assumptions and purports to generate answers to all the relevant questions in the sphere whose domain is governed by the ideology.

2. P. 2.

others and to which the current crisis in liberalism, if such it be, is equally irrelevant.

The first systematic treatment to identify the general theories of constitutional law as such is my own work, *Constitutional Fate*.<sup>3</sup> This book set out six archetypes of constitutional argument in the American system.<sup>4</sup> These "forms of argument" were historical (relying on the intentions of the framers and ratifiers of the Constitution),<sup>5</sup> textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary "man on the street"),<sup>6</sup> doctrinal (applying rules generated by precedent),<sup>7</sup> structural (inferring rules from the relationships among the structures established by the Constitution),<sup>8</sup> ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution),<sup>9</sup> and prudential (seeking to balance the costs and benefits of a particular rule).<sup>10</sup>

As set forth in *Constitutional Fate*, each of these arguments or approaches can be paired with an ideology<sup>11</sup>—a general theory of how constitutional questions should be answered and why they should be answered that way. Each provides, for example, its own justification for judicial review.<sup>12</sup> Indeed, one might say that much recent constitutional theory, as a genre, can be distinguished from the usual previous scholarship that simply dealt with contemporary cases in a way that assumed one of the archetypal theories. This new genre began with the self-conscious identification of particular approaches to constitutional interpretation, with one of which the author usually associated himself. It has developed into a general discussion of approaches to constitutional interpretation. *Red, White, and Blue* is the latest and most detailed addition to this genre.<sup>13</sup>

*Red, White, and Blue* is divided into two books. The first book addresses five of the forms of argument seriatim, but it does so from the

3. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) (following Philip Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695 (1980)).

4. *Id.* at 7-8, 93.

5. *Id.* at 9-24.

6. *Id.* at 25-38.

7. *Id.* at 39-58.

8. *Id.* at 74-92.

9. *Id.* at 93-119.

10. *Id.* at 59-73.

11. *Id.* at 57-58.

12. *Id.* at 5, 123.

13. The seminal work is CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). In the same genre, see JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980) [hereinafter Brest, *Original Understanding*]; Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981); Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980);

unstated perspective of the sixth—the prudentialist viewpoint. The second book collects articles by the author on various doctrinal issues prompted by recent decisions of the U.S. Supreme Court. I believe the great significance of this book lies in the first part, through its assessment of each of the five general theories. I therefore devote this review to that part, and its contribution to what Tushnet calls “Grand Theory.”

Tushnet assesses the five general theories by analyzing the particular defense to the countermajoritarian objection to judicial review that can be inferred from each archetypal form of argument. This is a useful strategy because it enables the author to convey a good sense of the nature of each form of argument. The objection itself has been concisely stated by Alexander Bickel: Judicial review constitutes

control by an unrepresentative minority of an elected majority . . . .  
When [on behalf of the People of the constitutional preamble] the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of the representative of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it.<sup>14</sup>

Of course, merely answering this objection does not constitute a theory; rather, an answer is a consequence of a general theory. Tushnet’s strategy of evaluating each of the five theories by examining and refuting their answers to the countermajoritarian problem would, in lesser hands, be far from comprehensive. But Tushnet writes with a relaxed eclecticism, and a very broad view of the objection, so that the most important characteristics of each of the ideologies are raised. The book is extremely well-organized, so that as each archetypal approach is taken up, we can follow a similar pattern of discussion. This is reinforced by Tushnet’s own adoption of a uniformly prudentialist perspective throughout the book. Sometimes this perspective forces him to make really egregious characterizations of particular opinions or arguments<sup>15</sup> because he is unwilling to take them on their own terms. Finally, however, it is the consistency and thoroughness of his approach that make this an extremely valuable book.

The real progress to be made in constitutional jurisprudence will come, I believe, on the basis of the analysis of constitutional modalities, that is, the ways in which constitutional arguments are made. *Red, White, and Blue* is significant not only in its recognition of the centrality of such an approach—sometimes Tushnet appears to have recut earlier articles to fit within the modal structure of Part I—but also in its showing of how such modalities are unconsciously applied even by an author trying to free himself from the grip of a single general theory. How

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14. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16-18 (1962).

15. See text accompanying notes 155-173 *infra* (discussion of *McCulloch v. Maryland* and *Gibbons v. Ogden*).

often does the doctrinalist, in his search for neutral general principles, behave as though his were the only proper way to evaluate all constitutional approaches?<sup>16</sup> To him, such a search simply does not appear to be on a level with the search for apt historical or structural arguments. Tushnet shows us the same is true with the prudentialist.

Though he lacks his sense of humor, Tushnet often reminds one of T.R. Powell, the premier constitutional prudentialist of an earlier era.<sup>17</sup> It is uncanny to find not only similar arguments, but even similar traits, in Tushnet's reactions to the ideas of his adversaries. Like Powell, Tushnet, when it suits him, is more a political scientist than a lawyer. For example, he treats *Brown*<sup>18</sup> and *Roe*<sup>19</sup> as if they raised the countermajoritarian objections of *Marbury*,<sup>20</sup> even though the former overturned state laws as to which the power of judicial review rests on different legal grounds (the sort of elision a lawyer would never make). Like Powell, he cannot bring himself to believe that an opponent who disclaims prudentialism is anything other than a knave or a fool, whether it is the naive doctrinalism of Justice Owen Roberts<sup>21</sup> or the diabolical textualism of Justice Hugo Black.<sup>22</sup> Like Powell, he appears to believe, finally, that law is a species of politics.<sup>23</sup> For the prudentialist, law must be a species of something, that is, there must be some external standard by which costs and benefits can be determined. This explains Tushnet's manifesto that, if he were on the Court, he would decide cases on the basis of whether or not a particular outcome would "advance the cause of socialism,"<sup>24</sup> and his mischievous Powell-like disclaimer, designed to set Dworkin's teeth on edge, that such a program is really quite "Dworkinian."<sup>25</sup> Yet Powell did not write—perhaps could not have written—a book like this, because constitutional theory did not then encompass the analysis of theory itself.<sup>26</sup> This makes Tushnet a transition figure—not yet freed from the perspective of a paradigm that is essentially no more general than the ones he wishes to evaluate, he nevertheless glimpses the great organizing structures of American constitutional law in a way not available to his predecessors.

16. See, for example, the eloquent ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976).

17. See, e.g., THOMAS REED POWELL, *THE SUPREME COURT AND STATE POLICE POWER, 1922-1930* (1932).

18. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

19. *Roe v. Wade*, 410 U.S. 113 (1973).

20. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

21. See, e.g., P. BOBBITT, *supra* note 3, at 39-41.

22. See, e.g., Thomas Reed Powell, *Insurance as Commerce*, 57 HARV. L. REV. 937, 982 (1944).

23. Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981).

24. *Id.* at 424.

25. P. 146 n.130.

26. See, e.g., THOMAS REED POWELL, *VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION* (1956).

This is, therefore, a book of real importance, not only for what it does, but for what it does not feel the need to do. Let us examine it carefully.

## II. THE RECURRENCE AND CRISIS OF GRAND THEORY

A prudentialist is someone who thinks everyone really thinks as he does and despises them for not admitting it.

—paraphrasing G.B. Shaw

Tushnet begins *Red, White, and Blue* with the observation that “[u]ntil 1970 those who were satisfied with the work of the Warren Court felt little urgency in defending it.”<sup>27</sup> So long as there was a liberal majority on the Court, “liberals felt no pressure to develop elaborate justifications for what the Court was doing.”<sup>28</sup> This statement serves notice that he thinks the motives for rationalization are largely political, in the sense of power-politics, for so long as you have the votes there is no need to explain.

It was only “with the appointment of four conservative Justices” that the liberals “had to provide justifications for the Warren Court . . . . The result was an explosion of articles and books on the theory of judicial review.”<sup>29</sup> In fact there seem to have been two explosions, one in the late fifties<sup>30</sup> and the other in the mid-seventies.<sup>31</sup> Neither of these actually correlates with substantial changes in the personnel on the Court, but rather with the rhetorical aftermath of two highly controversial decisions, *Brown v. Board of Education*<sup>32</sup> and *Roe v. Wade*.<sup>33</sup> Be that as it may, however, the confident assertion that articles and books simply must be the result of changes in the power structure of the Court not only shows how tone-deaf Tushnet is to the need for rationalization within the law’s own terms, its own logic, but also how one’s expectations govern one’s view of the evidentiary record. And so, like the astronomers of other centuries, one assumes that the ground on which one stands is the one, ideal, unmoving spot for observation. Thus, Tushnet writes that “[u]nlike the authors of works and decisions I consider, I am not interested in offering an alternative normative the-

27. P. vii. *But see* CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* (1960); HUGO L. BLACK, *A CONSTITUTIONAL FAITH* (1968); ANTHONY LEWIS, *GIDEON’S TRUMPET* (1964); *THE CONSTITUTION AND THE SUPREME COURT: A DOCUMENTARY HISTORY* (L. Pollak ed. 1966). See also articles such as Charles L. Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L. J.* 421 (1960); Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 *U. PA. L. REV.* 1 (1959).

28. P. vii.

29. *Id.*

30. *See, e.g.*, A. BICKEL, *supra* note 14; C. BLACK, *supra* note 27; LEARNED HAND, *THE BILL OF RIGHTS* (1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).

31. Brest, *The Fundamental Rights Controversy*, *supra* note 13; John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 (1973).

32. 347 U.S. 483 (1954).

33. 410 U.S. 113 (1973).

ory of judicial review.”<sup>34</sup> This agnosticism is clearly what the author is striving for; it is the characteristic watermark of contemporary epistemology with regard to the structures of language. But no matter how attractive these current fashions are to the author, he does not think this way, and so his work takes on the appearance of a rather standard 1960s International Style building that has been tarted up with the cornices, pediments, and so forth of post-modernism. Although he wishes to expose “the structure of arguments,” he never really gets the hang of this sort of analysis. Instead, Tushnet tends to rely on reprinting articles about the politics of constitutional decisionmaking, an interesting but entirely different subject, and revamping them along deconstructionist—or what Tushnet takes to be deconstructionist—lines. This is by no means off-putting; on the contrary, it reveals a conscientious scholar struggling to see his subjects clearly, eager to deploy the latest and most prestigious strategems but not quite able to abandon his habitual perspective. Thus, in common with some other members of the Critical Legal Studies movement, Tushnet appears to believe that deconstruction itself is a sort of intellectual’s *engagement*, a vaguely left-wing mannerism that will strip away the pretenses of ruling elites by exposing the underlying motives and biases in reading texts. But of course the deconstructionist manifesto is nothing of the kind: There is no separation between expression and motive.<sup>35</sup>

The standard radical attack on the liberal state attempts to deny it a legitimacy based on a presumed social consensus. Tushnet puts it this way in introducing one purpose of his book:

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34. P. vii; cf P. БОБВИТТ, *supra* note 3, at x (“Book I shows how the legitimacy of judicial review is achieved. This is a matter of various corridors of argument. Book II is an extended treatment of one of these ways of argument. It does not represent a preferred way; indeed the very idea of such a preference is incompatible with the general theory.”).

35. In fact, the difference between the way lawyers profess to apply the ideas of “deconstruction” and the way in which literary critics have deployed those ideas is so great as to provide an example itself of the deconstructive argument. The lawyers and the literateurs agree that the interpretation of texts is dependent on who is doing it. For the literary critics, this is because the act of reading a text (dependent as that act is on the previous reading one has done, which will differ from reader to reader) creates a new text. Thus, readers, not texts, are the instruments of expression. Indeed, even writers are such instruments since they will put onto paper expressions that resonate with the texts they have absorbed. The writer is not the isolated creator of his or her “ideas” because inspiration does not, cannot, come to a blank slate; and the book he or she writes is not complete until it interacts with a reader (who has, of course, a different context of apprehending, also managed by words). Meaning, then, does not reside in a text, and therefore can’t have been put there by an author.

For the law professor who is eager to appropriate the most fashionable jargon of critique—this sounds dismissive, but is such eagerness anything more than the wholesome and universal desire to find new metaphors?—deconstruction sometimes seems to me no more than the claim that an interpreter’s bias can be decoded. But since the interpreter here is usually a judge, and the “text” not just the constitutional one with which the commentator is preoccupied but also the opinion which constitutes the interpretation, the law professor’s “deconstruction” amounts to no more than a naive attempt to read a text by divining the intentions (sometimes allegedly unconscious, always political) of the author (the judge), with an obliviousness to the role of the reader (the law professor), the very thing that deconstruction was supposed to cure one of.

[M]aking judicial review and its theories intellectually coherent requires that the liberal tradition be supplemented by an alternative program from what I call the republican tradition. [Resort to this tradition of determining public preferences enables the constitutional society to overcome the atomism of liberalism which professes to treat all preferences without priority.] The difficulty is that, to the extent that we understand that republicanism is essential to the coherence of liberalism, we undermine the need for judicial review [which allows the constitutional society to order preferences according to the priority of choices expressed in the Constitution]. In a sense, the liberal tradition makes judicial review necessary but at the same time makes it impossible [since even in interpreting the Constitution the liberal tradition would not admit preferences with respect to the various, alternative readings of the choices embodied in the Constitution].<sup>36</sup>

And the obvious<sup>37</sup> liberal reply, I would imagine, is not that there exists a social consensus on any of the controversial issues of the day—whether the eighth amendment permits capital punishment, the first amendment permits organized prayer in the public schools, or the fourth amendment requires an exclusionary rule, and so on—but rather that a social consensus exists as to the way in which such questions will be determined. This consensus was put in place by the ratification of the Constitution with its careful hierarchy of federal supremacy over the states and the supremacy of the constitutional instrument over the federal government (making judicial review, among other things, inescapable). It is maintained, insofar as judicial review is concerned, by the legitimizing force of the various forms of constitutional argument, each of which is in turn the product of the ratifiers' choice of a legal instrument subordinating government to a popular sovereign. Of course attacks on that legitimacy occur from time to time; that is what has made the right-wing campaign on constitutional interpretation so insidious. One might even say that the secession by Southern states was an attack on the fundamental hierarchical choices that established that consensus in the first place. The liberal need not claim that a social consensus exists on every—or any—particular outcome to maintain that such a consensus supports the institutions that labor to achieve such outcomes according to constitutional methods.<sup>38</sup>

It is interesting, therefore, and perhaps ironic, that Part I of *Red, White, and Blue* is devoted to a series of chapters that track the forms of argument, that is, the very methods as to which a consensus exists.<sup>39</sup>

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36. Pp. viii-ix. I hope that the bracketed material fairly illuminates Tushnet's summary of his argument, which is, necessarily, highly abstracted at this, prefatory, stage of his presentation.

37. For related replies, see James Fishkin, *Bargaining, Justice, and Justification: Towards Reconstruction*, 5 *SOCIAL PHILOSOPHY AND POLICY*, 46 (1988).

38. The argument is somewhat more subtle than I have made it seem: as expressed in the text, it suggests that these forms of argument are a mediating device when in fact they simply are the way arguments are made in a legal context.

39. Chapter 1 deals with historical argument and contains an appendix entitled "Textu-



But because Tushnet fails to distinguish these forms when they serve as modalities of argument from their role as jurisprudential ideologies, he cannot explain how they might serve as legitimating devices. Thus their appearance seems so much like a fashionable dressing-up of an otherwise familiar political discussion of the ideological commitments of ways of decisionmaking, rather than an authentic analysis of how arguments legitimate and mean, the enterprise that gave rise to modal approaches in the first place.<sup>40</sup>

Why do the same general theories of judicial review recur in each generation of lawyers and judges? Tushnet appreciates the ideological commitments of these theories, but not the legitimizing role their arguments play, and so he cannot account for recurrence and must instead insist on a purely coincidental political crisis. This is to be expected because one mode—here, prudential—cannot account for the others but can only evaluate them from its own perspective.

Tushnet notes that “[c]urrent interest in grand theory is striking for two reasons. First, despite the existence of competing grand theories, each one is in its essentials a revived and purified version of an earlier grand theory.”<sup>41</sup> And he recognizes that “there is something distinctly odd” about this<sup>42</sup> but because he limits himself to instrumental, political explanations, not so much rejecting as ignoring the unquiet need for rationalization that underlies theorizing, he therefore sounds a little querulous when he complains:

The grand theorists have not explained how their theorizing activity actually serves their apparent political goals. Theorizing would do so only if the fact that a decision fit into a grand theory implied that it would have greater staying power than one that did not fit into such a theory, but it is difficult to come up with a theory of politics that can

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alism.” Chapter 2 deals with doctrinal argument; Chapter 3, with structural argument; and Chapter 4, with ethical argument.

40. For examples of such an analysis that is genuinely based on a modal approach, see Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987); see also Marc Gold, *The Rhetoric of Constitutional Argumentation*, 35 UNIV. OF TORONTO L.J. 154 (1985); HAROLD H. BRUFF & PETER M. SHANE, *THE LAW OF PRESIDENTIAL POWER* 27-29 (1988); PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 35-36 (1983); WALTER F. MURPHY, JAMES FLEMING & WILLIAM F. HARRIS II, *AMERICAN CONSTITUTIONAL INTERPRETATION* 291-301 (1986).

41. P. 1. Tushnet cites Ely's approach as a recent revival of John Marshall's (structural argument), though he is sometimes a little careless about distinguishing between the various forms. When he writes, for example, that Wechsler and Bickel had developed grand theories “within the confines of the tradition that Wechsler and Bickel brought to its highest point,” p. 1, he is confusing the doctrinal tradition with its prudential offshoot. See Gerald Gunther, *The Subtle Vices of the “Passive Virtues”*—A Comment on Principle and Expediency in Judicial Review, 64 COLUM. L. REV. 64 (1964), for an incisive demonstration of the distinctions.

42. P. 2. Previous historical examples of this recurrent critique, just to cite a few of the most obvious, are the debate over chartering the first Bank of the United States during the Washington presidency, the later bank controversy—and the nullification crisis arising over the 1832 tariff—during the Jackson presidency, the Lincoln-Douglas debates over the *Dred Scott* decision and the significance of slavery for American society, and, of course, the New Deal constitutional crisis of 1937.

plausibly support that argument.<sup>43</sup>

This misses the point that theory arises from the ways of legitimation and therefore that the theorist may genuinely be interested in whether a particular mode of judicial review is legitimately mandated by the Constitution. Furthermore, by tying theory to the perishable conflicts of the political hour, Tushnet is unable to connect the two phenomena of recurrence and timing. If he fully appreciated the modal dimension whose superficial structure he grafts onto his essays, and further recognized its significance for legitimacy, the connection would be apparent. Recurrence occurs because the Constitution determines certain modes of argument by which legitimacy is maintained; the particular timing of a debate occurs when legitimacy is put under stress (as in *Brown*, *Roe*, or the New Deal crisis). Instead, Tushnet observes that, "the most important aspect of that story [the revival of grand theory] is the way in which it reflects, indeed is the expression of, the crisis of contemporary liberal political theory."<sup>44</sup> If this highly implausible claim were correct, then there would be no recurrence of theories according to a few specified forms (unless a crisis in liberal political theory occurred in *every* generation and in the same way, and was then expunged from the memory of ideas so that it could reappear in the same form).

Accordingly, Tushnet tends to reduce theorizing to tactical political maneuvering. Rightly troubled that his description cannot account for the fact that Ely's structuralism "has little to say about the Warren Court's criminal justice decisions, although they are the ones under most serious pressure," Tushnet concludes that "[w]hat has happened is that the liberals have essentially given up on winning anything substantial in the area of criminal procedure, and constitutional theorists have similarly abandoned the effort to defend a position that has been lost anyway."<sup>45</sup> Among other things, such lame reductionism blinds Tushnet to the problem for Ely posed by the irrelevance of structural argument (apart from federalism and first amendment concerns) to the bulk of criminal law. Instead, Tushnet holds that "it is a commonplace of contemporary social thought that Western society is currently experiencing a crisis of legitimacy"; that "all the ideological structures designed to explain why the shortfall is defensible . . . have broken down;" and that "[g]rand theory and its problems are just constitutional law's version of this general crisis of legitimacy."<sup>46</sup>

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43. *Id.*

44. *Id.* This is a rare appearance, in Part I of *Red, White, and Blue*, of Tushnet's professed allegiance to the Critical Legal Studies movement, a group of contemporary thinkers loosely associated in part by their relationship to the idea, "the crisis in liberalism." This relationship sometimes reminds one of the caption in a *New Yorker* cartoon depicting two dogs in an urban, decaying environment. One dog, a Scottie, remarks morosely to the other, "Well, I attribute it to human error. But then," he concedes, "I attribute *everything* to human error."

45. P. 2, n.5.

46. P. 3.

If the first and second of these assertions *were* true (and I will say only that they seem peculiarly dated) then the third should be something like: Grand theory is an effort to restore legitimacy by showing that the system is fundamentally sound, right or just. That conclusion would be compatible with Tushnet's view that law is linked to society in the way that rooms in a house are linked to the house, and thus that the general crisis is an aggregation of the various crises, and is reflected in various social institutions. This would permit the conclusion that "the crisis of grand theory is the form that the failure of liberal political theory has taken in constitutional law."<sup>47</sup> This makes the "crisis in grand theory"—if that is what we are currently undergoing—conveniently coincident with critical legal attack. But is it really? Back when liberal political theory was riding high, were there not various crises in constitutional grand theory?<sup>48</sup>

And this is Tushnet's initial conundrum: if the "crisis" is local, temporal, and contingent, why does it recur in precisely the same forms? To account for the ongoing nature of the "crisis," Tushnet finds its roots in an original dualism that framed the Constitution, but which has eroded with time. This is the motive for a short essay on liberalism versus republicanism.<sup>49</sup> Yet such an enterprise is both incompatible with a single modal approach (here, prudentialism, but it could be any other) and hostile to the desire to assimilate law into politics. For if our failures were truly the outcome of the breakdown of the original ideologies of the framers, then presumably we would see unstable modalities of interpretation as well; we would demand the original balance of modalities and reject assimilation or reduction as equally inconsistent with the initial ideological balance; and we would have held that constitutional structures of interpretation—reflecting a commitment to liberal and republican ideals—and not the vagaries of day-to-day politics ought to determine constitutional decisionmaking. None of these conclusions is easily harnessed to a book whose fundamental assumption is that law is politics—no more, and, to the author's credit, no less.

This explains both the appearance and the disappearance of the essay on two contrasting political traditions that Tushnet calls the "liberal" and the "republican." "One theory, captured in the liberal tradition, emphasized the individualism of people . . . . The other theory, recently labeled the civic republican tradition, emphasized the essential social nature of individual being and examined how individual preferences rest on and constrain social institutions."<sup>50</sup> There follows a lengthy description of the liberal tradition. "The liberal tradition stresses the self-interested motivations of individuals and treats the col-

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47. P. 4.

48. Note that about the time of Daniel Bell's *THE END OF IDEOLOGY* (1960), the law reviews were publishing Bickel, Wechsler, Black and even Crosskey.

49. Pp. 4-7.

50. Pp. 4-5.

lective good as the aggregation of what individuals choose; the republican tradition has an ill-defined notion that the whole is greater than the sum of its parts."<sup>51</sup>

[A]s the framers considered questions of fundamental institutional design, they discovered that liberalism and civic republicanism converged on some important matters [the protection of private property, federalism, separation of powers and judicial review]. . . . These institutions, however, reduced the dangers that individualism and community pose to each other only because the framers' society was poised between the stable mercantilist and aristocratic order of the past and the dynamic democratic capitalist society that the Constitution was about to set in motion.

. . . The triumph of the liberal tradition has destroyed the coherence of the Constitutional scheme by eliminating those complementary mechanisms for assuring the preconditions for ordered liberty.<sup>52</sup>

There are undoubtedly features in many constitutions that correspond to Tushnet's description of the "republican": the 1982 Canadian Constitution's guarantees of linguistic rights, cultural rights, and rights of affirmative action,<sup>53</sup> the Federal Republic of Germany's constitutional right for unions to organize,<sup>54</sup> and so on. But Tushnet's characterization of the original American Constitution is anachronistic in its depiction of such purposes. One searches very hard to find similar elements to those just given (beyond, interestingly, the right to bear arms), until, of course, one gets to the Constitution as it has developed. And there, far from vindicating the charge that the triumph of liberalism has eliminated republican mechanisms, the case law and theory of the last twenty years stands as a thorough refutation. Indeed one sometimes feels that for Tushnet himself, republicanism is little more than what liberalism is not—his description is almost devoid of specific content except insofar as it would reject those premises that liberalism embraces. Sometimes one is tempted to believe that this part of the book doesn't entirely fit, except as a concession to fashion.

Not surprisingly, therefore, Tushnet concludes:

Republicanism made sense only in a specific social setting . . . [i]t is both unrealistic and irresponsible to suggest that the franchise be restricted once again. . . . Republicanism has no strong implications for institutional design. . . . Normative conclusions about the present-day institution of judicial review cannot be drawn from the republican tradition. The remainder of this book therefore concentrates on grand theory in the liberal tradition.<sup>55</sup>

But there are important reasons to attempt, at the outset, to account

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51. P. 6.

52. P. 7.

53. CAN. CONST. pt. 1.

54. GRUNDGESETZ (Basic Law) art. 9, abs. 3.

55. P. 17.

for the recurrence of certain modal forms (and the ideologies that arise from them), especially if one is inclined to superimpose these forms and acknowledge their recurrence, while arguing a reductionist thesis. I take the author's initial postponement of the project, however, as symptomatic of its difficulty. For the balance of the book, the focus of Tushnet's attack stems from his realization that "the liberal account of the social world . . . proves unable to provide a constitutional theory of the sort that it demands."<sup>56</sup> I am inclined to doubt whether the "liberal tradition" is really vulnerable to such a strategy: liberalism is not, after all, a theory of epistemology, and in any event the liberal agnosticism of the framers regarding substantive interpersonal ideologies has the precise virtue of not dictating a single mode of interpretation.

In expressing his frustration at this inability to provide determinism, Tushnet again shows himself to be uncomfortable with a family of modalities, indeed with the modal perspective itself. He writes: "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."<sup>57</sup> Or rather, *a* constitutional theory is impossible. This conclusion is hardly uncongenial. I once asked: "What is the fundamental principle that legitimizes judicial review?" and replied: "There is none. It follows from what I have said thus far that constitutional law needs no 'foundation.' Its legitimacy does not derive from a set of axioms which, in conjunction with rules of construction, will yield correct constitutional propositions."<sup>58</sup> However, in the next sentence I voiced the fear that "[i]ndeed, I would go further and say that the attempt to provide such a formulation for constitutional law will likely lead to the superimposition of a single convention on the Constitution, because only within this do we achieve the appearance of axiomatic derivation that the foundation-seeker is looking for."<sup>59</sup> *Red, White, and Blue* amply justifies these apprehensions. What makes the book particularly interesting, however, is that it comes after the six forms of argument have been identified, and thus it goes about its "superimposition" in a very contemporary, avant garde sort of way.

Tushnet understands that "grand theory's primary function is to explain why the existing system of constitutional law deserves our rational respect,"<sup>60</sup> but he seems unaware that he falls neatly within its traditions himself, and thus evaluates other theories from within one of the classic modalities that define American constitutional theory.

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56. P. 22.

57. P. 23.

58. P. BOBBITT, *supra* note 3, at 237; *see also* Laurence H. Tribe, CONSTITUTIONAL CHOICES 3-8 (1985).

59. P. BOBBITT, *supra* note 3, at 238.

60. P. 3.

## III. HISTORICAL ARGUMENT

Tushnet often confuses the various modalities, and this failure to distinguish carefully and consistently among each of them leads to various analytical errors. One reason to use the topology of constitutional argument is its usefulness in identifying the precise intellectual and political commitments that lie behind each mode; as Tushnet says, he wishes "to examine the structure of arguments to expose their sometimes unarticulated presuppositions about the nature of American society."<sup>61</sup> But this requires observing the distinctions among the various forms of arguments, because they comprise different structures with different commitments.

One of the earliest books in the genre of constitutional theory as theory is John Hart Ely's delightful *Democracy and Distrust*.<sup>62</sup> There Ely introduces the term "interpretivism," which encompasses the historical, textual, and structural modes, as distinct from "non-interpretivism," which is composed of the prudential, ethical, and doctrinal modes of argument.<sup>63</sup> Tushnet correctly identifies the historical mode as "originalism" and the doctrinal mode as depending on "neutral principles," but he also sometimes uses the term "originalism" to mean "interpretivism," a somewhat more inclusive term.<sup>64</sup> And he also sometimes uses "originalism" to include historical, textual, and doctrinal modes, again a larger and yet still different grouping. What difference does it make? After all, it's his book; why shouldn't he use these terms as he pleases? In fact, doesn't his fresh use of the terms rather support the idea that texts, and the words in them, are "radically indeterminate?"<sup>65</sup>

Three distinctions can be usefully made. First, "originalism" suggests, at least to a constitutional lawyer, something having to do with original intent. The "jurisprudence of history,"<sup>66</sup> insofar as it forms or is about legal argument—that is, insofar as it is jurisprudence—is relevant to the extent that the ratifiers of a legal act, because it is they who endowed the act with legal significance, can require that the conditions for their assent to that significance be observed. We speak of the framers simply because, in the constitutional context, their intentions are perhaps our most important source of what contemporary ratifiers thought they were validating. A truly secret intention of the framers, not disclosed to the ratifiers, might manifest itself in text, but it could

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61. P. viii.

62. J.H. ELY, *supra* note 13.

63. These terms seem at first counterintuitive, since the "interpretivist" eschews interpretation outside the document; and when the book was first widely discussed, but not so widely read, it was not uncommon for commentators to reverse the meanings of the two categories.

64. Compare pp. 23, 51 with J.H. ELY, *supra* note 13, at 1-14.

65. See p. 63.

66. This is the title of Tushnet's chapter on historical argument.

not form the basis for an historical argument in law, though it might be of great interest to historians. When Tushnet cites the extremely valuable work of Jefferson Powell<sup>67</sup> for the proposition that “[t]he framers themselves do not appear to have held an originalist theory of constitutional interpretation,”<sup>68</sup> the “originalist” theory to which Powell refers is a commitment to endow the intentions of the framers and ratifiers with legal authority.

Second, when Tushnet cites Ely for the term “interpretivism,” he is referring to essays and an important book that distinguished “interpretivism” from “non-interpretivism” on the basis of which argumentative resources were legally available to the two distinct approaches. The interpretivist was limited, in Ely’s words, to “a resort to the document itself, its drafting and adoption.”<sup>69</sup>

Third, doctrinalism—as many conservative commentators have pointed out in their objections to a common law of the Constitution<sup>70</sup>—is therefore neither an interpretivist mode nor, *a fortiori*, an originalist one. Much of the time, Tushnet writes as though he is aware of such distinctions,<sup>71</sup> but they sometimes seem to get away from him,<sup>72</sup> as when someone has not entirely mastered a particular way of looking at a problem.

Thus, for example, Tushnet mistakenly characterizes Chief Justice Marshall’s argument in *Marbury v. Madison* as originalist in the way that Mr. Edwin Meese’s arguments for judicial review are originalist. Meese, according to Tushnet, argues that originalism is the outcome of adherence to an “original contract” theory that confers the power of judicial review on the courts.<sup>73</sup> By adhering to the intentions of the framers and ratifiers, the courts are both required to review acts for their constitutionality and circumscribed in the approaches to which they may resort in so doing. Adherence to the original understanding requires both. In Tushnet’s view:

*Marbury v. Madison*, the Supreme Court’s first assertion of judicial review, can be read as adopting a version of the contract argument. Chief Justice John Marshall justified the exercise of the power of judi-

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67. H. Jefferson Powell, *Joseph Story’s Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285 (1985); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

68. P. 24.

69. J.H. ELY, *supra* note 13, at 1.

70. Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Grover Rees II, *Cathedrals Without Walls: A View from the Outside*, 61 TEX. L. REV. 347 (1982).

71. Thus he carefully divides a chapter into historical (“originalism”), doctrinal (“neutral principles”), and textual (“textualism”) sections; and he writes that “[w]e will see that these two theories are plausible only on the basis of assumptions that themselves challenge important aspects of the liberal tradition . . . assumptions [that] provide the foundations upon which both originalism and neutral principles ultimately depend.” P. 22.

72. See p. 24.

73. P. 23 n.9.

cial review by a number of arguments, prominent among which was his appeal to the idea of a written constitution. According to Marshall, the Constitution is law, albeit supreme law, and so is to be treated just as other legal documents are. Thus, when the Court is asked to determine what the Constitution means it is to do what it does when faced with other legal instruments. This enterprise is characteristically "originalist": judges must look both to the words of the document and, because the words of the Constitution . . . are too opaque, to the intent of those who wrote the document.<sup>74</sup>

This is very confused, but it provides a good example of the value of keeping the modalities straight. The Marshall argument is that the American Constitution, as a written document, conferred only limited power on Congress (in contrast to parliaments that take this authority from the sovereignty of the state); therefore statutory acts beyond Congress's constitutional authorization were not really law and could not serve as the basis for judicial decision.<sup>75</sup> The argument in *Marbury* is a classic doctrinalist defense of judicial review; it characterizes this power as an inadvertence, necessary to decide a case because it is necessary for a court to determine the applicable law before applying it.

Because Tushnet is insensitive to this distinction, he lumps Marshall in with Meese, and his rather creative addition of the argument "because the words are too opaque"—which does not, as far as I can recall, in fact appear in Marshall's opinion—brings this out. In Meese's view, if the words were too opaque to be construed without judicial discretion, the act of the legislature (or the executive) would have to stand; in Marshall's view, because the power of judicial review arises from the common law necessity of deciding cases according to law, such a fact would merely begin the process of decisionmaking and not, instead, deprive the court of its authority. Indeed Marshall quietly but clearly avoids reference to the intent of the framers and ratifiers, as regards the power of judicial review, but instead confines his resort to originalism to construe the disputed scope of Article III as regards the mandamus jurisdiction of the Supreme Court.<sup>76</sup>

Let us then proceed, with caution, through Tushnet's discussion of originalism. Characterizing originalism as depending on an "original contract" is perhaps an unfortunate choice, because it may tempt one into confusing an "original" contract with the "social contract," *i.e.*, in terms of constitutional arguments, confusing historical argument with textual argument. The textualist maintains that the source of the Constitution's authority lies in ongoing consent by the People. By not amending the instrument—and not overthrowing it altogether—the

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74. *Id.*

75. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (citation omitted). This is the intended meaning of the phrase, so absurdly quoted in *United States v. Nixon*, 418 U.S. 683, 703 (1974) (quoting *Marbury*, 5 U.S. at 177), that it is "emphatically the province and the duty of the judicial department to say what the law is."

76. *Marbury*, 5 U.S. at 137.



People agree to be bound by its terms. Thus the textualist believes the proper scope of judicial review is confined to giving the plain, contemporary meaning to the words of the text (and neither the meaning the words may have held in the eighteenth century nor may currently hold for lawyers). This is complicated by the fact that some of the framers and ratifiers considered themselves to be textualists,<sup>77</sup> so it is easy to be misled into thinking that an "originalist" view is a textualist one.

In fact, the framers took the crucial step by placing sovereignty under law; such a step accounts for why we have a written constitution.<sup>78</sup> And once this was done, the modalities of Anglo-American legal interpretation—hitherto confined to construing wills, property deeds, contracts, trust instruments, and the like—became the interpretive modalities for the Constitution. Perhaps it is even easiest to see the distinction between the textual and historical modes of interpretation by contemplating the usual legal debates over conventional, non-constitutional instruments, such as the use of legislative history or parol evidence.<sup>79</sup>

Tushnet has concluded that "[a]n originalist approach to constitutional interpretation was not part of the contract the framers entered, and courts that adopt such an approach cannot justify it merely by invoking the framers' intent."<sup>80</sup> But this conclusion is fraught with difficulty. In the first place, how could the framers have concluded otherwise? If in fact they had believed that their intentions should be ignored in construing the document, then presumably that intention also should be disregarded; if, on the other hand, they wished their intentions to govern subsequent construction, how would their wishes that this be done add anything to the instrument that embodied their intentions in any event? Finally, letting the argument turn on the nature of the framers' wishes is, for Tushnet, either disingenuous or circular. Circular, because to give significance to their wishes on account of their wish that we do so is redundant (as Tushnet's locution "part of

77. Tushnet is surely wrong to claim that the framers generally "believed that the meaning of the Constitution's terms was so clear to a fair-minded reader that the Constitution did not need to be interpreted in any subtle or sophisticated way." P. 24.

78. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION: THE BICENTENNIAL MELLON LECTURES AT OXFORD* (1989) (forthcoming, Blackwell's).

79. See, for example, Hand's discussion of the World War II Trading with the Enemy Act:

I don't know how you feel about interpretation. It is a very "chancy" subject. I remember a case we had years ago in the Second War. Congress passed the Trading with the Enemy Act, as it stood. In substance they said: "We re-enact the Act of 1917." Now, one of the provisions of that act was that there should be no claims for a seizure of property by the Custodian, which arose after a date before the second Act was passed. So we had to say whether that could be what they intended. Mind you, it meant that any seizure under the second law that took your property, although it wasn't really German property, you could not get back. So we said "No, that is not what they meant," and we got away with it. I was surprised, but we did.

LEARNED HAND, *A Personal Confession*, in *THE SPIRIT OF LIBERTY* 305 (3d ed. 1960).

80. P. 24.

the contract" reveals); disingenuous, because such a rhetorical device might easily be taken to suggest that if the framers could be shown to have preferred historical arguments to, say, doctrinal ones, this preference would be decisive or at least significant, when in fact Tushnet wishes to withhold from historical resort any such initial legitimacy.

Indeed, he would even deny that legitimacy to textual argument. Thus he writes:

Justice Hugo Black did say that [he was "simply enforcing the plain meaning of the Constitution"] but . . . nobody believed him. Some conservatives reiterate this position today, see, e.g., Lino Graglia, . . . but in their hands it is simply a lie. . . . [O]ne must merely listen to citizens addressing their city council meetings to know that for most people "denying due process of law" means "treating someone unfairly."<sup>81</sup>

I have left to the notes my reply to this observation. Here one only need say that neither Powell's superb research nor Tushnet's arguments necessarily mean that courts that adopt originalist approaches are acting in bad faith. The argument becomes a little more confused when textualist approaches are assimilated into historical ones, but this hardly warrants attacking the sincerity of courts or scholars. The example of the city council meeting scarcely disconfirms Black's judgment: "Treating someone unfairly" (when it is the government doing it) probably *does* mean something like "denying someone his rights" to the average person.

Tushnet also argues that "[a] second problem with the contract argument is that none of us entered the contract. The framers did, and it might be fair treatment of James Madison to enforce the contract against him. But he died a long time ago."<sup>82</sup> This reference to the framers suggests that Tushnet misunderstands the argument. The framers' consent is of no more legal significance than the consent of the

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81. *Id.* On the merits, Tushnet is being careless with the distinctions among the modalities and thus with their constraints: if "treating someone unfairly" is what "due process" means to our people, then that is what it means, period (for the textualist). These are the terms of the social contract and the underpinning of textual argument.

Procedurally, or professionally if you like, Tushnet's remark on Graglia's sincerity really has no place in scholarship. In this, too, unfortunately, Tushnet (who in life, as opposed to print, is a rather mild, pleasant man) is reminiscent of T.R. Powell, who accused both Justices Roberts and Black, at different times, of a disingenuousness that amounted to either cunning fraud or unblemished naiveté. For other examples of this apparent tendency toward the *ad hominem*, see Mark Tushnet, *Dia-tribe*, 78 MICH. L. REV. 694, 710 (1980) (attributing to Professor Laurence Tribe the corruption of his academic views by desire for political appointment); Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984) [hereinafter Tushnet, *Deconstruction*] (ridiculing Renata Adler for her "silly" review of *The Brethren*, in Renata Adler, *The Justices and the Journalists*, N.Y. TIMES BOOK REVIEW, Dec. 16, 1979, at 1). It is apparently very difficult for Tushnet to imagine that Adler has actually considered his point of view and, with great insight and depth in my opinion, rejected it. See also Tushnet's claim that Dworkin recasts arguments so that he can "forgo the sociological analysis that he states, but appears not to believe, is essential." P. 144.

82. P. 25.

lawyer who drafts a will; perhaps less so, because the delegates to the Constitutional Convention were not authorized to do more than recommend changes to the existing Articles of Confederation.<sup>83</sup> Tushnet continues: “[M]ost of us today—women, blacks, children and grandchildren of immigrants—are not successors in interest to the framers in any sense that makes the contract analogy compelling.”<sup>84</sup> But the legally significant agreement—the “contract”—was between the People as endowing sovereign and government. The framers were no more than draftsmen. If the mere longevity of the settlors were to determine the binding nature of a trust, we could scarcely have trusts—the Ford Foundation, Princeton University, and countless other institutions would have ceased to exist with the demise of their original endowers. It is we who are the successors in interest to the ratifiers of earlier periods, including, of course, those who ratified the twenty-sixth amendment in 1971. Can one seriously deny that and maintain that any law passed before the present moment binds us? In the case of the American Constitution, the theory of the period held that ratifiers endowed the government, sovereignty having passed to the nation’s people by virtue of the Revolution. They, like we, were governed by their theories.<sup>85</sup> But to appreciate this connection, one must be willing to entertain these notions on their own grounds, i.e., without recasting them before explication. For example, Tushnet writes: “Bruce Ackerman has tried to explain why an originalist theory is attractive for contract like reasons. . . . Constitutional politics . . . occurs during a period of heightened democratic consciousness, when the public is alert to and seeks to advance the public interest in a relatively principled way.”<sup>86</sup> Tushnet then ridicules this view as resting “on the proposition that they—the citizenry during constitutional periods—were better than we.”<sup>87</sup> However, Ackerman’s argument is actually a form of the sovereignty thesis of the eighteenth century. The ratifiers were engaged in “constitutional politics,” following the Revolution, quite unlike the everyday politics that assumes a constitutional context. Tushnet rebuts this suggestion by reminding us of the everyday political activities of the framers, who were after all very active in the ordinary politics of the era as well.<sup>88</sup> But the mere annotation of the politicking of the framers should neither shock nor persuade us, unless one assumes that constitutional politics (in Ackerman’s phrase) suspends ordinary politics; otherwise this rebuttal is simply a kind of wisecrack, a sort of innuendo for civics students.

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83. The Convention was convened “for the sole purpose of revising the Articles.” Resolve of Congress, passed February 21, 1787.

84. P. 25 n.15.

85. See EDMUND MORGAN, *POPULAR SOVEREIGNTY AND THE AMERICAN CONSTITUTION* (1987).

86. P. 25.

87. *Id.*

88. P. 26.

Tushnet prefers to offer a defense of originalism on pragmatic grounds—a foreshadowing of his assessment of each of the principal modes from the point of view of prudential argument. He writes: “Another defense of originalism is more powerful . . . Empirically, . . . novelty in tyranny is relatively rare, and because the framers were rather smart, they managed to preclude most of the really troublesome forms of tyranny in the Constitution that they wrote.”<sup>89</sup> Some risks remain, on this view, but these are less a threat than would have been the threat of judicial tyranny trying to stamp them out in the absence of the original precautions. “This pragmatic argument is fairly powerful,” he concludes.<sup>90</sup>

Tushnet then questions this defense from a similarly prudential point of view that we have come to associate with Michael Perry—the argument that *nonoriginalist* modes of interpretation have, after all, been beneficial.<sup>91</sup> And then, having introduced this perspective, Tushnet counters it with the usual prudential replies: Some wouldn’t agree with Perry’s values, and, in any event, a new court has used these modes on behalf of political values that neither Perry nor Tushnet would share.<sup>92</sup>

Tushnet’s further response to this defense of historical approaches is also pragmatic: Novelty in tyranny is in fact a substantial threat—*e.g.*, wiretapping—and thus we confine ourselves to the drafters’ foresight at our peril: “The drafters of the fourth amendment obviously could not have contemplated wiretapping when they thought about searches.”<sup>93</sup> But this again confuses historical and textual argument.<sup>94</sup> Wiretapping poses no problem for the civil libertarian working in a historical mode, who argues that the ratifiers were manifestly trying to protect privacy and the integrity of personal affairs from government intrusion by preventing unreasonable searches. Whether or not wiretapping provides an example within the scope of such purposes is a matter of conscientiously enforcing the framers’ and ratifiers’ intent. It is the text that presents a problem: While the textualist Justice Black consistently held that wiretapping was not covered by the fourth amendment,<sup>95</sup> historicists have little difficulty including it.<sup>96</sup>

Tushnet continues his prudential attack on originalism by saying that “the Bill of Rights provided protection, such as it was, against [acts by the federal government] not by the states. Because a genuine

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89. P. 27.

90. *Id.*

91. See generally MICHAEL PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 163 (1982).

92. P. 27.

93. P. 28.

94. See note 77 *supra*.

95. See, *e.g.*, *Katz v. United States*, 389 U.S. 347, 364 (1967) (Black, J., dissenting); *Berger v. New York*, 388 U.S. 41, 74 (1966) (Black, J., dissenting).

96. See, *e.g.*, Robert Bork’s opinion in *United States v. Mount*, 757 F.2d 1315 (D.C. Cir. 1985).

originalism would thus protect only against limited varieties of legislative tyranny, it fails to achieve its objective."<sup>97</sup> Surely the proper "originalist" inquiry, on the matter of application of the Bill of Rights to the states, is whether the intentions of the ratifiers of the civil war amendments were to provide such protection. Even the most ardent proponent of historical argument does not confine himself to the eighteenth century text out of a distaste for the present. The proper originalist construction of, for example, the twenty-second amendment asks what the framers and ratifiers intended at the time of its adoption in 1951.

Tushnet correctly attributes to the historicist this familiar argument: Government practices, whose legality was unchallenged by the very persons who proposed and approved constitutional provisions that are now used as the basis for attacks on those practices, can't be unconstitutional with respect to those particular provisions. Their peaceful co-existence at the time of the adoption of the constitutional provisions in question establishes their lawfulness in the minds of the framers and ratifiers. Tushnet attempts to preserve this argument by deflecting the familiar riposte, Ronald Dworkin's concept/conception distinction,<sup>98</sup> on two grounds. First, he would require that Dworkin

produce evidence . . . that the framers knew that they were enacting provisions that embodied a moral content richer than their own moral conceptions. And, simply put, there is no evidence at all that they did. The distinction relies on modern theories of law that were quite foreign, indeed probably would have been incomprehensible, to the framers of the Bill of Rights and the fourteenth amendment.<sup>99</sup>

Putting to one side my doubts as to the historical record, a record that I am inclined to think he greatly overstates, Tushnet again confounds textual and historical arguments. Dworkin is not saying the framers intended to deploy modern conceptions in the place of their own and therefore chose the broad language of concepts which the ratifiers approved. (Tushnet's use of the phrase "framers enacted" is surely careless and, as we shall see, important.) Rather, he is offering a straightforward construction of the text: Sometimes the language is that of concepts (equal protection, for example), of others, that of conceptions (the ex post facto provision, for instance). This is very much like a position that Justice Black took with regard to textual absolutes. He argued that some phrases ("Congress shall make no law") were ab-

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97. Pp. 28-29.

98. "Professor Dworkin, like Bickel before him, has observed that the Constitution often provides general *concepts*—of equal protection or due process, for example—to which each generation must affix particular *conceptions*—for example, promoting integration in the public schools or providing competent counsel to indigents." P. BOBBITT, *supra* note 3, at 23 (citations omitted).

99. P. 31 (citations omitted).

solute while others (“unreasonable searches and seizures”) required a case-by-case assessment.

Indeed, it is an important distinction between historical and textual or structural modes that “conceptions” originally held do not vary over time. One sees this distinction and its origin in the political theory that is the basis for historical argument, by asking what the *ratifiers* had in mind when they empowered the constitutional text. The framers may very well have agreed on broad concepts whose open-ended meanings bridged various controversies, but the ratifiers must have had conceptions. How else could they have understood the text? And if they had particular conceptions, then these are the ones they empowered. There is a reason why we squirm when we learn that segregated schools existed side by side with the campaign for the equal protection clause, without a murmur of their relevance during that campaign. It is a good reason, one that cannot be dismissed by a glib turn of phrase. But it is not the only reason to construe a constitutional command in a certain way.

Although Tushnet is sometimes uncertain about the precise distinctions among the modes, he never varies from his own resort to a prudential mode. Yet while he organizes his essays into sequential treatments of historical, doctrinal, textual, structural, and ethical argument, he has no chapter on prudential argument. Even his defenses of historical argument—defenses one never encounters in the writings of those inclined to rely on historical approaches exclusively, like Raoul Berger—are prudentialist. Thus, he writes:

[O]riginalists can argue . . . that originalism is *better* than the alternatives. It gives us a Constitution with many opportunities for legislative tyranny, some (though few) limits on legislatures, stringent limits on judges, and few opportunities for judicial tyranny. The alternatives provide many opportunities for judicial tyranny, few limits on judges, and an unknown mixture of opportunities for and limits on legislative tyranny.<sup>100</sup>

The prudentialist must rely on some standard external to the law to enable the measurement of the “better.” Here, it is the constraint on judges. But the full-bore historicist would simply say that we rely on the original intent because that is the lawful way to act; whether it is practical to do so is not a constitutional question. Because Tushnet so resolutely refuses to see this, and thus overlooks the difference between historical argument and historical analysis, he can perhaps be acquitted of the charge of gross unfairness to Berger. Having given some of the rules of construction that Berger derives from his historical approach,<sup>101</sup> Tushnet at first mildly offers a purely pragmatic guess as to what usefulness they have (“They may be crystallized expressions of

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100. P. 32 (emphasis added).

101. RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 1-19 (1977); P. 36.

what more detailed inquiries have shown to have been usually true").<sup>102</sup> He then savagely contrasts these highly reified rules with the detailed historical contexts that one finds in historical work. Tushnet concludes: "It is almost painful to read Berger's work after reading a far more subtle study by a serious historian, J. R. Pole."<sup>103</sup>

But Berger's rules are *legal* rules, common law rules of construction that have little to do with historical analysis as practiced by professional historians, even when they are writing on legal events of great historical significance. It is as if, for Tushnet, historical argument is just something about the past. Thus Tushnet gives Justice Brandeis's classic expression of the purpose of the free speech clause in *Whitney v. California* as "the best example in the case law of a hermeneutic effort to understand the past,"<sup>104</sup> when it is really no such thing. Indeed, that is why Justice Brandeis gives us no citations to historical sources; it is a purely prudential expression of the purpose of the amendment. Although it associates the speaker's understanding with that of the founders of the Republic ("those who won our independence"), it is by no means a historical argument. Had Justice Brandeis intended to make such an argument, he would have associated the views he was professing with those of the framers and ratifiers of the fourteenth amendment, on which he decided the case, for he was not careless about such things.

Thus, Tushnet, having no idea why the intentions of the framers should have legal significance—or indeed why any conclusion outside the pragmatic should have legal significance—hypothesizes an "intuitive" appeal that accounts for the stubborn adherence to historical approaches. He then discredits this appeal as unrealistic, and impossible of practical satisfaction:

The dilemma of originalism is that if it is to rely on a real grasp of the framer's intention—and only this premise gives originalism its intuitive appeal—its method must be hermeneutic, but if it adopts a hermeneutic approach it is foreclosed from achieving the determinacy about the framers' meanings necessary to serve its underlying goals.<sup>105</sup>

He adds: "Originalism attributes our choices to people in the past and so displaces our responsibility for constructing our society on the basis of the continuities we choose to make with our past."<sup>106</sup>

Can both these charges be true? If historical argument does not provide determinant answers, can we also then say that we do not have—indeed are we not compelled to have—the responsibility of constituting the continuities we choose to make with our past? Isn't this, in the last analysis, what distinguishes legal-historical argument from the work of historians generally: that it requires us to choose with the legal

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102. P. 37.

103. P. 37 n.55.

104. P. 40.

105. P. 46.

106. P. 45.

context in mind, and is neither determinative, nor a search for the determinative? This in turn requires us to distinguish historical argument—a modality of legal discourse about the Constitution—from the ideology of constitutional historicists whose search for the determinative is like that of the other ideologues of constitutional method: a search for a means of silence—to silence critics, to silence the nagging of one's own doubts, and above all, to silence responsibility.

Tushnet's conclusion is that "[t]he hermeneutic tradition suggests that historical discontinuities are so substantial that originalism must make incoherent claims because it can achieve the necessary determinacy about past intentions only by smuggling in an implausible claim about the ability to retrieve meaning across time."<sup>107</sup>

Thus, Tushnet disclaims what he is doing by doing it—preferring one mode to the others on the basis of modal values outside the modality he is describing. He evaluates the modality of historical argument prudentially, judging it against a standard of determinacy since determinacy is claimed to be a necessary condition for achieving the laudable goal of judicial constraint.

#### IV. DOCTRINAL ARGUMENT

Tushnet confuses argumentative modalities—how assertions are determined to be correct—with the ideologies to which they give rise—why claims from a particular perspective are constitutionally justifiable. He erroneously concludes that the epistemological shortcomings of the various constitutional ideologies render the forms of argument useless. In particular, Tushnet's demand for determinacy, which is a demand of a single ideology, leads him to reject doctrinal argument as a legitimate form of argument. This treatment of modality as ideology manifests the usual confusion that mixes the *justification* for judicial review (which must come from grounds external to its practice) and the *legitimacy* of review (which is maintained by adherence to rules within the practice). I shall return to this distinction.

Tushnet correctly sees the general approach associated with doctrinal argument as relying on the search for impersonal and durable principles of constitutional law that are *neutral* with respect to the parties or groups in society and are *general* with respect to *stare decisis*.<sup>108</sup> But he conflates this approach with its jurisprudential lobby, the Legal Process school. Thus he writes:

The theory of neutral principles . . . requires that we develop an account of consistency of meaning . . . within the liberal tradition. Yet the premises of that tradition tend to treat each of us as an autonomous

107. P. 46.

108. *Id.* See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 108-11 (1959). See also P. BOBBITT, *supra* note 3, at 39.



individual whose choices and values are independent of those made and held by others. These premises make it exceedingly difficult to develop such an account of consistent meaning. The autonomous producer of choice and value is also an autonomous producer of meaning.<sup>109</sup>

But liberalism is not a theory of metaphysics; the liberal may very well wish that decisions be as decentralized as possible, and the individual conscience respected, without subscribing to the doctrine of monads. Indeed, a liberal might even be a phenomenological determinist—as appears to have been the case with the very humane Spinoza<sup>110</sup>—and still believe that disputes ought to be settled by consistent, public methods according to neutral principles of general and not privileged application. The liberal would simply deny that the motive force for his actions was an existential virtue. Moreover, liberalism's "premises" do not "tend to treat each of [the judges] as an autonomous individual whose choices and values are independent of those made and held by others."<sup>111</sup> To the extent that a judge, for example, is exempted from the pleadings of a case, or the available precedents, or the need to make a decision that is coherent to the parties (or which will persuade a reviewing court or command a majority on a multi-member panel), he has shoved off from the moorings of doctrinalism. Perhaps that is why such approaches always focus on the common law tradition of deciding appeals.

The whole point of autonomy is to provide a role for moral decision; that role takes place after the decision is well-defined.<sup>112</sup> In that way we neither require determinacy nor risk arbitrariness; but that is not the reason we adhere to doctrinal argument. By contrast, Tushnet writes:

The rule of law, according to the liberal conception, is meant to protect us against the exercise of arbitrary power. The theory of neutral principles asserts that a requirement of consistency, the core of the ideal of the rule of law, places sufficient bounds on judges to reduce the risk of arbitrariness to an acceptable level. The question is whether the concepts of neutrality and consistency can be developed in ways that are adequate for the task.<sup>113</sup>

Note, however, that this is a prudential justification for a doctrinal argument. Henry Hart, a doctrinalist, put it differently. The court is *predestined* in the long run not only by the thrilling tradition of Anglo-American law but also by the hard facts of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing

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109. P. 46.

110. See, e.g., R. A. DUFF, *SPINOZA'S POLITICAL AND ETHICAL PHILOSOPHY* (1903).

111. P. 46.

112. See P. BOBBITT, *supra* note 71.

113. P. 46.

impersonal and durable principles of constitutional law.<sup>114</sup>

This is reminiscent of Marshall's doctrinal argument for judicial review: that judicial review is unavoidable if the Court is to decide the cases committed to it.<sup>115</sup> This argument does not weigh the benefits of such a role. Having established a prudential standard for this form of argument, however, Tushnet, not surprisingly, finds doctrinalism wanting.

Tushnet continues, "This section argues that each [of two possible types of neutrality] fails to provide the kinds of constraints on judges that the liberal tradition requires: The limits they place on judges are either empty or dependent on a sociology of law that undermines the liberal tradition's assumptions about society."<sup>116</sup> This argument assumes first that constraints are the point (a prudential assumption); and second, that the liberal tradition is a necessary parameter. The latter is an ideological assumption, that is, it assumes that an argumentative mode must be an all-embracing set of explanations, like Marxism or Behaviorism. It might well suit a judge, when told that the philosophers of the liberal tradition hold views that are inadequate to explain the operation of the common law, to reply: So what?

Notice how Tushnet introduces the prudential requirement and then uses it to dash the entire doctrinal approach:

One preliminary difficulty should be noted. The demand for neutral application ultimately rests on the claim that without neutrality a decision "wholly lack[s] . . . legitimacy." Legitimacy is a matter of concordance with the demands of this ideal. These demands, however, ultimately prove empty, for rather than constrain the proper role of courts the concept of neutrality presupposes a shared understanding and acceptance of any constraints.<sup>117</sup>

Yet stripped of the demand for an external constraint, how is this juxtaposition inconsistent (as suggested by the phrase "for rather")? Indeed, how could it be otherwise, that is, how could there be rule-following without shared understanding? And if it could not be otherwise, then must one conclude with Tushnet that the entire enterprise is an impossibility, or conclude instead that that is all it means to be neutral—to be able to follow a rule.

Legitimacy is a matter of following a form of argument. Doing so does not insure the best outcome, only a legitimate one. External standards of comparison—like whether following a particular form is sufficiently constraining—go to the issue of justification. A confusion between these two concepts accounts for Tushnet's oscillation between the methodology and the ideology of doctrinal argument.

Tushnet asks: "What, then, are methodologically neutral princi-

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114. Hart, *supra* note 108, at 99 (emphasis added).

115. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

116. P. 46.

117. Pp. 46-47 (footnote omitted).

ples? The best explication looks to the past. It would impose as a necessary condition for justification that a decision be consistent with the relevant precedents."<sup>118</sup> But reliance on *stare decisis* is not a necessary pre-condition for decisions according to doctrinal rules. If it were, overruling precedent would be illegitimate within this modality. Rather it is one means of insuring *generality* that, along with neutrality, is a necessary condition. Merely insuring that a particular holding follows precedent—a way, but not the only way, of insuring generality—will not justify a decision. As Holmes, our greatest doctrinalist, put it in his celebrated epigram, "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."<sup>119</sup>

Tushnet does appreciate the claim of doctrinalists that it is the way in which they reach decisions that gives their holdings legitimacy;<sup>120</sup> indeed, he finds this claim highly dubious. "It is implausible . . . that neutral application of principles is an important source of public acceptance of judicial decisions. The general public is unlikely to care very much about a court's reasoning process, which is the focus of neutral principles theory; its concern is with results."<sup>121</sup>

This observation supports the view that Tushnet is evaluating each of five various forms of argument from the point of view of the sixth, prudential argument. The standard he believes will determine legitimacy is that which the prudentialist sets for constitutional decision: the results. But if we were to take the doctrinalist claim seriously, is it so obvious that reasoned elaboration is irrelevant to legitimacy? I am inclined to think the public cares very much about how a judge reaches a decision, as we would discover if a judge rendered a decision saying that his astrologer told him to decide a certain way, or acknowledging that he had been paid by one of the parties to decide as he did. No doubt all Tushnet really means to say is that the public doesn't read judicial opinions, and that this lack of study is indicative of its true level of concern. But although I don't read biology journals, I would be very upset if I came to believe that some American Lysenko was being foisted off on the discipline by the political authorities; and I would rely on the biologists to tell me if this were the case.

Tushnet's chief complaint, however, is not that doctrinalism *doesn't* work—that it doesn't maintain the legitimacy of decisions made on that basis—but that it *can't* work because it fails to provide the determinacy that, in his view, is required: "At the moment a decision is announced we cannot identify the principle that it embodies. Each decision can be justified by many principles, and we learn what principle justified Case

118. P. 47.

119. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

120. It is not clear whether he appreciates that this is true with all the forms of argument.

121. P. 47 n.79.

I only when a Court in Case 2 tells us."<sup>122</sup>

This can't be quite right, because if it were true, then it would apply to itself; that is, it would be a Case 2 for some other Case 1. But in any event this is only a way-station to the conclusion that "[t]he theory of neutral principles thus loses almost all of its constraining force."<sup>123</sup> Tushnet gives the interesting example of the principles to be derived from *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, as these appear in light of the use to which they are put in *Griswold v. Connecticut*:

In one view *Griswold* tortures these precedents [*Meyer* and *Pierce*] . . . . Yet one can say with equal force that *Griswold* identifies for us the true privacy principle of *Meyer* and *Pierce*, in the way the abortion funding cases identify the true principle of *Roe v. Wade* . . . . [T]he retrospective approach to neutral principles must recognize the extensive creativity exercised by a judge when he or she imputes to a precedent "the" principle that justifies both the precedent and the judge's present holding.<sup>124</sup>

How true. Now why is this disturbing? Tushnet explains:

In a legal system with a relatively extensive body of precedent and well-developed techniques of legal reasoning, it will always be possible to show how today's decision is consistent with the relevant past ones, but conversely, it will also always be possible to show how today's decision is inconsistent with the precedents. This symmetry, of course, drains "consistency" of any normative content.<sup>125</sup>

In other words, the availability of choice drains doctrinal ideology of its justification as the sole appropriate modality; the ideology's normative, or justifying, claim requires determinacy. But consider whether such a charge is also effective against doctrinal argument as a legitimating modality. "Today's decision" is the product of thinking in the ways of doctrinal argument as surely as precedent it distinguishes. We have the scrivener's phrase "on all fours with" simply to demark those cases that can't legitimately be decided doctrinally on any basis other than one determined by a single precedent. A lawyer who concludes that a

122. P. 49.

123. *Id.*

124. P. 50; compare P. БОВВИТТ, *supra* note 3, at 239-40:

The present does in part control the past. Justice Douglas' use in *Griswold* of the *Meyer* case as a First Amendment precedent might strike a law review editor as unprincipled; the First Amendment, after all, is not even cited in *Meyer*. But after such use by the Court, *Meyer* becomes a First Amendment precedent and indeed may now be seen as the decisive first step in the development of a First Amendment doctrine of freedom of ideas. The present use of precedent transforms it, and the earlier case must then be read in light of the use to which it is later put.

125. P. 51. For example, Tushnet notes that "Perry rejects as 'deeply flawed' and 'fundamentally confused' the position taken by the Court in the [abortion] funding cases and repeated by Peter Westen." P. 48. I am inclined to conclude that Westen's position that *Roe* barred the government from criminalizing abortions only because criminal sanctions impose an undue burden on the woman's interest in deciding not to carry to term is analytically the better of the two. But in any event, even if one could read the *Roe* precedent to support either of two future holdings regarding funding, this does not mean that it is unprincipled.

lack of complete determinacy leaves open *any* conceivable rationale has very little imagination as to what is possible, even if implausible. More importantly, suppose producing doctrinally legitimate options, not foreclosing all but one, infuses rather than “drains” this approach of its normative content precisely because it requires moral choice?<sup>126</sup>

It's not just that Tushnet seems determined to enforce a prudentialist perspective on his description of doctrinalism; it's also that he seems insensitive to what doctrinalism consists of. This is how he criticizes one of the era's great doctrinal failures, *Roe v. Wade*:

When his opinion reached [the crucial issue of the “protected interest”], Justice Blackmun simply listed a number of cases . . . This may well fail to satisfy the current requirements of the craft [of doctrinal argument]. . . . [W]e can conclude that Justice Blackmun is a terrible judge [because the same commentators who criticize the argument in *Roe* accept the argument in *Griswold*.]

. . . . [I]f *Griswold* is acceptable we need only repeat its method in *Roe*.<sup>127</sup>

Suppose, however, that the argument in *Griswold* was unavailable to Justice Blackmun. Justice Douglas's rationale in *Griswold* was a prudential argument—that the explicit guarantees of privacy in the Bill of Rights could not be protected, as a practical matter, if the same judges who were expected to protect people's homes from unreasonable searches and seizures, ensure freedom of association, and prohibit the occupation of houses by government troops were also required to permit the monitoring of the bedrooms of married couples to check for the use of contraceptives.<sup>128</sup> Whatever one may think of this argument, it was not one that Justice Blackmun could have made in *Roe*. Abortions are not performed in the bedroom. Prudential arguments like Douglas's depend on such facts; when they are not available, the argument cannot simply be “repeated.”<sup>129</sup>

Similarly, Tushnet faults doctrinalism for its reliance on craft. Noting Dworkin's recent analogy<sup>130</sup> to common law decisionmaking, “that

126. P. BOBBITT, *supra* note 78.

127. P. 53.

128. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

129. This hardly means that there were not other avenues available to the Court to support the decision; nor does that mean that Justice Blackmun is a “terrible judge” simply because he, along with the rest of the Court and virtually all of the academic community, failed to look beyond the doctrinal mode in searching for such rationales.

130. Tushnet writes, pursuing the analogy of the novel to judicial craft:

Craft limitations make sense only if we agree on what the craft is. But consider the craft of “writing novels.” Its practice includes Trollope . . . Joyce . . . Mailer . . . . We might think of Justice Blackmun's opinion in *Roe* as an innovation akin to Joyce's or Mailer's. It is the totally unreasoned judicial opinion. To say that it does not look like Justice Powell's decision in some other case is like saying that a Cubist “portrait” does not portray its subject in the manner that a member of the academy would paint it. The observation is true but irrelevant to the enterprise in which the artist or judge was engaged and to our ultimate assessment of his or her product.

P. 54. This is an important remark because Cubism, here, is analogous to another modality.

a person asked to add one chapter 'in the best possible way' to a collaborative novel-in-progress faces limits similar to those that precedents place on judges," Tushnet says that Dworkin "fails to appreciate that, by disrupting our expectations about what fits best, the creative author may force us both to reinterpret all that has gone before and to expand our understanding of what a 'novel' is."<sup>131</sup>

Tushnet rightly concludes that the judicial craft breaks continuity, and he clearly has a break of a radical sort in mind, as when Joyce and Woolf took the novel inward. But the doctrinalist does not insist that results be dictated by precedent or argue that craft is merely a certain fluency. Rather, that craft—the art of choosing—is what makes the opinion law.

If it is only a consequence of the pressures exerted by a highly developed, deeply entrenched, homeostatic social structure that judges seem to eschew conclusions grossly at odds with the values of liberal capitalism, sociological analysis ought to destroy the attraction of the theory. Principles are "neutral" only in the sense that they are, as a matter of contingent fact, unchallenged, and the contingencies have obvious historical limits.<sup>132</sup>

But such jargon would shatter the faith only of a very naive believer—perhaps one who demanded determinacy and was credulous enough to be persuaded that "sociological analysis" might supply it if reliance on precedent did not. In fact, principles are neutral, for purposes of doctrinal argument, to the extent that they are neutral as to the parties; that they are therefore contingent is a matter of course.<sup>133</sup> What it means to be principled could be different, but then the world would be different. This modality could be different, but then we would be different. That we could have been otherwise than we are is of course true; but it is not so true as the fact that we are not.

## V. TEXTUAL ARGUMENT

By seeing the Constitution as a form of politics only, Tushnet loses the ability to appreciate the constitutional sources of the modes of argument; instead, the modalities of argument are, for him, merely instrumentally derivative of various political purposes or agenda.

In the next section, Tushnet addresses textualism, which he calls "the contention that some provisions of the Constitution need not be interpreted but need only be applied, because they are entirely

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But the "unreasoned opinion" is simply not law—as we now know it in our culture—because the current modalities are ways of assessing arguments and there is no argument in an unreasoned opinion. The analogy would be perhaps the "subjectless portrait."

131. P. 54 n.104.

132. P. 57.

133. Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

clear.”<sup>134</sup> What follows is an explication of neither textual argument nor “textualism,” a mode that prudentialists always find particularly hard to take seriously. Instead, Tushnet gives us a list of replies to the unstated query of how textual argument can possibly be made (“because the meaning of the text itself is directly available to courts without interpreting it, or because the text itself excludes enough possible interpretations”<sup>135</sup>). Yet the textualist would say that the provisions of the Constitution *simpliciter* need not be interpreted according to any external referent (the intentions of the framers, the practicality of the outcome, etc.) “because” the Constitution does not say to do so, rather than because the texts are especially clear, exclusionary, etc. That is why textual argument, like the other modalities, is circular and cannot justify itself. It is no answer to the question “Why do you conform to the Constitution as it reads?” to reply “Because that is how the Constitution reads.” The justification—the ideology—that lies behind the jurisprudence of textual argument is that of the social contract. The words of the constitutional text represent an implicit contract, to which the People, every day, give their implicit consent. Were its terms interpreted according to any recondite algorithm, that implicit assent could not be inferred. Neither methodology nor ideology can claim authority “because” the text is clear, excludes dangerous interpretations, or so forth.

This is the briefest of Tushnet’s treatments of the forms of argument, and the least careful. Again there are some confusions about the distinctions among the modes, a recasting of the description in prudential terms, a failure to distinguish between method and ideology, and the pattern of attack that we have hitherto seen, and will see again in Tushnet’s treatments of structural and ethical argument.<sup>136</sup> But the treatment is so cursory as to suggest that Tushnet finds it hard to believe that textual approaches are genuinely held.

He begins: “[T]extualism suffers from the same flaws that the attacks on originalism have exposed”<sup>137</sup> and proceeds along the same pattern. He is again insensitive to modal conflicts and distinctions, however, and thus mixes originalist and textualist modes. For example, he writes:

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134. P. 60.

135. *Id.*

136. This pattern is as follows: 1) The form of argument is stated in prudential terms, eliminating the grounding of the form in internal constitutional terms (for example, structural approaches are good for the country because they protect diversity and thus avoid civil strife); 2) a “theory” is concocted that purports to explain the particular features of the form (for example, a theory of democracy requires the protection of diversity); 3) the theory is shown to be unjustified since the practical premises by which it linked the form of argument to the theory—the use of structural approaches really will protect diversity—are shown to be false because in light of contemporary claims in the social sciences and political philosophy it can be established that the approach is indeterminate and thus will not necessarily lead to the result by which it is justified.

137. P. 60.

In such an unsophisticated form, textualism is obviously vulnerable in several respects. First, Frank Easterbrook has noted that the mathematical provisions, like all the others, have “reasons, goals, values, and the like,” behind them. . . . In this view the words “thirty-five Years” in the Constitution are simply the shorthand the framers used to express their more complex policies, and we could replace them by fifty years or thirty years without impairing the integrity of the constitutional structure.<sup>138</sup>

This confuses the intent of a provision with its expression in the text. If by “thirty-five years” the framers sought a provision that would insure a certain maturity and experience in the persons who held the office of president, the argumentative resort to this observation—in defense of the eligibility, for example, of an especially experienced thirty-year-old—is a resort to historical argument. A different sort of error is evident in this description of an alleged textual approach: Why isn’t a sixteen-year-old guru, whose followers believe in reincarnation, eligible for the presidency? For “if the President of the Senate had rejected their definition of ‘age’ she would have established a particular religious view about the definition of age and violated their rights under the free exercise clause, as well as their right grounded in democratic theory to choose who will govern them.”<sup>139</sup> This is a tortured attempt to give an example of how texts compete in the Constitution, and thus show that a textual approach cannot be determinative. A more correct (and more amusing) example, is given by Justice Black in his parody of similar arguments by Justice Frankfurter, whom he calls “Judge X”:

This case presents an important question of constitutional law. The United States is engaged in a stupendous national defense undertaking which requires the acquisition of much valuable land throughout the country. The plaintiff here owns 500 acres of land. The location of the land gives it a peculiarly strategic value for carrying out the defense program. Due to the great national emergency that exists, Congress concluded that the United States could not afford at this time to pay compensation for the lands which it needed to acquire. For this reason an act was passed authorizing seizure without compensation of all the lands required for the defense establishment.

. . . .

Plaintiff contends, however, that the Fifth Amendment’s provision about compensation is so absolute a command that Congress is wholly without authority to violate it, however great the nation’s emergency and peril may be . . . . When two great constitutional provisions like these conflict—here the power to make war conflicts with the requirements for just compensation—it becomes the duty of courts to weigh the constitutional right of an individual to compensation against the power of Congress to wage a successful war.<sup>140</sup>

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138. P. 61.

139. P. 62 (citing *Powell v. McCormack*, 395 U.S. 486, 547 (1969)).

140. Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. Rev. 865, 877-78 (1960). Yet



Such indeterminacy leads Tushnet to conclude that "unsophisticated textualism . . . allows conservatives to agree that there are constitutional limits on legislative power that courts can enforce, thus remaining within the liberal tradition, while vociferously denouncing the courts for doing anything at all, because in our society the only enforceable limits unsophisticated textualism acknowledges are not about to be violated."<sup>141</sup> But is this so? The judicial career of Justice Black, and the contemporary criticism of his jurisprudence as far too sweeping (that his simple textualism would invalidate not only all obscenity laws but conspiracy laws, antitrust combinations, etc., because he took the phrase "Congress shall make no law" literally) suggests otherwise.<sup>142</sup>

Tushnet discusses several current forays into textual argument, but it is clear his heart isn't in it.<sup>143</sup> These analyses amount to a description of one scholar's reading of a text, followed by Tushnet's own.<sup>144</sup> For my own part, I often found neither reading compelling, but of what importance is that? If we are not compelled to find a single answer, then the presence of alternative constructions should not trouble us. In the example Tushnet chooses—whether state sovereignty might enhance individual rights—he first replaces textualist standards with prudential ones, and then confuses the stricter demands of a modality's ideological justification with those of argumentative legitimacy, the latter of which do not require a single determinate answer. There is a reason for this behavior: *Red, White, and Blue* makes no distinction between ideology and argument, or between prudentialism and any other modality, because for Tushnet it's all politics. Thus he ends this section by saying:

Textualism in all its forms suffers from a fatal defect. It gives us a Constitution with the politics left out. At some level, that is its point. But if the Constitution is just another form of politics, the problem of social order recurs. I close with some textualism of my own. The Constitution provides that the Senate "shall be composed of two Senators from each State." For at least seven years, at least nine states had no Senators. How that came to be, and how the text of the Constitution came to accommodate that situation, tells us a great deal about textualism.<sup>145</sup>

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Tushnet is clearly aware of the relevance and importance of social context to textual argument: "The fragmentation of the linguistic community by political discord is central to those circumstances." P. 62.

141. P. 63.

142. See generally Sidney Hook, *A Philosopher Dissents in the Case of Absolutes*, FREE SPEECH AND POLITICAL PROTEST 77, 79 (Summers ed. 1967); Harry Kalven, Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 442-45 (1967).

143. Pp. 64-68.

144. *Id.* Compare Laycock's use of enumerated provisions to provide meaning of the unenumerated, Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 371-73 (1981) with P. BOBBITT, *supra* note 3, at 142-48.

145. Pp. 68-69. For two authors that do tell us a great deal about textualism, see the

This is meant to be powerfully evocative, but amounts to no more than an obtuse non sequitur. It does not tell us "a great deal" about textual argument and the ideology of textualism, but it does tell us a lot about Tushnet's project. Tushnet's observation shows that a sufficiently extreme political emergency—and for a constitution, a civil war must be the supreme crisis—will override even the clearest text. But if, in an emergency, facts override law, doesn't our awareness of this suggest that we know that something, something of importance, has been overridden?

## VI. STRUCTURAL ARGUMENT

Many of the constituent flaws in Tushnet's approach converge in his discussion of structural argument: the inability to account for modal recurrence among constitutional lawyers across several generations, the carelessness regarding modal distinctions, and the confusion between arguments and ideology. The model he chooses to analyze, as an example of structural argument, is John Hart Ely's important contribution: the notion of "representation-reinforcing review." "Ely argues that this theory provides the only justification for judicial review. It appears to be a perfect reconciliation of judicial review with the majoritarian aspects of democracy."<sup>146</sup>

Tushnet is surely right in noticing that here, as elsewhere, each of the various approaches suggests a particular sort of rationale for judicial review and a particular sort of reply to the countermajoritarian objection. But such rationales are not in themselves a "theory of the constitution," rather they follow from one. Beginning with this fragment, Tushnet attempts to enlarge Ely's structural rationale for judicial review into the entire structural approach, and accordingly misses its point. He makes this elemental mistake, I think, because he is tone-deaf to the harmony between Ely and his great structuralist predecessors, Chief Justice John Marshall and Charles Black. And how *could* he see these connections, after all, when he has recast structural argument, including Ely's contribution, in prudential terms? Tushnet takes structural argument to be "the jurisprudence of democracy" and gets tangled up in a rather oversimple civics-class model of democracy as the basis for Ely's argument, when in fact Ely's "democracy" (like Black's and Marshall's) is not a political scientist's ideal, but rather a legal ideal specified by the Constitution; indeed, that is why Ely's theory is worth understanding as within a *constitutional* approach at all. Disappointed with his construction of Ely's purpose, Tushnet still cannot resist restating it in prudential terms: "The theory of representation reinforce-

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estimable Hans Linde's rightly influential *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); Frederick Schauer, *The Constitution as Text and Rule*, 29 WM. & MARY L. REV. 41 (1987).

146. P. 71.

ment need not, however, find its sole justification in a narrow conception of democracy. It might be justified by the judgment that it is the best theory available to limit legislators enough without licensing judges to do too much."<sup>147</sup>

As with the other modal approaches, Tushnet ignores the basis that each theory would claim for itself, namely that some feature of the Constitution mandates it, in the legal sense of that term; and that this is why it provides a satisfactory rationale for judicial review. Instead, seeing each as no more than a policy proposal, Tushnet offers a prudential reason—the constraint of judicial discretion—from which he can derive the test of whether or not the particular form of argument adequately does this. Yet each approach fails him.

It should now be clear why on this treatment each of the five other approaches must fail. Legitimacy is maintained by following the forms of argument; these forms do not claim to justify themselves. Much earlier scholarly work that pressed such claims was circular for just that reason. But they are not delegitimated because they are discrete, because one form does not follow the rules of another. It is an irrelevance, as regards legitimacy, to measure a structural argument, for example, by the standards of a doctrinal argument. Both a majority opinion and a dissent can be legitimate (though both can't be right). Justification, on the other hand, is sought by the ideologies that derive from these forms. Each claims that it is the one true way, owing to a legal theory of power. The ratifiers had the power to endow the government with limited sovereignty; therefore their intentions in so doing must be followed if that sovereignty is to be legally justified. And so on, for each of the six forms.<sup>148</sup>

By recasting each form as justifiable only on prudential grounds, Tushnet not only does violence to the modalities, he "fixes" the argument so that it *must* fail. For if it were to claim justification on those grounds, it would have abandoned its distinctive form as well as the legal claim by which it maintains legitimacy. Legal theories are claims for authority, not simply appeals to the normative demands of political scientists. They are thus neither normative—in the sense of an appeal outside the system—nor descriptive. If I say the prevailing authority or precedent requires a certain outcome or range of outcomes, I am not saying that that is the outcome I prefer on policy or philosophical grounds, nor am I predicting a certain result, for even if I knew the judge had been corrupted and would rule otherwise, I would still make the same statement. Law is not politics, but neither is it political science.

With this introduction, let us look at Tushnet's depiction of the structural approach to interpreting the Constitution. Adopting Ely's

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147. *Id.*

148. See P. BOBBITT, *supra* note 78.

terminology for the structural rationale for judicial review, he calls the structural approach “representation-reinforcing review”:<sup>149</sup>

The situation with representation-reinforcing review is similar [to that of originalism]: the affirmative arguments for it rest on a narrow and probably indefensible conception of democracy, but it might be a decent theory if it constrains both legislators and judges enough for us to be satisfied that the remaining opportunities for tyranny are small and does so better than any alternatives. . . .

Although the theory has been given the name *representation-reinforcing review* only recently, its historical antecedents go back to Chief Justice John Marshall, who sketched the theory in a number of important federalism cases.<sup>150</sup>

It is certainly true that Marshall was our greatest structuralist judge; his arguments in the early federalism and commerce clause cases provide the classic examples of structural argument. But here notation matters: Marshall never sketched a representation-reinforcing theory of judicial review, and indeed held, as we know from *Marbury*, a completely different view of the rationale for judicial review. The difficulty is that, having taken representation-reinforcing review as a paradigm for structural argument generally, Tushnet must somehow link it up with Marshall’s approach. This error is greatly compounded when Tushnet takes Justice Stone’s celebrated footnote to *Carolene Products*—a note that does have something to do with *representation*, but nothing to do with the structural approach—as a typical, indeed fundamental, element in that approach. He writes, the “theory was developed further by Harlan Fiske Stone in the 1930s and the 1940s.”<sup>151</sup>

It is not easy to see how mistakes of agglomeration are made be-

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149. This is like calling Marxism “the labor theory of value” or Gothic architecture the “flying buttress.” It can generate some misunderstandings, not the least of which are the incongruities that arise when this theory is grafted onto those of other structuralists with *different* rationales for judicial review or other legal thinkers who share some elements of the rationale but not the general approach.

150. P. 72. This provides an example of why the notation “structural argument” is to be preferred to the phrase “jurisprudence of democracy”: Not only is the latter somewhat misleading as to Ely’s views, since the democratic structures he is concerned with reinforcing are those specified by the Constitution and not simply those that are democratic *per se*; it is also deeply misleading as to the antecedents of Ely’s structuralism. Thus Tushnet proceeds to introduce a number of important early structural cases arising out of federalism, a concept that has very little to do with democracy *per se*, but everything to do with the structures of American constitutional democracy.

151. P. 1 n.1. Justice Stone suggested, in his famous adumbration to the *Carolene Products* case, a distinction between the degrees of scrutiny appropriate to cases in which the electoral process was ill-suited to correct abuse, and other cases in which this defect was not present. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Justice Stone, a thorough-going and committed prudentialist, did not use structural argument to make his point. Indeed, the entire purpose of the footnote is to mark the appropriate lines for judicial intervention and thus shares much with Justice Brandeis’ *Ashwander* concurrence, *Ashwander v. TVA*, 297 U.S. 288, 341 (1936), and Bickel’s “Passive Virtues,” Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961), other classic statements in the prudentialist canon. For a later generation’s development of this tradition, see Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985). Characteristically, the footnote does not

cause they come to us in the agglomerated state. It is difficult to untangle the strands that have been melted together. But this, I think, is what has happened here: Tushnet correctly perceives Ely's rationale for judicial review as "structural," but erroneously takes it as dictating the approach generally (reversing the direction of entailment, as it were). Tushnet then confronts Marshall, whom he correctly perceives as a structuralist but who did not share Ely's views as to the basis for judicial review, and Stone, who shared Ely's rationale for judicial review but was no structuralist. This initial error blinds Tushnet to the differences among these figures, and so he arrives at an "Ely-Marshall-Stone approach."

What does it matter if the terms are used a little differently, or if great judges are classified somewhat differently? What is the importance of notation when discussing the modalities of constitutional interpretation? <sup>152</sup> Consider this description by Tushnet of "the theory" reduced to "representation-reinforcing review" with its larger structural approach ignored:

Two relatively uncontroversial cases clarify the application and defects of the theory in other, more interesting and controversial cases. The first example involves "states' rights." Can the courts ever properly overturn national legislation on the ground that it infringes on the constitutionally recognized interests of states? Here the theory, at least as presented by most of its adherents, says no. Because the interests of the states are expressed in a completely open and unobstructed way in the national political process, the courts cannot overturn on states' rights grounds legislation that emerges from that process.<sup>153</sup>

This reduces structural arguments to the representation-reinforcing element alone. Yet that element was included in the first place only because the constitutional structure demanded it, not because it had any independent status of its own—not, that is, because it appeared in a footnote to a Supreme Court opinion (and thus was required by adherence to precedent), and not because it restrained judges (and thus served a prudential goal). In fact, structural arguments would be the first, as Marshall and Charles Black argued, to protect the states on the grounds that the constitutional structure demands it. Offering no apparent idea as to the *constitutional* source of the notion of representation-reinforcing review, Tushnet does not, of course, connect the

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specify a substantive rule as to what standard should be applied, only a checklist as to when an intervention to review the legislature is appropriate.

152. Tushnet is not reluctant to accuse others of closet prudentialism, charges they must find particularly galling since he so widely misses their point of view. Thus, he says:

I have developed the theory [structural argument] in what I regard as its most defensible form. Most of its adherents appear to resist some of the conclusions I draw, by relaxing some of the premises in an ad hoc manner, for what seem to me to be straightforward political reasons: without the ad hoc adaptations the theory yields results that those adherents find politically unacceptable.

P. 72.

153. *Id.*

structural form of argument with anything that would protect constitutional *structures* (as distinct from “democracy”).

Tushnet continues with a discussion of interstate commerce:

Under what circumstances may the courts prevent states or localities from regulating commercial activity that has its origins or impact in other states? Here the theory appears to support a fair degree of judicial intervention, because the outsiders who are affected are said to have no role in the local legislature.<sup>154</sup>

Tushnet has the structural nature of this argument right: Court review is invoked, in the classic cases that develop this theory, to protect the structure of national economic union against the centrifugal forces of the state legislatures.

But this should have alerted him to the fact that more than representation-reinforcing review is going on in those cases, for representation-reinforcing review does not lead to such holdings. Indeed, in those cases in which Tushnet finds “formal” barriers to representation (e.g., an unrepresented external constituency), structural holdings are not the consequence of a desire to *enhance* representation at all. Thus, in *McCulloch*, the Maryland legislature was forbidden to tax a federal instrumentality not simply because its interests were not formally voted in state elections (such a holding would prohibit taxing corporations, for example) but because a tax on a federal enterprise extends to the entire national polity, which is *necessarily* unrepresented in the state legislatures according to the federal structure of the Constitution.<sup>155</sup> That is why the state power to tax federal operations at any level of taxation, no matter how modest, is inconsistent with the constitutional scheme, while the federal power to tax state operations depends on its actual impact.

These cases have nothing to do with the enhancement of representation that we are concerned about when civil liberties are jeopardized or minorities are stigmatized, and thus they do not provide much basis for protection in such circumstances. They are just not relevant, although the arguments in these classic cases fall within the genre of structural argument. By making what might appear to have been no more than a mistake in notation, Tushnet subsumes these cases within representation-reinforcing review and demands that they provide the basis for intervention when civil liberties and civil rights are threatened. Finding their reliance on formal relationships insufficient to do this job, he then proposes to correct them by having judges review legislative processes for their democratic and representative perfection; and then excoriates the “theory” he has reconstructed as one that fails to constrain judicial discretion, and thus, fails his test for legitimacy and justification:

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154. *Id.*

155. 17 U.S. (4 Wheat.) 316 (1819).

The defect in the theory . . . is that representation-reinforcing review must consider whether formal or informal obstacles in the political process are to be removed. If the theory focuses on formal obstacles alone, it is subject to serious criticism, for removing the formal obstacles would do little to alleviate the risk of tyranny. Yet if the theory takes informal obstacles into account, judges will be called upon to make controversial assessments of political reality and the theory loses its constraining force. Thus the theory designed to prevent both legislative and judicial tyranny, can prevent one only by creating the risk of the other.<sup>156</sup>

But the theory was “designed” to do no such thing; in fact, it was not *designed* at all. Moreover, this is not the “theory,” if by that Tushnet means the theory of representation-reinforcing review, that unites Ely and Marshall.

Tushnet nonetheless continues in this vein: “The Supreme Court discussed this theory in the important early case of *Gibbons v. Ogden*.”<sup>157</sup> But of course Marshall does no such thing. He never discusses representation-reinforcing review, and he never defends his approach on the grounds that he is attempting to prevent judicial tyranny. Tushnet is led into such an obviously wrong claim because there *is* a link—structural argument. But Tushnet fails to recognize precisely what it is that links Marshall and Ely, or for that matter what he himself is doing, because he is unsure of the nature and distinctions of the modalities.

Thus, Tushnet quotes Marshall’s reply to Ogden:

“The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.” . . . Jesse Choper has exhaustively elaborated this representation-reinforcing analysis of congressional power and states’ rights.<sup>158</sup>

Marshall’s argument, however, beyond using the word “representative,” is certainly not a representation-reinforcement argument. He is not arguing about the legislative process, as Wechsler does,<sup>159</sup> but about the nature of the power over commerce; that is why the war power is mentioned. Marshall’s point is that a plenary power, in contrast to a restricted power, is one whose objects the Congress alone must define constitutionally. His remarks about the wisdom and discretion of Congress are meant to underscore the common sense of such a

156. P. 72-73.

157. *Id.*

158. *Id.* Tushnet goes on to cite Wechsler’s celebrated argument that Congress’ constituent base makes it the appropriate check on federal encroachment on the states. *Id.* (citing Herbert Wechsler, *The Political Safeguards of Federalism*, in *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 49 (1961)).

159. Wechsler, *supra* note 158, at 49.

constitutional allocation; they are emphatically not its rationale,<sup>160</sup> as a less artful excerpting would disclose.<sup>161</sup> Finally, if Tushnet was right about Marshall's views, then Marshall assuredly would not permit court-imposed limits on any of the enumerated federal powers vis-à-vis the states, nor would he use the judicial instrument to enforce limits on non-plenary powers. There is, however, ample evidence to the contrary in Marshall's opinions.

Wechsler's argument is different, it being like Choper's<sup>162</sup> that the states are protected by the legislative and electoral process, but neither is an argument derived from the representation-reinforcement basis for judicial review. That is, neither suggests that the reason we ought to rely on the Congress, and not the courts, to police the boundaries of federal power is because the constituency basis for federal elections will make members of Congress more sensitive to the Constitution when it concerns federalism than when it concerns civil liberties or the protection of minorities. There is such an argument to be made, of course; it is usually made, as are practical, fact-centered constitutional arguments, from a prudential perspective. Having recast the "formal" structural cases like *McCulloch* and *Gibbons* as representation-reinforcing cases, and then limited structural argument to its representation-reinforcing aspect, Tushnet concludes: "If representation-reinforcement review is justified only where formal mechanisms of representation are absent . . . Congress will tyrannize over the states."<sup>163</sup>

Why is it important to keep straight whether Choper or Wechsler or Marshall is making structural arguments? After all, isn't the persuasiveness of the argument, and not its rhetorical characterization, the point? Take the conclusion just stated, that if judicial review were limited to cases where the formal mechanisms of federalism and representative government had broken down, Congress would tyrannize the states, because in the real world states are not really protected by their representatives in Congress no matter what the formal relation may be. Tushnet wrenches an argument from Choper to serve as the straw man for this conclusion:

Choper mentions bipartisan caucuses of House delegations from each state, the political positions such as Governor held by members of Congress before their election to Congress, the deep personal ties members have to their localities, and the importance of "state political chieftains" in generating support for those who would seek the presidency.<sup>164</sup>

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160. *Marbury* would be wholly undercut by such a rationale; in fact Bickel attempted to do so by precisely this means. See A. BICKEL, *supra* note 14, at 1-14.

161. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824).

162. See Jesse H. Choper, *The Scope of National Power Vis à Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

163. P. 74.

164. *Id.*



Tushnet then proceeds to discredit this claim by observing that "[t]here are serious difficulties in relying on this kind of evidence . . . . For each item on which he [Choper] relies one can find another that substantially weakens the point . . . . The difficulty is that those who live by empirical research die by empirical research as well."<sup>165</sup>

But Choper is not defending the dubious structural thesis Tushnet attributes to Marshall and Ely; he is in fact *replying* to a structural argument, which would insist on judicial review to protect the states,<sup>166</sup> with a fact-centered prudential argument of his own,<sup>167</sup> one which Tushnet simply doubts on a factual basis. Keeping the modalities straight would have cleared up this tangle and perhaps thrown into high relief the absurdity of the structural caricature. But that caricature appears to have been necessary to allow Tushnet to repeat the move made with the earlier modes discussed. Tushnet again concludes that the failure to achieve the theory's ideological goal (here the preservation of the structure of government) means that judges must cheat on the prescribed method of rationalizing (the mode of structural reasoning), and this cheating frees the judge from the constraints of the method, thus establishing the failure to achieve the principal policy goal set for each modality by the author, that of restricting the power of the judiciary: "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."<sup>168</sup> But to achieve such symmetry requires Tushnet to exercise main force on structural argument. This is particularly evident in his astonishing treatment of the principal American case in the structural mode, Chief Justice Marshall's opinion in *McCulloch*. Tushnet writes:

Our second example of the theory's operation is also drawn from federalism, here the question of the courts' power to declare state legislation unconstitutional on the grounds that the legislation interferes with interstate commerce.

. . . John Marshall again showed the way. *McCulloch v. Maryland* involved a tax that Maryland imposed on the activities of banks that were not chartered by the state legislature.<sup>169</sup>

But of course, as every first year law student knows, *McCulloch* is not an interstate commerce case. The whole point of its being a structural case is that in Part II of the opinion, which strikes down the Maryland statute, Marshall carefully avoids citing any affirmative federal power.

165. Pp. 74-75.

166. See, e.g., CHARLES L. BLACK, JR., PERSPECTIVES IN CONSTITUTIONAL LAW 30-31 (1963); see also *National League of Cities v. Usery*, 426 U.S. 833 (1976) (Rehnquist, J.); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579-80 (1985) (Rehnquist, J., dissenting).

167. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 176-93 (1980).

168. P. 75.

169. P. 76.

How could Tushnet make such a blunder? Because the framework he has painstakingly set up requires it. He needs a structural case that will link up representation-reinforcing review with the supremacy of Congress's commerce power. He purports to find one in *McCulloch* which does rely on theories of representation, and another in a genetically altered *Gibbons v. Ogden* (which does rely on the supremacy of the commerce power). Taken together, he will use these to show that structural argument (thus portrayed) yields an unavoidable but absurd conclusion: The supremacy of Congress and its real-world sensitivity to state interests not only give it the power, but give it the *exclusive* power, to police the boundaries of federal authority; the sole exception is those instances in which Congressional representation has broken down (because it is the representational nature of Congress that makes it both empowered to correct their abuses, since it is hierarchically superior, and institutionally suited to do so). Representation breaks down in the face of "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . [or] prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."<sup>170</sup> Thus are Stone and Choper linked to Ely, and all to Marshall. It is a travesty. By such tacking together we get this result (and the claim that the result is the product of inexorable logic): The structural approach would necessarily permit any legislative body (excluding Congress) to put *any* restrictions whatsoever on its constituency's franchise, and (including Congress) to forbid public discussion of *any* subject whatsoever (excepting only the discussion of the proscribing statute). A city council could limit appearances before it to members of a particular political party, a state legislature could reintroduce the all-white primary, and Congress could ban public debate (and public meetings) even on these events without any court being able to legitimately intervene. To these absurd results, Tushnet only replies: Well, it's *your* theory.

But is it? To make it a "theory" at all, Tushnet must deal pretty creatively with its constituent elements. Having characterized *McCulloch* as a commerce clause case, Tushnet now must somehow deal with the structural argument that Marshall introduces to deny Maryland's authority to tax a federal instrumentality. Hitherto this has been thought to be a paradigm of structural argument in that it—like *Chadha*<sup>171</sup> in our own day—does not inquire into the real-world impact of the offensive regulation, but requires instead a strict adherence to the constitutional structure. Notice how Tushnet assimilates the structural federalism rationale into a prudential commerce clause problem: "Maryland treated out-of-state banks differently from the way it treated

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170. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

171. *INS v. Chadha*, 462 U.S. 919 (1983).

in-state banks, but banks do not vote anyway. . . . If we are to save the theory [yet prevent discrimination against commerce] we must now introduce informal mechanisms of representation [which show that in-state banks have a real-world influence in the legislature]."<sup>172</sup>

But of course Marshall's argument does not even address the issue of taxing the bank as such. It is Maryland's taxation of federal taxpayers, not "out-of-state" banks, that was the problem; it was not necessary to show then that in-state taxpayers were "informally" represented. This rationale would not have helped Tushnet, however, who needs a different *McCulloch*. His *McCulloch* is *Hunt v. Washington State Apple Advertising Commission*,<sup>173</sup> authored neither by Marshall nor Stone, whom he quotes as a summation of the concocted *McCulloch* argument: "When the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."<sup>174</sup>

This is a quite different point from *McCulloch*'s: not that the legislature lacks authority, as in *McCulloch*, but that it lacks restraint. It is a prudential rather than a structural argument. Indeed, *McCulloch* is not even cited by the Court in *Hunt* (or in *South Carolina Highway Department v. Barnwell Bros.* either, from which the quoted passage is taken).<sup>175</sup> Yet Tushnet concludes that "[s]ince *McCulloch* and *Gibbons* it has been clear that Congress has power to regulate [a state's restriction on interstate commerce] in whatever way it wants."<sup>176</sup>

The principal burden of this chapter in *Red, White, and Blue* is to set up a "hierarchical" argument for which *McCulloch* and *Gibbons* are to provide the links to Marshall. This argument holds that: 1) If structural approaches are limited to those instances in which there has been a failure of adequate representation, and 2) the Congress may preempt state legislatures in every respect, then 3) whenever Congress's representation is adequate—as judged by the *Carolene Products* standard—structural approaches will be unavailing to courts trying to review state practices for their constitutionality. Tushnet puts it this way:

In the United States legislatures are arranged in a hierarchy: a superior legislature may override decisions made at a lower level. According to the version of the theory being considered here, courts must ignore an obstacle to representation in a subordinate legislature if representation in a superior legislature is unobstructed. In our system that means the representation-reinforcing review is appropriate only with respect to obstacles to representation in Congress, for, as we will see, Congress is

172. P. 77.

173. 432 U.S. 333 (1977).

174. P. 77 (quoting *South Carolina Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938)).

175. Does this sort of thing prove, or discredit, Tushnet's claim that any precedent, in the hands of a clever lawyer, can be characterized in any way?

176. P. 77.

the superior legislature not just with respect to regulation of commerce but with respect to the entire range of civil rights and civil liberties.<sup>177</sup>

Whatever one may think of this argument—and the allocation of jurisdiction to the federal courts by Congress would appear to render it vacuous on its own terms—it at least appears to be a structural argument. That is, it appears to depend on inferences derived from the relationships among those structures set up by the Constitution: specifically, federal supremacy (the relation) and representative federalism (the structure). Actually, however, the argument turns out to be a prudential recasting of structural arguments. Having rendered the judicial use of structural approaches impotent by the argument from hierarchy, Tushnet would save them through real-world assessments of precisely how well represented various interests are, only to profess horror at the introduction of judicial action that is axiomatically representation-denying insofar as it overturns the decisions of (formally) representative bodies.<sup>178</sup>

Consider, for example, his treatment of the negative commerce clause cases. The usual structural rationale for these cases is that the allocation to a national Congress of the commerce power sets up the structure of a national economic union; that this allocation inferentially denies to the states both the power to regulate interstate commerce *per se* (as the states do not have a national franchise) and the power to discriminate against out-of-state commerce (since the prevention of balkanization was the other pillar of the allocation to Congress). Judicial intervention is necessary to preserve the context of congressional action: the national economic market. The fact that Congress is hierarchically superior to the states as to this subject does not deny but *requires* judicial oversight.

For Tushnet, however, structural argument means representation-reinforcement, and that transforms all structural problems into assessments about the political process: “When one observes an outcome of the political process, how can one be sure that it results from obstacles to representation rather than from lack of sufficiently intense concern on the part of those affected?”<sup>179</sup> Thus, in the negative commerce

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177. P. 78. Tushnet first quotes Justice Jackson’s observation that Congress is too preoccupied to oversee the treatment of out-of-state interests by state legislatures and suggests that this would allow us to slip the restraints of the hierarchical argument. He then concludes, however, that “although judicial intervention appears at first blush to be representation reinforcing, on analysis it can seem representation denying, and the injection of political reality to counter the formalism of the ‘hierarchy argument’ makes it impossible to treat out-of-state interests as unrepresented in local legislatures.” P. 79.

178. P. 78. In a later chapter, Tushnet dismisses the significance of article III’s allocation of the jurisdiction of the federal courts to Congress. Waving aside arguments to the contrary by Black and Perry, he writes: “What matters here, though, is not constitutional theory but how politics operates. The scholarly consensus is a political force that keeps Congress from enacting jurisdiction-restricting legislation.” P. 200. This conclusion illustrates the pitfalls of academics who would comment on politics.

179. P. 80.

clause cases,

the issue is one of allocating the associated burdens of inertia and lack of intensity. Ideas about representation alone cannot specify the starting point or status quo allocation of those burdens. That, after all, is why the commerce clause cases routinely invoke the fear of balkanization, a normative criterion unrelated to representation, to justify what appears to be judicial displacement of local choices but what is actually a judicial determination of the group upon whom the burdens of inertia and lack of intensity will rest.<sup>180</sup>

Of course it is true that the fear of balkanization is not connected to representation-reinforcing review or representation; but instead of concluding that it is therefore merely a front or pretext for making a factual judgment that might allow a representation-reinforcing review theory to decide such cases, one ought to have doubts as to whether representation-reinforcing review is what is really going on there. Tushnet is obliged to ignore this if he is going to focus on the contingent beneficiary of the commerce clause analysis—who wins—as the basis for the decision. He simply does not treat the claim that fear of balkanization is the concern driving the analysis,<sup>181</sup> even though such a link to the constitutional structure is indispensable for a structural approach. Indeed, I think the use of the very terms “inertia” and “intensity”—terms drawn from political science that Tushnet has used to reconstruct the meaning of the negative commerce clause cases—would come as a surprise to the authors of those opinions, whom we are assured are “actually” preoccupied with such matters.

Tushnet thinks that representation-reinforcing review is grounded in an effort to enforce the democratic character of the political system; on this basis he then decides, as a practical matter, that it isn't. If he had appreciated the legal basis for structural argument, of which representation-reinforcing review is but an inference, the failure to adequately capture “intensity” and so forth would have seemed irrelevant.

Indeed, one doubts whether Tushnet can actually make a structural argument;<sup>182</sup> see, for example, how he uses the following case to reveal

180. *Id.*

181. *See id.*

182. *See* p. 82. Perhaps it would be well here to review briefly a typical structural argument. They tend to be logically straightforward: First, an uncontroversial statement about a constitutional structure is introduced; second, a relationship is inferred from this structure; third, a factual assertion about the world is made. The holding rests on the deduction drawn. For example, the argument in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (which was emphatically *not* a tenth amendment case), went essentially like this:

1. We have a federal system, composed of a supreme federal state and member states.

2. It follows that, to have such a system, there must be at least one thing that the national legislature cannot order the states to do; otherwise, we would not have a federal system but would instead have replaced it with the regions and departments of a unitary system.

3. Determining the wages and hours of state employees is a function crucial to the preservation of a state as a state; if Congress could manipulate the costs of such items, it could control state policies generally.

4. Therefore, Congress cannot be permitted to exercise such control.

the flaws in structural approaches:

*Kramer v. Union Free School District No. 15* illustrates the problems that the existence of a hierarchy of jurisdictions poses for representation-reinforcing review. [Kramer was an adult who lived with his parents and was neither a renter nor a taxpayer. The Supreme Court overturned the statute that prohibited his voting in school board elections, on the grounds that it thereby disenfranchised many persons with a greater interest in such elections than those it enfranchised.] . . . This decision appears to fit the theory of representation-reinforcing review: The Court removed an obstacle to participation in the political process because that obstacle was not precisely designed to advance state purposes unrelated to participation.<sup>183</sup>

Note first that the “theory” elides the difference between Stone’s prudentialism and Ely’s structuralism—that is, between a rationale for when to defer to the legislature, having undertaken review, and the rationale for judicial review *per se*. Second, even on Stone’s “theory,” we would merely require a closer look at the statute; it would not be the justification for overturning the statute. The *Carolene Products* footnote provides neither a justification for judicial review (in contrast to Ely’s theory) nor the substantive basis upon which to overturn a statute. Finally, does the case actually pose a problem for Ely’s theory?

Tushnet writes:

But the problem of legislative hierarchy poses a serious difficulty . . . . [A]lthough Kramer could not vote in school district elections, he could vote for state legislators who support the repeal of the local disenfranchisement. If we consider only formal obstacles to representation, the theory would not justify judicial review so long as the disenfranchised person can vote in elections for a legislature that can repeal voter disqualification rules that it or subordinate legislatures have imposed.<sup>184</sup>

On this view of Ely’s theory, it could never apply to any disenfranchisement except that barring voting for Congress since, according to section 5 of the fourteenth amendment, all legislatures are subordinate to Congress on that issue.<sup>185</sup> If enhancing representation is the only justification for intervention, and if deference to the legislature must be afforded whenever the system of representation is not rigged or in *rigor mortis* (and cannot cure itself—the *Carolene Products* points), then only interventions that correct representational defects that the system cannot itself correct are justified. Thus, Tushnet concludes from his analysis of *Kramer* that: 1) Structural theory requires a real-world assessment of Kramer’s access to, and likelihood of prevailing before, his hierarchically superior legislature; and therefore that 2) “now . . . we are deep into the details of political reality, which, as we have seen and will see

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183. Pp. 83-84.

184. P. 84.

185. *See id.*

again, eliminates the theory's constraining force."<sup>186</sup> Yet if we confine ourselves to structural approaches without the benefit of such political assessments, then we face this unhappy conclusion: "So long as the complainant has access to such a legislature, his or her exclusion from the vote for local bodies is unassailable within the theory."<sup>187</sup> I imagine that no one who could possibly be classified as a structural advocate could possibly hold such an absurd position. Only by confusing different modalities of argument can one be led, with seeming logical inexorability, to such an impasse. As Descartes whispered in agony, "*Messieurs, épargnez.*"<sup>188</sup>

This was a consequence of confusing prudential and structural approaches.<sup>189</sup> Let me give another, more dramatic example of the confusion of these two approaches. Tushnet evaluates how structural approaches cope with the problem of guaranteeing free speech and reaches this surprising conclusion: "The theory is then inadequate to guard against legislative tyranny" because it "justif[ies] invalidation of national sedition statutes, and nothing else" and "such tyranny expresses itself in laws other than sedition statutes."<sup>190</sup>

This is the argument:

The theory requires that policy result from the aggregation of revealed preferences. Disfranchisements prevent some people from using the vote to reveal their preferences whatever they are. Limitations on speech prevent people from revealing *particular* preferences, those for the policy about which speech is limited. For example, if a statute makes it unlawful to advocate racial segregation, those who prefer segregation will be unable to reveal that desire. The conclusion that only national laws can be attacked under the theory follows easily from the analysis of disfranchisements. Local restrictions on speech can be remedied by state or national legislation that prevents local legislatures

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186. P. 85. Tushnet sees the first half of this, that his reconstruction of the theory proves too much. Thus, he writes: "Is Congress a hierarchically superior body over state legislatures with respect to disenfranchisements? Both precedent and the theory say that Congress is indeed superior." P. 86. "Within the theory then, challengers ought to be able to attack only exclusions from the national franchise." *Id.*

187. P. 86.

188. JOHN P. MAHAFFY, *DESCARTES* 136 (1910).

189. Tushnet says that Lupu "argues that the allocation is justified by a substantive preference for an enlarged electorate; exclusions may distort the outcomes of local elections before the state legislature can act. But the concept of distortion itself requires a prior specification that the preferences of people like Kramer ought to be taken into account. That is precisely what is at stake, and although the judgment that those interests should be taken into account is certainly defensible, it cannot be made on the grounds of representation alone." P. 85 n.29 (citing Ira Lupu, *Choosing Heroes Carefully*, 15 HARV. C.R.-C.L. L. REV. 781, 797 n.62 (1980)).

This is a very acute observation and a valuable one. But notice what it tells us about the observer. Both Tushnet and Lupu are classifying themselves as prudentialists when they assert that there is some external value—for Lupu, a "substantive preference of an enlarged electorate"—against which the "allocation" must be measured, whereas for the structuralist these choices have been made.

190. P. 89.

from enacting such restrictions.<sup>191</sup>

First, one must observe that the “theory” does not require “that policy result from the aggregation of revealed preferences.” That would be a prudential theory, that is, one justifying a particular argument by its contribution to an external value (maximizing the satisfaction of revealed preferences). The structuralist may indeed hold such assumptions. It may be that Madison thought that representation was a good thing because it allowed the preferences of voters to be reflected in government. But it is doubtful that Hamilton felt this way, and it is unlikely that either would have weakened his commitment to parliamentary representation if it had been shown that some other system, of opinion polls or councils of sociologists, for example, was a more effective means of translating revealed preferences into policy. The reason why the structuralist is *committed* to the particular system of representation we have—so unique among the societies that we recognize as “democratic” as to be almost idiosyncratic—is because the Constitution specifies such a system.

Second, instead of beginning with an external preference—maximizing consumer satisfaction, say—begin instead with the structures that the text provides: a national legislature constituted through elections, for example. Now contrast the following argument from Charles Black with the quoted passage from Tushnet regarding the implications of structural approaches for state restrictions on free speech:

Again, I make bold to assert, that from the very structure of the relation between the national representative and his constituency, there arises a compelling inference of some national constitutional protection of free utterance, as against state infringement. Is it conceivable that a state, entirely aside from the Fourteenth, or for that matter the First Amendment, could permissibly forbid public discussion of the merits of candidates for Congress, or of issues which have been raised in the congressional campaign, or which an inhabitant of the district—or of the state, where the election is senatorial—might wish to see raised in the campaign? I start with that as the hard core, because I cannot see how anyone could think our national government could run, or was by anybody at any time ever expected to run, on any less openness of public communication than that.<sup>192</sup>

On a structural view, the “hierarchy of representation” leads to precisely the opposite of Tushnet’s conclusion.

Finally, there is no warrant for the inference that courts should, on representation-reinforcing grounds, desist from the review of state statutes. There appears to be one only if you confuse the prudential standard for judicial scrutiny with the substantive structural rationale for judicial review. If the latter arises from the constitutional structures

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191. *Id.*

192. C. BLACK, *supra* note 13, at 42-43.



created in the constitutional text, the courts could hardly refuse to decide matters on the ground that a perfectly representative body—the Congress—also had authority to remedy the matter, for it is Congress that has given the courts a mandate for decisions in such cases in the first place. The bar to judicial intervention only appeared if you thought the underpinning for review was somehow derived from Stone's advice as to how it should be administered.

In the balance of the chapter on structural approaches, Tushnet analyzes how these approaches treat the issues of equal protection, due process, and federalism. The attack never varies; it has three moves: 1) The theory is redefined in prudential terms as setting forth criteria against which policy must be measured—here the enhancement of representation, i.e., the revelation through election of voter preferences; 2) This redefinition requires that the underlying connection to the Constitution be suppressed—its source in the structures and relationships of the Constitutional text—while it is this connection that otherwise enables the legitimating goal of the theory; 3) The new, redefined standard is assessed, and it is shown, rather persuasively I think, that a naturalistic, non-conventional definitional scheme of the kind on which such a standard depends for its justification is discredited by current opinion in a number of cognate academic disciplines. Such criticisms can be drawn from historiography, or semiotics, or even, as here, from contemporary political science.<sup>193</sup>

And the conclusion never varies; one might say that within the subjects treated in the structural chapter, as among the various forms of argument that comprise Part I of the book, ontogeny recapitulates phylogeny. Thus, in the midst of the discussion of equal protection, Tushnet pauses to say:

The argument so far is this: (a) when the theory is confined to formal obstacles to representation, it yields so few constraints on legislative behavior that criticisms are convincing; and (b) a theory that considers informal obstacles to representation cannot constrain judges. Its adherents find it attractive because it falsely appears to them as a defense of the main lines of contemporary American liberal thought.<sup>194</sup>

But the ways in which these transformations are done is by no means as tedious as the reiterated conclusions may make it seem. On the contrary, they are very artful, even approaching the pyrotechnical performances once got in Laurence Tribe.<sup>195</sup> Consider Tushnet's treatment of equal protection from a structural point of view:

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193. But there are risks to eclecticism; see, for example, p. 101 n.71, for what amounts to a kind of caricature of microeconomic approaches to political problems.

194. P. 99.

195. E.g., Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 33-41 (1973) (defending *Roe v. Wade* on game theory grounds); Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065 (1977) (defending *National League of Cities v. Usery* on grounds of individual rights).

The third paragraph of the *Carolene Products* footnote refers to "discrete and insular minorities." How does that fit into the theory? According to the theory, public policy must be based upon revealed preferences. The law of disfranchisement and free speech deals with how preferences are revealed. The law of equal protection deals with how policy is based on revealed preferences. Discrete and insular minorities are groups which are allowed to participate in the representative process but whose voices will not be listened to.<sup>196</sup>

This is a very interesting and creative reconstruction of structural argument along prudential lines. Now the theory of structural argument is that the Constitution does not tolerate policies that are inconsistent with those commitments to the significant relationships among the various structures—bicameralism, federalism, and so forth—or ordained in the Constitution. Whether these relationships accurately reflect revealed preferences or not hardly enters into it. Indeed, "revealed preferences" is economists' jargon for the axiomatic personal inferences to be drawn from the market actions of a consumer; it is highly debatable whether a voter is imitating such a market actor when he or she votes, attends a precinct meeting, or signs a petition and so forth, that is when he or she participates in a process that is defined by its removal of decisionmaking from the market. But by giving this microeconomic twist to the terms, Tushnet transforms the constitutional processes of legislation and litigation into a market where disappointed bidders can have a second chance at the goods with respect to which they were outbid in the original market. Thus, Tushnet writes: "[P]eople litigate constitutional claims when they seek to alter the result of the representational process in which they were losers. That is, such claims are made only by those who were in the minority on the issue when it was before the legislature."<sup>197</sup>

Even if we confine ourselves to equal protection jurisprudence,<sup>198</sup> one must ask whether this is a natural reading of *Bakke*<sup>199</sup> or *Mow Sun Wong*,<sup>200</sup> to say nothing of the alien education cases (since aliens, were we to adhere to Tushnet's view of structuralism, have no judicially cognizable rights since they have no right to representation). In an era of public interest advocacy, we may be inclined to forget that most equal protection challenges, like most constitutional challenges generally, are incidental to the civil and criminal processes. They are interposed by defendants whose interest seldom extends beyond their own well-being. Seeing it as incidental to the legislative process is, however, helpful to set up the balance of the argument: "The theory must therefore

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196. P. 94.

197. *Id.*

198. Since the model described scarcely seems relevant to such quintessentially structural opinions as *Morrison v. Olson*, 108 S. Ct. 2597 (1988) (the special prosecutor case), and *INS v. Chadha*, 462 U.S. 919 (1983) (striking down the legislative veto).

199. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

200. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

distinguish between discrete and insular minorities, whose preferences are not taken into account, and other minorities, who are simple losers. Yet if we regard the political process as pluralist . . . we run up against rather serious difficulties as we try to draw the required lines."<sup>201</sup>

By taking Chief Justice Stone's prudential standard for deference to the legislature, and making it the criterion justifying structural argument, Tushnet can then legitimately ask when legislative losers fall into the magical category of the "discrete and insular minority," and attack the shifting real-world nature of such a definition. Tushnet says: "If the courts intervene even on the facially discriminatory statute, they may be displacing political judgments that resulted from a process in which all preferences were in fact taken into account. This outcome may occur whenever a group is not equally concerned about all the items on its agenda."<sup>202</sup>

This utterly reduces structural argument to politics. For structural purposes, it ought not to matter if the duly elected representatives of the "discrete and insular minority" coldbloodedly bargained away their constituents' rights. If a necessary constitutional relationship is compromised thereby, the legislative act cannot stand. The Constitution puts such a bargain beyond the bounds of politics. The quoted passage assumes that the purpose of judicial intervention to apply the equal protection clause, on structural grounds, is to assure a fair outcome of a fair bargaining process, where fairness is equated with equal representation. In fact, the purpose is to insure that no discriminatory outcome results no matter how it is arrived at. Imagine a modern-day Marcus Garvey who successfully negotiates a lucrative exile for blacks or a state legislature that decides to permit proxy voting in elections because it more closely tracks the opinion polls. For the structuralist, the constitutional bonds of citizenship cannot be bargained away.

According to Tushnet,

*Ely's Democracy and Distrust* is the most elaborate recent treatment of this theory. [Ely] concludes that the theory treats the following groups as minorities: blacks (with some labor on Ely's part), gays, and perhaps women with respect to statutes enacted prior to around 1950. On the whole the theory does not appear to be very powerful in this setting.<sup>203</sup>

From a structural point of view, Ely's theory is powerful if it offers a clear demarcation derived from the relationships implicit in the structures set up in the Constitution, because this satisfies its underlying reason for being. But for Tushnet, it is not "powerful" unless it includes more groups. It would be more "powerful" if, for example, Ely could generate an outcome that also labeled as minorities the aged, the handicapped, religious and ethnic groups, and so on. And this helps explain

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201. Pp. 94-95.

202. P. 95.

203. P. 99 n.65.

the difficulties Tushnet encounters with pluralism, because pretty soon this list starts to look like just a list of interest groups. Tushnet seems unaware that he has generated this difficulty by ignoring the basis for minority status that Ely has derived from the Constitution *because that was its only legitimate source*, not simply because it was an avenue that usefully served the purpose of inclusion. Indeed, Tushnet bridles at Ely's reliance on the constitutional text as a necessary basis for structuralism.<sup>204</sup>

Tushnet concludes the chapter with a paragraph on the relevance of federalism. Even in closing, he addresses a central constitutional structure from a prudentialist point of view. His virtuosity does not fail him. Since

smaller groups are easier to organize than larger ones, and groups concentrated in one location are likely to develop ties of friendship and cooperation that further ease the burden of organizing an opposition to outside efforts at control [and made civic education easier] . . . federalism is as much a process of representation as voting is.<sup>205</sup>

Actually, federalism is probably not a process of representation so much as the topological boundarying that voting requires if it is to be representational. But a more important point is this: It is unnecessary to go through this ungainly approach to make federalism relevant to structural argument unless you have forgotten the constitutional basis for such argument. With the wistful tone of a political scientist who could have designed a better system but who despairs of its realization in the hands of the clods running it now, Tushnet concludes: "We would have a quite attractive democratic representative process if we could perfect it. But the courts certainly cannot, and the citizenry might find the task overwhelming."<sup>206</sup>

Be that as it may, this has nothing to do with structural argument, and nothing to do with the Constitution (which nowhere directs the government to perfect it, and would have provided for a very different system if it did). Indeed, the very basis for the legitimacy of structural argument—that it maintains the constitutional arrangement—would progressively vanish, like an insincere smile.

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204. P. 180. Tushnet argues that it is problematic for representation-reinforcing review to resort to textualism (although Tushnet calls this originalism). "[C]rand theories must be pure; representation-reinforcement review cannot survive if, at convenient places, it requires an infusion of originalism." See pp. 179-87 (ch. 5, "Intuitionism and Little Theory"). This is an extremely controversial modal issue: Are the forms of argument confined to each one's parameters, respectively, or is there interpenetration, or is there even a hierarchy of modes? But it is not appropriate here because structuralism begins with inferences from the text; indeed that is one of the significant distinctions between structural and prudential argument and is why the structuralist rejects so-called external criteria by which to measure a particular "allocation."

205. Pp. 106-07.

206. P. 107.

## VII. ETHICAL ARGUMENT

By ignoring the constitutional basis for each of the forms of argument—thus treating strictly *constitutional* norms as unrelated to interpretation—Tushnet eviscerates what is particularly legal about these forms; thus ethical argument, in his hands, is no more than moral argument, depicted from a prudential point of view.

Thus far we have seen a consistent pattern of attack on the four preceding forms of argument: historical, textual, doctrinal, and structural. In each case, Tushnet's complaint about the interpretive form was not that it failed to capture his view that law is simply politics, though that may be his opinion.<sup>207</sup> Rather, the problem was that by treating law as no more than politics and by reinterpreting each of the forms along prudentialist lines, Tushnet generated problems that the forms could not resolve.

"Ethical argument" is a term of art, the meaning of which is less intuitively obvious than those of the other forms of argument. It denotes argument that relies on an appeal to those elements of the American cultural *ethos* as reflected in the Constitution. The fundamental American Constitutional ethos is the idea of limited government, the presumption of which assumes that all residual authority remains in the private sphere. Thus, ethical arguments are principally limit arguments: They usually arise as a consequence of the fundamental American constitutional arrangement by which rights are defined as those choices beyond the power of government to compel. Structural and ethical arguments share certain similarities. Like structural arguments, ethical arguments arise from certain textual commitments in the Constitution, specifically the ninth and tenth amendments, and potentially the privileges and immunities clause of the fourteenth amendment. But, also like structural arguments, they do not depend on the construction of any particular piece of text, but rather on the necessary relationships that can be inferred from the overall arrangement captured by the text. The tenth amendment, we are often reminded, is a truism; but the same may also be said of the ninth, because it simply restates the fundamental understanding of the federal system of powers and rights. The privileges and immunities clause might also be characterized as superfluous to the extent that the fourteenth amendment has superimposed the federal system of human rights on the states (a goal we have relied upon the textualist strategy of incorporation to achieve). The principal error one can make regarding ethical argument is to assume that any statute or executive act is unconstitutional if it produces effects that are incompatible with the American ethos. This equates "ethical argument," a constitutional form, with moral argument generally, which has no special constitutional status.

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207. See Mark Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

Therefore, Tushnet's failure to link ethical argument to the Constitution is particularly costly. Instead of identifying those questions the Constitution allocates to the moral judgment of individuals and non-governmental actors, (however that judgment might be evaluated from a philosophical or moral point of view) we have instead the familiar prudential reconstruction of the issue: Does a particular philosophical or moral approach provide an "objective" ranking of values that would enable us to derive an algorithm that would maximize those values? If it doesn't, then judges are unconstrained and the approach is insufficient; if it does, it probably depends on naturalistic claims about the sources of morality that are philosophically controversial.

Tushnet begins with the question of whether or not judges should exercise moral judgments, an issue that he treats as neither moral nor legal, but rather as appropriate to the sociologist of ideas. The tasks of moral philosophers, he contends, are actually very much like those of judges.

First, he examines the option of relying on "Systematic Moral Philosophy." Assume that human conduct can be divided into two (the morally prohibited and the morally required) or three (adding the morally permissible) categories of acts.<sup>208</sup> Tushnet then observes that it follows that

These philosophies must identify the boundaries between the categories. That task resembles the need to identify issues on which moral learning is preferable. [Such] line drawing and issue identification tasks have produced consensus on the formulation of the solution. We have to distinguish between fundamental, basic, or human rights on the one hand and nonfundamental, less basic rights on the other. . . . Then, according to the present theory, courts can enforce the judgments of moral philosophy. First they must decide whether a fundamental right is implicated by the statute in question. If it is, courts must then decide whether the statute has reached a morally impermissible result.<sup>209</sup>

"The positive case for relying on moral philosophy thus turns on the ability of judges to distinguish between fundamental and other rights and then to decide what moral philosophy requires."<sup>210</sup>

If courts could in fact apply moral philosophy in their judgments in this way, how would they go about reaching such judgments? Tushnet considers two possible methods: 1) by invoking the claims of a particular system, and 2) by reflecting the moral consensus of society. Notice that despite the use of terms like "fundamental rights," Tushnet ne-

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208. "There are slight differences between the two approaches: In a two-category system finding that no fundamental right is implicated means that we might have a morally impermissible result but still prefer under these circumstances to learn from experience. In a three-category system finding that no fundamental right is implicated means that the statute is morally neutral." P. 111 n.10.

209. Pp. 110-11.

210. P. 111.

glects to say how the Constitution requires moral argument. We therefore cannot determine whether either of the two proposed methods would actually serve the constitutional requirement. And yet “neglects” is not the right word: Tushnet, like any thorough-going prudentialist, doesn’t believe that there are any constitutional reasons for invoking a particular form of argument other than to promote a particular political agenda. That is why Tushnet doesn’t address the constitutional basis for ethical argument, but rather proceeds directly to evaluate moral arguments as a means of serving prudential ends. And when, not surprisingly, moral argument is shown to be far too indeterminate for such a role, it is abandoned as insufficient for a program (the “liberal tradition”) that neither Tushnet nor the advocates of moral argument shared in the first place (but one that Tushnet firmly believes lies behind the pious claims for moral approaches for their own constitutional sake).

Tushnet asserts that “the liberal traditions’ insistence that judges be constrained commits it to a rule-oriented moral philosophy, in which relatively general rules are stated and applied to individual cases.”<sup>211</sup> This appears to confuse the rule-oriented nature of doctrinalism with “rule-oriented moral philosophy.” It mechanically takes the common law tradition of deciding appeals on doctrinal lines and substitutes the idea “moral” for “legal.” But it has scarcely been argued that legal rules that result from ethical argument have the same syntactical structure as the moral sentiments on which they rely or the doctrinal arguments with which Tushnet confuses them. Let me give an example.

A well-known model of ethical argument occurs in the case of *Moore v. City of East Cleveland*.<sup>212</sup> In *Moore*, the Supreme Court confronted an Ohio ordinance that limited occupancy of a dwelling unit to members of a single family. Under this ordinance, a 63-year-old grandmother was convicted of having failed to remove a grandson from her house. The decision by Justice Powell turns on this passage: “Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.”<sup>213</sup> The legal rule here, which forms a part of the ethical argument, is that the state may not coerce living arrangements that rend family life. But the moral sentiment—that the relationship between grandmother and grandchild is preciously, paradigmatically familial—is neither a rule nor derived from a rule.

A second, more difficult, example can be gleaned from *Roe v. Wade*.<sup>214</sup> An ethical argument supporting the holding in that case

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211. P. 112.

212. 431 U.S. 494 (1977).

213. *Id.* at 504.

214. 410 U.S. 113 (1973).

would be: 1) The American ethos would not tolerate state coercion of intimate acts; 2) A woman's pregnancy and giving birth are paradigmatically intimate acts; 3) Criminal abortion statutes result in such coercion by forcing a woman to carry pregnancies to term. Point 2 reflects a moral sentiment while point 1 states a legal rule allegedly derived from the Constitution's allocation of certain decisions to non-governmental actors. Like the argument in *Moore*, this is a truncated summary. It omits the constitutional groundwork laid by the allocation of personal liberty to the individual that is the consequence of the arrangement of government powers and inferred personal rights that forms our Constitution.<sup>215</sup> It is precisely because certain means are not appropriate to the powers of government—means such as dictating who counts as a family member for inclusion in private homes, or coercing women (or school children, or the welfare family for that matter) to carry out acts of great personal intimacy—that there can be an element of moral decision. One asks: Does this case (the criminal abortion law or the sex education class or the zoning ordinance or the low income housing regulation) fit the rule?<sup>216</sup>

Consider, instead, how Tushnet treats the issue:

Before deciding whether the woman's decision to have the abortion or bear the child is the right thing to do, most of us would want to know . . . the conditions under which the pregnancy occurred, her notions of her own potential, her aspirations, her religious convictions, and so on almost indefinitely. Of course the consideration of context must end at some point, for she must make a decision one way or the other. But moral rules are likely to play a small part in the process or in our evaluation of her decision.<sup>217</sup>

The last sentence hardly follows. The reason we are asking all these factual questions is to enable us to make a moral decision. Otherwise, the questions would be different. Tushnet thinks rules are like: "Never 'hit' 17 when you play against the dealer";<sup>218</sup> that is, that they are directions we consult in difficult or uncertain circumstances. But most rule-following is like that which enables us to generate a new sentence. Knowing the rule lies in being able to go on; the rule is not external to the practice, though of course a rule may be stated in retrospect. Yet Tushnet continues:

The . . . argument is that, whenever we look at claims that some set of moral truths implies that certain social arrangements are morally required, permissible, or prohibited, we find that the connections be-

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215. See William Van Alstyne, *The Fate of Constitutional Ipse Dixits* (Book Review), 33 J. LEGAL EDUC. 712 (1983) (criticizing this omission).

216. P. BOBBITT, *supra* note 3, at 142-56.

217. P. 113.

218. This is slang for advice to a blackjack player. It means: Don't ask for another card if your own cards total 17; since ties are won by the dealer, the odds shift against you in these circumstances.



tween the general truths and the particular results are incredibly *ad hoc*. This produces a well-grounded skeptical belief that people are just dressing up their personal preferences and presenting them as the products of abstract moral reasoning.<sup>219</sup>

Because Tushnet has no basis for distinguishing the constitutional source of ethical argument from systematic moral arguments generally, he cannot then distinguish between the ethical rule derived from such a constitutional mandate and the specific "result" that he objects to as being *ad hoc*. If he were to make these distinctions, he would not complain that the application of ethical rules to a specific context is merely the result of personal preferences. On the contrary, this is what the Constitution requires. As he ably shows in this very chapter, how could it be otherwise?

Tushnet indicts David A.J. Richards—who has probably done more than any other scholar to move moral issues into legal analysis<sup>220</sup>—on just this point. He writes: "Richards finds in the Constitution a theory of human rights involving 'the belief that every person has a capacity for autonomy, and . . . the principle that every person has the right to equal concern and respect in pursuit of his autonomy,'"<sup>221</sup> and he takes Richards to task for relying on what seem to Tushnet to be entirely contingent facts about the role of the nuclear family. "[T]he broader point, the contingency of the relationship between biological parenthood and the values from which Richards attempts to derive parental rights, can be seen in another way by imagining a society only slightly different from our own. . . . Imagine . . . a system in which the initial assignment of young people to older people is routinely reconsidered after two years."<sup>222</sup>

Such passages show that Richards is reasoning in a legal mode, while Tushnet is acting more like a political science professor I once heard who asked: "Suppose we didn't have a Senate?" Well, suppose we *did* reassign infants to different "parents" at 2 years of age, and reassign them again at age 4, age 6, and so on. Such a constitutional system would be so different from ours—such a world would be so different—that determining the effect of a zoning ordinance on the "family" would be the least of the problems we would confront. But isn't the hypothetical intended to challenge readers for whom "parents," "family," etc., have meanings strongly connected to the contingent facts of our lives, and to our cultural history? Tushnet refuses to take seriously Richards's claim that the Constitution would have us enforce a general rule ("every person has the right to equal concern") and focuses instead on the specific, moral claim. He writes, acidly, that "[t]o speak of

219. Pp. 114-15 (footnote omitted).

220. See, e.g., DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986); David A.J. Richards, *The Individual, the Family, and the Constitution*, 55 N.Y.U. L. REV. 1 (1980).

221. P. 115.

222. P. 117 (footnote omitted).

certain young people as 'my' children is already to be committed to a rather comprehensive moral theory."<sup>223</sup>

Of course this is true. If there were no notions such as "my children" it would be hard to make concrete sense of the constitutional command that, in those circumstances not allocated to governmental power, private decisions shall govern. And of course the Constitution did not enact the systematic moral theory of Immanuel Kant any more than it did Mr. Herbert Spencer's *Social Statics*.<sup>224</sup> But the claim of ethical argument is that, having established that the decision has been allocated to the moral sphere, systematic moral philosophies may play a decisive role. I myself am skeptical of the utility of such systems; I gather that Tushnet shares such skepticism. That, however, is a discussion for the philosophy common-room. With respect to constitutional interpretation, it does not discredit ethical approaches to show that the basis on which some persons make decisions is unsound, any more than an attack on, say, the theory of general equilibrium discredits prudential argument.

Still, Tushnet prefers to treat the entire matter as a question of prudence. He writes:

Judicial review means that courts can sometimes displace judgments made by legislators. The theory being considered here would fail if judges were not *better* than legislators at working down from abstract principles to particular judgments. There are several reasons, though, to be skeptical about claims that judges are indeed systematically better than legislators.<sup>225</sup>

This would make the approach of ethical argument amount to: "Do good!" It would, as Tushnet suggests, turn on our real-world assessments of the likelihood that constitutional decisions are more or less likely to bring about a better world. This transforms this form of argument into prudentialism, with the external standard—against which the costs and benefits are measured—a moral one.

By contrast, ethical approaches (using that phrase as a term of art to denote a particular mode of constitutional interpretation) hold that, whether better or not, judges are required to recognize arguments in an ethical modality because of the Constitution's role in society, its commitments (not those of the judges), and so on. Seeing the role of such arguments as matters of utility only, however, it was not jarring to have Tushnet introduce the theory of the second-best as a reason not to permit judicial review.<sup>226</sup>

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223. P. 118.

224. *See* *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

225. P. 120 (emphasis added).

226. "The analogy [of the theory of the second-best] to political action is appealing, for some actions that alleviate an immediate problem may, by reducing political pressure, delay the rectification of other, perhaps greater, injustices." P. 122. "Sometimes a judge might decide to perpetuate an existing injustice that hurts real people present before her or him so

Nor was it surprising when Tushnet offered "The Pragmatic Defense of the Theory." Having restated ethical argument to turn on its practical effects, one might well expect that if it were to be defended, it would have to be in this way: "[T]here is a lingering sense that, all things considered, it is good to have judges thinking that they should do the right thing. *Lingering* is the operative word here. It is a residue of the nation's experience with the Warren Court."<sup>227</sup> That is, a residue of a political program with which "liberals" are in sympathy, a program advanced by this form of argument. Tushnet identifies Chief Justice Warren with the "good"—Earl Warren's "instincts . . . resonated strongly with the best values in American society."<sup>228</sup> He thus establishes, from a prudential point of view, both the case for ethical argument and an external standard by which to measure its results.<sup>229</sup>

As an example of this "defense," Tushnet recounts the moving story told by Kenney Hegland about a small town Southern judge who told a rural sheriff: "The law requires you to protect the demonstrators. If you don't, I have no choice but to hold you in contempt."<sup>230</sup> Citing this story, Tushnet says: "This is an essentially pragmatic defense of the theory: whatever the theory's analytic merits or defects, it works in society to protect valued interests. Like all pragmatic arguments, this one must be examined in light of the actual operation of today's courts."<sup>231</sup>

But is Hegland's really a pragmatic defense of ethical argument, or rather an effort to call attention to the unusual power of judicial review when it is perceived as legitimate? That is, is it a claim that adherence to law works for "the good," or is it a claim about *how* "the good" works? Written as a response to deconstructionists, who are notoriously insensitive to the legal consequences of judicial reasoning,<sup>232</sup> it is acutely relevant here because of its emphasis on the backdrop of compliance that the law engages—and this is scarcely a matter of doing

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that an indefinite but it is hoped larger number of people will be hurt less in the more or less distant future." P. 122 n.44.

This is an awkward analogy to second-best theory, for if the analogy held, the judge could not make the decision to defer on the grounds that to do so would help others—or might help them—because the theory holds that one simply can't tell. More importantly, this sort of suggestion is what happens when we substitute moral or deontic modalities for legal ones: by what authority does a judge "perpetuate" a legally redressable wrong to satisfy his or her hope that good will come of it?

227. P. 123.

228. P. 133.

229. Chief Justice Warren was certainly a forthright proponent of ethical argument, as, for example, in *Brown v. Board of Educ.*, 347 U.S. 483 (1954). G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* (1982) (discussing Warren's contributions in the ethical argumentation of constitutional cases), is a valuable contribution on this point.

230. P. 123 n.45 (citing Kenney Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203, 1219 (1985)).

231. P. 124 (footnote omitted).

232. There is no reason in principle why this should be true. For an excellent counterexample, see J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987).

“good” in the eyes of those who are likely to differ with such a characterization. Tushnet partly sees this and thinks it is a weakness of Hegland’s position. He writes: “One difficulty with this position, to the extent that it truly does concede the validity of the challenges to the theory, is that it assumes that political opponents will not figure out that something is going wrong in the constitutional theory that is being used to harm them.”<sup>233</sup> But Hegland need not postulate the stupidity of his opponents—as Tushnet is required to do—unless he ignores the distinction between the form of ethical argument (which maintains legitimacy and thus induces compliance) and the moral and political claims that determine the outcomes of such arguments.

Tushnet conflates the two as a way of setting up his own prudential assessments—we shall shortly see that he wishes to use Hegland’s observation as the introduction to a “test” to determine whether good is actually done by courts. For the prudentialist, legitimacy is entirely in the womb of history: History has vindicated the civil rights revolution (hence the nostalgic references to the Warren Court). This sweeps aside the legitimacy that is won by adherence to ethical argument *per se*. We should remember that Hegland’s demonstrators would have been in a very different situation if they had had to wait on history for the law to be enforced. Tushnet’s argument is simply one more manifestation of his lack of concern for the status of his own modal perspective. In attempting to discredit Hegland’s position by turning to current decisions,<sup>234</sup> Tushnet ignores the point that if the Constitution mandates ethical arguments, it is irrelevant to the legitimacy of those arguments that the mix of winners and losers (from Tushnet’s viewpoint, or that of any political perspective) changes over time. But this is precisely what Tushnet wishes to rely on—that from a particular viewpoint (that of the “liberal”), recent constitutional cases do not justify faith in judicial review.

Tushnet concludes:

What does this record add up to? Not much from any point of view. Liberals might be pleased by some of the political cases, although it is difficult to believe that, for example, editorializing by public broadcasters is likely to do a lot for the liberal cause. They should be troubled by the campaign finance case, though. . . . Liberals thus have gotten some things from recent first amendment cases, but they have lost some things as well. Of course that means that conservatives are in the same situation.<sup>235</sup>

Against such an assessment, the prudentialist must balance the probable outcomes in the absence of judicial review:

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233. P. 124 n.46.

234. “In the last four years of the Burger Court, the Supreme Court upheld a few more than a dozen free speech claims and rejected about twice as many.” P. 124.

235. P. 126 (footnotes omitted).

Consider what might happen if the Court announced that five years from now it would no longer entertain free speech claims. We would be driven back upon ourselves, forced to confront our desire to repress . . . [W]e might learn from our mistakes and gradually take control of our lives . . . What makes the scenario troubling to some is their sense that legislators would go hog-wild once the threat of judicial review was removed. Right now they just try to repress at the margins . . . The scenario includes a five-year delay to provide a period for civic education and thoughtful consideration of fundamental questions. If we knew that we had to rely on our legislators, we might become more careful in choosing them. But we might not.<sup>236</sup>

This kind of speculative political science<sup>237</sup> has very little attraction for me; it is hard to take terribly seriously. But if I were to speculate on these lines, I suppose I would have to say that: 1) We already rely on our legislators now for the most important governmental decisions in society; giving *them* even more responsibility is unlikely to do much for *our* acting responsibly as citizens; 2) Our citizenry would require "civic education" of the kind perfected by the Khmer Rouge before the legal forms of first amendment jurisprudence would become the daily fare for reflection—indeed, the first year of law school, which may be said to have something in common with forced re-education camps, does not even wholly succeed at this; 3) This is to say nothing of the need for inducing mass amnesia—for even if the Court is to cease deciding cases, there will still be a considerable body of case law to which the public and lawyers will have resort, indeed which is probably the chief (though indirect) source of the public's understanding of the Constitution; and 4) That finally, the "scenario" treats the members of the branches of government like so many billiard balls, colliding or sometimes caroming off rails, with no self-awareness; but legislators have their own views of free speech, which views are, not surprisingly, also largely the product of the courts' work (that is, they are structured in a way that corresponds to the forms of common law argument).

As I say, I have little gift for this sort of political "science"; yet I simply do not see how these fanciful speculations, about which I have some reservations, could possibly support the confident conclusion that "[j]udicial review in first amendment cases is thus a mixed blessing."<sup>238</sup> The reason for this, Tushnet concludes, is that "liberals can take only a little comfort from the general framework of first amendment law if they consider it in purely pragmatic terms. We [must assume the same is true for constitutional theory generally since we] cannot perform a complete pragmatic survey of constitutional law here."<sup>239</sup>

In the final section of this chapter, "The Moral Philosophy of the

236. P. 128.

237. The necessity for it is one of the shortcomings of prudential argument.

238. P. 128.

239. P. 131.

Community," Tushnet discusses an alternative way of developing moral argument; but because here, as before, he is unsure what constitutional status such argument should have, his discussion varies in its helpfulness.

He begins by identifying four well-known objections to relying on the moral sense of the community as an element in judicial review:

First, the judges must identify both what the common values are and what these values imply for the resolution of the issue they face. Judges could rely on surveys or on their consciences. Yet surveys consistently show great sensitivity to variations in the way questions are phrased. [Their results often appear contradictory or of such a general nature as to be of little help in deciding a specific case.] . . . Public views on such statutes are likely to be unformed and unavailable to the courts. The difficulty in asking the judges to consult their consciences to determine what common values are is that, as we have seen, judges are drawn from a narrow stratum of our society and what they consider to be common values may instead be the reflection of their personal experience.

Second . . . the level of generality on which the common values are identified is open to substantial manipulation. . . .

Third, one undeniable value in our society is federalism . . . . Any apparently aberrational regulation can be defended as the expression of some complex common value, such as "Privacy, taking federalism into account." In this view a locality can prohibit sodomy precisely because its intrusion on privacy is justified by the fact that homosexuals can move to cities and states more tolerant of the practice.

Finally, in any constitutional case courts have before them one indisputable item of evidence about common values, the regulation at issue.<sup>240</sup>

Before discussing these four points, let us take stock: we have seen that Tushnet's fundamental posture—to adopt a prudential point of view, and then evaluate each of the forms of argument by transmuted them into prudential positions—largely dictates his analysis. With regard to ethical argument, Tushnet ignores the constitutional basis for such arguments, and is then obliged to come up with some reason for using ethical arguments. For the prudentialist, this can only be the fact that ethical arguments work, that is, they serve a particular moral or political agenda. Tushnet does not face the question for whom such a standard works because he has postulated a group whom judicial review must satisfy—the liberals. Thus the first section of this chapter was devoted to an evaluation of recent cases as to whether their outcomes would please or upset liberals. Finding that there was much to displease liberals does not necessarily discredit "systematic moral philosophy"; there may be other systems than the ones currently in vogue at the Supreme Court that would serve such goals. But it does cast

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240. Pp. 134-36 (footnotes omitted).

doubt on the ability of judges, through a competition in such systems, to arrive at the results Tushnet is looking for.

How then can we use moral argument to determine what is the "good," so that judges can act on that determination? "Instead of looking to systematic moral philosophy in the abstract, theory might direct its attention to the philosophy of justice implicit in our community."<sup>241</sup>

But here also, the severing of any constitutional connection renders the approach unsound. Objections 3 & 4 above are fatal for the prudentialist version of ethical approaches: If the question has become whether we can look to the community for our moral judgments and thus enable judges to know what is the "good," then legislators and policemen have every right to say that the very practices being challenged are far likelier to reflect community values, having been adopted through communal processes, than lawyerly attacks on those practices.

If, on the other hand, we accept the constitutional basis for ethical argument—that the Constitution commits some decisions to private parties by supreme law, that it commits governments to conform to certain guarantees and disempowers governments from acting inconsistently with those commitments—then acts of legislatures or executives to the contrary notwithstanding, we will still demand judicial decisions that may legitimately turn on the moral standards professed by the community in media other than its statute books. Indeed, once that link is made, objections 3 and 4 appear entirely fanciful. It may well be that the community standards of Topeka endorse segregation. Yet the issue of the ethos of a society is relevant not in the air, but in answer to the legal question: Does equal protection tolerate the segregation of persons by the state on account of race? It gives us an answer by determining whether (for this society) shunning and physical demarcation, traditionally the marks of a caste system, are in fact incidents of the equal regard the law is supposed to afford.

The first two objections are more substantial, but each of these also depends on ignoring the constitutional basis for ethical argument that is a consequence of treating this form as though it were merely the way Elmer Gantry would do prudential argument.

Let us begin with the objection based on "the level of generality." It appears that, like William Van Alstyne,<sup>242</sup> he takes the argument in *Constitutional Fate* regarding *Roe* to be: 1) There is no government power to coerce intimate acts; 2) A mother's pregnancy and giving birth are paradigmatically intimate acts; 3) Criminal abortion statutes result

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241. P. 133.

242. See note 215 *supra*. For a discussion of the generality issue, see P. BOBBITT, *supra* note 3, at 154-56. To illustrate the manipulation of the generality issue, Tushnet first quotes Laurence Tribe's treatise as proclaiming that "it makes all the difference in the world what level of generality one employs" and then observes sarcastically that "it may be worth noting . . . that Tribe argued the case against the *Bowers* statute." P. 135 nn. 92-93.

in such coercion by forcing a mother to carry to term. Therefore, 4) A criminal abortion statute is not constitutionally compatible with the American ethos.

Such an argument, Tushnet believes, is subject to the objection of generality: If we ask whether or not criminal abortion statutes per se, and not the coercion of intimate acts, are tolerable within the American ethos, the answer may well be yes; so the approach is really just a matter of "manipulating" the level of generality. The example Tushnet analyzes is *Bowers v. Hardwick*:<sup>243</sup>

The majority upheld the statute [criminalizing sodomy], devoting much of its opinion to an enumeration of the statutes against sodomy and the historical tradition of making it a criminal offense. It concluded, "Against this background, to claim that a right to engage in [homosexual sodomy] is 'deeply rooted in this Nation's history and tradition' . . . is, at best, facetious." The four dissenters pointed to a more general commitment in the society to privacy in sexual matters.<sup>244</sup>

Is it simply then a matter of fixing an outcome, and then choosing the level of inquiry to fit? I did argue that criminal abortion statutes are unconstitutional because they are offensive to the American ethos of limited government, an argument of which the four step rationale above is a truncated version. But I emphatically did not and do not argue that merely asserting that a statute has effects that are incompatible with the American ethos makes it unconstitutional. Rather, it is crucial to set up, as carefully as one can, a specifically constitutional basis as a predicate for such considerations. One way to infer the specific content of unenumerated rights<sup>245</sup> is to rely on the enumerated powers; that is, rights are those things that government is not given the affirmative power to interfere with; therefore, as Madison and Hamilton independently observed, even if there were no first amendment, the federal government could not establish a church or suppress the press because no affirmative powers to do so are granted.

Because the states are creatures of plenary, not enumerated constitutional power, such an inferential method does not appear to be available to the judge who conscientiously tries to enforce the civil war amendments' obligation that the human rights norms that hitherto applied to the federal government must, henceforth, apply to the states.<sup>246</sup> How do we infer the unenumerated rights against states when the inferential method on which we relied *vis-à-vis* the federal government is unavailable? Grappling with that conundrum has con-

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243. 478 U.S. 186 (1986).

244. P. 135.

245. See P. BOBBITT, *supra* note 3, at 142-56. But this is only one way. *Id.* Moreover, as the equal protection example shows, there is a role for ethical arguments with respect to the enumerated rights (analogous, perhaps, to the role of structural argument in the construction of the enumerated powers).

246. *Id.*



sumed most of the post-Civil War history of constitutional decisionmaking.<sup>247</sup>

As the necessary constitutional predicate for the argument from the American ethos, I proposed this method: If a particular statutory means is denied to the federal government, then it is denied to the states, even if the goal involved is permitted to the states. It is enough to show that the means is denied the federal government for a court to similarly deny such means to the states, even if the rationale for the federal decision—that the means is not appropriate to any enumerated federal goal, that the means is expressly forbidden in the Bill of Rights, etc.—does not apply *per se* to the states. It remains only then to determine whether a criminal abortion statute is in fact such a means. That *part* of the argument is excerpted in the four steps above.

This is not the place to defend the foregoing argument. Many will disagree with either the constitutional premise regarding the inference of unenumerated rights, or the assessment of the abortion statute. But I draw attention to one feature of that argument: The level of generality is irrelevant, not decisive. Even if the purpose of the statute were to promote world peace and harmony and every single American took an oath claiming to believe that that statute would deliver it, the means employed might still offend our ethos. If the majority in *Bowers* is persuasive, it is precisely because the actual conduct of homosexual sodomy did not, traditionally, correspond to our notions of intimacy but instead seemed (perhaps erroneously) more like licentiousness. Whether or not the argument regarding *Roe* is persuasive also depends on whether the specifics of a woman's carrying a fetus to term corresponds to our ideas of intimacy. If they don't, then the level of generality—whether or not Americans want to protect privacy, on the one hand, or fetal life on the other—is simply irrelevant.

But a prudentialist might not see that. He might think that the argument really was manipulable because he might not require that some link to the structure of rights and powers in the Constitution be demonstrated before a legitimate, constitutional argument had been made.

It is the first objection, however—how we are determine the content of the moral ethos—to which Tushnet, quite properly, devotes the greatest attention. This discussion is largely centered on the work of Ronald Dworkin:

Ronald Dworkin has grappled with the dialectical interplay between criticism and apologetics more carefully than anyone else. His efforts, which involve several attempts to work around the difficulty, have led him to formulations that retain the critical intention but lack substantial content. . . . Dworkin has offered . . . several approaches to adjudication, but all are premised on some sort of appeal to community

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247. See Philip Bobbitt, *The Ninth, Tenth, and Fourteenth Amendments: Rules for Reading Constitutional Rights* (work in progress).

values.<sup>248</sup>

However, according to Tushnet, Dworkin uses community values to attack community acts but doesn't really derive them.<sup>249</sup>

What Tushnet ignores is that Dworkin struggles to provide a link to constitutional argument. Dworkin asks what method of determining community values is mandated by the Constitution, or is "relevant" in Constitutional terms. It is this struggle that unites what Tushnet sees only as "several attempts." So Tushnet really has it backwards when he disparages the inescapable observation that Dworkin always makes arguments "taking as a given our community's commitment to the proposition that constitutional adjudication must rest on constitutional interpretation."<sup>250</sup> Indeed Tushnet demonstrates that Dworkin, and not he, has a clear understanding of the distinctions between ethical and prudential argument, between ethical and moral argument, when he disapprovingly observes that "moral philosophy enters Dworkin's scheme not because it is good in itself that courts invoke moral philosophy but rather because moral philosophy is the only way to make sense of our commitment to interpretation."<sup>251</sup>

Tushnet appreciates the problematic nature, however, of any prescription purporting to rely on the American ethos:

Several authors, relying at least in part on some aspects of Dworkin's analysis, have suggested . . . [another] way to invoke a community's commitment as the basis for judicial review. Instead of relying on "common values" widely shared in the society at the time of decision, courts could invalidate statutes because they are inconsistent with an enduring consensus about fundamental values, as reflected in the language of the Constitution, decided cases, and our society's cultural heritage. . . . One might fairly wonder why we are not told that the deepest values of our society require us to adopt a form of Christian socialism. Or perhaps the enduring values of our society are what some would describe as racist, sexist, and generally inegalitarian and intolerant . . . . Or finally, perhaps there is no "deep consensus" in the United States because the United States is simply the adventitious collection of people whose primary relationship is coresidence in an arbitrarily defined territory.<sup>252</sup>

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248. P. 137.

249. If there is a criticism here of Dworkin, it is that he uses ethical argument hierarchically. That is, the method is used to generate the legal link by means of the other modes—textual, doctrinal, historical, etc.—and then to decide among these modes, or among the choices within modes, by seeking out the best moral argumentative conclusion. Hierarchy among modes is an important issue for constitutional interpretation nowadays. See Fallon, *supra* note 40. But this important modal issue is simply not available to Tushnet because, despite the patina of modal appreciation, he is basically in the grip of one mode and never achieves the perspective to see this and thus to question the implicit hierarchy of arguments.

250. P. 137.

251. P. 138.

252. Pp. 139-41 (footnotes omitted).

This is an attack on ethical argument, which takes its name not from ethics but from the ethos of the national community.

Tushnet fails, however, to appreciate the nature of a national ethos. We can first dismiss the suggestion that the only thing in common in our national culture is "coresidence in an arbitrarily defined territory." But what about the questions regarding the nature of our ethos? Why can't it be fundamentally Christian, socialist, racist, or so forth? Well, some may say that it is, and they may be correct in some respects. The important point is that these characterizations must link up with some legal commitment in the Constitution.<sup>253</sup> Ethical argument does this in several ways, one of which is to put certain choices outside the realm of government control by extrapolating from the limits on the affirmative subjects of power allocated to the federal government to limits on the means permitted any constitutional government. Such a legal limit protects the racist, the socialist, and the sexist. An ethos that protects diversity and contradictions will accordingly be capable of characterization in many attractive—and not so attractive—ways. Now if one expects the characterization of the ethos to justify judicial review, one will naturally demand a single, complete, non-contradictory, determinate, and politically acceptable national ethos. Something like this ideology is reflected in Tushnet's hunger for a republicanism of civic virtue. But if instead you are analyzing a modality of argument—that is, the way in which a particular constitutional argument is validated—you will expect no more of such characterizations than that they arise from the necessities and possibilities of the Constitution itself.

A written constitution gives rise to textual arguments; a constitution that derives rights from limits on power gives rise to ethical arguments. It is therefore hardly surprising that Dworkin does not give us a list of acceptable values, but requires only that, in carrying out the enterprise I have specified, appeals to our values can be legitimately made. Tushnet's sarcastic conclusion—that Dworkin's approach combines an attractive method (an appeal in one form or another to the values held by real communities) "with a pervasive inability to specify what those

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253. Perhaps it would be well to review an example that shows the basic pattern of an ethical argument. The American *constitutional* ethos is the reservation of powers not delegated to a limited government.

In the *Austin American-Statesman* of May 26, 1988 (on file with the *Stanford Law Review*) it was reported that a superior court judge in Phoenix had ordered an 18-year-old woman to practice birth control for the rest of her child-bearing years as a condition of probation. An ethical argument challenging such an offensive sentence would go like this:

1. There is no express constitutional power to implement a policy of eugenics.
2. Moreover, eugenics programs are not appropriate means to implement any of the express powers of the federal government.
3. Those means denied the federal government are also denied the states.
4. The Phoenix sentence amounted to ordering a woman to comply with a eugenics plan and hence is unconstitutional.

The American ethos at stake is the reservation to individuals and families of certain kinds of decisions and behavior; this ethos is the very basis of our constitutional arrangement of limited government.

values are”<sup>254</sup>—is misplaced.

The same criticism applies to his attack on Dworkin’s metaphor as to how judges, over time and geography, manage decisions that reflect a continuity and consistency of values despite the chaos of human passions:

Dworkin explains his view that law is a culture’s interpretation of itself by using a striking metaphor. . . . [H]e asks us to consider the enterprise of writing a collaborative novel. One person writes a chapter and sends it on to the next author, whose obligation is to write another chapter that will make the novel the best it can be, given what has gone before . . . . Dworkin argues that adjudication is like writing this sort of novel . . . . The metaphor of the collaborative novel is indeed illuminating but not quite as Dworkin intends . . . . The difficulty is that Dworkin has taken the classical novel as his exemplar. Suppose instead that we took modernist works as our models. Discontinuity pervades modernist novels. . . .<sup>255</sup>

This carries forward, relentlessly, the awful symmetry of Tushnet’s attacks. His pattern for each of the other modes sought to discredit them by showing that, on the latest thinking, they were simply impossible to carry out, as a practical matter: Historians no longer thought we could recapture the past; hermeneuticists denied that texts impose meaning; modern political scientists rejected the pluralism that underlay structure; and so on. Now we find that literary critics and novelists would deny Dworkin his metaphor of the “novel seriatim”:

Discontinuity pervades modernist novels, in part precisely to raise questions about the category of “the novel.” One view of modernist

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254. P. 141.

255. Pp. 141-42 (footnotes omitted). Compare Dworkin’s metaphor with a story told by the great physicist John Wheeler about a game of “Twenty Questions”:

“You recall how it goes—one of the after-dinner party [is] sent out of the living room, the others agreeing on a word, the one fated to be questioner returning and starting his questions. ‘Is it a living object?’ ‘No.’ ‘Is it here on earth?’ ‘Yes.’ So the questions go from respondent around the room until at length the word emerges: victory if in twenty tries or less; otherwise, defeat.

“Then comes the moment when I am . . . sent from the room. [I am] locked out unbelievably long. On finally being readmitted, [I] find a smile on everyone’s face, sign of a joke or a plot. [I] innocently start [my] questions. At first the answers come quickly. Then each question begins to take longer in the answering—strange, when the answer itself is only a simple ‘yes’ or ‘no.’ At length, feeling hot on the trail, [I] ask, ‘Is the word “cloud”?’ ‘Yes,’ comes the reply, and everyone bursts out laughing. When [I was] out of the room, they explain, they had agreed not to agree in advance on any word at all. Each one around the circle could respond ‘yes’ or ‘no’ as he pleased to whatever question [I] put to him. But however he replied he had to have a word in mind compatible with his own reply—and with all the replies that went before.”

This story is an illuminating metaphor of the process of constitutional decision. Note that if Wheeler had chosen to ask a different question, he would have ended up with a different word. But, by the same token, whatever power he had in bringing a particular word—“cloud”—into being was only partial. The very questions he chose arose from and were limited by the answers given previously.

P. BOBBITT, *supra* note 3, at 238 (citations omitted).

art holds that its aim is to force upon readers and viewers an awareness of the artificiality of the artist's creation . . . . This view has unsettling implications for Dworkin's approach, for it denies that there are standards of goodness of the sort that Dworkin seeks.<sup>256</sup>

Here, as with the other approaches, Tushnet redefines the demands of the modalities as if they were the ideological claims of prudentialism, that is, as if they required external standards of validation ("standards of goodness") to justify their approaches.

Tushnet concedes that Dworkin is talking only about the community of judges and need not contradict the modernist assertion that there are no universal communities. But Tushnet does not acknowledge that the mere observation that "modernists" believe a particular idea commits him to the proposition that the notion of a community of interpretation is not nonsense.

Rather, Tushnet qualifies his concession by asserting that there is no evidence, no "sociological fact," that would verify an assertion of such a community: "Dworkin employs an incredibly casual empirical theory of judicial socialization on which his entire edifice rests."<sup>257</sup> But it takes little sociological research to establish that there exists a community of judges who share a vocabulary sufficiently coherent to enable them to rely on each other's precedents and to use them to create new precedents. The enterprise is not impossible, Tushnet's reading of literary criticism notwithstanding, unless it is so redefined as to become impossible. As Dr. Johnson kicked a stone to refute Berkeley, one might merely point to Shepard's. Nevertheless, Tushnet concludes that "[t]he existence of a community of interpretation that includes writers and readers, judges and citizens, is exactly what modernism places at issue."<sup>258</sup>

At the end of this chapter, Tushnet notes approvingly that "Michael Perry has faced the difficulties of using moral philosophy in constitutional theory by calling on the judges to carry forth the prophetic strand of our political tradition."<sup>259</sup> However, he notes that "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 pre-emptive nuclear first strike."<sup>260</sup>

"Engaging" is not the right word, of course, but there is a wonderful A.A. Lorenz cartoon that captures this idea. A couple is looking out their window into the Christmas night sky as Santa Claus, in his sleigh, is being pulled up and away from their chimney by reindeer. Across the back of his sleigh are numerous bumper stickers with slogans like "Reg-

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256. P. 142.

257. P. 143 n.122.

258. P. 143.

259. P. 143 (footnote omitted).

260. P. 144 n.125.

ister Communists Not Firearms” and “Let’s Get the U.S. Out of the U.N.” The wife is saying to the husband, “That’s funny. For some reason I always thought of him as a liberal.”

It is a good point. The difference between Perry and Dworkin is precisely that Dworkin is conscientiously trying to craft ethical arguments—as that term of art is defined in constitutional law—while Perry has abandoned that enterprise for a prudentialism whose moral goals are forthrightly stated.

At the beginning of this chapter, Tushnet told this story:

One day, as Justice Oliver Wendell Holmes was leaving to go the Supreme Court, a friend said to him: ‘Well, off to do justice again!’ Holmes is said to have replied, ‘Sonny, I don’t do justice; I just make sure that people play by the rules.’ . . . But the Justice’s friend appealed to a deeply rooted sense that judges can do something else—they can provide justice. For our purposes “doing justice” means making sure that the legal process produces morally acceptable outcomes. In this view judges should uphold statutes that are morally permissible and strike down those that are morally impermissible.<sup>261</sup>

The contrast between this account and the actual anecdote is revealing on many grounds, but I will confine myself to one. The story comes from a reminiscence of Holmes by Learned Hand:

I remember once I was with him; it was a Saturday when the Court was to confer . . . . When we got down to the Capitol, I wanted to provoke a response, so as he walked off, I said to him: “Well, sir, goodbye. Do justice!” He turned quite sharply and he said: “Come here. Come here.” I answered, “Oh, I know, I know.” He replied: “That is not my job. My job is to play the game according to the rules.”<sup>262</sup>

There is a world of difference between, on the one hand, trying conscientiously to play by the rules and, on the other hand, seeing your task as making others do so. And there is an analogous difference between ethical arguments, with their mandate in the Constitution, and moral arguments generally. When the legal process is justified on the grounds that it produces morally acceptable outcomes, and not by its adherence to rules, it is being judged on a prudential basis, and all the other forms are merely sham. It is a pity that Tushnet, who is so clearly interested in the various modes, has so little feel for them.<sup>263</sup>

#### VIII. PRUDENTIAL ARGUMENT

Tushnet never appreciates that he, along with the writers he criticizes, is imprisoned within a particular approach. By the end of Part I

261. P. 108 (footnotes omitted).

262. *LEARNED HAND, THE SPIRIT OF LIBERTY* 306-07 (3d ed. 1960).

263. Doubtless I am being too proprietary. Eight years after giving the Common Law lectures, Holmes wrote to James Barr Ames of the Harvard Law faculty with what can hardly be considered modesty: “My ideas on each subject, so far as I know were new, and have been accepted as such.” *Quoted in HENRY FRIENDLY, BENCHMARKS* 289 (1967).

of *Red, White, and Blue*, the author has discussed five of the six modalities of argument: historical argument ("The Jurisprudence of History"), textual argument ("Textualism"), doctrinal argument ("Neutral Principles"), structural argument ("The Jurisprudence of Democracy"), and ethical argument ("The Jurisprudence of Philosophy"). Each chapter or subchapter deals with the theory under scrutiny by analyzing how the countermajoritarian objection to judicial review is overcome under that particular theory.<sup>264</sup> Tushnet decides to call these forms of argument "formalisms" since they provide "a set of public criteria by which theorists, interested observers, and the judges themselves can evaluate what judges do."<sup>265</sup> When confronting his own ideological preference, he is at a loss to recognize the underlying similarity. This preference he decides to call "Anti-formalism," reflecting his assumption that prudentialist thinkers do not merely offer yet one more form of argument.<sup>266</sup> Tushnet's discussion of the "anti-formalists" is curiously truncated in light of his detailed descriptions of the partisans of other approaches: "Owen Fiss, Frank Michelman, and Cass Sunstein have attempted to ground constitutional theory in what they call public values . . . [that] must be different from ones that merely happen to be commonly shared . . . Sunstein and Michelman explicitly link their vision to the republican tradition,"<sup>267</sup> which conceives of the public interest as distinct from the aggregate of private interests. "To Owen Fiss, 'adjudication is the social process by which judges give meaning to our public values.'<sup>268</sup> Michael Perry, Laurence Tribe, Anthony Kronman, Alexander Bickel, and Edmund Burke are all mentioned (but only just mentioned) as falling within this category of thinkers. Tushnet is right to group these disparate critics together; he has a good eye for his list. But it remains merely a list in the absence of the group's defining characteristic, a definition that would have swept in Tushnet as well: Prudential argument is actuated by a political and economic program as to which the Constitution itself is agnostic, and thus the prudentialist must provide a standard external to the Constitution.

## IX. CONCLUSION

A modality is the way in which we determine a form of expression to

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264. "The preceding chapters have examined a number of efforts to explain why a small group of people, called judges, should be allowed to displace the otherwise legally authoritative decisions of a somewhat larger group of people, called legislators, who are selected by processes that seem closer to the normatively attractive mechanisms of democracy than those used to select judges." P. 147.

265. Pp. 147-48.

266. Pp. 149-58. Tushnet thus includes Cover, Burt, and James Boyd White, whose work has nothing to do with describing an ideology that would respond to the countermajoritarian objections to judicial review.

267. Pp. 160, 162-63.

268. P. 164 (quoting Owen Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979)).

be true. For instance, a logical modality may be attributed to a proposition, *p*, by saying that it is logically necessary, or contingent, or impossible that *p*. To say that it is now, or will be, or was the case that *p*, attributes temporal modality. To say that it is obligatory, permissible, or forbidden that *p* is to mark a moral or deontic mode. To say that it is known or unknown or known that it is not the case that *p*, is to employ an epistemic mode. And so on.<sup>269</sup> By contrast, to say simply that *p*, or it is '*de fide* true that *p*,' does not characterize the way in which *p* is true.

The six forms of constitutional argument are modalities. They are not true in themselves, but provide criteria by which we can determine whether statements about the American Constitution are true. Although there is a certain jargon associated with this idea—that there are six forms of argument, that they arise from the history, text, doctrine (neutral principles), structure, and so on, that they are associated with particular constitutional ideologies—one very largely misses the point by adopting the jargon of six forms without understanding the fundamental ideas of this sort of analysis.

These six forms are available to any judge; indeed it was their availability as common law forms that recommended them once the power of the state was subordinated to law by our Constitution. Thus they are distinct from the ideologies to which they have given birth. A modality makes no claim as to its truth value; it is a way of determining truth values. An ideology, by contrast, makes precisely the claim that its way of looking at things is true. For that reason, it is to the ideology of textual argument, for example—the whole set of ideas about a tacit social contract, the ongoing nature of the constitutional compact, the assessability of its interpretation to those giving tacit consent, and so on—that the textualist appeals for justification. Thus, the modalities may provide legitimacy, but they cannot, in themselves, provide justification.

Why does all this matter? What difference does it really make if these six categories are used by an author for some novel purpose? Where do I get off (do I own these categories?) delivering this rather didactic introduction to constitutional jurisprudence and calling it a conclusion to a book review? Understanding the interpretation of the Constitution in the way I have outlined dooms the very enterprise in which Tushnet is engaged. Both the procedure—the repeated stylized attack, like a favorite chess opening, by which he proceeds to demonstrate the infeasibility of the forms of argument—and the substance of his effort—the endeavor to shatter our rather complacent faith against the irony of modernism by showing that each form is a pathetic and inept mask for politics—depend upon a confusion between modality and ideology. This confusion requires that we augment analysis with allegations of false consciousness, stupidity, bad faith, and so forth, be-

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269. ANTHONY FLEW, *DICTIONARY OF PHILOSOPHY* 235 (1984).



cause in fact, far from being infeasible, the case reporters are full of examples of the tasks that Tushnet has shown to be impossible. By contrast, the ideologies of constitutional jurisprudence are indeed vulnerable to claims of indeterminacy.

It has often been observed, and it is of course true, that our constitutional law reflects a continuing struggle among contending interests for the privilege of having the government on its side. Our constitutional jurisprudence is a changing product of earnest efforts to enforce the power of the state against others. In a democracy, publicly appealing reasons must be given for the constitutional proposals for interpretation made by different interests or groups, including even those of groups who wish to promote common interests. These reasons must, at least, express a perspective that transcends the struggle for power.<sup>270</sup>

Imagine, in Amartya Sen's winsome images about property rules, the following scene. There is a wooden flute, and there are three boys. Each boy wants the flute for his own. The first says, "I made that flute; it belongs to me. Without me there would be no flute." The second says, "You two have many toys. I have none. That little flute ought to go to me." The third says, "I am the only one who can play it. I should have that flute." No doubt if we introduced 7-year-old lawyers into this scene, they would put their client's claims in more general terms. These claims seek ideologies as much as they are formed by them (imagine the sense of injustice the boy felt who had the flute taken away!). Each of the ideologies of constitutional law seeks to justify a certain pattern of allocation. In my opinion, this search for ideological justification must fail, if only because each inevitably resorts to a circular appeal to its own premises. For example, one must believe in the legitimacy of historical argument, as a matter of law, before one can claim that appeals to the intentions of the framers and ratifiers are the only conscientious method of interpreting the Constitution. This circularity is not the result of indeterminacy, I hasten to add. Indeed, to take an example offered by Tushnet, the very criteria of the modalities weaken such an assertion. Tushnet gave us the example of an adolescent believer in reincarnation who wished to run for President. Over 35? Well over, he thought. But this is not really troublesome for the textualist. Nor is Tushnet on firm ground when he taxes each form of argument with an inability to meet criteria he has imported from another form (prudentialism); indeed one might almost say this is what it means to be a distinct form—the ability to impose criteria that are unsatisfied within the other conventional modes.

The ideologies of constitutional law have taken on the structure of argument; in this way each has criteria to establish legitimacy, for it is the modalities of argument, and not any foundational ideology, that

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270. See Louis Eisenstein, *Some Second Thoughts on Tax Ideologies*, 23 N.Y.U. INST. FED. TAX. 1, 3 (1965).

legitimate judicial review. The difficulty arises from this relationship: Just as the ideologies cannot legitimate—as Tushnet rightly argues—so the modalities cannot justify. Following the forms of argument not only does not insure a just outcome, it does not even give us the means of assessing our outcomes.

For Tushnet, this means that law is simply politics. Having reached this conclusion, he taxes the framers as naive: “[They] did not understand that courts are inevitably part of society’s governing coalition.”<sup>271</sup> He then sets up a political test as the rubric by which to judge constitutional theory: “An approach to constitutional law . . . is indefensible if it would allow judges to uphold the worst and invalidate the best politically feasible programs.”<sup>272</sup> Finally, he announces this agenda for future theorists: “The task of constitutional theory ought no longer be to rationalize . . . . It should be to contribute to a political movement that may begin to bring about a society in which civic virtue may flourish.”<sup>273</sup>

Of course he is right that if you are certain of what civic virtue consists, you will be able to state a program that need not tolerate the contradictions of the multi-valenced scheme of competing modalities. Such virtue at the moment appears to have been discovered by many to reside in the “republican tradition.” But for the very reasons that have led him to reject other claims to overarching grand theory, Tushnet is compelled to concede that the simple adoption of the republican solution is not available to him. Thus, he concludes, in resignation: “The preceding chapters have . . . suggested that grand theory cannot be made coherent today because of the erosion of the republican tradition.”<sup>274</sup> Moreover, he is right in identifying the principal theories of constitutional interpretation as ideologies.<sup>275</sup> He writes:

Grand theories are what I will call unitary theories of constitutional law. Any theory identifies a set of principles from which its results follow, but unitary theories are special in two related ways. First, there are no conflicts among their principles . . . . [S]econd . . . their results follow from their principles in a reasonably rigorous way . . . . The fact that unitary theories of constitutional law have dominated recent dis-

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271. P. 186. *But see* J.R. Pole, *The Individualist Foundations of American Constitutionalism* (n.d.) (unpublished manuscript on file with the *Stanford Law Review*).

272. P. 186. This would imply that arguments before a judge must be, at least for one side, “indefensible,” because constitutional theory determines the availability of arguments. A theory that would not “allow” judges to rule either way is a theory that would provide only one side with legitimate arguments.

273. P. 187.

274. P. 179. It has been suggested before that individual liberty can only be assured within a community of a certain sort or one possessing a certain public responsibility. Rousseau, for example, maintained that personal liberty depended on the performance of public services. *See* JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1762) (M. Cranston trans. 1968). It has also been argued that the qualities required by each person in order to perform civic duties must be the civic virtues. *See* Quentin Skinner, *The Idea of Negative Liberty*, in *PHILOSOPHY IN HISTORY* 193 (R. Rorty, J.B. Schneewind & Q. Skinner eds. 1984).

275. *See* P. BOBBITT, *supra* note 3, at 247.

cussions provides the preceding chapters with a structure.<sup>276</sup>

But why does he not see the connection between these insights: that his very certainty is the stuff of ideology (a "unitary theory") and that it is the collapse of various modalities into a single ideology that is fatal to the legitimacy of judicial review? Law is not politics any more than it is history or textual criticism or political philosophy. It is simply a mistake to suppose that we consult these disciplines to tell ourselves how to apply a legal rule. We did not derive our modalities of argument and decision from constitutional ideology; they were present in the common law at the time we created the Constitution. By subordinating state power to law we implicitly superimposed the forms of law onto the hitherto sovereign state. Doing law—even the law that would govern the state itself—was not a matter of consulting ideology, though of course the practice can always be described in ideological terms. Tushnet's error in this regard is vividly portrayed in what at first appears to be no more than an erudite garnish: a footnote referring to an essay by Saul Kripke on certain arguments of Wittgenstein regarding rule-following. Kripke's observation is also picked up elsewhere, in the text, in part in the following passage:

Consider the following multiple choice question: "Which pair of numbers comes next in the series 1, 3, 5, 7 . . . ? (a) 9, 11; (b) 11, 13; (c) 25, 18." It is easy to show that any of the answers is correct. The first is correct if the rule generating the series is "List the odd numbers"; the second is correct if the rule is "List the odd prime numbers"; and the third is correct if a more complex rule generates the series. Thus, if asked to follow the underlying rule—the "principle" of the series—we can justify a tremendous range of divergent answers by constructing the rule so that it generates the answer we want.<sup>277</sup>

At first, this example looks like one taken from Wittgenstein (or Kripke on Wittgenstein). Wittgenstein repeatedly asks questions such as, "What justifies us in saying that 1002 follows 1000 in the series of even numbers, and in dismissing the student's answer 1004 as incorrect?"<sup>278</sup> Our usual defenses—that we know what accords with the rule, that the formula determines what steps to take next—are, as Wittgenstein shows, mere platitudes. The "rule for even numbers" might very well be "Go by twos until you hit 1000, then by 22."<sup>279</sup> Kripke replies to this skeptical account by relying on the socialization

276. P. 181. This is a clarifying and helpful structure, though not unprecedented. Cf. P. BOBBITT, *supra* note 3, Book I (Ch. 1: "A Typology of Constitutional Arguments"; Ch. 2: "Historical Argument"; Ch. 3: "Textual Argument"; Ch. 4: "Doctrinal Argument"; Ch. 5: "Prudential Argument"; Ch. 6: "Structural Argument"; Ch. 7: "Ethical Argument").

277. P. 55 (footnotes omitted).

278. See, e.g., LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 187 (G.E.M. Anscombe trans. 2d ed. 1958); LUDWIG WITTGENSTEIN, *REMARKS ON THE FOUNDATIONS OF MATHEMATICS* 3e (G.H. von Wright, R. Rhees & G.E.M. Anscombe eds., G.E.M. Anscombe trans. 1956) [hereinafter *REMARKS*].

279. See L. WITTGENSTEIN, *REMARKS*, *supra* note 278, at 62e.

process, the community of mathematicians, and so on.<sup>280</sup> Similarly, to account for the apparent consistency in appellate decisionmaking, Tushnet introduces the explanation of “pressures exerted by a highly developed, deeply entrenched, homeostatic social structure.”<sup>281</sup> But Wittgenstein’s real point, as perhaps even Kripke would concede, is not that a sociological account solves the problem, but rather that there is no mediating device that tells us how to apply a rule. When we go to 4, having written 1, 2, 3, we do not consult a rule. Our following a rule amounts to no more, and requires no more, than that we do go on (though of course we can state a rule if asked.) Nor, in my opinion, could a descriptive sociology explain how a rule could be applied in new situations. The very fact that any new result is compatible with some construction of the pre-existing facts defeats this account as thoroughly as the notion that the new application is deduced from the old. To know how to go on—to know the next number in the series—is all it means to know how to follow a rule.

But now look a little more closely at Tushnet’s example. Wittgenstein is satisfied to join issue even on the extreme case, when the series is simply 2, 2, 2, 2, . . . and at some point the student introduces a 3.<sup>282</sup> Whereas Tushnet’s previous example introduced a purposeful ambiguity: Any of the choices strikes us as plausible. We are required to choose. But Wittgenstein’s whole point is that in doing a series the one thing we do not do is decide. For it is not the skeptic’s doubt about explanation that troubles Tushnet—his very example actually shows Wittgenstein’s point, because we wouldn’t see the options as requiring a choice if we really had no idea how to go on—it is the necessity of choice. And this, finally, is what Tushnet does not tolerate.

Law’s indeterminacy, which the daily observation of ordinary legal practice, like the observation of children completing arithmetical series, seems perversely to reproach, does not make law inadequate unless one believes that legal rules require the inference of a consistent, coherent rule before one can go on. Unless, in other words, one believes that the practice requires an ideology of the sort Tushnet calls a “unitary

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280. See generally SAUL KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* (1982).

281. P. 57. Cf. P. BOBBITT, *supra* note 3, at 52-53.

282. See note 278 *supra*. I have slightly simplified these examples. For those interested in studying the question of how one follows or derives a rule, it is not necessary to do so through mathematical examples. Tushnet may have picked up Kripke (or Peter Winch) on Wittgenstein as a guide, but one can instead go directly to Wittgenstein’s discussions in the *Philosophical Investigations*:

“But how can a rule shew me what I have to do at *this* point? Whatever I do is, on some interpretation, in accord with the rule.”—That is not what we ought to say but rather: any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning.

L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 278, ¶ 198, at 80e (emphasis in original); see also discussions of deriving a rule at ¶ 156, at 61-62e; ¶ 163, at 65-66e; ¶ 164, at 66e.

theory.” It is this requirement that leads Tushnet both to mock despair—he claims to be driven to political action since theorizing cannot provide the solution<sup>283</sup>—and to adopt a unitary theory of his own, one that is quite compatible with supplanting rationalization with political action.

Tushnet briefly considers the possibility that some sorts of issues are more amenable to certain modal approaches than to others. This “strategy is to allocate specific areas of the Constitution to different grand theories: privacy to moral philosophy, criminal justice to originalism, the first amendment to representation-reinforcement, and so on.”<sup>284</sup> But this “strategy” is clearly insufficient for Tushnet precisely because it requires a decision: how to characterize a case.

But suppose you didn’t feel such an ideological need, what then? Then you might see the multiplicity of modal choice as a necessary thing. For it is this multiplicity that makes moral choice possible, as opposed to a single ideology that would dictate such choices. Tushnet briefly addresses such a possibility, but his fatal confusion of modality and ideology, precipitated perhaps by his requirements for law and rules, and a certain lack of perspective on his own modal vantage point, lead him to dismiss the suggestion. He does not seem to entertain the possibility of a pluralist, anti-foundational thesis of the sort presented in *Constitutional Fate* and, perhaps, in Laurence Tribe’s *Constitutional Choices*.<sup>285</sup> Instead, he writes:

Pluralist theories have a respectable philosophical pedigree, but they cannot be the foundation of the theory of constitutional law. Plu-

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283. “[L]ike Seurat’s proposed system of painting, or that projected Universal Algebra Gödel innocently believes Leibnitz to have perfected and mislaid . . .” Randall Jarrell, *Verse Chronicle*, THE NATION, Feb. 23, 1946, reprinted in RANDALL JARRELL, KIPLING, AUDEN & Co.: ESSAYS AND REVIEWS, 1935-1964, at 136 (1981).

284. P. 180. Cf. P. BOBBITT, *supra* note 3:

A particular problem is more or less suited to a particular [modality] when the factual features of the problem bear a certain relationship to the corresponding factual feature of the Constitution which gives rise to that approach.

*Id.* at 231.

. . . The various constitutional arguments and approaches I have discussed are made possible by corresponding features of our Constitution. A textual argument is possible only because we have a *written* Constitution; it is the Constitution’s “writtenness,” if you will, that enables textual approaches. Historical arguments are possible because the Constitution was proposed by a deliberative body, and campaigned for, and ratified by the People, instead of being imposed on the People or announced as law by fiat. Structural arguments work because the Constitution establishes three principal, fundamental structures of authority—the three-branch system of national government, the two-layer system of federalism, and the citizen-state relation. Prudential arguments are a result of our Constitution’s rationalist superstructure of means and ends, of enumerated powers and implied methods, which impose a calculation of benefits. Doctrinal arguments are possible only because of the imposition of the federal courts onto the constitutional process. Ethical arguments arise from the ethos of limited government, from the “limited-ness” of our constitutional grant of power.

*Id.* at 230.

285. L. TRIBE, *supra* note 58.

ralist theories tell those whom they address to think carefully and balance the relevant considerations before arriving at a judgment. That judgment, however, cannot in the end be defended by more than what John Rawls and other philosophers call intuitionism. It is perfectly all right, and perhaps inevitable, that I rely on my intuitions in deciding what to do and in attempting to persuade others to join me. But, as we have seen, the situation is different within liberal constitutional theory, where the issue is who can exercise coercive power over another. Pluralist theories give judges an unreviewable discretion to force on the rest of us what their intuitions tell them is correct, and that discretion is unacceptable in the liberal tradition.<sup>286</sup>

I am inclined to believe, however, that it is the liberal tradition (taking that to be the tradition of our Constitution and its construction) that not only permits but requires that judges and presidents and members of Congress resort to their consciences when, having scrupulously followed the modes that ensure legitimation, there remains a conflict. An opinion in law—of which a judicial opinion is only one example—is not an account of how the result was reached, but of how it can be legitimately reached. The fact that the final decision is expressed in a legal account is to say no more than that it is a legal decision. A psychological, theological, or even biochemical explanation is always possible, but that does not make law psychology or theology or biochemistry.

I conclude that Tushnet misunderstands the law, that he requires (and thinks the liberal tradition requires) that the law's judgments be "true" in the way that propositions about the world are true, that he believes in a set of legal presuppositions that are discoverable in the absence of legal argument, and that he thinks legal argument depends on these presuppositions. I think that he believes that judicial review must be legitimated by a hypothesized causal explanation that is derived from the fashionable sociopolitical theories of the moment, and that he believes that such theories exist on a privileged plane and are not themselves simply other, highly stylized moves within another convention-bound game whose only relevance to constitutional argument is through the prudentialist modality.

I have claimed that, owing to such beliefs, he falls into the error of demanding of law what only ideology can give, what each "grand theory" promised when other law professors (and attorneys general) demanded similar things of their interpretive schemes (not least of which was to discredit the very legitimacy of all other approaches).

What is the relevance of this critique? Tushnet is not a cynic, nor even a revolutionary (which requires less conviction); one does not write a 300-page book, one half of which is devoted to analyzing cases,<sup>287</sup> if one believes there is no law. Rather, Tushnet is an ironist.

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286. P. 182 (footnotes omitted). This issue is also treated in P. BOBBITT, *supra* note 78.

287. I have not discussed this second half in this essay. Part II of *Red, White, and Blue* will

And this is why it matters: The reification of law into politics does *not* save it from the pitiless disillusion that results from unmasking the unsupported claims of naturalism. Rather it condemns it to parties who have no need to "rationalize" (who wouldn't in other words have troubled to write Part II of *Red, White, and Blue*) and who would use law only to serve programs of an enforced civic virtue. Then the smile of irony becomes the forced grin of violence. Once lost, the habits of legitimacy are hard to recover. Is it for this that we should sweep away the forms within which our law has grown and, decade by decade, not always increasing in every decision, but always increasing nevertheless, steadily strengthened its command over arbitrary state power?

Mark these lines of Zbigniew Herbert:

First there was a god of night and tempest, a black idol without eyes, before whom they leaped, naked and smeared with blood. Later on, in the times of the republic, there were many gods with wives, children, creaking beds, and harmlessly exploding thunderbolts. At the end only superstitious neurotics carried in their pockets little statues of salt, representing the god of irony. There was no greater god at that time.

Then came the barbarians. They too valued highly the little god of irony. They would crush it under their heels and add it to their dishes.<sup>288</sup>

Tushnet and his important book belong to the second generation of those who think that law statements are statements about the world; a true statement in the law will be one that has been brought into line with the facts of the world. By overlapping this fundamental belief with the modal perspective given by the forms of argument, he simply works his way into one form, when it was allegiance to one form that he wished to escape, and from which a modal perspective promised freedom. I have said that Tushnet is therefore a transition figure, not having quite fully assimilated the insights provided by the forms of argument—unlike say Robert Post<sup>289</sup> or Akhil Amar<sup>290</sup> or Richard Fallon<sup>291</sup> or Marc Gold<sup>292</sup> and Brian Langille<sup>293</sup> in Canada—but it may be

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be familiar to those who have read Professor Tushnet's articles. For example, Chapter 6 ("The Constitution of Government") is largely composed of *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809 (1983), Chapter 7 ("The Constitution of the Bureaucratic State") of *The Constitution of the Welfare State*, 86 W. VA. L. REV. 1077 (1984), Chapter 8 ("The Constitution of Religion") of *The Constitution of Religion*, 18 CONN. L. REV. 701 (1986).

288. Zbigniew Herbert, *Mythology*, in THE FABER BOOK OF POLITICAL VERSE 422 (C. Milosz trans. 1986); see also Tushnet, *Deconstruction*, *supra* note 81, at 646-47.

289. Robert Post, *Theories of Constitutional Interpretation* (n.d.) (unpublished manuscript on file with the *Stanford Law Review*).

290. Akhil Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1053 (1988); Akhil Amar, *Law Story* (Book Review), 102 HARV. L. REV. 688 (1989).

291. Fallon, *supra* note 40, at 1189.

292. Gold, *supra* note 40.

293. Brian Langille, *The Jurisprudence of Despair and the Search for the Grammar of Constitutional Law* (1988) (unpublished manuscript on file with the *Stanford Law Review*).

that he is himself in transition.

*Red, White, and Blue* (in a comparison that I fear can only displease both parties) ranks with Laurence Tribe's *Constitutional Choices* in its ambition, erudition, and importance. Tushnet's rejection of the five unitary grand theories, like Tribe's anti-foundationalism,<sup>294</sup> deserves attention, and, I believe, acclaim. Each is its author's bid to achieve the front rank among constitutional theorists. What disappoints is the sense one has that precisely what is new and profound in each author's work is but a veneer on which neither has deeply reflected and to which neither is deeply attached. Like Hamlet, who has become educated in the new science but who must return to a society in which superstition governs, Mark Tushnet is suspended between the new and the old. *His* ghost is a rather sentimentalized socialism that would seem dated in any other industrialized society. He too plans to use his newly acquired techniques to fulfill a mission. But make no mistake about this: Despite appearances, he is still gripped by the old paradigms, the old superstitions (like the countermajoritarian objection) that have long dominated this field. I surmise he is not alone in this.

When I first wrote *Constitutional Fate*, I believed it to be a break with previous thinking on constitutional interpretation, in part because it shifted the strategy of attention from the expression of a theory to the study of the nature of theorizing. It would not have been possible without the previous work of others who have explored the ideological underpinnings of forms of argument."<sup>295</sup> *Constitutional Fate*, however, made a topological, not typological, claim that the forms of constitutional argument legitimated constitutional interpretation and accordingly imposed certain interpretive constraints. It did not simply call attention to the fact that the competing forms of argument differed as to their interpretive commitments, but rather it attempted to step outside the ring and indicate what all had in common in the nature of these commitments and their relationship to the forms of argument. That is why it expressed no single favored theory of constitutional interpretation, an aim Tushnet repeatedly professes to share but so signally fails to achieve. In some ways the paradigm has shifted; for example, it is becoming almost commonplace to see the countermajoritarian dialogue organized along modal lines,<sup>296</sup> and it is becoming more common to see constitutional interpretation treated as

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294. Regarding Tribe's anti-foundationalism, see Mark Tushnet, *The Unities of the Constitution*, 21 HARV. C.R.-C.L. L. REV. 285, 286-89 (1986).

295. See, e.g., C. BLACK, *supra* note 13 (isolating a form of argument, structural argument, for the first time); Deutsch, *supra* note 133 (analyzing the recursive character of arguments from neutral principles); see also J.H. ELY, *supra* note 13; Brest, *Original Understanding*, *supra* note 13; Grey, *supra* note 13; Tribe, *supra* note 13 (each focusing on types of argument and their ideological underpinnings).

296. See, e.g., Daniel Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. UNIV. L. REV. 1113 (1988).



a series of legitimizing modalities.<sup>297</sup> I did not write *Constitutional Fate*, however, to commence one genre, but to end another. I believe now, as I did then, that the future useful work to be done in law does not lie in commentary on criticism but rather in the usual analysis of legal problems, and such accounts of these problems—economic, anthropological, historical, etc.—as may be useful to that analysis. Rather than sow a certain jargon, I would leave everything as it is (but the reader).

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297. Two recent casebooks are exemplary: W. MURPHY, J. FLEMING & W. HARRIS, *supra* note 40; P. SHANE & H. BRUFF, *supra* note 40. See also Professor Tribe's advice that we must choose "constrained and channeled by a constitutional text and structure and history, by constitutional language and constitutional tradition," as well as "by who we are and by what we have lived through." L. TRIBE, *supra* note 58, at vii.