RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW by Mark Tushnet (Cambridge, Mass.: Harvard University Press, 1988) pp. xi + 328.

Over the past dozen years, Mark Tushnet, a law professor now at Georgetown University, has published extensively on topics in U.S. legal history, constitutional law, and the federal court system. His fabled industry has resulted in several books as well as numerous pieces in journals devoted both to law and to the humanities.[1] He was a charter member and the original secretary of the Conference on Critical Legal Studies and has been a major exponent of an avowed leftist challenge to traditional, Anglo-American legal theory.[2] The publication of *Red, White, and Blue* is important in several respects, not least for the opportunity it has given Tushnet to collect, refine, and elaborate the controversial arguments that hitherto have been spread throughout his many articles.

Red, White, and Blue has two main parts. In the first, Tushnet articulates how the traditional attempts to justify judicial review are all bound to fail. Second, he explores how the Supreme Court's interpretation of the U.S. Constitution has significantly re-shaped the institutions of the welfare state, of religion, and of economic organization in that country. This review concentrates on the first part of Tushnet's book.

Tushnet makes a radical contribution to the enduring debate over the political and moral legitimacy of judicial review in a constitutional context. What justifies a court's power to invalidate an action or measure approved by an elected legislature? Will a society tend to be more just because of the presence of this power in the courts? These questions have become increasingly acute in Canada since the adoption of the Charter and have stimulated thoughtful debates among the new generation of constitutional commentators.[3] Throughout his discussion, Tushnet seeks to expose the frail normative assumptions that underpin contemporary constitutional law. He also contends that it is impossible to reconcile all these assumptions. In particular, Tushnet wants to demonstrate the poverty of recent attempts to fashion a coherent "grand theory" for constitutional law.[4] By grand theory Tushnet means a comprehensive, rational account of the limits that apply to legislative action and also to the practice of judicial review.

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1. Among his publications are *The American Law of Slavery 1810-1860* (Princeton: Princeton University Press, 1981), *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 1987), and *Central America and the Law: The Constitution, Civil Liberties, and the Courts* (Boston: South End Press, 1988). Tushnet's remarkable production is noted in J. H. Schlegel, "Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies" (1984) 36 Stan. L. Rev. 391 at 409.
2. Tushnet himself has described the rise of the CLS Movement in "Critical Legal Studies: An Introduction to Its Origins and Underpinnings" (1986) 36 J. Legal Educ. 505. *See also* M. Kelman, *A Guide to Critical Legal Studies* (Cambridge, Mass.: Harvard University Press, 1987).
3. See, e.g., such excellent treatments as the following: P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Carswell, 1987); A. Petter, "The Politics of the Charter" (1986) 8 Sup. Ct. L. Rev. 473; and J.C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall L. J. 123.
4. A different set of doubts about the utility of such theorizing is contained in W. Van Alstyne, "Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review" (1983) 35 U. Fla. L. Rev. 209.

Unlike many other constitutional writers, Tushnet is not simply concerned with the differences in reasoning or in virtue between an activist and a restrained judicial philosophy. Nor does his discussion turn on a contrast between the "progressive" era of the Warren court and the "conservative" achievements of the courts led by Burger or Rehnquist. Tushnet takes a different angle. His main object is a fundamental critique of various conventional approaches to understanding constitutional doctrine and constitutional theory. The critique he offers is structural. In Tushnet's view, the very terms framing the discussion of some central issues in constitutional law are imbued with premises derived from what he calls the "liberal tradition". That tradition is pervasive, dominant, and troubled. It forms the background for the theories proposed by such apparently diverse writers as Alexander Bickel, John Hart Ely, Ronald Dworkin, and Michael Perry.[5]

According to Tushnet, legal theorists who write in the mainstream of constitutional discussion are heirs to a deeply-rooted set of presuppositions about the need for "ordered liberty" and how a legal system can fulfil that need. These theorists take for granted the Hobbesian depiction of why political association and governmental institutions are required.[6] To avoid a war of all against all, the state is created and is granted certain powers over the public life of its citizens. Nevertheless, liberal theorists have traditionally been careful to maintain that certain areas of human activity are beyond the reach of state coercion. Therein lies the need for a constitutional regime. An established constitution (whether it is written or understood as a set of fundamental values, conventions, or customs) places limits on the activities of a legislature. In a federal context, the constitution is supposed to guard against national legislative tyranny by diffusing power throughout several levels of government. It does this also by endowing courts with the power to declare legislation invalid. The constitution can serve the further purpose of giving citizens an instructive reference point that helps them assess how the courts are performing this function.

The liberal tradition, as Tushnet defines it, is not the sole intellectual system that has shaped our legal institutions and practices. Especially in the political history of his own country, Tushnet finds a competing, though by now relatively neglected, set of ideals and political values. In *Red, White, and Blue* Tushnet briefly chronicles the political tradition deriving from the U.S. revolutionary experience in the eighteenth century. He calls this the "republican" tradition of democratic politics.[7] His explicit recognition and discussion of this alternative political ideal is

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5. See A. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962); J. H. Ely, *Democracy and Distrust* (Cambridge, Mass.: Harvard University Press, 1980); R. Dworkin, *Taking Rights Seriously*, rev. ed. (Cambridge, Mass.: Harvard University Press, 1978); R. Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986); and M. J. Perry, *The Constitution, The Courts, and Human Rights* (New Haven: Yale University Press, 1982).

6. It is odd that Tushnet should identify the origins of liberalism by reference to Hobbes, who himself is hardly a liberal. A broader historical view of the central ideas of liberty and constitutionalism, stretching back to medieval thinkers, can be found in Q. Skinner, *The Foundations of Modern Political Thought*, 2 vols. (Cambridge: Cambridge University Press, 1978) and in H. J. Berman, *Law and Revolution* (Cambridge, Mass.: Cambridge University Press, 1983). More likely by "liberalism" Tushnet intends to denote a range of assumptions — metaphysical, moral, and political — that compose what has been called the "liberal individualist" tradition. For a history of this tradition, see A. Arblaster, *The Rise and Decline of Western Liberalism* (Oxford: Basil Blackwell, 1984).

7. Again, this tradition is not indigenous to the U.S. Its intellectual antecedents were in earlier European political theories of the sixteenth and seventeenth centuries: see Skinner, *ibid.*

perhaps the most significant addition to his work that *Red, White, and Blue* contains.[8]

On Tushnet's account, liberalism differs from republicanism in several major features. First, liberal ideology tends to emphasize liberty over equality. Liberals prize the market as a necessary institution for distributing resources. Moreover, liberals see the ideal government as neutral: it does not choose among competing conceptions of individual welfare. By contrast, republicans recognize that sometimes a communal good is more imortant than individual preferences and that public institutions should be used to help shape a citizen's character. Liberals affirm the importance of preserving so far as possible each individual's idiosyncratic values. Republicans stress how a person's civic character and sense of social responsibility should be cultivated. Such traits are the result of interpersonal exchange and creative debate over issues that affect the polity. Finally, Tushnet argues that liberalism is wedded to the idea that the legal process represents a different form of rational decision-making from the political process. Without this distinction, liberals fear that courts could not fulfil their constraining role. Republicans are less worried about the consequences of seeing law as merely a genre of politics.

In Tushnet's view, the chief ambition of recent constitutional theorists, who each attempt a "grand" synthesis by which to justify judicial review, has been impossible to satsify. Tushnet claims that none of the theories put forth in the past generation of constitutional scholarship can withstand his attack. *Red, White, and Blue* discusses four types of theories that would constrain judicial review: the appeal to neutral principles; originalist interpretation; the reinforcement of representative politics; and the use of moral theory.[9]

Tushnet maintains that the "neutral principles" school of constitutional interpretation only makes sense if it rests on a non-liberal normative foundation, in which the crucible of constitutional values is a socially constructed consensus.[10] Without the requisite "continuities of history and meaning", the principled approach cannot sustain the judicial exercise of displacing legislative choices.

Similarly, the "originalist" approach to a written constitution, popular especially with Justice Department officials during the Reagan administration, is embarrassed by a lack of the kind of historical knowledge necessary to determine what might have been the framers' original intent or convictions.[11] Because there are many possible "alternative re-creations" of the so-called original intention of the drafters of a constitution, there is in effect no constraint on the scope of judicial decision-

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8. The literature spawned by the recent "rediscovery" of the civic republican side of the U.S. constitutional ethos is voluminous: see, e.g., A. Fraser, "Legal Amnesia: Modernism Versus the Republican Tradition in American Legal Thought" (1984) 60 Telos 15; F. Michelman, "The Supreme Court, 1985 Term — Foreword: Traces of Self-Government" (1986) 100 Harv. L. Rev. 4; C. Sunstein, "Beyond the Republican Revival" (1988) 97 Yale L.J. 1539; and R. H. Fallon, Jr., "What is Republicanism, and Is It Worth Reviving?" (1989) 102 Harv. L. Rev. 1695.

9. Tushnet criticizes and rejects some writers' attempts to provide a theory of constitutional adjudication that recognizes different kinds of argument as legitimate. This kind of theory leaves only the problem of appropriately weighting the interpretive and normative arguments. For an example of such an eclectic approach, see R. H. Fallon, Jr., "A Constructivist Coherence Theory of Constitutional Interpretation" (1987) 100 Harv. L. Rev. 1189.

10. See H. Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 Harv. L. Rev. 1.

11. For a journalistic account of this period, see L. Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (New York: Knopf, 1987).

making.[12] Tushnet is especially thorough in his review of the literature that both expounds and rejects various formulations of an originalist or, as it is sometimes called, an "interpretivist" approach.[13]

On another view the courts' role in the constitutional process is to reach decisions that will enhance democratic procedures. That is, the institution of judicial review can be reconciled with democracy, because it is aimed at removing, not creating, impediments to government by the people. This "representation-reinforcing" theory, which Tushnet describes as foreshadowed in the opinions of Chief Justice Marshall, also founders. According to Tushnet, the theory rests on wrong empirical assumptions about U.S. political institutions and about who wields power in Western societies composed of different social classes. It also relies on a defective democratic ideal. In either event, the theory fails as a defensible account of constitutional interpretation. To support his view, Tushnet explores the difficulty of applying this theory to traditionally vexed constitutional issues in federalism and the protection afforded by certain guarantees in the U.S. Bill of Rights.

Tushnet also criticizes the attempt to ground judicial review on considerations of morality. Such foundations consist either in an articulate, systematic moral philosophy or in the actual morality of a community. Tushnet finds serious faults in both accounts. First, the reliance on abstract morality questionably assumes that judges are better moral reasoners than legislators. It also assumes that judges are able to infer particular conclusions from abstract principles. In addition, even on a "pragmatic" level, Tushnet is not persuaded that modern courts have tended to be more morally enlightened than their legislative counterparts.

Tushnet further disputes the account according to which judges can resort to a background moral philosophy of the relevant community. Judges are institutionally unable to conduct sociological surveys of common opinion. At the same time their own consciences are usually products of a narrow and unrepresentative experience. Tushnet singles out Dworkin as notable among contemporary theorists for tending to mix a republican appeal to common values with a liberal position on the lack of a shared vision of the good.[14]

Having disposed of the various leading theories that attract adherents in current debates, Tushnet devotes most of the remainder of his book to describing how legislatures have become "judicialized". That is, in the face of landmark court cases, federal legislators in the U.S. have been transformed from "creatures of will" into "beings of reason".[15] In a judicialized legislature, "interests are openly articulated and fairly balanced against each other".[16] Tushnet characterizes this phenomenon as part of a larger "technocatic rationality" that marks our modern societies.

In his concluding chapter, Tushnet summarizes his case against legal constitutionalism as an ideology. He doubts the political wisdom of building a scheme of

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12. *Red, White, and Blue* at 51.
13. See, e.g., R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass.: Harvard University Press, 1977). For a good exposition of interpretivism, see Perry, *supra*, note 5.
14. For Dworkin's response to Tushnet on the alleged moral skepticism of liberals and their refusal to subscribe to a theory of what is valuable in life, see *Law's Empire*, *supra*, note 5 at 440 n.19.
15. *Red, White, and Blue* at 213.
16. *Ibid.*

national government on the bedrock of a written constitution that purports to consolidate the rules or values by which the society will be governed. Instead, in a sketchy outline at the end of *Red, White, and Blue*, Tushnet imagines an alternative conception of social and political order that would dispense with many liberal-democratic ideals and with the varieties of constitutional interpretation that now contend for pre-eminence. This alternative would take the form of "constitutional politics" in a radically decentralized society. We would take as our ideal a conversational model of the polity.[17] The reader might have expected Tushnet to plead for the revival of republican institutions and aspirations. For various reasons listed by Tushnet, that form of politics is no longer a practical alternative, though it retains rhetorical potency.

The portrait of a revitalized polity with which Tushnet concludes his discussion involves a substantially revised federalism. In this projected society, citizens would have a stronger commitment to promoting the common good rather than their own self-interest. They would be empowered to rethink the kinds of institutions, such as property, democratic participation, productive relations, and the like, that ought to attend this revamped federation. Tushnet shrinks back from describing in detail the type of commonwealth that he would envision. Most importantly in his eyes, citizens of such a commonwealth must have the opportunity to formulate afresh the economic and social pre-conditions that will make the projected type of politics preferable to what we already have.

How much assistance does *Red, White, and Blue* offer to a reader seeking to understand our present constitutional situation? The book very usefully sums up the different interpretive positions being discussed in U.S. law and politics today. On each view, Tushnet offers a cogent and thoughtful critique. Canadian readers might find the discussion of originalism too remote from our country's constitutional context. That is true for now, though perhaps several decades hence the present U.S. debates invoking such a theory could become startlingly relevant. By contrast, Tushnet's treatment of the various alleged sources of constitutional principle, of which judges have peculiar knowledge, will be immediately appreciated by those Canadian commentators who are trying to detect a philosophical or ideological pattern in our own Supreme Court's constitutional decisions.[18]

There are at least three difficulties with Tushnet's presentation that should be mentioned. The first is his reconstruction of liberal ideology. It is unclear, even after Tushnet has charted the contrast between liberal and other ideological beliefs, precisely what liberalism means and in what respect it is unique. In particular, Tushnet's critique often seems to cast modern liberalism as the only political theory that is animated by basic questions about the proper relationship between the individual citizen and the state. If that were a characteristic peculiar to liberalism, then a great deal of political thought prior to Hobbes would be unintelligible.[19] Tushnet should

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17. For a discussion of the range of this theme, see M. Stanley, "The Mystery of the Commons: On the Indispensability of Civic Rhetoric" (1983) 50 Soc. Res. 851.

18. See, e.g., R. Martin, "Ideology and Judging in The Supreme Court of Canada" (1988) 26 Osgoode Hall L. J. 79 and P. Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117.

19. See, e.g., Plato, *Crito* 49e-54d in *Euthryphro, Apology, Crito*, trans. F. J. Church, 2nd rev. ed. (Indianapolis: Bobbs-Merrill, 1956); R. Kraut, *Socrates and the State* (Princeton: Princeton University Press, 1984); and Aristotle, *The Politics* 1261a16-24, ed. S. Everson (Cambridge: Cambridge University Press, 1988).

be asked whether the intractable problems of liberal theory, as he presents them, are not really part of the traditional puzzles of political theory *tout court*.

Also left relatively unexplored is the force of the distinction between the liberal and the republican points of view. Tushnet appears to place these in polar opposition, at least for heuristic and critical purposes. On his account, our allegiance to the principles of both implies that our political philosophy must be fundamentally incoherent. Further, it appears that we cannot reasonably hope to integrate the ideals associated with each theory. The conflict among them cannot be mediated through the construction of a grand theory which best explains constitutional jurisprudence. In light of the contrast between the two ideologies, Tushnet offers his brief synthesis of a post-liberal form of political life and legal institutions.

Missing from this approach is an explanation of the extent to which liberalism and republicanism have for generations represented interlaced political ideals. The natural ideological contrast to liberal politics is not republican aspirations. Rather, the contrast more properly is with one or another form of authoritarianism. For a good example of a complex political theory that includes as important elements both liberal and civic republican values, one can turn to Rousseau's conception of how persons can be at one and the same time both citizens and subjects.[20] It remains unclear how these points of view are so antagonistic that we must always feel the urgent need to choose between them. Even if it is observed that certain constitutional arrangements reflect a liberal rather than a republican view, this does not necessarily sap the foundations of the applicable constitutional theory. It does not always import a destructive antinomy.

A third ground for criticizing Tushnet relates to an argument he uses on several occasions to dispose of two of the alternative justifications of judicial review. When he considers both the neutral principles approach and the attempt to provide a theory of adjudication based on moral philosophy, Tushnet suggests that our inherited liberal tradition provides a bare minimum of shared conceptions. Each of us is supposed to be "an autonomous individual whose choices and values are independent of those made and held by others".[21] Therefore, we cannot expect that any grounds exist to guarantee consistency of meaning in legal or moral discourse. At best, we are limited to a sociological description or hermeneutic understanding of the meanings that are relevant in different communities or in our own community in different eras.[22]

The major problem with Tushnet's argument on this score is that some liberals would not accept such a thesis of radical autonomy as adequately reflecting their views on the origin and maintenance of social relations. Dworkin, for example, has expressly repudiated this manner of interpreting liberalism. It simply fails to match what he takes to be the core principles or the "nerve" of liberalism.[23] Moreover, such claims made by Tushnet as the following bear little resemblance to what Dworkin understands as the principle of adjudicative integrity:

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20. J.-J. Rousseau, *The Social Contract*, trans. M. Cranston (1968).

21. *Red, White, and Blue* at 46.

22. See *ibid.* at 58 for an analogy between the shared conceptions necessary for conversational discourse and for constitutional adjudication.

23. For discussion on this, see R. Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) at 181-204.

> Dworkin's methodological prescription simply tells us to rely on moral philosophy. It does not tell us what moral philosophy to rely on, and we have already seen in this chapter that we will have difficulty in assuring that the courts will figure out what the best moral theory is.

This interpretation of Dworkin's theory presented in *Law's Empire* is problematic. Dworkin does not assume that each judge may legitimately formulate a moral theory reflecting personal predilections and then use it to justify the legal result of a case. Nor ought a judge defer to the judgment of most members of the community about what morality demands. Instead, conscientious judges are envisioned by Dworkin's scheme as able to repair to a sense of what are the principles underlying their community. In other words, to use Dworkinian terms, those judges are bound to honour the values of fairness and integrity in reaching their interpretive conclusions. Within this scheme, there is of course no *assurance* that judges will always develop and apply the best moral theory that reflects the community's complex, guiding set of political virtues. But neither is the process untethered. Judges will have to discern and respect various sources of constitutional value. Tushnet misconceives Dworkin's argument by maintaining that it provides no real constraint at all on constitutional adjudication. Dworkin's discussion in *Law's Empire* of several cases discloses various constraining factors, which significantly depend on notions of shared values that Tushnet's portrait of liberalism would otherwise deny to Dworkin.[24]

A final comment on *Red, White, and Blue* is about the tone Tushnet adopts. Earlier in his career, Tushnet was notorious for the vigour with which he denounced traditional constitutional scholarship. His language could be pointed, even caustic. Especially the final sentences of his articles regularly manifested the lapidary stylist in Tushnet.[25] He also displayed political boldness by urging that a socialist interpretation of the U.S. Constitution was demanded by his principles of justice.[26] The reaction to Tushnet's work occasionally amounted to outrage.[27] In reworking his previously published material, Tushnet has noticeably tempered the expression, if not the substance, of his radical point of view. *Red, White, and Blue* adopts a generally solemn mode of argument, without much of the "playfulness" that marked Tushnet's earlier articles.[28]

Nevertheless, the final sentence in the book is epigrammatically resonant and will undoubtedly be a point of departure for future debate. After discussing the relatively muted indications in his book of any positive programme for political transformation, Tushnet concludes with the sentence: "Critique is all there is." This can be read optimistically. That is, we have been directed to an intellectual

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24. See *Law's Empire*, *supra* n. 5 at 379-99.

25. The most celebrated example of this is found in his review of Laurence Tribe's treatise in constitutional law: see M. Tushnet, "Dia-Tribe" (1980) 78 Mich. L. Rev. 694 at 710.

26. See *ibid.* at 696 *et seq.*

27. See Posner's criticism of Tushnet for his "unpardonable personal abuse of Laurence Tribe" in R. Posner, "The Present Situation in Legal Scholarship" (1980) 91 Yale L. J. 1113 at 1127. Posner has also characterized the "anti-law" group among law teachers (apparently the members of the Critical Legal Studies movement) as "unassimilable and irritating foreign substances in the body of the law school": see *ibid.* at 1128.

28. Tushnet was described as a "playful writer" in P. E. Johnson, "Do You Sincerely Want To Be Radical?" (1984) 36 Stan. L. Rev. 247 at 283. None of the chapter headings in *Red, White, and Blue* borrow from Bruce Springsteen: cf. M. Tushnet, "Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Scholarship" (1980) 89 Yale L. J. 1037.

path that leads us out of the impasse created by our simultaneous embrace of both liberalism and republicanism. The sentence could also, however, betoken a wistfulness for direct political action. The book leaves readers uneasily having to choose whether they have been given grounds for hope, or just a reminder of the consolation of constitutional philosophy.

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