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## COMPARING ALTERNATIVE APPROACHES ABOUT CONGRESS'S ROLE IN CONSTITUTIONAL LAW

Charles Tiefer\*

Mark Tushnet's *Taking the Constitution Away from the Courts*<sup>1</sup> presents many aspects of the theme expressed in its title. I find most interesting the aspect concerning Congress's role in constitutional law. I like this aspect because I spent almost two decades working on constitutional law in Congress, principally as the House of Representatives' Solicitor and Deputy General Counsel representing the House of Representatives in countless constitutional controversies,<sup>2</sup> and I have written a good deal about it.<sup>3</sup> Tushnet provides us with an alternative perspective from which we can view Congress both during that time and since. Tushnet's book is kind enough to cite some of my works and I have both personal and professional admiration for what he has done.

There is what I will call a standard, "court-centered" paradigm of constitutional law.<sup>4</sup> And, Tushnet provides an alternative termed "populist constitutional law."<sup>5</sup> Tushnet's populist constitutional law compares interestingly to another, third alternative to the standard, "court-centered" paradigm. I will call this third alternative the "political dynamics" approach to constitutional law. With three alternatives to contrast, we can have a lot of fun and perhaps also shed a little light.

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1. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

2. For a discussion of that post and what it entails, see Charles Tiefer, *The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client*, 61 *LAW & CONTEMP. PROBS.* 47 (1998).

3. See, e.g., CHARLES TIEFER, *THE SEMI-SOVEREIGN PRESIDENT* (1994) (regarding Congressional-Executive relations during the Bush Administration); CHARLES TIEFER, *CONGRESSIONAL PRACTICE AND PROCEDURE* (1989) (a 1000-page treatise about Congress).

4. Actually, there are many possible variants of judicial supremacy views. See Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 *HASTINGS CONST. L.Q.* 359, 389 (1997) (revisiting judicial supremacy).

5. TUSHNET, *supra* note 1, at x.

The first section of this article will sketch the three alternatives—court-centered, Tushnet's populist, and political dynamics—emphasizing Tushnet's populist approach. The second section will take us through how a few specific areas receive treatment under each of the three alternatives. The final section will discuss what is so wonderful about Tushnet's approach.

### I. THREE APPROACHES: COURT-CENTERED, TUSHNET'S POPULIST, AND POLITICAL DYNAMICS

Most of us have taken a course in constitutional law using a casebook, that is, a fat collection of predominantly Supreme Court opinions. So, most of us learned constitutional law from an implicitly court-centered paradigm.<sup>6</sup> Let me recite that paradigm with the alienated, stand-offish tone of a Martian anthropologist strolling down Main Street and talking about the obvious and familiar.

The court-centered view of constitutional law consists of a tour of Supreme Court opinions. Often it starts with *Marbury v. Madison*,<sup>7</sup> *McCulloch v. Maryland*,<sup>8</sup> and other decisions of the Marshall Court that, in this view, created the structure and process of constitutional law. It then continues, perhaps subject area by subject area, from older Supreme Court decisions that may or may not have survived, to more recent ones. For example, First Amendment law might go through the cases about subversives of the 1920s and 1950s, leading up to the golden years of the Warren Court.<sup>9</sup> It might then come to current major frontier cases regarding campaign finance, free exercise of religion, and commercial speech.<sup>10</sup> As in other descrip-

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6. There are exceptions. For example, see LOU FISHER, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 2000), a casebook written by one of the leading scholars of the political dynamics of constitutional law.

7. 5 U.S. (1 Cranch) 137 (1803).

8. 17 U.S. (4 Wheat.) 316 (1819).

9. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (holding that a statute that failed to distinguish advocacy from incitement to imminent lawless action violated the First Amendment); *Dennis v. United States*, 341 U.S. 494, 516 (1951) (upholding a statute making it a crime to teach or advocate the violent overthrow of any government in the United States); *Whitney v. California*, 274 U.S. 357, 380 (1927) (holding that a state statute based on the state's power to protect the public from violent political action is constitutional).

10. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976) (upholding several contribution limits to campaigns, but allowing unlimited expenditures based on the fact that such restrictions would restrict political expression under the First Amendment); *Employment Div. v. Smith*, 494 U.S. 872, 882 (1990) (holding that the free exercise clause did not prohibit the application of Oregon drug laws to ceremonial ingestion of peyote); *Central Hudson Gas*

tions of court-centered law, the court-centered view of constitutional law treats the law as owing a little something to the original pre-judicial text—in this instance, the Constitution, but in other instances, a statute, regulation, contract, will, or the like. However, the open-ended nature of the text leaves room for the exponents—namely the courts—to create doctrines, expressed partly by holdings and partly by statements in opinions, and the court-centered view of constitutional law locates that law almost wholly within the expounding opinions.

The court-centered view has what Alexander Bickel called the counter-majoritarian problem, that, in our democracy, the elected branches of government have legitimacy from the consent of the governed, and the unelected judiciary does not.<sup>11</sup> For unelected courts to strike down statutes by the elected Congress poses the counter-majoritarian problem in acute form.<sup>12</sup>

Those presenting the court-centered view may often express regret that sometimes the Court has taken a wrong turn, whereas Congress did something right. In *City of Boerne v. Flores*,<sup>13</sup> a key recent example, even some (but not all<sup>14</sup>) court-centered constitutional scholars think Congress did something right by passing the Religious Freedom Restoration Act,<sup>15</sup> while the Court did something wrong by striking it down.<sup>16</sup> But, it no more shakes the faith of the court-centered constitutionalists that bad things sometimes happen to good statutes, than the observed happening of bad things to good people causes the pious to abandon their faith in the deity.

Of course, if we have a warm and fuzzy feeling about enlightened judges, as law students often have after their first-year case-oriented courses, and the opposite feeling about unenlightened legislators, as cynical newspaper readers sometimes have, then the counter-majoritarian problem does not seem acute. Judges seem

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v. Public Serv. Comm'n, 447 U.S. 557, 571-72 (1980) (holding that a state's interest in preventing inequities in utility rates was not a constitutionally adequate reason for restricting protected speech).

11. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (2d ed. Yale Univ. Press 1986) (1962).

12. See *id.*

13. 521 U.S. 507 (1997).

14. See generally Saikrishna Prakash, *A Comment on Congressional Enforcement*, 32 *IND. L. REV.* 193 (1998).

15. 42 U.S.C. § 2000bb-1 (1994).

16. See David Cole, *The Value of Seeing Things Differently: Boerne v. Flores and Congressional Enforcement of the Bill of Rights*, 1997 *SUP. CT. REV.* 31, 32 (1997).

trustworthy and elected officials do not. But, exposure to history and life experience counteract the judge-worship of the first-year law student. For example, as progressives get older, they come not to have such warm and fuzzy feelings about Justices Scalia and Thomas, particularly when thinking about what their judicial review would do if those Justices had a working majority on the Court backing them. Then Congress—particularly the Congress of the 1960s and 1970s and of 1987-95 that enacted so much good legislation on civil rights, women's rights, environmental law, and individual rights vis-à-vis state and local officials—does not seem quite so bad.

Conversely, some conservatives follow a similar analytical route.<sup>17</sup> As they acquire knowledge of history and life experience, they too can lose the warm and fuzzy feeling about judges of the first-year law student. They think about what Justices Brennan and Douglas did, such as what conservatives consider to be the worst excesses of the Warren Court and its aftermath: from finding an implied privacy right to abortion, to prisoners' rights, to an expansive exclusionary rule applicable to evidence of crimes obtained even under a warrant (when the warrant turns out to be challengeable).<sup>18</sup> Then, the conservatives focus on elected figures like President Reagan,<sup>19</sup> and the Congress of the 1990s, with some enactments to their liking such as the Religious Freedom Restoration Act of 1993<sup>20</sup> and the Prison Litigation Reform Act of 1995,<sup>21</sup> combined with the turnover and changes in party control that show members of Congress's lack of entrenchment. Then, the elected branches of government do not seem quite so bad to them in comparison to the Court. Both progressives and conservatives see that putting unelected officials (Justices) in office for life, without the moderating

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17. See Edwin Meese III, *Putting the Federal Judiciary Back on the Constitutional Track*, 14 GA. ST. U. L. REV. 781, 782 (1998).

18. See *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (recognizing the constitutionally protected right of privacy of married persons to use contraception); *Johnson v. Avery*, 393 U.S. 483, 490 (1969) (holding that a state prison regulation prohibiting inmates from helping other prisoners prepare petitions for postconviction was invalid); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (requiring state officers to comply with the Fourth Amendment when making searches and extending the Fourth Amendment exclusionary rule to prosecutions in state courts).

19. President-adulation had a particularly strong influence on conservatives. For a response, see Peter M. Shane, *Reflections in Three Mirrors: Complexities of Representation in a Constitutional Democracy*, 60 OHIO ST. L.J. 693 (1999).

20. 42 U.S.C. § 2000bb-1 (1994).

21. Pub. L. No. 104-34, 110 Stat. 1321-66 (codified in scattered sections of 11 U.S.C., 18 U.S.C., 28 U.S.C., 42 U.S.C.); see Shane, *supra* note 19, at 790 & nn.49-50.

effect of public accountability, and letting them make major decisions with little control, has its downsides compared to keeping the power in officials (presidents or members of Congress) whose stay in office is limited, who have many controls, who care what the public and press think of them, and who, therefore, tend not to stray for very long in a consistent direction away from overwhelming consensus views of the American public.

Now, let us look at Tushnet's populist constitutional paradigm.<sup>22</sup> In the Tushnet view, we can imagine the end of judicial review and the discovery that such an end has more benefits and fewer downsides than the court-centered view suggests. Tushnet separates the central aspects of constitutional law that the public most cares about, the "thin Constitution," from the many aspects the public appropriately need not care so much about, the "thick Constitution."<sup>23</sup> As to the thin Constitution, ultimately we can, and should, depend on the people's commitment to constitutional values, filtered through the structure and process of our representative democracy. So, Congress can and should have a large role in constitutional law. Disputes about constitutional law should get debated and resolved (temporarily or permanently) in lots of ways, engaging the public at its best, rather than depending upon unelected judges whose influence may, paradoxically, bring out the worst in elected officials and the public.

In the court-centered view, the boundary between politics and law is a wide street between two forums, namely, First Street N.E. in Washington, D.C., which separates the Capitol on the west side from the Supreme Court on the east side. In the Tushnet populist view, the boundary between politics and law is much more complex and subtle.<sup>24</sup> It is the change in attitude between when Joe Smith and Jane Doe, or Representative Smith and Representative Doe, discuss and debate mere policy decisions like farm prices, and when they discuss and debate an issue that they, as Americans, will recognize has a constitutional aspect, such as the issue of vouchers expendable on parochial schools and its relation to the Establishment Clause.

Chapters Six and Seven of Tushnet's book ("Assessing Judicial Review" and "Against Judicial Review," respectively) particularly

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22. See TUSHNET, *supra* note 1, at 181-82.

23. See *id.* at 9-14.

24. See *id.* at 186-87.

work on the superior benefits and lesser downsides of doing without judicial review.<sup>25</sup> But it is earlier, in Chapter Three (“The Question of Capacity”), that Tushnet challenges the main argument of the court-centered view as to why Congress must not have too large a role: the asserted incapacity of Congress as an institution due to the asserted evils of legislators’ reelection incentive.<sup>26</sup> Constitutional law exists now, and should exist even more in an ideal situation, not primarily in the minds and discourse of judges, but in the minds and discourse of all those who debate and resolve constitutional issues, including the American public and its elected political representatives. The reelection incentive, by rooting Congress in a public which has a commitment to constitutional values, will ultimately help, not hinder, the creation of valid constitutional law. A ready analogy exists in Great Britain where the courts do not overturn Acts of Parliament, and Parliament nevertheless maintains something of a constitutional system (for example, a stable, democratic governmental structure and civil liberties, even in the absence of a written constitution). Parliament has faithfully preserved Britain’s democracy and civil liberties, not in spite of, but because of, the reelection incentives of Members of Parliament, which keep them rooted in a public that adheres to constitutional values.

Tushnet’s method consists primarily of drawing upon other commentators, mostly legal ones but also some political scientists and historians. He takes their analysis of some dispute in constitutional law, and reviews it from his new angle of imagining whether it undercuts the support for judicial review or bolsters the support for nonjudicial constitutional debate and decision-making. For example, he briefly discusses the subject of voting rights, drawing upon a superb analysis by Peter Shane, one of the leading academic analysts of the beneficial role of Congress in constitutional law.<sup>27</sup> As Shane describes, and Tushnet confirms, Congress’s action on voting rights legislation shows, in Tushnet’s words, “[e]liminating judicial review does not mean doing away with judicially enforceable rights. We can still create statutory rights that can be as inspiring as constitutional ones, and sometimes more so.”<sup>28</sup>

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25. *See id.* at 129-76.

26. *See id.* at 54-71.

27. *See* TUSHNET, *supra* note 1, at 168-69; *see also* Peter M. Shane, *Voting Rights and the ‘Statutory Constitution’*, 56 LAW & CONTEMP. PROBS. 243 (1993).

28. TUSHNET, *supra* note 1, at 168.

What do I mean by my third alternative of “political dynamics”?<sup>29</sup> It is the view that the existing system of constitutional law consists of a cross between the exaggerated depiction in the court-centered view that makes judicial review appear historically and currently as the all-powerful engine of constitutionalism, and Tushnet’s thought-experiment that imagines a complete end to judicial review and the resulting creation of a constitutional system wholly without courts striking down Acts of Congress. “Political dynamics” analyzes historic and current constitutional law to assess that judicial review has much less significance than the court-centered view would suggest, and that the elected branches have a good deal of what Tushnet thinks it would take his thought-experiment for them to have in the way of influence over constitutional law.<sup>30</sup> I will call the person espousing the political dynamics view the “political dynamicist” or “poli-dynamicist”; forgive me, patient readers, if the term bothers you.

Like Tushnet, the poli-dynamicist locates constitutional law much more in the minds and discourse of the public and its representatives than in the minds and discourse of judges. Also like Tushnet, the poli-dynamicist emphasizes the parts of constitutional law that never get to court for reasons like the political question doctrine, such as the allocation between the President and Congress of the powers over foreign affairs and national security conferred by the Constitution,<sup>31</sup> or the Congressional procedures in impeachment trials and investigations of the President.<sup>32</sup> Again, like Tushnet, political dynamicists also emphasize the processes of constitutional law that may affect the courts but occur outside the courts, like the appointment process for Supreme Court Justices that kept Robert Bork off the Court and put (currently) two women, one black and two Jews on a Court that at one time had been solidly Christian (until the 1910s), solidly white (until the 1960s), and solidly male (until the 1980s).

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29. The leading work on this subject is LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* (2d ed. 1996).

30. See TUSHNET, *supra* note 1, at 163-72.

31. See generally STEPHEN DYCUS ET AL., *NATIONAL SECURITY LAW* (1990).

32. See generally Charles Tiefer, *The Controversial Transition between Investigating the President and Impeaching Him*, 14 ST. JOHN'S COMMENTARY 111 (1999); Charles Tiefer, *The Senate Trial of President Clinton*, 28 HOFSTRA L. REV. (forthcoming 2000); Charles Tiefer, *The Specially Investigated President*, 5 UNIV. CHI. ROUNDTABLE 143-204 (1998).



Unlike Tushnet, the poli-dynamicists need no thought-experiments to construct their paradigm. They treat their alternative to the court-centered view not primarily as an exploration of an imaginary situation, but as a real exploration of the actual situation. And, Tushnet's interest seems to me to be primarily normative—to decide whether eliminating judicial review would be good or bad. Poli-dynamicists need not take a normative view, but can exercise their skills quite fully in trying to understand how constitutional law works outside the courts. Whereas Tushnet primarily explores by the method of discussing what other commentators have written, the poli-dynamicist has to decipher the encoded record of what Congress and the President have done, a record much harder to read than Supreme Court opinions. For example, Louis Fisher's excellent book on congressional-presidential relations requires him to study not only judicial opinions but the press, history, the Congressional Record, congressional hearings and reports, presidential documents, Justice Department opinions, and all kinds of extraordinarily arcane sources like the portions in Asher Hinds's treatise on House of Representatives precedents that deals with how the House of Representatives obtains information to perform its constitutional function in enacting statutes for foreign affairs obligations.<sup>33</sup>

## II. CLOSER COMPARISONS OF THE THREE ALTERNATIVE APPROACHES

Let us discuss some concrete illustrations of the three alternative approaches in action as a basis for closer comparison. As one example, let us take the abortion issue.

In a course on constitutional law, we might get the standard court-centered approach. This would take us along the major Supreme Court cases, starting with *Roe v. Wade*.<sup>34</sup> As a supplement to these cases, the course might discuss the various attempts of commentators to come up with better articulations of the kinds of court-oriented theories than those of the judges themselves. For example, it might look for a better privacy-based theory than that of Justice Blackmun's in *Roe*, or, on the other side of the debate, a

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33. See LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (rev. 4th ed. 1997). Fisher may well be the leading poli-dynamicist of our time.

34. 410 U.S. 13 (1973).

better theory for reducing the courts' role in abortion than that of the dissenters in recent decisions reaffirming *Roe*.

Tushnet uses abortion to show that victories in judicial review can have paradoxical effects.<sup>35</sup> He describes how *Roe v. Wade* and its progeny energized abortion opponents. "[C]onservative activists in the Republican party gained control over judicial appointments, and insisted on appointing only right-wing judges. The pro-choice victories themselves eroded with that transformation."<sup>36</sup> Tushnet also describes how judicial review lends itself to a rhetoric of rights (here, the right to abortion) and opposing counter-rights (here, the opposing viewpoint arguing "the fetus's fundamental right to life").<sup>37</sup> This means "[c]ompromises may seem unacceptable in principle" and so "policy will swing wildly from protecting one right and denying the counter-right to protecting the counter-right and denying the initial one."<sup>38</sup> In short, where the court-centered constitutionalist only looks at the Court's decisions and sees them as straightforwardly expounding constitutional law, Tushnet sees the Court's decisions as affecting political processes and having paradoxical effects of producing the opposite (and deleterious) impact on constitutional law rather than what would be expected.<sup>39</sup>

The poli-dynamicist starts with some agreement with Tushnet—for example, that instead of a narrow focus on what judges do and say, we also learn by looking at movement and activity outside the Court, such as the shaping of judicial appointments. However, the poli-dynamicist does so not as the start of an alternative imaginary theory of a constitutional world without judicial review, but as part of looking at how much of our current constitutional world consists of nonjudicial disputes and decisions in which the judicial opinions are simply a component and, in fact, a component with much less significance than in the court-centered commentary.

For example, because the Court declines to supervise Congress's decisions, via the various versions of the Hyde Amendments,<sup>40</sup> about federal funding of abortions for the poor, Congress makes and

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35. See TUSHNET, *supra* note 1, at 135-41.

36. *Id.* at 139.

37. *Id.* at 139-40.

38. *Id.* at 140.

39. See *id.*

40. See *Harris v. McRae*, 448 U.S. 297, 312-28 (1980); *Williams v. Zbaraz*, 448 U.S. 358, 369 (1980).

remakes those decisions by appropriation-bill debates every year.<sup>41</sup> For another example, Congress and the President have had major debates over the years about international family planning policy, a realm the Court says nothing about.<sup>42</sup> And, of course, even when the Court decides to allow state restrictions on abortion such as parental notification,<sup>43</sup> political dynamics created and put forward the state laws that led to those decisions, and shaped the context of the Court's decision (for example, the position of the Solicitor General in those cases, and the amicus filings by influential groups). Moreover, political dynamics decided which states use the discretion left them by the Court, and which states do not. Hence, even in this area of the constitutional law (abortion) that has a very large and visible judicial content, political dynamics shapes policy as much or more than what the judges do and say. The poli-dynamicist could stop with this analysis and choose to make no normative conclusions at all about judicial review, content to understand how there can be a great deal to constitutional law besides judicial review; whereas, Tushnet's central focus is his normative conclusion about judicial review.<sup>44</sup>

Now let us turn to two examples, the Competition in Contracting Act of 1984 ("CICA")<sup>45</sup> story and the flag-burning story, discussed in Tushnet's book, with which Tushnet and I were involved when they occurred.<sup>46</sup> I am pleased that he has continued to think so insightfully about these instances, and to use them so well to build his larger jurisprudence.<sup>47</sup>

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41. See Jon F. Metz et al., *A Review of Abortion Policy: Legality, Medicaid Funding, and Parental Involvement, 1967-1994*, 17 WOMEN'S RTS. L. REP. 1 (1995) (providing a detailed history of the legal evolution of Medicaid funding and parental notification).

42. This controversy is discussed in Charles Tiefer, *Adjusting Sovereignty: Contemporary Congressional-Executive Interactions about International Organizations*, 35 TEX. INT'L L.J. (forthcoming 2000).

43. See *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 520 (1990) (upholding a statute requiring parental notification to be given by a physician performing an abortion on a minor); *H.L. v. Matheson*, 450 U.S. 398, 413 (1981) (upholding the constitutionality of a state statute requiring parental notification for an abortion performed on a minor).

44. See TUSHNET, *supra* note 1, at 129-76 (providing a detailed history of the legal evolution of Medicaid funding and parental notification for abortion).

45. Pub. L. No. 98-369, 98 Stat. 1175 (codified in scattered sections of 10 U.S.C., 31 U.S.C., 40 U.S.C., 41 U.S.C.).

46. See TUSHNET, *supra* note 1, at 116-19.

47. Tushnet's use of footnotes and a bibliography give out generous credit. I find Tushnet in this book, as in his previous writings and in person, remarkably generous with intellectual credit, free of egotism and status-hangups, and a pleasure to watch in intellectual action.

In the mid-1980s, a political firestorm occurred over Attorney General Edwin Meese's strongly-stated and acted-upon position that he could declare statutes unconstitutional and instruct the Executive Branch to disobey them, even contrary to judicial decisions upholding the statutes.<sup>48</sup> As Tushnet summarizes, "[t]he Reagan administration decided that an obscure statute called the Competition in Contracting Act unconstitutionally infringed on the president's prerogatives."<sup>49</sup> The statute was called "CICA" for short, so, we may call this the "CICA story." As Tushnet explains, CICA "directed the executive branch to refrain from awarding a contract if it was notified by the Comptroller-General, an official located in the legislative branch, that there were questions about the proposed contract."<sup>50</sup>

Congress, particularly the Democrat-controlled House of Representatives and, most particularly, two of its committees, "took out after the administration."<sup>51</sup> Soon, Meese retreated.<sup>52</sup> Some district court and appellate opinions not only upheld the statute, but harshly condemned Meese's doctrine about his powers.<sup>53</sup> Although the Justice Department has only partly retreated and in other respects has held its ground,<sup>54</sup> it has not acted on that issue again with the same extreme arrogance as Meese manifested.<sup>55</sup>

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48. See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 986 (1987).

49. TUSHNET, *supra* note 1, at 116. Tushnet may call the Competition in Contracting Act ("CICA") obscure if he likes. Perhaps to those who teach constitutional law, CICA is obscure. As the coauthor of a casebook that celebrates the importance of the field of law in which CICA looms large, see CHARLES TIEFER & WILLIAM A. SHOOK, *GOVERNMENT CONTRACT LAW* (1999), I feel I must defend CICA as very well-known and highly visible. I will try not to speak negatively of Tushnet, but the asserted obscurity of government contract law is a sensitive subject. I must warn him (entirely in jest) that professors who teach jurisprudence, and who cite other jurisprudents, live in a glass house on the subject of "obscure" legal matters and should take care with the throwing of stones.

50. TUSHNET, *supra* note 1 at 116.

51. *Id.*

52. *See id.*

53. *See, e.g.*, *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1120-21 (9th Cir. 1988); *Parola v. Weinberger*, 848 F.2d 956, 959 (9th Cir. 1988); *Ameron, Inc. v. United States Army Corps of Engr's*, 809 F.2d 979, 992 n.8 (3d Cir. 1986).

54. *See generally* Walter Dellinger, *Legal Opinion from the Office of Legal Counsel to the Honorable Abner J. Mikva*, 48 ARK. L. REV. 313 (1994).

55. My own role was to represent the House of Representatives in the court cases, to testify at hearings and, most gratifyingly, to see the court borrow some of my writings and incorporate them in the opinions. I wrote the original opinion within Congress defending CICA. *See* CHARLES TIEFER, *CONSTITUTIONALITY OF THE COMPETITION IN CONTRACTING ACT*, H.R. REP. NO. 98-1157, at 59 (1984) (appendix to congressional committee report). This drew on an earlier article of mine that Tushnet cites. *See* Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59 (1983). After Meese's challenge, I testified at hearings. *See Statement Regarding the Executive Branch's*

How do our three paradigms deal with this most interesting instance? The court-centered approach might possibly miss the whole thing because the Supreme Court did not write any opinions on the matter. If a court-centered account did reach down to the lower court opinions, it would tell an interesting story, to be sure, but only a two-dimensional one. A court-centered account makes it look as though executive excess had been curbed by judicial review, and as though constitutional law consists predominantly, if not solely, of the doctrines and authority cited in judicial opinions. I think very highly of the judges who wrote those opinions, and particularly of district court Judge Harold Ackerman, who, decisively and articulately, first stood up to Meese,<sup>56</sup> but it does not detract in any way from Judge Ackerman's historic stand to say that a court-centered account is not complete.

Tushnet's populist constitutional approach uses the instance to answer the question: "Will we get a better enforced Constitution if we rely on self-enforcing structures than if we rely on judicial enforcement, acknowledging that neither self-enforcement nor judicial enforcement leads to perfect enforcement?"<sup>57</sup> Tushnet ties the CICA story to James Madison's theories about how the government's structure (not judicial review) would promote constitutional liberty.<sup>58</sup> He explains how the turning point in the CICA story came when the congressional committees publicly confronted Meese and Meese backed down.<sup>59</sup> Finally, Tushnet gives a wonderfully terse analysis: "The process is simple: Political conflicts occur, the parties explain their positions to the public, and some resolution is reached."<sup>60</sup>

A poli-dynamicist might fully approve of Tushnet's account and applaud his analysis, but would simply take the result in a different direction. Rather than fueling the thought-experiment about how a system would work without judicial review, a poli-dynamicist would use the CICA story to show the complex ways our current system

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*Declaration that the Competition in Contracting Act is Unconstitutional: Hearings Before the Subcomm. of the House Comm. on Government Operations, 99th Cong., 257-7 (1985).* Tushnet testified at the same hearing, which gives his version of the story special gusto and insight.

56. See *Ameron, Inc. v. United States Army Corps of Eng'rs*, 607 F. Supp. 962 (D.N.J. 1985) (Ackerman, J.), *aff'd*, 787 F.2d 875 (3d Cir. 1986).

57. TUSHNET, *supra* note 1, at 96.

58. See *id.*

59. See *id.*

60. *Id.* at 116.

depends as much on congressional and public attitudes on constitutional law, as on courts.<sup>61</sup>

For example, as a participant in these events, I would say that a decisive aspect in the CICA story came with mounting coverage in the national press, both news and editorial pages. The court-centered approach treats what judges say as "real" law and what is said in legislative forums as "not real." But, when a controversy over constitutional law erupts in both types of forums, the news covers both forums, and looking at the news coverage and its effects emphasizes the similarities of judicial and legislative forums. Both forums provide grist for the public's nongovernmental normative voice, as the two sides and the observers all speak in press and editorial commentary. Both forums thereby shape the incentive systems for political actors who reach their office, and maintain their authority in it, in part by their attention to the way the public's nongovernmental normative voice speaks in the press.

In that sense, the press does not merely report "real" constitutional law happening in the courts or elsewhere. The medium is the message; the press coverage is itself the "real" stuff of constitutional law for those constitutional controversies fought out in the public eye by official actors sensitive to press. From this viewpoint, court-centered constitutional law casebooks consist of one peculiar part of the press with some significance, but only limited significance. Casebooks are significant not because they contain the only type of thing (Supreme Court opinions and commentary thereon) that makes up constitutional law, but rather because at a formative stage, law students in training as potential lawyers read such casebooks—rather than, say, reading collections from the *New York Times* editorial page, or books loaded with the materials created in the political process. However, as law students graduate and move along in their careers toward the attainment of significant offices—judicial, executive, or legislative—they supplement that straitened early diet with a good deal more press coverage of constitutional events. The casebook tells a certain narrow and rarified kind of doctrine, but the press, like life experience, adds other elements that make up constitutional law disputes and outcomes—elements like power, interests, institutional patterns, strategies and tactics, personalities, and cultural underpinnings. These are not gossip. The poli-dynamicist demonstrates that these

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61. See *id.* at 114.

are as much a part of the kind of constitutional law involved in public controversies as rarified doctrine.

A second example consists of the 1989-90 flag-burning interaction discussed by Tushnet and myself as follows.<sup>62</sup> Texas had a statute banning flag-burning. The Supreme Court struck it down by a five-to-four decision.<sup>63</sup> A national outcry ensued. President Bush called for a constitutional amendment to cut back on the First Amendment, and thereby to protect the flag.<sup>64</sup> The Democratic Congress instead passed the Flag Protection Act of 1989,<sup>65</sup> for which there was some reason to think there might be a five-to-four decision the other way.<sup>66</sup> On review, the Court struck this statute down also, by the same five-to-four count as the first time.<sup>67</sup> Although efforts continued to adopt a constitutional amendment, the fervor cooled off by the time of the second Supreme Court decision, and so no constitutional amendment has been adopted by Congress (let alone by the states).

A court-centered account would stick to the two Supreme Court decisions. With effort, we can find some interest in that doctrinal account. We might look at the flag decisions as part of the line of decisions on the conduct/speech distinction, for the subtle ways the Court has distinguished between the legislative power to regulate other kinds of conduct like burning draft cards, and the lack of power to regulate the conduct of burning flags. Or, we might look at the flag decisions as illustrating the Court's ability to refuse to pay attention, in this instance, to two elements: deference to the Congress that held hearings and wrote reports about the Act's constitutionality; and original intent, since a strong argument can be made that at the time of the Framers, it would have been thought entirely proper for the government to protect the flag as an incident of sovereignty.

Tushnet's populist constitutional account uses the incident to show one of the bad effects of judicial review—its creating a “judicial

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62. See *id.* at 58-60; Charles Tiefer, *The Flag-Burning Controversy of 1989-90: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357, 357-98 (1992).

63. See *Texas v. Johnson*, 491 U.S. 397, 410 (1989).

64. See 135 CONG. REC. H3134 (daily ed. June 27, 1989) (statement of Rep. Michel describing President Bush's public call for a constitutional amendment).

65. 18 U.S.C. § 700 (1989).

66. See Tiefer, *supra* note 62, at 365-68.

67. See *United States v. Eichman*, 496 U.S. 310, 319 (1990).

overhang” with bad influences on the legislature.<sup>68</sup> In Tushnet’s summary, Congress had a serious question before it: “[i]n dealing with flag-burning, the issue we as a people have to confront is whether the flag’s symbolic value is so great that we should protect it even at some cost to the protection of free expression.”<sup>69</sup> By setting up First Amendment tests that did not tolerate balancing, “[t]he Court’s decisions made it nearly impossible for Congress to face that issue.”<sup>70</sup> Tushnet fits this instance in with other examples of how the “judicial overhang” distorts, impairs, or misleads what would otherwise be a valuable legislative process of debating constitutional issues.<sup>71</sup>

I have previously written my poli-dynamicist account of the flag-burning matter,<sup>72</sup> on which Tushnet draws. We agree that the greater interest of this matter for understanding constitutional law lies outside the Court, in the processes surrounding congressional action. No one could more approve Tushnet’s insight that the judicial overhang interfered with congressional efforts at a political resolution of the flag-burning issue drawing upon the public’s quite strong devotion to the First Amendment. The poli-dynamicist’s focus simply shifts from the theoretical situation if judicial review had not imposed that overhang, to the very large role in practice, notwithstanding judicial review, of nonjudicial, and especially congressional, activity in the current constitutional law system.

If flag-burning threatens the First Amendment, the threat comes from the unique appeal underlying calls, like President Bush’s in 1990 or Republican Congressional leaders in the late 1990s, for a constitutional amendment. Veteran groups have reason to disdain

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68. TUSHNET, *supra* note 1, at 57-65.

69. *Id.* at 59-60.

70. *Id.* at 60.

71. *See id.* at 57-65.

72. *See Tiefer, supra* note 62, at 357. My role for the House of Representatives was to argue the defense of the Flag Protection Act in two district court cases, and then to brief the defense in the Supreme Court. As discussed in my article, I believe that the effort by the House of Representatives to enact and to defend that statute materially contributed to the public’s ultimate willingness, as tempers on this issue cooled, to tolerate disobeying President Bush’s call for a constitutional amendment. *See id.* at 377. One of the points of the matter, that only achieves special interest at a later time, consists of how the Justice Department’s initial coolness to defending the statute (in contrast to the Administration’s eagerness to call for a constitutional amendment) gave way when the matter went to the Supreme Court, to the conscientiousness of the Solicitor General in defending the statute. *See id.* at 369. The Solicitor General, who conscientiously performed that defense, and thereby performed a sincere and real service to aid the efforts of Congressional Democrats to protect the Constitution, was Kenneth Starr.



flag-burning, as minority groups have to disdain hate speech and traditional-values groups have to disdain pornography in channels accessible to minors. When such groups make their efforts to protect the public against what they consider disgusting and noxious expression by trying to carve out some exceptions to the First Amendment through constitutional amendment, we get a form of constitutional lawmaking in which the Court has no role. The story of how, initially in 1989-90, and then in the decade since, a constitutional amendment for the flag has been fended off in Congress, tells us much about how constitutional law evolves in the real world—where it counts, which is not just in courts, but in legislative forums.

### III. TUSHNET'S VALUE

Let me work toward the value of Tushnet's approach, which I will call his *purely normative* favorable evaluation of populist constitutional law. I will start with some elimination. First, what the court-centered approach does, his approach does not do. At its best, the court-centered approach equips us to address disputes and their resolution by the Supreme Court. At its least, it helps us analyze individual court decisions, or synthesize multiple ones. It may help us criticize them. It might possibly even help us predict future ones. Tushnet eschews all of this. Indeed, he cites far fewer decisions of the Court than most comparable books on constitutional law. To paraphrase Shakespeare's Mark Anthony, Tushnet certainly does not come to praise judicial review, and he may even come to bury it.

Second, what the poli-dynamic approach does, his approach does not do. Take as an example what political dynamicists might do with the Congress's fending off, for the past decade, a constitutional amendment about flag protection. Part of this has to do with public attitudes that might be elucidated by sensitive articulators and probers of values—like press commentators or pollsters. Part of this has to do with legislators' attitudes. Tushnet identifies the right target when he disputes the simplistic view that looks down on legislators as afflicted detrimentally, and obsessively, by the "vice" of legislative reelection incentives.<sup>73</sup> But, exploring what in legislators' attitudes actually maintains constitutional law involves investigating the subtleties of constitution-defending attitudes and

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73. See TUSHNET, *supra* note 1, at 96-104.

discourses among legislators that differ between parties, ideologies, regions, and time periods. Yet another part has to do with legislative organization, of committee jurisdictions and floor agenda controls, which guarantee annual enactment of a thousand appropriation accounts while miraculously fending off constitutional amendments, sometimes for decades.

Tushnet has much more interest and sympathy for Congress than other constitutional law theorists. And, while many of them consider themselves ace political thinkers—but are not—Tushnet modestly makes no expansive claims to political insight—while displaying a good deal. His discussion, footnotes, and bibliography show attention to political science and historical writing. Nevertheless, to take the example of flag protection, committed political dynamicists would immerse themselves in studies of public attitudes, legislators' attitudes, or legislative organization as these relate to constitutional debates and resolutions outside the courts. Tushnet has interest in these, but only some interest.

Moreover, by *purely normative*, I mean that Tushnet does not take his favorable evaluation of the imaginary situation of doing without judicial review beyond the stage of pure evaluation. He does not discuss how to get from where we are to anywhere near to the situation he favors. Of course, the Supreme Court will not overrule *Marbury v. Madison*.<sup>74</sup> But, there are two ways we could get closer to there from here. First, we might persuade the Court to reduce judicial review, perhaps by picking the areas of judicial review for which the Court might be most open to such persuasion. For example, in the 1930s, the Court backed off from substantive due process review of regulatory legislation.<sup>75</sup> In the 1980s, the Court backed off from federalism review of federal statutes, only to resume this in the late 1990s.<sup>76</sup> Tushnet does not differentiate among areas of judicial review, so he does not provide a stepwise program for persuading the Court to reduce the number of areas in which the Court performs judicial review.

Tushnet could, but does not, propose techniques to reduce judicial review by the elected branches shielding themselves more from judicial review. Second, we could put forth statutes (again, perhaps,

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74. 5 U.S. (1 Cranch) 137 (1803).

75. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

76. Compare *Seminole Tribe v. Florida*, 517 U.S. 44, 75-76 (1996), with *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530 (1985).

in particular subject matter areas) adjusting sovereign immunity, judicial remedies, or the Court's appellate jurisdiction itself to curb judicial review. Or, we could support litmus tests for new Justices regarding lesser judicial review. At least, we could urge the elected branches to do more of what we think is good, like reports, hearings, debates, regulations, and legislation on constitutional law subjects. Tushnet is neither a rabble-rouser nor a program-planner and none of this interests him much.<sup>77</sup>

So what does Tushnet's theoretical exploration teach us, particularly about Congress? It provides a wealth of concepts and insights for a view of the development of constitutional law by Congress *normatively* favorable from a *populist* direction. That is, Tushnet provides a rich and fresh defense of nonjudicial sources of constitutional law, based on the theory of popular pro-Constitution attitudes. His defense comes from a belief that the American public historically adheres to normatively good values on constitutional issues. His public is the public that rallied behind the Declaration of Independence, ratified the Constitution and the Bill of Rights, elected and reelected Washington and Jefferson, defended the Union, sustained progressivism during the dark days of the *Lochner*-era Court, ultimately welcomed into victory the Civil Rights Movement of the 1950s and 1960s, restored constitutional balance in the 1970s to national government after the Cold War decades of an imperial presidency, and in recent years has backed women's and minorities' rights even as the Rehnquist Court has not. The public deserves to be empowered to carry forward its basically good impulses on constitutional subjects because nothing is more American than our shared commitment to our Constitution.

Tushnet leads this evaluation from an angle where it has not been led before—an angle largely independent of an ideological critique of the current (or historical) Supreme Court. I must admit that when I first started to read the book, I assumed Tushnet would jump with both feet on unpopular current Supreme Court decisions to illustrate his theory. So many critics think the Court has been misguided in *City of Boerne v. Flores*,<sup>78</sup> or in its recent string of five-to-four

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77. For a conservative who proposes much of the same program just described, see Meese, *supra* note 17, at 791 ("The Senate should use its confirmation authority to block the appointment of activist federal judges . . . Congress should exercise its power to limit the jurisdiction of the federal courts . . .").

78. 521 U.S. 507 (1997).

decisions striking down Acts of Congress on federalism grounds,<sup>79</sup> that I took it for granted Tushnet would cite these as Exhibit "A" for his critique of judicial review. Yet, *City of Boerne* gets a brief mention in the Prologue,<sup>80</sup> and the questionable federalism decisions barely get a nod at all.

Let us contrast past critiques of excessive judicial review and inadequate judicial deference to the elected branches with Tushnet's favorable evaluation of populist constitutional law. Traditionally, past critiques of judicial review have come from whatever ideology most dislikes the contemporary Court. For the first third of the century, as a conservative *Lochner* Court struck down progressive legislation on subjects like child labor and maximum hours,<sup>81</sup> liberals complained about judicial review. From the 1950s on, as a liberal Warren Court expanded constitutional protections for minorities, alleged subversives, and criminal defendants, conservatives complained about judicial review. Now, in the past decade, a (slim) conservative<sup>82</sup> majority on the Rehnquist Court has begun striking down progressive legislation—legislation creating rights against states (as invading federalism),<sup>83</sup> campaign finance legislation (as invading the free speech rights of well-heeled interests),<sup>84</sup> and affirmative action legislation (as invading the civil rights of the majority)<sup>85</sup>—it is, again, progressives who have increasingly complained about judicial review. In each of these eras, to be sure, the complainants about judicial review tapped into recurring ideologically neutral themes—the lack of democratic legitimacy of the courts, and the institutional superiority for making accountable policy decisions of the elected branches. Still, the complaints have obviously developed in part from the ideological unhappiness in each era by those oriented oppositely to the Court's direction.

While Tushnet does critique the Court's current direction, that is only a small part of his presentation. He ranges over past decades to show his critique of judicial review transcends preferences for (or against) particular Supreme Court decisions. For example, he

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79. See, e.g., *Printz v. United States*, 117 S. Ct. 2365, 2368 (1997); *United States v. Lopez*, 514 U.S. 549, 551 (1995).

80. See TUSHNET, *supra* note 1, at 4.

81. See *Lochner v. New York*, 198 U.S. 45, 58 (1905).

82. For a discussion of the ideological swing, see Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990).

83. See *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999).

84. See *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 613-23 (1996).

85. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995).

devotes an entire chapter (Chapter Four) to “The Constitutional Law of Religion Outside the Courts.”<sup>86</sup> He devotes relatively little room to critiquing Supreme Court decisions. Rather, he shows how the Establishment Clause fits with America’s political heritage of religious diversity, pluralism, and tolerance.<sup>87</sup> And he works at discussing how political dialogue could occur between the relatively tolerant secular groups and mainstream religions, on the one hand, and “the dynamic evangelical churches whose political activism has provoked much liberal concern about the role of religion in politics”<sup>88</sup> on the other. This is Tushnet at his best: sensitive to the other side in a debate, bringing the skills of the legal scholar not just to the (comparatively easy) task of writing for the judicial forum, but also to the (comparatively harder) task of finding the merit in discourse among the highly different groups found in the political forums.

In short, Tushnet has rendered a great service by his imaginative and wide-ranging intellectual synthesis of a normatively supportive, nonideological argument for a populist constitutional law. He makes an original and invaluable contribution on a subject of much historical debate and continuing central importance.<sup>89</sup> Let us hope his book will be a wake-up call to the dogmatic slumberers of court-centered constitutional law.

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86. TUSHNET, *supra* note 1, at 72-94.

87. *See id.*

88. *Id.* at 81.

89. For a historical treatment, see Gary Apfel, *Whose Constitution Is It Anyway? The Authority of the Judiciary’s Interpretation of the Constitution*, 46 RUTGERS L. REV. 771 (1994).