After Bureaucracy

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The New Constitutional Order, Mark Tushnet.

Postmodernists in the humanities and social sciences face three principal problems. First, those among them who embrace the claim that "physical 'reality,' no less than social 'reality,' is at bottom a social and linguistic construct"1 make the postmodernist enterprise appear ridiculous to most of the non-academic world.2 Second, though postmodernists typically deny that they are moral relativists in the sense that they hold no values, they rarely offer reasons for preferring the values they hold—liberty, equality, and fraternity, say, rather than slav-

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1 The claim appears in a parody of postmodernism that was nonetheless published as a genuine contribution by the editors of Social Text. See Alan D. Sokal, Transgressing the Boundaries: Toward a Transformative Hermeneutics of Quantum Gravity, 46/47 Social Text 217, 217 (Spring/Summer 1996). For Sokal's account of his hoax, see Alan D. Sokal, A Physicist Experiments with Cultural Studies, 6 Lingua Franca 62 (May/June 1996). For a list of papers responding to Sokal's hoax, see his NYU faculty homepage, online at http://www.physics.nyu.edu/people/sokal.alan.html (visited May 2, 2004).

2 To be sure, many postmodernists purport to accept the reality of the external world. See, for example, Richard Rorty, Does Academic Freedom Have Philosophical Presuppositions?, in Louis Menand, ed, The Future of Academic Freedom 21, 30 (Chicago 1996) ("Given that it pays to talk about mountains, as it certainly does, one of the obvious truths about mountains is that they were here before we talked about them."). But to those untrained in philosophy, it is difficult to fathom exactly what that acceptance entails. See id (stating that "the utility of [the] language-games" in which postmodernists talk about mountains and other external objects "has nothing to do with the question of whether Reality as It Is In Itself, apart from the way it is handy for human beings to describe it, has mountains in it"). Well, alright, the point is difficult to fathom even for many people who are trained in philosophy. See, for example, Ronald Dworkin, Objectivity and Truth: You'd Better Believe It, 25 Phil & Pub Aff 87, 95–96 (1996) (questioning whether the statement that "mountains exist" and the statement that "mountains exist in reality as It Is In Itself" mean different things).
ery, caste, and alienation—other than that the former are, in fact, the values they hold. Third, although the anti-authoritarian impulses of postmodernism tend to attract persons with left-of-center political ideals and goals, as a consequence of the proximity of postmodernism to moral relativism, postmodernists lack a normative vocabulary with which to advance the values they hold.

The situation is somewhat more complex in the American legal academy. As Mark Tushnet observes in the preface of *The New Constitutional Order*, criticism of objectivity and rationality by scholars within the critical legal studies (CLS) movement is continuous with parallel critiques by scholars in the humanities and social sciences. Whatever its exact pedigree, and glossing over what are no doubt important distinctions to those within the relevant movements, CLS can fairly be called a form of “applied postmodernism.” However, as I shall explain momentarily, the assault on objectivity and rationality in *law* has been part of mainstream legal thought for over a century, and thus the crits are not nearly as vulnerable to appearing *especially* ridiculous or morally obtuse as are postmodernists in other disciplines. But if the crits thus manage to dodge the first two problems I identified with other branches of postmodernism, they remain beset by the third: their skepticism leaves them ill-equipped to argue for an affirmative project.

A very brief history of skepticism in American legal thought may illuminate what, if anything, distinguishes CLS from mainstream legal academic thought, and also why the former has reached an impasse. To begin, as I have just noted, criticism of objectivity and rationality in law has hardly been the exclusive province of left-wing radicals. For example, Oliver Wendell Holmes, Jr., who led the first great attack on legal formalism, was a social Darwinist in matters of politics and occasionally law. Holmes was nevertheless lionized by early twentieth-century progressives because his skepticism led him to adopt a defer-

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3 See, for example, Stanley Fish, *Don't Blame Relativism*, 12 Responsive Community 27, 31 (Summer 2002) (“Our convictions are by definition preferred; that’s what makes them *our* convictions, and relativizing them is neither an option nor a danger.”).

4 “The critical legal studies approach” includes “a critique of certain claims about objectivity and rationality, particularly but not exclusively in law” (p ix).

5 In an important article on the CLS movement, Tushnet identified postmodernism as only one strand of CLS. See Mark Tushnet, *Critical Legal Studies: A Political History*, 100 Yale L J 1515, 1518 (1991). In this Review, I use the term “postmodernism” somewhat more broadly to encompass the various anti-foundationalist approaches that Tushnet distinguishes from postmodernism. See id at 1517–18 (distinguishing among “fem-crits,” “critical race theorists,” “postmodernists,” “cultural radicals,” and “political economists”).


7 See *Buck v Bell*, 274 US 200, 207 (1927) (“Three generations of imbeciles are enough.”).
ential posture toward the output of electorally accountable bodies, and, as a Justice of the Supreme Court, to vote to uphold progressive legislation. Yet the association of skepticism with the political left lasted only so long as courts were more conservative than legislatures. When the Warren Court and its successors invoked abstract constitutional language in support of racial equality, the rights of criminal suspects, and sexual freedom, the left and right switched positions.

From the mid-1950s until the mid-1980s, conservatives routinely charged that modern constitutional law "[had] almost nothing to do with the Constitution and [was] simply a cover for the Supreme Court's enactment of the political agenda of the American left." Then, as the Court became more conservative under Chief Justice Rehnquist, the political valences flipped again. Thus, after the Court stopped the counting of ballots in the 2000 presidential election, hundreds of law professors condemned the five Justices in the majority for "acting as political proponents for candidate Bush, not as judges." Though professing to represent scholars "of different political beliefs," it is difficult to imagine that more than a handful of these law professors voted for Bush. And although conservatives still find it useful to campaign against liberal judges and continue to condemn particular liberal Supreme Court decisions—such as the 2003 invalidation of a Texas prohibition on same-sex sodomy—mainstream conservative figures, for the most part, now find themselves defending the Court against such charges by liberal and left critics.

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8 See Lochner v New York, 198 US 45, 75 (1905) (Holmes dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.").
11 For example, after a liberal three-judge panel of the Ninth Circuit Court of Appeals delayed the California gubernatorial recall election on the authority of Bush v Gore, 531 US 98 (2000), but before a conservative eleven-judge en banc panel reversed the panel, the former chairman of the California Republican Party, Shawn Steel, said, apparently without intended irony: "We hoped the court was going to be reasonable and at least pretend to follow the law. . . . This decision was brought down by leftist ideologues. It should be apparent to everyone that this court is out of control." Charlie LeDuff and Nick Madigan, The California Recall: The Candidates; New Twist Brings Anger from Right, NY Times A1 (Sept 16, 2003).
12 See Lawrence v Texas, 123 S Ct 2472, 2497 (2003) (Scalia dissenting) (contending that "the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed").
13 For examples of defenses of the Court by mainstream conservatives, see Kenneth W. Starr, First among Equals: The Supreme Court in American Life (Warner 2002); Marci Hamilton, The Supreme Court's End of Term Cases: A Demonstration of the Court's Continuing Independence That Proves Commentators Wrong, Writ (July 3, 2003), online at http://writ.news.findlaw.com/hamilton/20030703.html (visited Apr 19, 2004) (controverting "[l]iberal commentators [who] have claimed, over and over again, that the Court is anti-civil rights, and improperly politicized—and therefore illegitimate"). For a recent attack on conservative judicial activism, see Martin Garbus, Courting Disaster: The Supreme Court and the Unmak-
Mark Tushnet and the CLS movement do not fit comfortably into this chronology. CLS scholars joined the attack on objectivity and rationality at a time—the 1970s—when most liberals still supported the Court and were building interpretive theories that would justify what most conservatives were still decrying as judicial activism. In part this timing reflected the difference between leftists and liberals. As leftists, the crits tended to support redistribution through progressive taxation and a general expansion of the welfare state; while most liberals who supported what Tushnet describes in *The New Constitutional Order* as “the New Deal–Great Society constitutional order” also supported the welfare state as a worthwhile political project, they generally believed that it was not the place of constitutional law to impose the welfare state through the judiciary. Liberals viewed the Supreme Court’s decisions protecting negative liberty as giving them all they could reasonably hope to obtain through judicial action, while crits were often indifferent to these judgments. Given the Court’s unwillingness to protect positive rights and the degree to which liberal rights can be and were used to block progressive regulatory programs, critics had few qualms about undermining a liberal-but-hardly-left Court.

14 Of course, Tushnet does not speak for all crits. Indeed, just over a decade ago, he was accused by his colleague Gary Peller of, among other things, abandoning critical premises just at the moment when feminists and scholars of color were turning that critique against the academic enterprise itself. See Gary Peller, *The Discourse of Constitutional Degradation*, 81 Georgetown L J 313, 339 (1992) (“When left academic politics was about demonstrating how misguided mainstream scholars were—how much smarter the left was—critical legal studies and similar organizations were comfortable places for this left faction. Now that the agenda has begun to consider the social construction of intellectual merit itself, many likely feel threatened.”). Moreover, Tushnet himself has questioned whether there are any core commitments shared by all crits. See Tushnet, 100 Yale L J at 1523 (cited in note 5) (“[C]ritical legal studies is a political location for a group of people on the Left who share the project of supporting and extending the domain of the Left in the legal academy. On this view the project of critical legal studies does not have any essential intellectual component.”). Nonetheless, as the most prominent crit in constitutional law for over a generation, and a founder of CLS, Tushnet can stand in for the general movement as well as anybody. Accordingly, throughout this Review, I treat the trajectory of Tushnet’s views as bearing on the CLS movement more broadly.

15 See Tushnet, 100 Yale L J at 1523 (cited in note 5) (placing the origin of CLS as a formal movement in 1976).

16 See, for example, Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* 11 (Harvard 1996) (“Even a judge who believes that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth, or collective ownership of productive resources, a constitutional requirement, because that interpretation simply does not fit American history or practice, or the rest of the Constitution.”); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw U L Rev 410, 411 (1993) (observing the “vivid discrepancy between constitutional case law and political justice concerning a particular aspect of our economic life—the welfare of the poor”).

17 The most prominent example in the 1970s and 1980s was the way in which procedural

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Moreover, even those crits who were also civil libertarians may have made a judgment like the one Tushnet made explicitly in his 1999 book, *Taking the Constitution Away from the Courts*: namely, that over the long haul, liberals will do better to focus their hopes and energies on strategies for effecting change through the democratic process than to look to courts.\(^{18}\) Given class-based and other biases, judges, in this view, will more likely stand in the way of, than usher in, progressive politics. Further, even when courts do act to remedy injustice that the political process has left untouched—as in the desegregation cases—the results disappoint the hopes they inspire.\(^{19}\) One need not be a crit to think that judicially decreed progress occurs only when it garners substantial political support.

Whatever combination of reasons accounts for the fact that crits have denied the objectivity and rationality of law in good times and bad, that denial has usually been taken to be definitive of the critical position. Yet, as Gary Peller put it in 1985, “we are all [legal] realists now,”\(^{20}\) in the sense that virtually no legal scholar believes in the complete objectivity and rationality of law. What then distinguishes a crit from a conventional legal scholar?

The answer appears to be largely a matter of degree rather than kind. Tushnet once remarked that “[o]ne could account for perhaps ninety percent of Chief Justice Rehnquist’s bottom-line results by looking, not at anything in the *United States Reports*, but rather at the platforms of the Republican Party.”\(^{21}\) As Tushnet was not singling out Rehnquist as an especially political Justice, we may infer that the 90 percent figure more or less reflects his general view of the proportion of politics in judicial decisionmaking. That proportion is probably much higher than the proportion that most mainstream legal academics would ascribe to politics. Certainly, the hundreds of law professors who objected to what they described as the Supreme Court’s partisanship in the 2000 presidential election could not have thought that such partisanship was par for the course in nine out of ten cases. If they had, there would have been no cause for outrage.\(^{22}\)

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\(^{18}\) See Mark Tushnet, *Taking the Constitution Away from the Courts* 172 (Princeton 1999) (claiming that “progressives and liberals are losing more from judicial review than they are getting”).

\(^{19}\) See generally Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago 1991) (maintaining that efforts by progressives to use the courts to effect social change have proved largely unsuccessful).


\(^{22}\) For a contrary view, see Jack M. Balkin, *Bush v. Gore and the Boundary between Law*
whereas mainstream legal thought imagines that most laws exhibit a rather substantial "core of certainty and a penumbra of doubt," the crits envision only a very small core of legal certainty in a large reservoir of politics.

Accordingly, the crits fare better than postmodernists in other disciplines. Disbelief in the objectivity of law—as opposed to disbelief in the objectivity of science or morals—is not a particularly radical or left-wing position; and though the crits take their disbelief farther than others in the legal academy, the critical view is probably best characterized as occupying one end of a spectrum rather than as rejecting fundamental premises, as in other disciplines.

But despite its respectability, critical legal studies must be judged a failure because of its inability to offer concrete alternatives to other—more starkly normative—approaches to law, such as law and economics, process theory, or formalism. The problem is not that mainstream bodies like Congress and the Supreme Court have rejected the reform project of critical legal studies. The problem is that there is no such project.

If written before the publication of The New Constitutional Order, the previous sentence would have had to have been qualified in the following way: the crits had no distinctly legal project, because they disavowed the idea of anything distinctly legal, but of course they did have an affirmative project—namely, politics plain and simple. If law is just politics, then one can either play the law game dishonestly (which is, after all, the only way it can be played), or one can give up on it and play the politics game directly.

Tushnet himself successively gave both of these answers. Circa 1981, he said that in the event that the country underwent the sort of political shift that would enable him to become a Supreme Court Justice, he would cast his votes so as "to advance the cause of socialism" and then write his opinions "in some currently favored version of Grand Theory." Then, in Taking the Constitution Away from the Courts, he argued that, in effect, no one should engage in constitu-

and Politics, 110 Yale L J 1407, 1441-47 (2001). Balkin acknowledges that the ability of legal scholars to criticize Bush v Gore as political suggests a distinction between law and politics but argues that with more time, the Justices could have fashioned a more persuasive, albeit still politically motivated, opinion; had they done so, he says, the case would have been like any other opinion setting forth a plausible legal justification for a result actually reached on other, nonlegal grounds.


24 See Michael C. Dorf, Legal Indeterminacy and Institutional Design, 78 NYU L Rev 875, 928 (2003) (arguing that "the left has no program—in the sense of an approach to adjudication that faithfully seeks to render adjudication legitimate").

tional adjudication, advocating (at least as a rhetorical device) an amendment rendering the Constitution nonjusticiable, with the result being that questions now posed as matters of constitutional law would thereafter be posed as matters of politics.26

*The New Constitutional Order* represents a further, and a giant, step for Tushnet. Now politics itself has become a misleading, largely futile exercise. When members of Congress debate various policy proposals, they are not so much battling for the supremacy of the social groups and interests they represent as they are carrying out the hidden logic of the current structure of American politics. The key features of that structure, according to Tushnet, are sharp ideological distinctions between the two major political parties, divided government, and, as a result of these and other factors, an inability of a governing majority to agree on major changes. Consequently, a substantial remnant of the New Deal–Great Society constitutional order persists, while no substantial new legislation is enacted. Given the near certainty of gridlock in the new constitutional order, politics now looks like law has always looked in the CLS paradigm: a rigged and basically pointless undertaking.

The balance of this Review proceeds in three parts. Part I summarizes and evaluates *The New Constitutional Order*’s account of contemporary American politics. Though the book makes no express normative claims, it offers descriptive, causal, and predictive claims about national (and, to a much lesser extent, state and local) politics in the United States. Tushnet is careful to qualify his predictive claims as probabilistic, but his descriptive and causal claims do not, for the most part, come with such disclaimers. He thinks it a fact that American national politics has been chastened, and he appears also to think that the explanation for such chastening can be found primarily in structural changes in the American political system over the last two or three decades—such as the substitution of mass primaries for party insider selection mechanisms for selecting candidates. I argue in Part I that in focusing on political structures to the near-exclusion of popular attitudes and social movements, Tushnet understates the degree to which the chastened constitutional order he describes also reflects the dominant political ideology of the nation as a whole. In other words, Tushnet downplays the possibility that an important reason the national government does not do many bold new things is that the American people don’t want it to do many bold new things. The one-sentence version of this alternative explanation is that the country has moved to the right; the longer version explains that the country has moved in multiple directions along multiple axes simultaneously, but

that there remains little faith in what people regard as the characteristic institutional form of the New Deal–Great Society constitutional order: bureaucracy, understood as regulation by centralized command and control.

Part II canvasses the portions of *The New Constitutional Order* that address constitutional law. Tushnet characterizes the jurisprudence of the Rehnquist Court as synchronized with the political branches. As Tushnet explains in the book’s preface, he is engaged in “descriptive sociology” that “link[s] the structure of constitutional doctrine to some aspects of the way in which political institutions actually operate in the present day” (p ix). Though I find Tushnet’s exegesis to be quite illuminating, I question the connection he draws between the Rehnquist Court’s constitutional jurisprudence and the new constitutional order as Tushnet describes it. Just as Part I concludes that popular preferences have as much to do with the chastening of the political branches’ ambitions, so I contend that those same preferences—filtered through the Justices—account for what Tushnet describes as the relative timidity of the Rehnquist Court. In the judiciary, as in the political branches, broad social, cultural, and political forces are as important as structural ones.

Part III examines some implications of Tushnet’s descriptive sociology. Suppose Tushnet is right that large programs of government-led social reform are no longer on the table. What should critics of the new constitutional order propose in their stead? The answer depends on the reason why governmental ambition has been chastened. If Tushnet is right that the fact of divided and gridlocked government holds the key, then no substantial reform proposal stands a chance of being enacted. However, if I am right that hostility to top-down bureaucracy—rather than just gridlock between welfare statists and watchman statists—accounts for much of the chastening of government’s ambitions, then there is room for activist government through non-command-and-control institutions. Part III sketches this alternative.

I. NATIONAL POLITICS IN THE NEW CONSTITUTIONAL ORDER

Tushnet uses the term “constitutional order” to mean “a reasonably stable set of institutions through which a nation’s fundamental decisions are made over a sustained period, and the principles that guide those decisions” (p 1). The New Deal–Great Society constitutional order, he says, was characterized by the New Deal commitment of the federal government to providing the basic needs of all citizens and the Great Society era’s commitment to respecting the civil and political rights of all persons. Politics in this period was characterized by interest group bargaining.
The new constitutional order has not exactly repudiated the commitments of the prior one. Instead, Tushnet says, it has moved away from command-and-control mechanisms for securing welfare and individual rights in favor of market-based mechanisms (p 165). Further, because divided government has replaced interest group bargaining in national politics, the new order does not produce any large-scale new legislative initiatives of the sort we saw in the prior era. Presidents can implement some medium-sized programs because the very gridlock that prevents Congress from accomplishing much of its own agenda also limits Congress’s ability to block administrative initiatives (pp 25–26), but on the whole, Bill Clinton’s 1996 declaration that “the era of big government is over” serves as the rough credo of the new constitutional order.

Invoking the work of political scientist Stephen Skowronek, Tushnet acknowledges that past constitutional orders have tended to reflect substantive and institutional commitments formed over the course of years in response to political movements and (typically presidential) leadership (pp 9–10). It might appear that the same is true of the current constitutional order. In the twenty-three years since Ronald Reagan came to power vowing to get government off the backs of the American people, there has been a substantial shift in public opinion.

As a first-order approximation, one might say that the political center has shifted substantially to the right since the mid-1970s. However, it might be more accurate to observe simultaneous movement in multiple directions. First, a new “Great Awakening” has led to a large increase in the number of evangelical Christians who, by contrast with their predecessors who eschewed politics, play an increasingly active role in politics. Christian conservatives exercise considerable power in national politics and even more power in state and local government—advocating socially conservative positions on issues such as abortion, church-state separation, and gay rights, even as, on the last of

28 See Stephen Skowronek, The Politics Presidents Make: Leadership from John Adams to Bill Clinton (Belknap 1997) (providing a historical survey of the ways in which presidents have shaped politics).
29 The precise phrase was actually uttered by Reagan’s Vice President, George H.W. Bush. See Remarks of the Vice President at the Annual Republican Senate-House Dinner, 1981 Pub Papers 336, 338. In his first inaugural, Reagan said that he intended to make government “work with us, not over us; to stand by our side, not ride on our back.” Inaugural Address of President Ronald Reagan, 17 Weekly Comp Pres Doc 1, 3 (Jan 20, 1981).
30 See, for example, Elisabeth Bumiller, Evangelicals Sway White House on Human Rights Issues Abroad, NY Times § 1 at 1 (Oct 26, 2003).
these issues, the country as a whole has become more liberal over the last generation.

Meanwhile, on issues involving the size of government, there has been a general loss of faith in the ability of conventional bureaucracies to deliver the services they need to provide. Some of this shift in public opinion may simply be a response to a cynical but effective strategy of the right: conservative politicians inadequately fund the agencies charged with serving the public and then point to the agencies' failures as evidence that they should be abolished altogether. But much of the shift in public opinion may be a response to real limits in the capacity of centralized bureaucracies to respond effectively to complex social problems. Whatever the precise admixture of accurate and manipulated perception, the American people have little stomach for large new public undertakings.\footnote{In 1954, 15 percent of respondents told Opinion Research Corp. interviewers that big business represented the greatest threat to the country, 41 percent said it was big labor, and only 14 percent named big government. In the 2000 Gallup, CNN, and USA Today survey, 65 percent of respondents saw big government as the greatest threat, followed by big business at 22 percent and big labor at 7 percent. In Gallup's July 2002 poll, the portion of respondents that named big government as the greatest threat to the nation had fallen to 47 percent, with 38 percent naming big business, and 10 percent big labor. Karlyn Bowman, Like Bush, Congress Sees Approval Rating Decline since Sept. 11, Roll Call (Aug 8, 2002). Those numbers still reflect remarkable hostility to government, given that the polls were conducted less than a year after the terrorist attacks of September 11, 2001, and in the wake of multi-billion dollar corporate scandals. To be sure, hostility to "big government" coexists with broad support for specific government programs, see John B. Judis and Ruy Teixeira, The Emerging Democratic Majority (Scribner 2002); Christopher Matthews, Big Government: A Necessary Evil, San Francisco Examiner A21 (Apr 20, 1995), but what this means is unclear. One possibility is that the popularity of particular programs exists in the abstract, but that when faced with the dollar costs of such programs, the public's general hostility to government prevails. Another (not necessarily inconsistent) possibility is that progressives have been remarkably ineffective at translating what should be a popular agenda into the sorts of slogans that conservatives have used to undermine that agenda. See The Rockridge Mission, online at http://www.rockridgeinstitute.org/perspectives/mission (visited May 4, 2004).}

Accordingly, although he meant the point ironically, Bill Clinton was basically correct in characterizing the difference between the Democratic Party he led and its opponents as the difference between "Eisenhower Republicans" and "Reagan Republicans."\footnote{Bob Woodward, The Agenda: Inside the Clinton White House 165 (Simon & Schuster 1994).} The years since Clinton made that remark have only seen a consolidation of the generally rightward trend in American politics, including Newt Gingrich's Contract with America and conservative Republican George W. Bush's presidency in an era of hyper-patriotism.

Tushnet acknowledges the rightward shift of American politics,\footnote{"[T]he mainstream in the new constitutional order is more conservative than it has been even in the recent past" (p 105).} but for the most part he attributes the chastened aspirations of the national government to structural rather than substantive ideological
factors. Chief among these is divided government, which itself has several causes: first, where party leaders formerly chose candidates with an eye toward capturing median voters, party primaries in which activists disproportionately participate skew the parties' respective candidates toward the ideological extremes, making bipartisan consensus on any substantial new government project nearly impossible to achieve (p 14); second, because of partisan gerrymandering and voter migration, congressional districts have become politically homogeneous, creating numerous safe seats for ideologues of the right and left (pp 14–15); third, as candidates have become more dependent on the national parties for fundraising, the parties have been able to insist on greater loyalty in Congress, even while individual voters who are not activists have largely abandoned the parties (pp 16–19); fourth, as the mass media have assimilated news into the category of entertainment, politicians competing for scarce eyeballs have had to grab the attention of viewers with sensational moves, inclining them toward what Tushnet calls "the politics of scandal" (p 21), a further source of division in national politics; and fifth, middle-of-the-road voters who are alienated by the extreme positions of polarized parties actually prefer divided government and vote accordingly (though coordination problems limit the effectiveness of this approach) (pp 15–16).

The foregoing factors and a few others Tushnet describes combine to ensure divided, and thus chastened, government, but Tushnet does not suggest that these factors are themselves the manifestation of some deeper underlying and unifying cause. He simply identifies a number of largely unrelated political trends, all of which happen to lead to divided government. Nonetheless, the trends Tushnet discusses are strong and longstanding; accordingly, he predicts that divided government will likely persist for a considerable period.

The political science Tushnet ably and succinctly synthesizes in Chapter One of The New Constitutional Order is basically sound; for the reasons Tushnet identifies, national politics today is characterized by greater political polarization than in previous eras. And yet, there was also something right about Ralph Nader's accusation during the 2000 presidential election that the Democratic and Republican Parties are better understood as different wings of the same political movement—Eisenhower and Reagan Republicans, if you will.

In Tushnet's account, the national government's ambition has been chastened because the ideologically distant parties cannot agree on any big new projects. But, at a minimum, this way of characterizing

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the current constitutional order overlooks the big new project of dismantling big old projects.

To be sure, Tushnet recognizes that dismantlings happen in the current era of divided government. Nonetheless, Tushnet does not fully acknowledge what these dismantlings signify. If the primary change since the breakdown of the New Deal–Great Society constitutional order were the emergence of divided government, one would expect the federal government to be unable to create or destroy large federal programs. The constitutional supermajority requirements for a change in the status quo would enable Republicans to block new programs while Democrats would preserve old ones. Although we sometimes see this phenomenon—as in fights over environmental deregulation—we also see bipartisan consensus for politically conservative initiatives: welfare reform—which was signed by a Democratic President—is the most obvious example; the acquiescence by leading Democrats to Bush’s massive tax cuts and his costly foreign policy adventure in Iraq, which have greatly exacerbated the federal budget deficit and thus will ultimately constrain discretionary spending on social programs, are more recent examples.

Tushnet is correct that the existence of ideologically coherent, reasonably well-disciplined political parties in Washington prevents some ambitious political programs that Democrats favor from being enacted into law, and in that sense, divided government contributes to the chastened ambitions of the new constitutional order. Yet an equal if not larger piece of the story may be the overall shift of American public opinion about the proper role of government bureaucracies in solving social problems. In short, an important reason why the era of big government is over is that most Americans and their elected representatives like it that way.

II. JURISPRUDENCE

For someone who would like to take the Constitution away from the Court, Tushnet devotes an unusually large portion (roughly two-thirds) of The New Constitutional Order to Supreme Court cases. Some of this discussion, such as his account of doctrine governing federal preemption of state legislation and the Court’s inference of a constitutional prohibition of federal “commandeering” of state legislatures and executive officials, seems unduly technical given the book’s

35 Chapters Two and Four, addressing “The Supreme Court of the New Constitutional Order” and “The Jurisprudence of the New Constitutional Order” respectively, consider Supreme Court doctrine, and collectively comprise 92 of the book’s 172 pages of text; a Chapter titled “Globalization and the New Constitutional Order” and totaling 23 pages mostly examines how Supreme Court doctrines of federalism and preemption are affected by globalization.
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overall aims. For the most part, however, Tushnet lucidly explains the Rehnquist Court’s jurisprudence. For example, his succinct account of the Court’s narrow interpretation of congressional power to enforce the Fourteenth Amendment (pp 46–55) explains the heart of the controversy for non-specialists without sacrificing nuances that specialists would find important. That is no mean feat, given the complexity of this area of the law.

Tushnet’s exposition of constitutional doctrine is not merely descriptive, however. He also advances an interpretive claim. As against those who see the Rehnquist Court as counter-revolutionary, Tushnet views the Court as moderate. In keeping with the zeitgeist of the new constitutional order, the Court will preserve or at most chip away at, but not dismantle, the legacy of the New Deal–Great Society constitutional order, while resisting efforts to extend that legacy.

Tushnet’s view is broadly accurate. Consider the federalism cases. In United States v Lopez and United States v Morrison, the Court forbade Congress from extending the reach of the Commerce Clause into what the Court thought was new territory, even as it reaffirmed the quite broad view of the Commerce power that had been sustained in the New Deal case of Wickard v Filburn. The Morrison case, as well as others like it, has also barred Congress from expanding beyond the Great Society era’s conception of fundamental rights by insisting that when Congress “enforces” the Fourteenth Amendment pursuant to Section Five of that provision, it must take the Court’s understanding of Section One as its starting point. Because that understanding has not moved much since the 1970s—for example, treating discrimination based on race or sex but not disability as invidious—the Court’s cases accordingly bar Congress from moving much (at least with respect to authorizing private suits for money damages).

The Rehnquist Court’s individual rights cases fit the this-far-and-no-further pattern as well. In 1992 the Court preserved what it called the “core holding” of Roe v Wade, protecting abortion against pre-viability prohibitions, even as it permitted regulations under a new “undue burden” standard that would have failed what the Court de-

36 See, for example, Garbus, Courting Disaster (cited in note 13); John T. Noonan, Jr., Narrowing the Nation’s Power: The Supreme Court Sides with the States (California 2002).
40 See p 67 (quoting James Fleming’s characterization of the decision in the right-to-die cases as saying “this far and no further”). See also Washington v Glucksberg, 521 US 702 (1997); James E. Fleming, Fidelity, Basic Liberties, and the Specter of Lochner, 41 Wm & Mary L Rev 147, 152 (1999) (“Glucksberg seems to say ‘this far and no further,’ while also attempting to gut the [privacy] precedents of any vitality or generative force.”).
41 410 US 113 (1973).
ridden as Roe's "rigid trimester framework."

Likewise, in 2000 the Court held that Miranda v Arizona announced a constitutional rule that Congress may not supersede legislatively, despite the fact that intervening cases had cut back on some of Miranda's broader implications. While refusing wholesale overrulings of its most well-known individual rights precedents, the Court has also declined to recognize what it regards as new rights, as in its unanimous 1997 rejection of a right to physician-assisted suicide.

Accordingly, in the context of both powers and rights, the Court's cases parallel the trend Tushnet sees in Congress. They chip away at the New Deal–Great Society constitutional order, but do not fundamentally reject its commitments.

Tushnet begins his longest chapter on the Court with the observation that "[t]he Supreme Court could do essentially anything its majority wanted in a regime of divided government" (p 33). Except in the unusual circumstances in which one party controls both houses of Congress and the presidency (as is true at the present moment, albeit just barely), on questions of statutory interpretation there will rarely be the political will to overrule the Court's decisions; and, in matters of constitutional law, the supermajority of both houses of Congress and the state legislatures needed to overrule the Court will almost never be found. So Tushnet is correct that the Court is practically omnipotent, but this raises the question of why the Court has used its near-omnipotence in a way that mirrors the this-far-and-no-further attitude of Congress. Why, in other words, is the Rehnquist Court only moderately conservative rather than counter-revolutionary?

In answering this question, Tushnet gestures toward the appointment process. When the presidency and the Senate are in the hands of different parties—and indeed, given the possibility of a filibuster, even when they are in the hands of the same party but the majority party in the Senate holds fewer than sixty seats—moderates are much more likely to end up on the Supreme Court than strongly conservative or liberal Justices (pp 103–06). Given that Supreme Court vacancies are rare events, Tushnet acknowledges the possibility of ideological appointments, but he thinks the current moderately conservative Court to be more or less what one would expect from the new constitutional order.

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45 See Michael C. Dorf and Barry Friedman, Shared Constitutional Interpretation, 2000 S Ct Rev 61, 76–80 (arguing that "some post-Miranda decisions clearly are defensible" while others are "more dubious").
order. To be more precise, in Tushnet’s view, the Court’s median Justice—Sandra Day O’Connor or, depending on the issue, Anthony M. Kennedy—personifies the new constitutional order.

Tushnet’s argument appears to be missing a step. Once on the Court, why would the typical median Justice—who is, recall, essentially omnipotent—want to fashion doctrine that fits the new constitutional order, given that, in Tushnet’s view, the latter is not a coherent ideological program but simply the result of political gridlock? Why not fashion his or her own ideologically coherent, albeit politically moderate, set of doctrines?

One possibility, which Tushnet rejects, is that constitutional orders have normative force that judges must respect. Aficionados of constitutional theory will be struck by the similarity between Tushnet’s project in *The New Constitutional Order* and Bruce Ackerman’s effort to divide American constitutional history into discrete periods separated by “constitutional moments.” The very idea of a “constitutional order” suggests that the Constitution we have is not, as in conventional accounts, the one bequeathed to us by the Framers, but something that has been reconstructed again and again—and not just by formal amendment. As Tushnet himself notes, however, there is an important distinction between his approach and Ackerman’s.

Ackerman’s constitutional moments—the Founding, the Reconstruction, and the New Deal—are periods of heightened political activity that (according to Ackerman) lead to dramatic shifts in the constitutional order. Much of the theoretical apparatus Ackerman develops in the two volumes of *We the People* he has published thus far is designed to distinguish between, on the one hand, successful constitutional moments that result in express or implicit changes in the Constitution, and, on the other hand, ordinary politics and failed constitutional moments that leave the prior regime intact. The distinction is important for Ackerman because his ultimate aim is to reconcile non-originalist judicial interpretation of the Constitution with an account of popular sovereignty in which neither ordinary politics nor judicial creativity suffices to change the Constitution. For Ackerman, the solution is synthesis: what may appear to the untrained eye as judge-made constitutional law is better understood, he argues, as an effort by the Justices to synthesize the constitutional commitments forged by the People themselves during the Founding, the Reconstruction, and the New Deal. The criteria for distinguishing constitutional moments from

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ordinary politics enable the (Ackermanian) judge to identify the commitments that she believes herself duty-bound to respect.

Tushnet, by contrast, has no interest in legitimating judicial review or in preserving any distinction between plebiscitarian democracy and the sort of dualism—constitutional moments versus ordinary politics—that Ackerman favors. Accordingly, Tushnet’s notion of a constitutional order is somewhat fuzzier than Ackerman’s. We can slip from one Tushnetian constitutional order to another gradually, without any great political upheaval, and even without anybody really noticing. More importantly for our purposes, the transition from one constitutional order to another places no interpretive obligations on judges. Knowing that we inhabit one rather than another constitutional order is useful for analyzing how political and judicial actors behave, but, to borrow H.L.A. Hart’s terminology, that knowledge need not play any “internal” role in a judge’s or other government official’s decisionmaking.49

To be sure, it is possible that the current and likely future median Justices would disagree with Tushnet. Might they think, on Ackermanian or other grounds, that they are duty-bound to respect the principles of the new constitutional order? If so, then that fact itself could be incorporated into Tushnet’s account of the new constitutional order: a principle of the new constitutional order would then be that judges (for bad reasons) believe themselves bound to respect the constitutional order that characterizes the political branches. Although this is a theoretical possibility, it is a complete nonstarter as an account of what the current Supreme Court Justices actually think. As Tushnet himself notes, the “[o]ne theme [that] runs through the modern Court’s decisions . . . is suspicion of a legislative process in which . . . politicians engage in grandstanding for their constituents, adopting legislation that seems ‘good’ in the abstract but that has no decent policy justification” (p 94). How likely is it that a Court with this view of Congress would treat the very pathologies that lead to congressional grandstanding as legal meta-principles commanding judicial respect?

If the new constitutional order does not directly command the Justices’ respect, there remains the possibility that it does so indirectly. The sort of person most likely to survive the appointment process in periods of divided government, the argument goes, will be a moderate in the sense that her views on specific controversial questions such as abortion, affirmative action, federalism, gay rights, the right to die, and separation of church and state are within a standard deviation of the midpoint of public opinion. In addition, such a person will likely be a methodological moderate without a coherent judicial philosophy,

49 Hart, Concept of Law at 89 (cited in note 23).
muddling through on a case-by-case basis rather than articulating and applying a unifying approach to the law. Among other things, such a methodological eclectic can more credibly answer senators' questions about how she decides a case in a way that provides few hints to how she would resolve specific controversial issues, and thus avoid the opposition likely to be triggered by a judicial nominee with strong methodological commitments that are likely to be read as signaling views on concrete controversies.

The foregoing argument—which is at least implicit in *The New Constitutional Order*—looks unassailable. But it also looks banal. Do we really need an account of anything so grand as a constitutional order to conclude that the Supreme Court will generally have views that are close to the middle of American public opinion? Mr. Dooley didn't.51

Moreover, if I have correctly identified the mechanism by which median Supreme Court Justices are usually chosen, Tushnet's talk of a new constitutional order is not merely unnecessary; it is also misleading. The new constitutional order that Tushnet describes says "this far and no further" because that is what gridlock entails. It is true, as I noted above, that much of the Rehnquist Court's jurisprudence takes the this-far-and-no-further form. However, some of it does not.

Consider, for example, last term's decision in *Lawrence v Texas*, which overruled *Bowers v Hardwick*.52 The majority opinion of Justice Kennedy in *Lawrence* contended that *Hardwick* "was not correct when it was decided,"53 and argued at some length that the *Hardwick* Court reached the wrong decision based on the material available to it at the time. But precisely because the relevant material was available to the *Hardwick* Court in 1986, outside observers can legitimately ask why the Court saw the issue differently in 2003.

The decision in *Lawrence* was handed down after the publication of *The New Constitutional Order*, and so Tushnet does not discuss the case. Nonetheless, insofar as *The New Constitutional Order* directs our attention to judicial appointments as the principal means by which the Court is connected to the political process, we can readily imagine

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50 Tushnet cites favorably the work of Cass Sunstein describing the Rehnquist Court this way (pp 130-38) (discussing Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Harvard 1999)). See also Daniel A. Farber and Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (Chicago 2002) (providing a similarly anti-theoretical account of constitutional adjudication as a form of muddling through).
51 See Finley Peter Dunne, *Mr. Dooley's Opinions* 26 (R.H. Russell 1901) ("[T]h' supreme court follows th' iliction returns.").
52 123 S Ct 2472 (2003).
54 *Lawrence*, 123 S Ct at 2484.
how Tushnet might answer the question of what happened between 1986 and 2003: the Court’s personnel had changed.

Yet under close inspection, this answer is inadequate. To be sure, the only remaining Hardwick dissenter, Justice Stevens, was in the majority in Lawrence, as were the two Democratic appointees to the Court, Justices Ginsburg and Breyer. But the remaining members of the Lawrence majority, Justices O’Connor, Kennedy, and Souter, were all Republican nominees to the Court, and one of them, Justice O’Connor, had been a member of the Hardwick majority.

It is possible that Kennedy and Souter thought Hardwick should be overruled from the moment they were appointed, although Souter espoused a modest view of substantive due process in his confirmation hearings, suggesting that, circa 1990, he would have been unlikely to reject Hardwick’s then-recent rule. But, in any event, what about O’Connor? She only concurred in the judgment in Lawrence on the ground that the Texas prohibition of same-sex sodomy violated the Equal Protection Clause. This maneuver permitted her to maintain the fiction that her votes in the two cases were not inconsistent—a fiction because, in Hardwick, it was the Court itself that introduced the distinction between heterosexual and homosexual sodomy; the Georgia statute at issue there did not single out same-sex conduct. Thus if the distinction violated Equal Protection all along, then Justice O’Connor had no business joining Justice White’s majority opinion in Hardwick. The more plausible explanation is that Justice O’Connor changed her mind between 1986 and 2003.

Why did Justice O’Connor change her mind? A certain kind of what-the-judge-had-for-breakfast legal realist might be interested in knowing about O’Connor’s personal experiences and relationships, but there is another version of legal realism—what might be called “sociological legal realism”—that calls attention instead to broader social trends. We need not wonder about what exactly happened to

55 Souter would not even commit himself to the proposition that the substantive due process right of married couples to use contraceptives that was recognized in Griswold v Connecticut, 381 US 479 (1965), extended to unmarried couples. See Linda Greenhouse, Defining Souter, Some; Undogmatic Middle-of-the-Road Nominee Is Surprise for Liberals and Conservatives, NY Times A1 (Sept 19, 1990). Souter’s caginess did not require him to call into question any of the Court’s precedents, however, because Eisenstadt v Baird, 405 US 438 (1972), which is often understood as extending Griswold to unmarried couples, and which contains sweeping language about individual rights, see id at 453, was nominally an interpretation of the Fourteenth Amendment’s Equal Protection Clause, rather than its Due Process Clause.

56 Based on her reading of private correspondence, N.E.H. Hull has noted that Karl Llewellyn sought to distance legal realism from the sociological jurisprudence of figures such as Roscoe Pound. See N.E.H. Hull, Some Realism about the Llewellyn-Pound Exchange over Realism: The Newly Uncovered Private Correspondence, 1927–1931, 1987 Wis L Rev 921, 964–66. In contrast, Neil Duxbury has argued that “there are no good historical or conceptual reasons for demarcating the pre-realists from the realists, and that realism should, accordingly, be regarded
O'Connor or, for that matter, to Kennedy and Souter. We can look instead to changes in social attitudes about homosexuality and sodomy.

Indeed, the Lawrence opinion does just that, noting that since the Court's decision in Hardwick, twelve of the twenty-five states that criminalized sodomy had eliminated their prohibitions.\(^7\) In this respect, the case parallels the Court's decision of a year earlier in Atkins v Virginia,\(^8\) holding that execution of the mentally retarded, which it had deemed permissible in 1989, was unconstitutional because of a state trend toward abolition of the practice. Nor must we confine our attention to changes in positive law. As Jack Balkin observes, the existence of a highly rated network sitcom featuring a gay protagonist explains as much about the result in Lawrence as anything in the written opinion.\(^9\)

The foregoing is, as I have indicated, good old-fashioned legal realism of the sort that a crit like Tushnet would have endorsed in his youth—and which, for all I know, he still endorses. And yet note how this account of the Lawrence case makes the new constitutional order in national politics irrelevant, except perhaps to the extent that both the Court's opinion and, say, the flak that Senator Rick Santorum took for his equating same-sex intimacy with polygamy, incest, and adultery,\(^6\) are epiphenomena of the same underlying change in social attitudes. In Lawrence—and in many other cases that I won't bother detailing—it's not the gridlock that results from the structural forces Tushnet identifies as central to the new constitutional order that drives the Court. It's the underlying social attitudes that may or may not find expression in the output of the political branches.

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\(^7\) See Lawrence, 123 S Ct at 2481.

\(^8\) 534 US 1122 (2002).


[O]nce Will and Grace becomes a Top Ten show in the Nielsen ratings, we may assume that gays have achieved a basic degree of acceptance in American society, even if they are not treated equally in all respects. What courts do in these fundamental rights cases is reflect changing social mores that are worked out in political struggles about basic values and then translated into constitutional doctrine.

III. WHAT IS TO BE DONE?

The critics used to have an answer to the charge that they lacked an affirmative program: by exposing the ways in which the legal system masks the exercise of raw power, CLS aimed to discredit the law’s authority, thus paving the way for, if not exactly a revolution, at least a large-scale reorientation of law and politics. For example, in a seminal article, Joseph Singer argued that the revelation that law is simply politics “should be experienced as empowering.”¹¹ Scholars, lawyers, and activists who used to worry that judges and others ought not conflate the law with their political preferences were liberated to pursue politics in judicial as well as other, more conventionally political, fora.

Set against this backdrop, The New Constitutional Order sounds a death knell for CLS. Tushnet continues to believe that law is simply politics, but now politics itself is largely futile. There is nothing wrong with pursuing political aims through litigation, regulation, or legislation. But it is largely a sucker’s game.

To be sure, Tushnet acknowledges that a few ultra-conservative appointments to the Supreme Court could tilt that body in a truly counter-revolutionary direction (p 35), but without exactly saying that liberals who fret over this possibility are so many Chicken Littles, he reassures the reader that the judicial appointment process under conditions of divided government makes it quite unlikely.

Similarly, Tushnet implies that there will rarely be any point in making substantial proposals to Congress because—and this is the whole point of the book, it seems—in the current constitutional order, Congress will not enact anything other than feel-good measures. Nor need activists worry much that Congress will dismantle the rump of the old constitutional order, because “[t]he new constitutional order remains committed to preserving a baseline of New Deal–Great Society protections for some quality-of-life programs, such as environmental protection, some aspects of the social safety net, such as the social security program, and a fair amount of pluralistic tolerance” (p 32).

How about the states? In an era of devolution, might architects of social change concentrate their energy there? Tushnet argues that as a result of the mobility of capital and the anti-tax movement, states lack the resources to fund any substantial new projects (p 28). Moreover, because term limits in many states force legislators to seek higher office almost from the moment they come to power, state legislatures rarely undertake important projects anymore, and what they do undertake is often carried out incompetently (p 29).

If you thought you could take your case directly to your fellow citizens, changing public attitudes in a way that would force your elected representatives to stand up and take notice, think again. You may be able to find some like-minded folks via the Internet, but to grab the attention of the general public you will need access to the mass media, which is interested only in infotainment. Changing public opinion on a massive scale will work only if packaged as part of a blockbuster Hollywood film (pp 19–22).

One is left to wonder, therefore, why a talented person of the left (or the right) who wanted to influence the real world would spend his time writing law review articles and scholarly books rather than screenplays. Aside from the difficulty of making a political film entertaining, for Tushnet the answer appears to be simply habit. Having come of age in an era when critical positive analysis of law and legal institutions indirectly served justice by revealing their defects, he continues in that vein even when it serves primarily as a form of therapy.

This is not to say that Tushnet exactly counsels indolence. Though the new constitutional order may assure moderation in the long run, a reader of Tushnet’s book as well as the newspaper might be mindful of Keynes’s aphorism (“In the long run we are all dead”) and accordingly worry that with one or two more Supreme Court appointments, all branches of the federal government will be prepared to dismantle permanently much of the progressive legacy of the New Deal and Great Society. Someone worried about this possibility—which is not ruled out by Tushnet’s analysis—might well think that the best use of her energies is to fight to preserve as much as possible of the New Deal–Great Society constitutional order as she can. If focused on the courts, the goal would be, as the American Constitution Society mission statement puts it, “to restore the fundamental principles of respect for human dignity, protection of individual rights and liberties, genuine equality, and access to justice to their rightful—and traditionally central—place in American law.”

But if the goal is to defend the Warren Court against the Rehnquist (or Thomas or Ashcroft!) Court, crits are ill-prepared for the task. From the beginning, critical legal studies has aimed to unmask terms like “human dignity” and “genuine equality” as just so much metaphysical nonsense disguising the exercise of raw political power. A crit who is dismayed, on ideological grounds, about the potential rightward drift of the Court would have to follow Tushnet’s ad-

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62 Think of “socialist realism” in the old Soviet Union.

63 John Maynard Keynes, A Tract on Monetary Reform, in 4 The Collected Writings of John Maynard Keynes 1, 65 (Macmillan 1971).

64 American Constitution Society, Goals, online at http://www.acslaw.org/about (visited May 4, 2004).
vice circa 1981: pretend that the law really does mandate your preferred political program.\(^65\)

Of course, members of the American Constitution Society and other mainstream liberals need not engage in any pretense, for mainstream liberals tend not to be crits. They really believe that the Constitution, best understood, entails most of the positions of the John Kerry for President campaign—just as mainstream conservatives seem to believe that it entails the Bush campaign’s platform. The problem to which I would call attention is not so much the conflation of legal and political views. In a post–Legal Realist world, even non-crits recognize that these are not hermetically sealed domains. The problem is that groups like the American Constitution Society are selling an agenda—the New Deal–Great Society constitutional order—that the public isn’t buying.

Tushnet sees the problem. In the final chapter of *The New Constitutional Order* he identifies the sort of activist regulatory programs that could succeed in the current era of skepticism of government activism. These programs come in two types. The 1990 Clean Air Act amendments—which substitute a market in pollution emission credits for requirements of specific technology or specific emissions limits—typify the first “deinstitutionalized” form of regulation. So too do a slew of recent proposals by Bruce Ackerman and various co-authors that aim to accomplish traditional left/liberal goals through forms of private ordering: one-shot redistribution of wealth to convert impoverished citizens into “stakeholders”;\(^66\) “patriot dollars” that will counter the impact of real dollars on the system of campaign finance;\(^67\) and one day of (paid) deliberation by citizens who otherwise would (and do) cast uninformed ballots.\(^68\)

Tushnet focuses mostly on a second form of regulation, what Charles Sabel and I (and others) have called “democratic experimentalism,”\(^69\) which Tushnet graciously calls “the most promising candidate for a theory of government activity in the new constitutional order” (pp 171–72). In very broad outline, democratic experimentalism names a system of decentralized yet centrally monitored government

\(^{65}\) See note 25.

\(^{66}\) See generally Bruce Ackerman and Anne Alstott, *The Stakeholder Society* (Yale 1999).

\(^{67}\) See generally Bruce Ackerman and Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* (Yale 2002).

\(^{68}\) See generally Bruce Ackerman and James S. Fishkin, *Deliberation Day* (Yale 2004).

in which local, democratically accountable units are free to set goals
and to choose the means to attain them. Concurrently, legislative bod-
ies or regulatory agencies set and ensure compliance with framework
objectives. These framework objectives shape and in turn are shaped
by means of performance standards based on information about cur-
rent best practices that regulated entities provide in return for the
freedom to experiment with solutions they prefer.

Consider an extremely condensed but real example that illus-
trates how democratic experimentalism differs from both stereotypi-
cal regulation and deregulation: the regulation of air quality. In (a
somewhat stylized version of) the traditional regulatory paradigm—
that is, the New Deal–Great Society constitutional order—
environmentalists would lobby for strict limits in Congress or an ad-
ministrative agency that had been delegated the relevant power by
Congress, while industry (and perhaps organized labor) would lobby
for weak or no limits. The end result of this process would be either no
regulation or a more-or-less once-and-for-all limit based on either a
political compromise or a scientific judgment that would likely be ob-
solete by the time it was implemented (especially if the relevant limit
were set by agency rulemaking subject to the laborious process of ju-
dicial review).

How does democratic experimentalist regulation of air quality
differ? Consider the actual Clean Air Act. 70 Although many of its key
provisions took shape during the heyday of the New Deal–Great So-
ciety constitutional order, 71 in important respects the Act is nonethe-
less an example of experimentalist regulation. Congress established a
very general overarching goal—air quality at a level "requisite to pro-
tect the public health" 72 —and instructed the federal Environmental
Protection Agency (EPA) to set minimum air quality performance
targets compatible with that goal. 73 Requiring that the agency learn
from experience, the Act provides that both the list of regulated pol-
lutants and the performance targets ("National Ambient Air Quality
Standards" or "NAAQS") are to be revised periodically in light of ex-
pert opinion and the experience of the states in adapting national
standards to local conditions. 74 The states in turn have primary respon-

70 42 USC § 7401 et seq (2000).
71 The first Clean Air Act was adopted in 1963 as Pub L No 88-206, 77 Stat 392 (1963). It
was amended in 1967 by the Air Quality Act, Pub L No 90-148, 81 Stat 485 (1967), substantially
amended by the Clean Air Amendments of 1970, Pub L No 91-604, 84 Stat 1676, and periodically
amended again in the ensuing years.
72 42 USC § 7409(b)(1).
73 See 42 USC § 7409(a)(1).
74 See 42 USC § 7408(a)(1) (requiring the Administrator to "publish, and . . . from time to
time thereafter revise, a list" of pollutants subject to regulation); 42 USC § 7409(d)(2)(A) (man-
dating that at least one of the seven members of the statutorily required scientific review com-
sibility for ensuring that air quality within their territories meets the EPA's standards. They are free to devise whatever mix of regulations, incentives, voluntary measures, land use restrictions, alternative transportation plans, and other means that they believe will best achieve the performance targets in their regions, tailoring policy mixes to reflect locally varying economic and environmental conditions. States are also free to set their own more ambitious air quality targets if they so choose, but they must, at a minimum, meet the national target. In exchange for this broad grant of authority, the states must provide detailed reports to the EPA on their plans as well as on actual air quality performance and progress toward achieving the targets, derived from air quality monitoring in each region. The EPA retains power to review and approve the regional plans, to reject any it believes likely to fall short of achieving the national performance targets, and to demand revisions if a currently operative plan falls short of improvement goals. If a state fails to submit plans, submits incomplete or substantively inadequate plans, or repeatedly defaults on its performance obligations, the EPA is authorized to step in and devise and implement its own plan to achieve air quality performance goals in the defaulting region.

Cooperative federalism of the sort embodied in the Clean Air Act is not a perfect exemplar of democratic experimentalism. For example, though it requires state consultation with local political authorities, it does not guarantee rights of participation for stakeholders such as labor and industry representatives, environmental nongovernmental organizations, and other activist groups that might be enlisted in the formulation, implementation, and refinement of state and local standards. Still, it sufficiently illustrates the experimentalist paradigm to answer the objection that democratic experimentalism is a purely theoretical construct.

To be clear, Tushnet does not exactly raise the objection just addressed. He thinks that experimentalism is real enough and that it fits the chastened ambitions of the new constitutional order because "democratic experimentalist initiatives emerge when there is a consensus that something needs to be done but the array of political forces makes it impossible for the political system to produce results consistent with the wishes of any particular side" (p 169). That is true, but
Tushnet's formulation of this advantage suggests that democratic experimentalism is primarily a vehicle for circumventing gridlock. But it is more. Tushnet imagines that gridlock arises from a clash between interest groups or ideologues, who know what they want, if only they could get their hands on the levers of power. Yet we democratic experimentalists consistently emphasize that in the conditions of modern life, people increasingly find that their problem is not so much an inability to persuade those with different interests or viewpoints of what to do; their problem is that no one has a complete solution to what collectively ails them. Democratic experimentalism posits that people with diverse interests and viewpoints can come together to solve their common problems by deliberating rather than simply negotiating. We suggest that various stakeholders have not only stakes but also local knowledge, and that by pooling their knowledge they can collectively discover opportunities that individually they would miss.

Tushnet tempers his enthusiasm for democratic experimentalism in a number of ways. To begin, he questions whether it actually works. Some of its provisional successes, he says, may simply be examples of the “Hawthorne Effect,” in which participants in a study temporarily improve their performance simply because they are being studied. Once the novelty wears off, so do the improvements (p 170).

Yet the Hawthorne Effect, named for studies conducted at Western Electric's Hawthorne Works in Chicago, has been debunked as resting on a flawed interpretation of the original data. Moreover, even if one accepted Tushnet's account of the Hawthorne Effect—the notion that improvements in performance occurred “because the workers knew they were participating in an experiment” (p 170)—that would hardly count as an argument against democratic experimentalism. The whole point of democratic experimentalism is for actors to feel—correctly—that they are always participating in an experiment. Accordingly, if there were a Hawthorne Effect of the sort Tushnet invokes, democratic experimentalism would institutionalize it.

Indeed, one can go further still. Paul Blumberg, who undertook a careful re-analysis of the Hawthorne studies, concluded that they in fact demonstrated a phenomenon quite conducive to democratic experimentalism: workers who are given a voice in the production process outperform workers commanded to follow orders from hierarchical superiors. That lesson, of course, underlies the transformation from Fordist assembly-line production to flexible specialization that

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has been occurring in the last two decades. Elsewhere, Sabel and I have explained the homology between flexible specialization and democratic experimentalism, but one can object to parallels between private and public sector forms of organization while still seeing the relevance of the real Hawthorne Effect for the latter: bureaucracies that carry out detailed, centrally selected directives will operate less effectively than looser organizations that give those on the front lines—such as agency staff, local units of government, and affected citizens—a substantial role in implementing, and thereby customizing, public policy.

Nonetheless, Tushnet is right that the jury is still out on most of the main examples of democratic experimentalism. The next round of inquiry should undertake detailed and rigorous analysis of the performance of systems of regulation that can be fairly characterized as fitting the democratic experimentalist paradigm.

Tushnet’s chief misgiving is that democratic experimentalism may be parasitic on a system of national politics that will typically be hostile to it. In its full realization, Tushnet says, and I agree, democratic experimentalism is a big new government program. It requires Congress to enact regulatory goals and to ensure rights of participation in stakeholder processes. Yet, Tushnet reminds us, Congress is unlikely to adopt big new government programs in the new constitutional order. So democratic experimentalism will likely be limited to a number of interesting projects of dubious legality operating at the margins of the gridlocked administrative state.

Suppose, however, that, as I argued in Part I, Tushnet’s causal account of the chastened ambitions of the new constitutional order is wrong. Suppose, in other words, that the reason Congress doesn’t enact any major new regulatory programs has more to do with popular opposition to such programs than with the structural factors that he observes lead to divided government. The question we must then ask is, why don’t Americans want the government to undertake (m)any large new programs?

One possibility is that Americans have become Nozickian minimalists about government on the sort of grounds that one would see

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82 See Dorf and Sabel, 98 Colum L Rev at 314–23 (cited in note 69).
83 Perhaps Americans do want their government to undertake a few new large programs, such as combating terrorism and reforming public education. In the case of the latter, however, the form of the federal effort—the No Child Left Behind Act, Pub L No 107-110, 115 Stat 1425 (2002), codified at 20 USC §§ 6301–6578—fits the democratic experimentalist paradigm, although it has other flaws. See generally James S. Liebman and Charles F. Sabel, The Federal No Child Left Behind Act and the Post-desegregation Civil Rights Agenda, 81 NC L Rev 1703, 1703 (2003) (maintaining that the No Child Left Behind Act “trigger[s] just the kind of locally, experimentally, and consensually generated standards whose absence has kept courts from carrying through with their initial commitments to desegregated, educationally effective schools”).
urged in publications of the Cato Institute. But consider another possibility that seems more likely to be true: Americans still want the government to tackle large problems; they just don’t want government to tackle these problems via the characteristic institutional form of the New Deal–Great Society constitutional order, namely, bureaucracy. If this interpretation of mainstream public opinion is correct, the public, and therefore Congress, would be willing, perhaps even eager, to enact the sort of framework legislation necessary to implement democratic experimentalism. Perhaps I’m wrong in these judgments, but if the only alternative is a counsel of despair, where’s the harm in putting them to the test?

CONCLUSION

The New Constitutional Order is a fastidiously austere book. Tushnet avoids any expressly normative analysis, sticking to what he quite accurately describes as a project of “descriptive sociology” (p ix). And yet one cannot help but read between the lines a certain sadness on his part at the passing of the New Deal–Great Society constitutional order. Though Tushnet may shed no tears for the decline of the Warren Court—which rooted so many of its decisions in a jurisprudential philosophy that Tushnet considers only so much window dressing for political judgments—he seems to feel a far greater attachment to the actual political accomplishments of FDR, LBJ, and the Congresses with which they collaborated.

Precisely why Tushnet and others on the legal left may feel an attachment to the archetypal institutional forms of the New Deal–Great Society period is largely beyond the scope of this Review, but I would suggest two reasons. First, as a matter of historical fact, during the New Deal–Great Society period, the Democratic Party played the dominant role in national politics, and pursued substantive policy aims that, while falling far short of social democracy in other parts of the world, were, by contrast with the policies pursued in the preceding and following periods, on balance progressive. For left-leaning American legal scholars, top-down bureaucracy may benefit from “innocence by association” with the substantive goals of the New Deal–Great Society period.

Second, as the heirs of legal realism, crits like Tushnet may share the legal realists’ view that, relative to the formalisms of common-law reasoning, administrative agencies can flexibly bring to bear scientific expertise on social problems without the constraint of unduly backward-looking and status-quo-preserving formal doctrine. Today, of

course, common parlance associates bureaucracy with rigid rules applied unthinkingly, and while that view of bureaucracy is hardly new, for the legal realist predecessors of the critical legal studies movement, the rigidities of bureaucracy were less salient than its perceived advantages over the common law.

Regardless of whether and to what extent these factors account for Tushnet’s apparent sentimental attachment to bureaucracy, it is that attachment, I think, that leads him to see the eclipse of the New Deal–Great Society constitutional order as largely a byproduct of structural political forces that, through sheer bad luck, have led to congressional gridlock. Were Tushnet less attached to (the political manifestations of) the New Deal–Great Society constitutional order, he might be more willing to see its decline as also manifesting popular preferences that reflect a dissatisfaction with its characteristic institutional form.

In a sense, Tushnet’s difficulty is that he has become too much of a conventional American political scientist and too little of a Marxist. As a political scientist, he looks to voting rules, party practices, and the like for the determinants of the political zeitgeist. These factors no doubt matter a great deal, but a Marxist would say that they play a subordinate role to the main currents of social and economic organization. In the private sector and increasingly in the public sector, those currents now flow away from the hierarchical bureaucracy typical of the New Deal–Great Society constitutional order. Where do those currents flow to? It is too early to say. Powerful forces now seek to resurrect laissez-faire capitalism on the ruins of the


86 To extend the metaphor, perhaps the organizational pattern might better be viewed as an estuary, which, though it on balance flows downstream, also flows upstream. Thus, even as support for public bureaucracies has dwindled, and even as much of the private sector has moved from mass production to “flexible specialization,” Michael J. Piore and Charles F. Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (Basic 1984), some of the retrenchment in public bureaucracies has been accompanied by growth in private bureaucracies that serve parallel functions by much the same top-down methods as the old public institutions. See, for example, Jacob S. Hacker, *The Divided Welfare State: The Battle over Private and Public Social Benefits in the United States* 124-73 (Cambridge 2002) (discussing the relation between the private pension system and the public social security system). In this respect, it is worth remarking that where, as in the case of health insurance, private bureaucracies are no better (and probably worse) at delivering services without red tape, the private bureaucracies are unpopular as well. See Phyllis C. Borzi, *Distinguishing between Coverage and Treatment Decisions under ERISA Health Plans: What’s Left of ERISA Preemption?*, 49 Buff L Rev 1219, 1220–21 (2001) (observing that the same public worries about treatment decisions being made by government bureaucrats that were exploited to defeat the Clinton health care plan have resurfaced as anxieties about treatment decisions being made by private bureaucrats working for health maintenance organizations).
administrative state. There are, however, alternatives, both of the sort that Ackerman and his co-authors have proposed and the sort that Sabel, I, and our co-authors have proposed. Tushnet apparently sees each of these alternatives as inferior to the sort of activist government that the new constitutional order precludes; given that our political system is (in his view) unfortunately unwilling to extend the New Deal–Great Society constitutional order, second-best projects like market-based regulation and democratic experimentalism are the best that can be hoped for. If Tushnet is right about this, then The New Constitutional Order is a depressing narcotic. If he is wrong (and I am right), then it is a call to arms.