Introduction

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

¹ Professor of Law, Columbia University School of Law. For helpful comments and conversations, I thank Karima Bennoune, Neil Buchanan, Norman Cantor, Sherry Colb, Donna Dennis, Archon Fung, Alan Hyde, Samuel Issacharoff, Bradley Karkkainen, John Leubsdorf, James Liebman, Gregory Mark, Dara O’Rourke, James Pope, and Charles Sabel. For outstanding research assistance, I am grateful to Akiva Goldfarb.

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, ___ (1996). For Sokal’s account of his hoax, see Alan D. Sokal, A Physicist Experiments with Cultural Studies, ___ Lingua Franca 62 (May/June 1996). For a list of papers responding to Sokal’s hoax, see his NYU faculty homepage,
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 slavery, caste and alienation—other than that the former are, in fact, the values they hold.\(^3\) 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

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\(^2\) To be sure, many postmodernists purport to accept the reality of the external world. See, e.g., Richard Rorty, *Does Academic Freedom Have Philosophical Presuppositions?*, in Louis Menand ed, *The Future of Academic Freedom* 21, 30 (University of Chicago Press, 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. ("But 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, e.g., 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).

\(^3\) See, e.g., Stanley Fish, *Don’t Blame Relativism*, 12(3) The Responsive Community ___, ____ (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.") (emphasis in original).
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.\(^4\) Whatever its exact pedigree, and glossing over what are no doubt important distinctions to those within the relevant movements, critical legal studies can fairly be called a form of "applied postmodernism."\(^5\) 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.

\(^4\) See Mark Tushnet, The New Constitutional Order ix (Princeton 2003) ("NCO") ("The critical legal studies approach" includes "a critique of certain claims about objectivity and rationality, particularly but not exclusively in law . . . .").

\(^5\) In an important article on the critical legal studies movement, Tushnet identified postmodernism as only one strand of CLS. See Mark V. Tushnet, Critical Legal Studies: A Political History, 100 Yale LJ 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.")
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 have 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\(^6\) and occasionally law.\(^7\) Holmes was nevertheless lionized by early twentieth century progressives because his skepticism led him to adopt a deferential posture toward the output of electorally accountable bodies, leading him as a Justice of the Supreme Court to vote to uphold progressive legislation.\(^8\) Yet the association of skepticism with the political left lasted


\(^7\) See *Buck v Bell* 274 US 200, 207 (1927) ("Three generations of imbeciles are enough.")

\(^8\) See *Lochner v New York*, 198 US 45, 75 (1905) (Holmes dissenting) ("The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.")
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.”\(^9\) 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.”\(^10\) Though professing to represent scholars “of different political beliefs,” it is difficult to imagine that more than a handful voted for Bush. And although conservatives still find it useful to campaign against liberal judges\(^11\) and continue to condemn


\(^11\) For example, after a liberal three-judge panel of the Ninth Circuit Court of Appeals delayed the California gubernatorial
particular liberal Supreme Court decisions—such as the recent invalidation of a Texas prohibition on same-sex sodomy—12—for the most part, mainstream conservative figures now find themselves defending the Court against such charges by liberal and left critics.13
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 reflects 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

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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 Geo 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, supra note 5 at 1516 (suggesting “that critical 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 critical legal studies, 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, supra note 5, at 1523 (placing the origin of CLS as a formal movement in 1976).
Order as “the New Deal-Great Society constitutional order”\textsuperscript{16} 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.\textsuperscript{17} Liberals viewed the Supreme Court’s decisions protecting negative liberty as giving them all they could reasonably hope to obtain through judicial action, while critics 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,\textsuperscript{18} critics had few qualms about undermining a liberal-but-hardly-left Court.

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\textsuperscript{16} NCO, passim.
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\textsuperscript{17} See, e.g., Ronald Dworkin, Freedom’s Law: The Moral Reading of the American Constitution 11 (Harvard U Press, 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 Gene 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 concern[ing] a particular aspect of our economic life--the welfare of the poor").
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\textsuperscript{18} The most prominent example in the 1970s and 1980s was the way in which procedural rights under the Administrative Procedure Act and the Constitution were used to frustrate agency action. See generally Jerry L. Mashaw & David L. Harfst, The Struggle for Auto Safety (Harvard U Press, 1990).
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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 affecting change through the democratic process than to look to courts.\(^{19}\) 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. One need not be a crit to think that judicially decreed progress occurs only when it garners substantial political support.\(^{20}\)

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

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\(^{19}\) See Mark Tushnet, *Taking the Constitution Away From the Courts* 172 (Princeton U Press, 1999) (“progressives and liberals are losing more from judicial review than they are getting”).

now,"\(^{21}\) 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.”\(^{22}\) As Tushnet was not singling out Rehnquist as an especially political Justice, we may infer that the ninety percent figure more or less reflects his general view of the proportion of politics in judicial decision making. 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,


\(^{22}\) Mark V. Tushnet, This is not the exact title A Republican Chief Justice, 88 Mich. L. Rev. 1326, 1328 (1990) (reviewing Sue Davis, Justice Rehnquist and the Constitution (Princeton U Press, 1989)).
there would have been no cause for outrage. More generally, 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

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23 For a contrary view, see Jack M. Balkin, Bush v. Gore and the Boundary Between Law 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, non-legal grounds.

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.\textsuperscript{25}

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

Then, in *Taking the Constitution Away From the Courts*, he argued that, in effect no one should engage in constitutional adjudication, advocating (at least as a rhetorical device) an amendment rendering the Constitution non-justiciable, with the result being that questions now posed as a matter of constitutional law would thereafter be posed as matters of politics.

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 Presidential or other legislative 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

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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 simply reflects the dominant political ideology of the nation as a whole. In other words, Tushnet downplays
the rather obvious explanation that the national government does not do many bold new things because 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 the characteristic institutional form of the New Deal–Great Society constitutional order: bureaucracy.

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.” 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

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NCO at ix.
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 (somewhat justified) hostility to bureaucracy—rather than gridlock between welfare statists and watchman statists—primarily accounts for the seemingly chastened ambition of government—then there is room for activist government through non-bureaucratic 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.”

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. 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 also limits Congress’s ability to block administrative initiatives, but on the whole Bill Clinton’s 1996 declaration that “the era of big government

28 Id at 1.
29 Id at 165.
30 Id at 25-26.
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. 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.

33 NCO at 9-10.
34 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, Pub. Papers, 1981, p 336 at 338, col. 2. 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.” See ___.

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 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.
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.” 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, 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 bi-partisan consensus on any substantial new government project nearly impossible to

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36 See, e.g., NCO at 105 (“the mainstream in the new constitutional order is more conservative than it has been even in the recent past”).
achieve;\textsuperscript{37} 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;\textsuperscript{38} 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;\textsuperscript{39} 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,”\textsuperscript{40} 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 the coordination problems do not always ensure that they succeed).\textsuperscript{41}

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 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,

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at a minimum, this way of characterizing 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 super-majority 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 in 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 is the overall shift of American public opinion about the proper role of government bureaucracies in solving social problems. In short, the main 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.\(^43\) Some of this discussion, such as his account of doctrine governing federal preemption of state legislation and the Court’s inference of a

\(^{43}\) Chapters Two and Four, addressing “The Supreme Court of the New Constitutional Order” and “Jurisprudence” 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 pre-emption are affected by globalization.
constitutional prohibition of federal “commandeering” of state legislatures and executive officials, seems unduly technical given the book’s 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 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

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44 NCO at 46-55.

45 See Garbus, supra note 13; John T. Noonan, Jr., Narrowing the Nation’s Power: The Supreme Court Sides with the States (U Cal Press, 2002).
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, have 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

46 See NCO at 67 (quoting James Fleming’s characterization of the decision in the right-to-die cases as saying “this far and no further”). See also 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”).
prohibitions, even as it permitted regulations under a new “undue burden” standard that would have failed what the Court derided 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,”\(^\text{47}\) despite the fact that intervening cases had cut back on some of Miranda’s broader implications.\(^\text{48}\) While refusing wholesale overruling 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.\(^\text{49}\)

Accordingly, in both powers and rights cases, 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.”\(^\text{50}\) Except in the unusual circumstances

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\(^{47}\) Dickerson v United States, 530 US 428, 444 (2000).

\(^{48}\) See Michael C. Dorf and Barry Friedman, Shared Constitutional Interpretation, 2000 S Ct Rev 61.


\(^{50}\) NCO at 33.
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 super-majority 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 appointments 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.\(^{51}\) Given that Supreme Court vacancies are rare events, Tushnet acknowledges the possibility of ideological appointments, but he thinks the current

\(^{51}\) Id at 103-06
moderately conservative Court to be more or less what one would expect from the new constitutional 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 is 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, 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, Reconstruction, and the New Deal. The criteria for distinguishing constitutional moments from 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 decision making.

To be sure, it is possible that the current and likely future median Justices 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 non-starter 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 . . . .”\(^{52}\) 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 appointments 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

\(^{52}\) Id. at 94.
rights, the right to die, and separation of church and state are within a standard deviation of the midpoint of public opinion on these questions. In addition, such a person will likely be a methodological moderate without a coherent judicial philosophy, muddling through on a case-by-case basis rather than articulating and applying a unifying approach to the law.\(^3\) 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

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53 Tushnet cites favorably the work of Cass Sunstein describing the Rehnquist Court this way. See NCO at 130-38 (discussing Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (Harvard U Press 1999); see also Daniel A. Farber and Suzanna Sherry, Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations (U Chi Press, 2002) (providing a similarly anti-theoretical account of constitutional adjudication as a form of muddling through).
Supreme Court will generally have views that are close to the middle of American public opinion? Mr. Dooley didn’t.\textsuperscript{54}

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,\textsuperscript{55} which overruled Bowers v. Hardwick.\textsuperscript{56} The majority opinion of Justice Kennedy in Lawrence contended that Hardwick “was not correct when it was decided,”\textsuperscript{57} 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

\textsuperscript{54} See Finley Peter Dunne, Mr. Dooley’s Opinions 26 (R.H. Russel 1901) (“th’ supreme court follo ws th’ iliction returns.”)
\textsuperscript{55} 123 S Ct 2472 (2003).
\textsuperscript{56} 478 US 186 (1986).
\textsuperscript{57} Lawrence, 123 S Ct at 2484.
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 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 be unlikely to reject Hardwick’s then-recent
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

*Souter would not even commit himself to the proposition that substantive due process right of married couples to use contraceptives that was recognized in Griswold v Connecticut, 381 US 479 (1965) properly 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 (Sep 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.*
of legal realism—what might be called “sociological legal realism”—that calls attention instead to broader social trends.\textsuperscript{59} We need not wonder about what exactly happened to 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 \textit{Lawrence} opinion does just that, noting that since the Court’s decision in \textit{Hardwick}, 12 of the 25 states that criminalized sodomy had eliminated their prohibitions.\textsuperscript{60} In this respect, the case parallels the Court’s decision of a year earlier in \textit{Atkins v Virginia}, 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

\textsuperscript{59} 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, \textit{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 as the continuation of a particular trend—namely, the growing dissatisfaction with legal formalism—rather than as the beginning of something substantively new.” Neil Duxbury, \textit{Patterns of American Jurisprudence} 77 (Oxford U Press 1995). In using the term “sociological legal realism,” I do not necessarily mean to take Duxbury’s side in the debate over the relation between sociological jurisprudence and legal realism. Rather, I mean to emphasize the role that the social—as opposed to the personal—played in legal realists’ account of judicial decision making.

\textsuperscript{60} See \textit{Lawrence}, 123 S Ct at 2481.
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.  

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, 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

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61 See http://balkin.blogspot.com/2003_06_29_balkin_archive.html (observing that “once 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.”)

drives the Court. It’s the underlying social attitudes that may or may not find expression in the output of the political branches. To paraphrase the 1992 Clinton campaign, it’s the social movements, stupid.

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.” 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

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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, but without exactly saying that liberals who fret over this possibility are so many Chicken Littles, he reassures the reader that the judicial appointments 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.”

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64 NCO at 35.
65 NCO at 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. 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.

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 only interested in infotainment. Changing public opinion on a massive scale will work only if packaged as part of a blockbuster Hollywood film.

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

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66 Id at 28.
67 Id at 29.
scholarly books rather than screenplays. Aside from the difficulty of making a political film entertaining,\textsuperscript{68} 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’ aphorism (“In the long run we’re all dead”) and accordingly worry that with one or two more Supreme Court appointments, all branches of the federal government will be prepared to permanently dismantle 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,

\textsuperscript{68} Think of “socialist realism” in the old Soviet Union.
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 advice circa 1981: pretend that the law really does mandate your preferred political program. 

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 Howard Dean for America campaign—just as mainstream conservatives seem to believe that it entails the Bush campaign’s platform (and Justice Scalia apparently thinks it entails most of Andrew Jackson’s platform). The problem to which I would call attention is

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69 http://www.americanconstitutionsociety.org/About.htm#  
70 See supra note 26.
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”; \(^\text{71}\) “patriot dollars” that will counter the impact of real dollars on the system of campaign finance; \(^\text{72}\) and one day of (paid)

\(^{71}\) See Bruce Ackerman and Anne Alstott, The Stakeholder Society (Yale U Press 1999).

\(^{72}\) See Bruce Ackerman and Ian Ayres, Voting with Dollars: A New Paradigm for Campaign Finance (Yale U Press 2002).
deliberation by citizens who otherwise would (and do) cast uninformed ballots.\footnote{See Bruce Ackerman and James S. Fishkin, Deliberation Day (forthcoming 2004).}

Tushnet focuses mostly on a second form of regulation, what Charles Sabel and I (and others) have called “democratic experimentalism,” which Tushnet graciously calls “the most promising candidate for a theory of government activity in the new constitutional order.”\footnote{NCO at 172.} In very broad outline, democratic experimentalism names a system of decentralized yet centrally monitored government in which local democratically accountable units are free to set goals and to choose the means to attain them. Concurrently, legislative bodies 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 current 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 illustrates how democratic experimentalism differs from both stereotypical regulation and deregulation: the regulation of air quality. In (a somewhat stylized version of) the traditional regulatory paradigm, i.e., the New Deal-Great
Society constitutional order, environmentalists would lobby for strict limits in Congress or an administrative agency that has 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 obsolete by the time it is implemented (especially if the relevant limit is set by agency rulemaking subject to the laborious process of judicial review).

How does democratic experimentalist regulation of air quality differ? Consider the actual Clean Air Act.\textsuperscript{75} Although many of its key provisions took shape during the heyday of the New Deal-Great Society constitutional order,\textsuperscript{76} in important respects the Act is nonetheless an example of experimentalist regulation. Congress established a very general overarching goal—air quality at a level "requisite to protect the public health"\textsuperscript{77}—and instructed the federal

\textsuperscript{75} 42 U.S.C. § 7401 et seq. (2000).


\textsuperscript{77} 42 U.S.C. § 7409(b)(1).
Environmental Protection Agency to set minimum air quality performance targets compatible with that goal.  

Requiring that the agency learn from experience, the Act provides that both the list of regulated pollutants and the performance targets ("National Ambient Air Quality Standards" or "NAAQS") are to be revised periodically in light of expert opinion and the experience of the states in adapting national standards to local conditions. The states in turn have primary responsibility to ensure that air quality within their territory meets the Environmental Protection Agency’s ("EPA") 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 target in their region, tailoring policy mixes to reflect locally varying economic and environmental conditions. States are also free to set their own more

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79 See 42 U.S.C. § 7408(a)(1) (requiring the Administrator to "publish, and . . . from time to time thereafter revise, a list" of pollutants subject to regulation): 42 U.S.C. § 7409(d)(2)(A) (mandating that at least one of the seven members of the statutorily required scientific review committee that periodically reviews ambient air quality standards "represent[] State air pollution control agencies.")

80 See 42 U.S.C. § 7407 (assigning to states "the primary responsibility" for air quality).

81 See 42 U.S.C. § 7410(a)(2) (setting forth the necessary elements of a state plan).
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 EPA on their plans as well as actual air
quality performance and progress toward achieving the
targets, derived from air quality monitoring in each region.
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
the 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, 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
guaranteed rights of participation for stakeholders such as
labor and industry representatives, environmental non-

82 See id.
84 See 42 U.S.C. § 7410(a)(2) (M).
governmental 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 that objection. 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 make it impossible for the political system to produce results consistent with the wishes of any particular side.” 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, each of whom knows what he wants, if only he can get his 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

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85 Id at 169.
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.86

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

86 Id at 170.
original data.\textsuperscript{87} 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,”\textsuperscript{88} 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 \textit{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.\textsuperscript{89} That lesson, of course, underlies the transformation from Fordist assembly-line production to flexible specialization that has been occurring in the last two decades. Elsewhere, Sabel and I have explained the homology between flexible


\textsuperscript{88} NCO at 170.

\textsuperscript{89} See Paul Blumberg, \textit{Industrial Democracy: The Sociology of Participation} 34-35 (Schocken 1969).
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
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-Segregation Civil Rights Agenda, 81 NC L Rev 1703 (2003).

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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.” 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. It is that attachment, I think, that leads him to see the eclipse of the New Deal-Great Society
constitutional order as largely a by-product 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 would be more willing to see its decline as manifesting popular preferences that simply 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, 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 administrative state. There are, however, alternatives, both of the sort that Ackerman and his co-authors and the sort that Sabel, myself and our
co-authors, have proposed. Tushnet sees these alternatives as satisficing; given that our political system is 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.