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COMMENTARIES

REANIMATOR: MARK TUSHNET AND THE SECOND COMING OF THE IMPERIAL PRESIDENCY

*Neal Devins**

A world without judicial review? Not that long ago—when the Left fought tooth and nail to defend the legacy of the Warren and (much of the) Burger Courts—the thought of taking the Constitution away from the courts would have been horrific. Witness, for example, Edward Kennedy’s depiction of “Robert Bork’s America” as “a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, [and] rogue police could break down citizens’ doors in midnight raids.”¹ Bork’s sin, of course, was embracing a kind of populist constitutional discourse, that is, the notion that the founders “banked a good deal upon the good sense of the people” and their elected representatives to sort out the meaning of equality, due process, and the like.²

Bork, however, never questioned the finality of Supreme Court decisions.³ Ronald Reagan’s Attorney General Edwin Meese stepped on that landmine in October 1987 when he claimed that only the Constitution, not the decisions of the Supreme Court, binds the

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1. 133 CONG. REC. S9188 (daily ed. July 1, 1987) (statement of Sen. Edward Kennedy).

2. *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong. 114-17* (1987) (statement of Robert H. Bork).

3. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 3 (1990) (explaining that “[w]hen the Supreme Court invokes the Constitution, whether legitimately or not, as to that issue the democratic process is at an end”).

government.⁴ The American Civil Liberties Union, the *New York Times*, and the *Washington Post* took aim at Meese, dubbing his comments a “jurisprudential stink bomb” and an invitation to “anarchy.”⁵

How things change. Today, the Left is increasingly skeptical of a judge-centered Constitution. In part, smarting from several Rehnquist Court defeats, progressives see elected government as more apt to embrace their agenda than the judiciary. Furthermore, much of the Court’s salience as an agent for social change has been obliterated. There is an increasing recognition both of the Court’s tendency to follow the election returns and of the pivotal role that social movements play in transforming society.

The Left’s embrace of the Constitution outside of Court, however, is hardly a call for the end of judicial review. Instead, progressives—like Ruth Bader Ginsburg—speak of “judges play[ing] an interdependent part in our democracy . . . participat[ing] in a dialogue with other organs of government, and with the people as well.”⁶ For this very reason, some progressives see the Court as a beneficent democracy-forcing facilitator, encouraging elected government and the people to engage in constructive constitutional dialogues.⁷

But do the courts really play a constructive role in shaping constitutional values? And if not, what should stop us from amending the Constitution to preclude judicial review altogether? For Mark Tushnet, the answers to these questions are no and nothing. And by laying down the gauntlet, Tushnet’s *Taking the Constitution Away from the Courts*⁸ forces us to confront the most basic question in constitutional law.

In the pages that follow, I will defend Tushnet’s decision to tackle this most basic question. There is good reason for progressives (and others) to question the “value added” of court interpretations of the

4. See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 983 (1987).

5. Michael Kinsley, *Meese’s Stink Bomb*, WASH. POST, Oct. 29, 1986, at A19; see Anthony Lewis, *Law or Power?*, N.Y. TIMES, Oct. 27, 1986, at A23; Stuart Taylor, Jr., *Liberties Union Denounces Meese*, N.Y. TIMES, Oct. 24, 1986, at A17. Even the American Bar Association denounced Meese, arguing that White House challenges to Supreme Court decision-making would “shake the foundations of our system.” *Id.* (quoting ABA President Eugene C. Thomas).

6. Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198 (1992) (footnote omitted).

7. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

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

Constitution. But even if Tushnet's assessment of the limited benefits and significant costs of judicial review is correct, his call for populist constitutional discourse does not make sense in the real world. In particular, the competing incentives and powers of the White House and Congress will yield a constitutional order dominated by a single branch, the Executive. More to the point, it is hard to reconcile a constitutional order dominated by a single individual with Tushnet's call for populist constitutional discourse.

* * *

Mark Tushnet is right. There is good reason to doubt the efficacy of judicial review.⁹ To start with, it is not especially consequential. Take *Brown v. Board of Education*,¹⁰ arguably the most important case in modern constitutional law. By itself, *Brown* accomplished next to nothing. In the decade following the decision, less actual desegregation occurred than in 1965 alone. The reason: In 1965, Southern school systems had financial incentives to desegregate. At that time, Congress made available millions of dollars in federal funds to *nondiscriminatory* public school systems.¹¹ Whether or not "the political landscape in the mid-1960s would have looked the same even if *Brown* had been decided differently,"¹² it is quite clear that social and political forces, not judicial edicts, made school desegregation a reality.

Judicial review, moreover, is hardly ever counter-majoritarian. Even when striking down legislation, the Supreme Court is often validating elected government preferences. For example, in recognizing a married couple's right to use contraceptives at a time when only two states banned the use of contraceptives, the Court did little more than act "on behalf of a national political majority

9. The analysis which follows is an elaboration of several of the (undoubtedly true) empirical assertions that help ground Mark Tushnet's case against judicial review. I do not, however, rely on any of the (highly debatable) normative claims that figure into Tushnet's detailed and nuanced case against judicial review. In particular, I reject Tushnet's claim that the only part of the Constitution worth honoring is the Preamble. *See id.* at 12. Tushnet is willing to take this step because he thinks that constitutional interpretation is about power, not the search for truth. *See id.* For me, this effort to elevate the so-called "thin Constitution" would neuter the Constitution altogether. For a detailed assessment of Tushnet's normative claims, see Saikrishna Prakash, *America's Aristocracy*, 109 *YALE L.J.* 541, 548-52 (1999) (reviewing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)).

10. 347 U.S. 483 (1954).

11. *See* GARY ORFIELD, *PUBLIC SCHOOL DESEGREGATION IN THE UNITED STATES, 1968-1980*, at 5-7 (1983); GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION* 2-3 (1969).

12. TUSHNET, *supra* note 8, at 146.

that has not yet worked its will through legislation."¹³ More fundamentally, when it is willing to break ranks with elected government, the Court "rarely holds out for an extended period against a sustained national political majority."¹⁴ The *Lochner*¹⁵ era gave way to the New Deal Court; *Roe v. Wade*'s¹⁶ absolutism was replaced by *Planned Parenthood v. Casey*'s¹⁷ moderation; *Mapp v. Ohio*¹⁸ likewise gave way to good faith and other exceptions; forced busing gave way to a series of Rehnquist Court decisions valuing local control; and so on and so forth.

None of this is to say, as Henry Steele Commager argued, "that had there never been an instance of judicial nullification of a congressional act, our constitutional system would essentially be the same as it is today."¹⁹ It is to say that courts cannot accomplish all that much (at least not without populist support). For this very reason, the costs of judicial review must be considered.

Taking the Constitution Away from the Courts calls attention to some of the costs of judicial review. Of particular concern to Tushnet are institutional costs, especially the fact that judicial review encourages policymakers to care less about the Constitution. Rather than struggle over the possible constitutionality of their handiwork, lawmakers can simply delegate that question to the courts. Indeed, members of Congress (especially nonlawyer members) typically pass constitutional questions along to the courts.²⁰ For example, in urging Congress to enact the National Industrial Recovery Act, Franklin Delano Roosevelt told Congress that "the situation is so urgent and the benefits of the legislation so evident

13. *Id.* at 144; see *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing the right to use contraceptives).

14. TUSHNET, *supra* note 8, at 134. On this point, Tushnet looks to Robert Dahl's seminal study, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957). See also Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50 (1976); William Mishler & Reginald S. Sheehan, *The Supreme Court As a Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993).

15. *Lochner v. New York*, 198 U.S. 45 (1905).

16. 410 U.S. 113 (1973).

17. 505 U.S. 833 (1992).

18. 367 U.S. 643 (1961).

19. HENRY STEELE COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* 47 (1943). For a more contemporary account (that essentially reaches the same conclusion), see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

20. See DONALD G. MORGAN, *CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY* 336 (1966); Mark C. Miller, *Congress and the Constitution: A Tale of Two Committees*, 3 SETON HALL CONST. L.J. 317, 319-20 (1993).

that all doubts should be resolved in favor of the bill, leaving to the courts . . . the ultimate question of constitutionality."²¹ More recently, Congress has included in several recent statutes a procedure to permit quick challenges before the Supreme Court.²² The not-so-hidden message in statutes that contain expedited review procedures: "We're not sure about the constitutionality of what we have done. But the statute is politically popular and we don't want to figure out whether we bungled it. But don't worry. The Court will set it right."²³

Another way in which "judicial overhang distorts what legislators say about the Constitution" is that legislative consideration of constitutional matters is little more than an attempt by lawmakers to fit their statutes into preexisting Supreme Court doctrine.²⁴ For example, the House and Senate Judiciary Committees are understood to take constitutional interpretation seriously because they are keenly interested in whether the Court will uphold their actions, and are therefore willing to moderate the legislation they produce.²⁵ In other words, rather than develop their own distinctive interpretive methodologies, lawmakers (when they talk about the Constitution) almost always mimic the Supreme Court.²⁶ And when Congress does respond to Court decision-making, the cost of ensuring compliance with judicial norms is significant. To "credibly claim" that the federal Flag Protection Act would satisfy the Supreme Court, for example, "the statute had almost nothing to do with what its supporters thought a flag protection law ought to do."²⁷

21. TUSHNET, *supra* note 8, at 57 (quoting Letter from President Franklin Delano Roosevelt to Congressman Hill (July 6, 1935), in 4 FRANKLIN DELANO ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 297 (1950)).

22. Examples of statutes in which Congress has incorporated this procedure include the Gramm-Rudman-Hollings Act of 1985, 2 U.S.C. § 922(a)(5) (1994); the Flag Protection Act of 1989, 18 U.S.C. § 700 (1994); the Line-Item Veto Act of 1996, 2 U.S.C. § 691 (Supp. III 1997); and the Communications Decency Act of 1996, 47 U.S.C. § 223 (1994 & Supp. III 1998).

23. For a floor speech that, more or less, tracks the above language, see 141 CONG. REC. S4244 (daily ed. Mar. 21, 1995) (statement of Sen. Paul Simon).

24. TUSHNET, *supra* note 8, at 57.

25. See NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES 123-31 (1996); Miller, *supra* note 20, at 328-32, 337-42, 347-53.

26. See TUSHNET, *supra* note 8, at 58-65. In many ways, Executive Branch interpretations of the Constitution also mimic the Supreme Court. For example, rather than call upon Congress to embrace a theory of federalism at odds with the Court, Bush administration officials—when testifying against freedom of choice legislation—served up a narrow construction of Supreme Court case law. See 16 Op. Off. Legal Counsel 1 (1992).

27. TUSHNET, *supra* note 8, at 59.

The question remains: Is judicial review, ultimately, counterproductive? For example, if judicial supremacy contributes to political stability,²⁸ policymakers should think of ways to leave the Constitution to the Court. Alternatively, if elected branch interpretations do little more than perpetrate social injustice, well, there would be good reason to encourage elected officials to follow the Court's lead.

Neither of these things is true, however. Without the powers of purse and sword, the Court itself recognizes that it "must take care to speak and act in ways that allow people to accept its decisions."²⁹ As such, political stability can only be achieved if Court decisions are somewhat consistent with elected government preferences.³⁰ Indeed, elected government intervention is necessary, in part, to stave off the destabilizing effects of Court decisions that limit individual and minority rights. Among other things, lawmakers have responded to restrictive Supreme Court rulings on child labor, public accommodation, search and seizure, freedom of the press, voting rights, women in the military, and religious freedom.³¹

Considering the general unwillingness of Congress to countermand the Court, these examples suggest that lawmakers are able to play a constructive role in shaping constitutional values. For their part, Supreme Court Justices sometimes prove inept at constitutional interpretation. Although Tushnet's claim that "the proportion of constitutional fools on the Supreme Court approaches that in Congress"³² may overstate matters, it is nevertheless true that federal judges "can be lazy, lack judicial temperament . . . [and] pursue a nakedly political agenda" without fear of removal.³³

In the end, there is no argument for judicial supremacy. A stable, enduring constitutional order must involve elected officials as well as the people. It is also true that social and political forces, not

28. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371-81 (1997) (arguing that the settlement of contested issues is a crucial component of constitutionalism and that the Supreme Court can achieve this goal by acting as an authoritative interpreter).

29. *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992).

30. See Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 90-106 (1998).

31. Along these lines, an argument can be made that the hidden agenda of *Taking the Constitution Away from the Courts* is the advancement of Lefty political causes. See Prakash, *supra* note 9, at 552. I do not agree with Prakash's claim, although I understand why a skeptical reader of Tushnet's book would reach this conclusion.

32. TUSHNET, *supra* note 8, at 56.

33. RICHARD A. POSNER, *OVERCOMING LAW* 111 (1995).

judicial review, define most of our constitutional order. Consequently, if judicial review creates disincentives for lawmakers to think seriously about the Constitution, there is reason to question (as a policy matter) the sensibility of judicial review.³⁴ But is it not possible that taking the Constitution away from the Court will create a new set of problems that are even more costly than the costs of judicial review? Here, I think, is where Tushnet's argument against judicial review comes apart.

Let us start with Congress. True, judicial review creates disincentives for lawmakers to invest much energy in constitutional interpretation. But without judicial review, there is little reason to think that Congress will pay significantly more attention to the Constitution than it does today.³⁵ Consider, for example, the reasons why most members of Congress find service on the House and Senate Judiciary Committees unattractive.³⁶ Motivated by reelection, power within Congress, and the ability to reward constituencies, there is little gain in sorting out national policy on divisive issues like abortion, affirmative action, and gun control.³⁷ Correspondingly, those lawmakers who seek out these committees tend to be "true believers," individuals who do not feel the heat for taking a stand on contentious constitutional questions. For these reasons, party leaders have difficulty finding members to staff the Judiciary Committees (especially members who are also acceptable to hardliners within the Committee).³⁸

Might these incentives change if the Constitution were taken away from the Court? After all, interest groups would increasingly see Congress as the "Court of last resort" and, accordingly, pressure Congress to pay greater attention to constitutional questions. But

34. Indeed, in recent years, proposals have been advanced to give Congress a veto over judicial decisions or to take life tenure away from the courts. See ROBERT H. BORK, *SLOUCHING TOWARD GOMORRAH* 117 (1996) (discussing a proposal to give Congress the power to override judicial decisions); Prakash, *supra* note 9, at 568-84 (discussing a proposal to eliminate life tenure on the judiciary).

35. Tushnet, while conceding that Congress now pays scant attention to the Constitution, argues that lawmakers might well invest in the Constitution "if [they] knew that they were responsible for [it]." TUSHNET, *supra* note 8, at 66.

36. See CHRISTOPHER J. DEERING & STEVEN S. SMITH, *COMMITTEES IN CONGRESS* 58-123 (3d ed. 1997); David E. Price, *Congressional Committees in the Policy Process*, in *CONGRESS RECONSIDERED* 161, 162 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 3d ed. 1985).

37. Indeed, lawmakers often seek cover in Supreme Court rulings in order to avoid such decisional costs. See sources cited *supra* note 36; Mark Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUDIES IN AM. POL. DEV.* 35 (1993).

38. See DEERING & SMITH, *supra* note 36, at 81-82.

interest groups already pressure Congress on a broad range of constitutional questions. Indeed, responding to interest group pressures, Congress sought to countermand Supreme Court decisions on voting rights, flag burning, abortion, school prayer, busing, religious liberty, and a host of other contentious issues. To the extent that Congress is a reactive institution,³⁹ it may be that judicial review often provides the necessary spur to legislative consideration of constitutional questions.

Of course, without the fear of judicial nullification Congress can make bolder policy than it does today. And it may be that some interest groups internalize the risks of judicial invalidation, and therefore, do not press Congress as hard as they might. At the same time, other interest groups may not have pressured Congress precisely because they thought that the courts would strike down legislation inconsistent with their beliefs. Consequently, it is doubtful that—in a world without judicial review—Congress will moderate its handiwork all that much.⁴⁰

What will change is the type of constitutional discourse that takes place within Congress. No longer will the Judiciary Committees employ the language of the Supreme Court when debating constitutional questions. Whether Congress will develop its own modalities of constitutional interpretation (or, for that matter, talk much about the Constitution) is another matter altogether. Most committees within Congress see constitutional arguments as simply another roadblock standing in the way of what they want to accomplish. For that reason, most congressional committees do not talk about the Constitution at all. Consider, for example, the House Energy and Commerce Committee. As one staff member who worked for both the Judiciary and Energy and Commerce Committees put it: “A good legal argument wins on Judiciary; power wins on Energy and Commerce. Power, not legal training, is the most important thing on Commerce. Commerce doesn’t listen to legal arguments, just

39. See Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEX. L. REV. 207, 211 (1984); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166, 173-74 (1984).

40. At the state level, however, it is easy to imagine a more profound change taking place. In the aftermath of Court decisions expanding state authority to regulate abortion, for example, once dormant court-dependent pro-choice interests were awakened. See DEVINS, *supra* note 25, at 67-77. *Taking the Constitution Away from the Courts*, unfortunately, does not take the states into account. Indeed, Tushnet does not even consider the very real possibility that state court interpretations of state constitutional provisions will fill much of the void left by federal court interpretations of the U.S. Constitution.

ideology.”⁴¹ For another staff member: “Energy and Commerce members move quickly to fix the problems before them without getting bogged down in fruitless debates over the possible constitutionality of the bills before them.”⁴² Consequently, when the Reagan Federal Communications Commission (“FCC”) questioned the constitutionality of awarding racial preferences, the Energy and Commerce Committee castigated all five commissioners for hiding behind the Constitution. Committee member Al Swift, for example, bemoaned the FCC’s “legalistic gobbledygook,” remarking that “I am not a lawyer, and I am mystified by them all the time.”⁴³

Perhaps taking the Constitution away from the courts will change this practice. Perhaps members of power and constituency committees will take more seriously their duty to independently assess the constitutionality of their actions. Perhaps, but do not count on it. Members join these committees either to assume power or to serve their constituents (and thereby improve their chances of reelection). It is hard to see how the evisceration of judicial review will fundamentally change that reality.

* * *

My skepticism, I think, is well founded. But let us say that I am wrong and that “[p]olitical calculations [about the importance of constitutional debate] might change if [the] people [and their representatives] knew that they were responsible for the Constitution.”⁴⁴ After all, judicial review is not especially consequential, nor especially countermajoritarian. Consequently, only a marginal improvement in congressional deliberation about the Constitution would warrant taking the Constitution away from the courts.

In critical respects, Tushnet embraces this type of cost-benefit analysis. He never says that Congress *will* do a much better job than it does today. Rather, his view is that Congress *may* do a better job and—in light of the Court’s limitations—that is enough.⁴⁵ Tushnet, moreover, sees Congress as the seat of populist government. As he states: “The position I have developed would make the Constitution

41. Miller, *supra* note 20, at 341-42 (quoting a 1989 interview with a Judiciary Committee staff member).

42. *Id.* at 345 (quoting an interview with an Energy and Commerce staff member).

43. *Minority-Owned Broadcast Stations: Hearing Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong. 53-55 (1986) (statement of Rep. Al Swift).

44. TUSHNET, *supra* note 8, at 66.

45. *See id.* at 168-69.

what a majority of Congress says it is.”⁴⁶ But what about the Executive? For sure, Tushnet recognizes that the White House will play a large role in shaping populist constitutional law.⁴⁷ Yet, the focus of Tushnet’s brand of populism is legislation, not regulation. Specifically, he imagines that the White House and Congress will “appeal to the court of public opinion” as they bargain over the content of constitutional lawmaking.⁴⁸

On this point, however, I think Tushnet does not consider how it is that the Executive will manipulate the Constitution far more often and far more successfully than Congress. “The opportunities for presidential imperialism are too numerous to count,” according to Terry Moe and William Howell, “because when presidents feel it is in their political interests, they can put whatever decisions they like to strategic use, both in gaining policy advantage and in pushing out the boundaries of their power.”⁴⁹ When presidents act, moreover, it is up to the other branches to respond. In other words, presidents often win by default—either because Congress chooses not to respond, or its response is ineffective.⁵⁰

Put another way: The President is able to exercise agenda control precisely because he is an executive (with the reins of government in his hands). Furthermore, because the President *is* a unitary actor and the Congress is made up of 535 individual actors, the President can advance (and can seek to build public support around) a singular vision of the Constitution. For this very reason, on matters where the President can exercise unilateral power, presidential

46. *Id.* at 52.

47. *See id.* at 120.

48. *Id.*

49. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 138 (1999) (arguing that “the president’s base of independent authority . . . is enhanced . . . by the executive nature of his constitutional job”).

50. For example, Congress overrode only three of one-thousand executive orders issued between 1973 and 1997. *See id.* at 165-66.

interpretations of the Constitution (at least in a world without judicial review) are often synonymous with the Constitution itself.⁵¹

Consider, for example, war powers. Here, the constitutional design envisions (at a minimum) a significant congressional role. Notwithstanding this clear constitutional mandate, Congress has very little incentive to play a leadership role. Why? Although each of Congress's 535 members have some stake in Congress as an institution, parochial interests invariably overwhelm this collective good. Consequently, rather than oppose the President's military initiatives, members of Congress "find it more convenient to acquiesce and avoid criticism that they obstructed a necessary mission."⁵² Presidents, in contrast, achieve fame by leading the nation into battle and, consequently, have strong incentives to launch military strikes.⁵³

War powers is anything but an isolated example. Whenever Congress delegates power to an Executive Branch agency, the President is well positioned to advance his constitutional agenda. Indeed, even if Congress disapproves of his regulatory initiatives, the President still gets his way. Take the case of the Reagan and Bush administrations' abortion counseling initiatives. After Congress rejected Reagan administration efforts to enact legislation prohibiting recipients of federal family-planning funding from talking about abortion, the administration promulgated regulations on this very subject. Finding this gag rule "bizarre and cruel," forty-five Senators cosponsored legislation to overturn it.⁵⁴ But, President Bush used his veto power to stave off this legislative campaign. And

51. I do not mean to suggest here that the President is unconstrained in his actions. To a greater or lesser degree, presidents are representatives of a preexisting political coalition. That coalition places independent demands on the president, which the president will likely seek to meet both out of a sense of political obligation, in payment for earlier assistance rendered, and in expectation of future legacies.

Keith E. Whittington, *The Political Foundations of Judicial Supremacy* (unpublished manuscript at 9, on file with author); see also STEPHEN SKOWRONEK, *THE POLITICS PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO GEORGE BUSH 17-32* (1993).

52. Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 1006 (1999).

53. See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 700 (1997).

54. See John Chaffe, *Congress Should Remedy the Court's Decision*, WASH. POST, June 7, 1991, at A23. Senator Chaffe's Op-ed was written in the immediate aftermath of *Rust v. Sullivan*, 500 U.S. 173 (1991), a Supreme Court decision upholding the gag rule. See *id.* at 203.

a Congressional override failed, with the House voting 276 to 156 to override the veto.

The gag rule is telling for another reason. It calls attention to the transience and ultimate instability of a presidentially-centered constitutional order. Just days after taking office, Bill Clinton repealed the gag rule. Condemning both the Reagan and Bush administrations for promulgating and defending the gag rule, Clinton argued that the rule "endanger[ed] women's lives" and was of questionable legal validity.⁵⁵ Needless to say, to the victor go the spoils and, consequently, Clinton was in no way bound to follow the constitutional opinions of his predecessor.⁵⁶

In a world without judicial review, however, the power of each administration to embrace a radically different conception of constitutional truth comes at a great cost. Specifically, the idea of law as a stabilizing force cannot be reconciled with a regime in which each presidential election serves as a national referendum about which vision of constitutional truth sits well with the electorate.⁵⁷ Rather, a stable constitutional order requires some baseline. In particular, a government of laws must be constrained by law. And, if elections are the only constraint on populist sentiment, the Constitution begins to look more and more like an historical relic—not a rule of laws that constrain government. "What a government of limited powers needs," as Charles Black observed, "at the beginning and forever, is some means of satisfying the people that it has taken all steps humanly possible to stay within its powers."⁵⁸ In other words, there must be continuity to the rule of law in a government of law. And, while courts are greatly influenced by social and political forces, there nevertheless is a continuity to their decision-making.

55. Memorandum for the Secretary of Health and Human Services on the Title X "Gag Rule," 29 WEEKLY COMP. OF PRES. DOC. 88 (Jan. 22, 1993).

56. See Jeremy Rabkin & Neal Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 228-46 (1987) (providing a textual defense of this claim).

57. This is especially true since most Americans pay little mind to constitutional questions. See Thomas E. Baker, *Marbury v. Madison—Requiescat in Pace?*, 83 JUDICATURE 83 (Sept/Oct. 1999) (referencing a study that reported that only five percent of Americans could correctly answer ten basic questions about the Constitution). Of course, as Tushnet argues, more voters might pay attention to the Constitution in a world without judicial review. But they might not. After all, nonjudicial interpretations already play a dominant role in the shaping of constitutional values.

58. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* 52 (1960).

But, if the Supreme Court largely follows the election returns, how can judicial review operate as a stabilizing, legitimating force in our constitutional order? In other words, if Tushnet goes too far in seeing the benefits of a world without judicial review, do I not go too far in seeing the benefits of judicial review?

Maybe, but I do not think so. The “judicial overhang” of which Tushnet complains actually operates as a legitimating constraint on elected government interpretations of the Constitution, especially Executive Branch interpretations. The Office of Legal Counsel (“OLC”), for example, treats both Supreme Court decisions and OLC precedents as a source of legal authority in its interpretations of the Constitution.⁵⁹ Without judicial review, there is good reason to question what, if anything, would constrain the OLC. No longer would the OLC need its own precedents to counterbalance those of the Supreme Court. Instead, each administration might see the national election as a referendum on its constitutional philosophy (so that little weight would be accorded to prior Executive Branch interpretations). The Supreme Court, in contrast, largely adheres to past precedent. In part, this is a manifestation of the instrumental role that *stare decisis* plays in legitimating their decisions.⁶⁰ In part, it is a by-product of the fact that changes in Court doctrine occur gradually. With nine Justices and life tenure, the Court is not apt to flip flop with each election.

True stability and, with it, the notion of the Constitution as supreme law of the land, needs all parts of government to participate in constitutional dialogues with one another. Just as judicial supremacy is not the answer, neither is the elimination of judicial review. Whatever the limits of judicial review may be, the cost of taking the Constitution away from the Court is too great. Whatever its deficiencies and limitations, judicial review is critical to the maintenance of our constitutional order.

59. See John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative Descriptive, and Historical Prolegomenon*, 15 *CARDOZO L. REV.* 375, 380-82, 434 (1993).

60. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 854-69 (1992).

