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AGAINST CONSTITUTIONAL LAW (POPULIST OR OTHERWISE)

*Michael Mandel**

*There was a fine scholar named Mark
Who argued that, should we all hark
To the 'thin' Constitution
It'd be the solution
To the judges going off on a lark*

*But the critics were heard to remark
"Mark's thrashing around in the dark!
What use thin constitutions
When on huge revolutions
We need, after all, to embark?"*

(Anon.)

Mark Tushnet has written a great critique of constitutional judicial review. With his sure grasp of the scholarship, his commitment to the issues and the real people behind them, and his methodical, flawless reasoning, he has effectively blasted the theoretical foundations of judicial constitutional law to smithereens. As such, he has made a valuable contribution to legal scholarship that will remain so for a long time to come.

The essence of Tushnet's critique is that judicial interpretations of the Constitution have no superior validity (logical, prudential, legal, historical, etc.) to nonjudicial ones. It logically follows that there is no democratic reason to allow judges to have any more say than anyone else on the meaning of the Constitution. Judges being a tiny minority of the population, this would marginalize them rather significantly.

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We should be grateful to Tushnet for this, even though it is certain that his critique will not lead to the overthrow of the system of judicial review. There are powerful interests behind the system and only a weakening of *them* could possibly weaken *it* (more of this later). Nevertheless, a critique that goes to the very legitimacy of judicial review is an important repellent against bad judicial decisions, of which, as history shows, there are always more than good ones. The power of judicial review rests on its legitimacy, because all judges really do is confer or withhold legitimacy (from concrete acts, social relations, etc.). A critique that weakens the power of judicial review by delegitimizing it is, therefore, right on track.

Nevertheless, I have some serious problems with Tushnet's approach. I am going to illustrate them by placing Tushnet's contribution in the context of judicial review's critical tradition.

I. THE CRITICAL TRADITION

Tushnet's critique is pretty familiar to Canadians. We have been debating the fundamental question of judicial review for about twenty years now, as our system is only that old and many of us can still remember the political motivations for its sponsorship and even the (bad) actors who sponsored it. But the democratic critique of judicial review goes back a long time: to Charles Beard in the United States,¹ Edouard Lambert in France,² Franz Neumann in Germany,³ and the entire Left in Italy during the Constituent Assembly of 1946-48⁴ to name just the most well-known examples. The essence of this critique is to view judicial review's historical mission as being an *antidote* to democracy, *i.e.*, an antidote to the mortal danger posed by democratic representative institutions to the oligarchy of private property. As long as representative institutions

1. See CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (Free Press 1986) (1935); CHARLES A. BEARD, *THE SUPREME COURT AND THE CONSTITUTION* (Prentice-Hall Inc. 1962) (1912). For a recent critique in this tradition, see RUSSELL GALLOWAY, *JUSTICE FOR ALL? THE RICH AND POOR IN SUPREME COURT HISTORY 1790-1990* (1991).

2. See EDOUARD B. LAMBERT, *LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX ÉTATS-UNIS* (1921).

3. See Franz Neumann, *Rechtsstaat, the Division of Powers and Socialism*, in *SOCIAL DEMOCRACY AND THE RULE OF LAW* 66 (Keith Tribe ed., Leena Tanner & Keith Tribe trans., 1987).

4. See Michael Mandel, *Legal Politics, Italian Style*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 261 (C. Neal Tate & Thorbjörn Vallinder eds., 1995).

were kept the personal possessions of the rich, primarily through limitations on the suffrage, their constitutional theorists sang the praises of legislative sovereignty. But the moment the propertied classes lost control of these institutions, these same constitutional theorists started to worry about the "tyranny of the majority" (the way they never worried about the "tyranny of the minority"). They hurried to the drawing board and came racing back with judicial review. Like the Italian *gattopardo* (leopard), they changed everything (namely constitutional theory) so that everything (namely the oligarchy of the wealthy) would remain the same. They placed boundaries around government action and called on the legal profession to police the boundaries.⁵

The critique of judicial review as reactionary in a class sense was conventional wisdom on the Left before the Second World War. It got side-tracked for a short period after that because of the world-famous liberal period of the U.S. Warren Court, lasting roughly from *Brown v. Board of Education*,⁶ through *Miranda v. Arizona*,⁷ to *Roe v. Wade*.⁸ It was only to be expected that the critique would return once the "hope" of the Warren Court revealed itself to be "hollow,"⁹ and the American judiciary returned to its familiar position to the Right of government. The hope was hollow because the American judiciary, even at its best, delivered only a very narrow, bourgeois conception of constitutional rights, completely divorced from questions of property and social class. Desegregate the public schools, but do nothing to prevent their desertion by anyone who could afford it, and their consequent deterioration through neglect.¹⁰ Forbid the criminalization of abortion, but say it is perfectly all right to refuse funding to women who could not afford it, and even to ban it from "any public facility."¹¹ Insist on due process, but at the same time create so much inequality that violence becomes uncontrollable and repression is ratcheted up to the point where the U.S. prison

5. See Michael Mandel, *A Brief History of the New Constitutionalism or "How We Changed Everything So That Everything Would Remain the Same,"* 32 *ISR. L. REV.* 250, 251 (1998).

6. 347 U.S. 483 (1954).

7. 384 U.S. 436 (1966).

8. 410 U.S. 113 (1973).

9. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

10. See *id.* at 72-106.

11. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 504-13 (1989).

population has become legendary, on top of an execution rate that has returned to its pre-Warren Court levels.¹²

Nor is the antidemocratic record of U.S. constitutionalism unique: from Nazi Germany to Pinochet's Chile, the courts have harassed the reformers and backed the tyrants all the way. And if they should lose their senses and take their independence seriously, to the point where they actually become a problem for the power brokers, as the Russian constitutional court did in 1993, the tanks are sent in, the constitutionalists applaud, and the International Monetary Fund picks up the tab.¹³

II. MODERN CONSTITUTIONALISM IN CANADA

The course of modern constitutionalism in Canada has been a textbook case of constitutional politics as antidemocratic politics.¹⁴ The Canadian Charter of Rights and Freedoms (the "Charter")¹⁵ of

12. About two million adults were in jail or prison on any given day in 1998, see U.S. Dep't of Justice Bureau of Justice Statistics, *Correction Statistics* (last modified Feb. 28, 2000) <<http://www.ojp.usdoj.gov/bjs/correct.htm>>, and another 4.1 million on parole or probation, see U.S. Dep't of Justice Bureau of Justice Statistics, *Probation and Parole Statistics* (last modified Aug. 22, 1999) <<http://www.ojp.usdoj.gov/bjs/pandp.htm>>. The 98 executions of 1999 were the most in any year since 1951, which totaled 105. See *Death Penalty Information Center, Executions in 1999* (visited Apr. 10, 2000) <<http://www.essential.org/dpic/dpicexec99.html>>; *Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online* (visited Apr. 10, 2000) <<http://www.albany.edu/sourcebook>>.

13. It seems to me that, as far back as 1846, Marx and Engels had a very good grasp of the limits of the judicial independence, one that would predict such events as the violent confrontation in Moscow in September 1993:

The division of labour . . . manifests itself also in the ruling class as the division of mental and material labour, so that inside this class one part appears as the thinkers of the class (its active, conceptive ideologists, who make the perfecting of the illusion of the class about itself their chief source of livelihood), while the others' attitude to these ideas and illusions is more passive and receptive, because they are in reality the active members of this class and have less time to make up illusions and ideas about themselves. Within this class this cleavage can even develop into a certain opposition and hostility between the two parts, which, however, in the case of a practical collision, in which the class itself is endangered, automatically comes to nothing, in which case there also vanishes the semblance that the ruling ideas were not the ideas of the ruling class and had a power distinct from the power of this class.

Karl Marx & Frederick Engels, *The German Ideology: Part I*, in *THE MARX-ENGELS READER* 146, 173 (Robert C. Tucker ed., 2d ed. 1978).

14. Most of what follows is a summary of matters discussed in great detail in MICHAEL MANDEL, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* (Thompson Educ. Publ'g, rev. ed. 1994).

15. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

1982 was introduced primarily to thwart the aspirations of the French majority of Québec who were seeking to escape their second-class status and become “masters in their own house.” When the Québec provincial government started to exercise its considerable sovereign legislative authority under the constitution of 1867 in a way that challenged English hegemony (in a province eighty-percent French), the rest of Canada decided it was time to change everything so that everything would remain the same. The old constitution was declared, for the first time in history, to be amendable without Québec’s consent and sweeping constitutional changes were introduced to overrule Québec’s language legislation. The federal courts proved faithful executors of this federal policy, if not of the constitutional text itself. They twisted the words of both the new Charter and the old constitution to harass the independentist government, striking down its laws on the language of legislation, education and business signs, despite the fact that these laws used scrupulously democratic means to achieve the totally legitimate end of breaking the economic and social stranglehold of English in the province.¹⁶ Recently, with referenda on Québec’s independence approaching within a whisker of success, the government of Canada asked its hand-picked Supreme Court to come to the rescue, which it did with some classic antidemocratic constitutional reasoning: a “mere majority” would not be enough in a referendum to even *start* negotiations on independence; and, whatever international law said, and however many referenda it won, Québec could never achieve independence without the consent of the rest of Canada.¹⁷

Despite the absence of the word “property” in the Charter of Rights, the Supreme Court of Canada has, like other constitutional courts more fortunately endowed, faithfully defended the oligarchic market principle of “one dollar, one vote” against the democratic menace of “one person, one vote.” For example, the Supreme Court has used “freedom of expression” to entrench the fundamental human right of tobacco companies to advertise their lethal products.¹⁸ And, though the Supreme Court found “freedom of association” robust enough to include the right of companies to merge, it could not for the life of it find any room in the same concept for the right to collective bargaining, much less the right to

16. See MANDEL, *supra* note 14, at 19-38, 127-76.

17. See Reference re Secession of Quebec from Canada [1998] S.C.R. 217; see also Michael Mandel, *Un cour au service du gouvernement canadien*, LE DEVOIR, Oct. 1, 1998, at A9.

18. See RJR-MacDonald v. Canada (Attorney General) [1995] 3 S.C.R. 199; MANDEL, *supra* note 14, at 327-32.

strike.¹⁹ Canadian courts have also ensured that, through four federal elections and one national referendum, there have been no controls on campaign spending, because, following the inexorable “one dollar, one vote” logic of American jurisprudence, they struck them down as an interference with “freedom of expression.”²⁰ The Supreme Court has also decided, in acquitting one of the world’s major purveyors of Holocaust-denial literature, Ernst Zundel, that “freedom of expression” in Canada includes the right to tell deliberate Nazi lies.²¹ It has also equated “freedom of religion” with the right to do business seven days a week.²² And, while it has made a lot of noise about protecting the procedural rights of people charged with crimes and of refugee applicants, it has crafted its judgments so as not to interfere either with a rate of repression that (though dwarfed by the great example of the United States of America) has spiralled out of control, or with the restrictive immigration policies of one of the world’s richest countries.²³ While corporate criminals and racists seem to be able to take advantage of these procedural rights, for the usual suspects they seem to be mainly a way of making us feel better about more punishment.²⁴

Though women have won some decisions, the Charter has been a double-edged sword. Many cases, for example, in sports, labor relations, maternity benefits and child-care expenses, have pitted individual women, not against men, but against most other women.²⁵ The Supreme Court has also decided that the Charter includes the right of rapists’ lawyers to harass rape victims on the witness stand, but that it does not give a nurses’ union the right to say “the law is an ass.”²⁶ The Court’s belated defense of abortion rights did not include the right to abortion funding, which has had to be won, trench by trench, at the political level.²⁷ Similarly, the Court’s halting defense of gay and lesbian rights wound up looking like nothing more than an attempt to scramble atop a legislative bandwagon that had almost passed it by.²⁸ On the high-profile

19. See MANDEL, *supra* note 14, at 262-83.

20. See *id.* at 288-93.

21. See *id.* at 369-76.

22. See *id.* at 313-27.

23. See *id.* at 240-57.

24. See *id.* at 220-40.

25. See *id.* at 399-405.

26. *Id.* at 383-89, 281-82.

27. See *id.* at 428-33.

28. See *M. v. H.* [1999] 2 S.C.R. 3; *Vriend v. Alberta* [1998] 1 S.C.R. 493. *But see Egan v. Canada* [1995] 2 S.C.R. 513.

subject of aboriginal rights, the Supreme Court, with the aid of great rhetorical camouflage, managed to stall for a generation and actually to impose "reasonable limits" on rights that are written into the constitution in unlimited terms, including the accommodation of the rights of commercial extraction interests.²⁹ According to my colleague Kent McNeil, the Supreme Court's landmark decision on aboriginal rights was "simply perverse" in subscribing to the view that "what is good for Macmillan Bloedel [the paper company] is good for Canada."³⁰

III. BACK TO TUSHNET

Given the United States's enormous heft in the world, we can forgive our American cousins their natural tendency to navel gaze. And though Tushnet's excursions into comparative law are far too few, they are, nevertheless, fairly well-informed.³¹ They certainly avoid the cheerleading naivete characteristic of some of his colleagues.³² On the other hand, they highlight what I believe to be the central problem with the Tushnet approach, namely its effective detachment from the historical and political context of constitutional law, without which, I believe, it is almost impossible to comprehend. Let me give two examples from Canada, one of local, and the other of general significance.

Take the example of Canada's "Notwithstanding Clause."³³ Tushnet canvasses it as one possible constitutional way of dethroning the Supreme Court, though in a footnote he adverts to the fact that it "got caught up in the controversy over the status of Quebec, and something like a convention against using the override appears to have emerged."³⁴ This is approximately correct, pretty close in

29. See MANDEL, *supra* note 14, at 353-69; *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010.

30. *Has the Supreme Court finally got it right? "Yes and no," says Roberts Chair in Canadian Studies Kent McNeil*, YORK UNIV. GAZETTE, Apr. 22, 1998, at 3.

31. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). Nobody is going to worry much that he misspelled *Morgentaler*, Canada's *Roe v. Wade*, *see id.* at 139, but for the well-deserved next printing, maybe Princeton University Press could correct it!

32. See BRUCE A. ACKERMAN, *THE RISE OF WORLD CONSTITUTIONALISM* (Yale Law Sch. Occasional Papers 2d Series No. 3, 1997).

33. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33.

34. TUSHNET, *supra* note 31, at 221 n.51.

fact, but it glosses over something extremely important, namely the politics of the Notwithstanding Clause.

The Notwithstanding Clause was inserted in the Canadian Charter of Rights and Freedoms as a political compromise. The ruling Liberals' (federal government) main battle, as I explained above,³⁵ was with Québec (provincial government) over the status of French and English in the province. The federal Liberals brought the reluctant English-speaking provinces (what we call the Rest of Canada ("ROC")) on-side by inserting a clause in the Charter that would allow provinces to opt out of practically everything—everything that is, but those irreconcilable questions dividing the federal government and the government of Québec (for example, mobility rights, official languages, and minority language education rights). The Notwithstanding Clause is actually a major clue to the political purposes behind the Charter: everything could be overridden for our rights-loving Prime Minister Trudeau except the relatively minor rights having to do with his struggle with Québec. You could override equality, conscience, association, due process, and the rest of the big rights, but not the right to move to Québec and have your children educated in English there!

Nor is it a "convention" that prevents the clause from being used outside Québec: it is powerful institutions such as the federal government and the big-business media (who love the Charter as part of their hatred of real democracy). Their constant public veneration of the Charter has made use of the Notwithstanding Clause a political impossibility in almost all cases. Most likely, they are keeping it in reserve should there ever be a decision that really challenges their interests. Otherwise, the clause has a tendency, in Canadian judicial discourse, to *legitimate* judicial review. Every time the Supreme Court prepares to do something unpopular, it reminds everyone that the Notwithstanding Clause gives the legislatures the final say. Then it proceeds to declare that "fundamental dignity" requires such and such, and the Notwithstanding Clause is never used. The Notwithstanding Clause has become just another device in the elite game of constitutional politics. No doubt this would be its fate in the unlikely event that it was adopted in the United States.

35. See *supra* note 16 and accompanying text.

An example of broader significance is the question of "social rights." Tushnet argues that, if judicial review were abolished, it might be easier to insert social rights into the Constitution, because the main objection to them is precisely their enforceability:

Freed of concerns about judicial review, we might also be able to develop a more robust understanding of constitutional social welfare rights, which are recognized in many constitutions around the world. Generally, constitutions adopted after 1945 contain guarantees of such rights—to employment, to housing, to a minimally decent standard of living, and the like. Today as nations contemplate constitutional revisions—in Canada and the European Union, for example—strong voices urge that the new documents should contain a "Social Charter."³⁶

Once again, this is an analysis totally devoid of the political reality in which constitutional social rights actually live and make sense. In fact, the attempt to put unenforceable social rights in the constitution divided the Left in Canada. The (successful) opponents were opposed, not because we were against social rights, but because their insertion into the constitutional project was so obviously part of a strategy by Right-wing governments and sell-out Left-wing governments to legitimate their very concrete destruction of the public sphere through cuts to public health and education, privatization, deregulation, wage controls, "free" trade ("free" for those with the economic power to buy it) and so on. Their idea was to put social rights in the constitution instead of putting them *in force*, or to celebrate their inclusion in the constitution to make us forget that these very same people who were sponsoring social rights in the constitution were destroying them in practice. The same goes for the social rights in the European Union: an unenforceable sop to the workers to legitimate the highly enforceable total economic integration so desired by business.³⁷ And the same goes for all the social rights in the constitutions of the twentieth century, from the Mexican, through the Italian, to the South African. Italian constitutionalist Piero Calamandrei hit the nail right on the head when he said of the Italian Constituent Assembly:

Thus to compensate the forces of the Left for the *missed* revolution, the forces of the Right did not oppose the gathering up in the constitution

36. TUSHNET, *supra* note 31, at 169.

37. See Stephen J. Silvia, *The Social Charter of the European Community: A Defeat for European Labor*, 44 INDUS. & LAB. REL. REV. 626 (1991).

of a *promised* revolution . . . well knowing that, once the moment of crisis had passed, the reforming impulses would lose their urgency, and, once they had ceased to boil, could remain in waiting for another century.³⁸

To be fair to Tushnet, it is clear that the main problem with social rights in twentieth-century constitutions is that they have been enacted or interpreted (sometimes without textual support—as in the case of Italy and the European Union³⁹) as second-class, completely unenforceable rights, in a context of first-class, eminently enforceable property rights. So, their character as pure legitimation has been hard to miss. Tushnet does not make the error of thinking some good will come of unenforceable social rights in a framework of enforceable property rights. Instead, he wants to make *all* rights unenforceable. Does this make things better? That depends on whether unenforceable constitutional rights are a good or bad thing, on what role we might expect them to actually play. But, this is the one question that Tushnet does not investigate, besides the entirely noncommittal speculation that “in this context at least rhetoric may matter.”⁴⁰

IV. THE PROBLEM WITH POPULIST CONSTITUTIONAL LAW

And this is my major frustration with the book: its purely *legal*, as opposed to historical or political or philosophical, approach to these questions. This is clearly not limited to Tushnet’s discussions of the experience of other countries. It also dominates his own idea of “populist constitutional law.”

Tushnet devotes relatively little time to populist constitutional law, only seventeen out of one hundred and ninety-four pages of text,⁴¹ but this does not mean it is not important to him. In the preface, he describes his whole book as being “in the service of what I call populist constitutional law” and explains that it is populist “because

38. Piero Calamandrei, *Cenni introduttivi sulla costituente e sui suoi lavori*, in 2 PIERO CALAMANDREI, *SCRITTE E DISCORSI POLITICI* 461-62 (Norberto Bobbio ed., 1966) (original source in Italian, translation provided by the author).

39. See Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights under the European Community’s Legal Order*, 37 HARV. INT’L L.J. 307, 309 (1996).

40. TUSHNET, *supra* note 31, at 171.

41. See *id.* at 177-94.

it distributes responsibility for constitutional law broadly.”⁴² So, though the title may be *Taking the Constitution Away from the Courts*, the subtitle could be “and giving it to the people.”

But it is not the Constitution that the courts have administered for two centuries that Tushnet wants to give to the people. *That* Constitution, the racist and sexist document that entrenched slavery and protected the rich against having their debts not paid is headed for the trash can. The constitution he wants to give to the people is a radically pruned “thin” Constitution that is trimmed of everything but the Declaration of Independence and the Constitution’s Preamble. And even these documents are not to be taken literally. Not just because they remain stamped by sexism and racism (only “*men* are created equal” and even that does not seem to have included “*the merciless Indian Savages*”). In Tushnet’s vision, populist constitutional law is “law oriented to realizing the *principles* of the Declaration of Independence and the Constitution’s Preamble. More specifically, it is a law committed to the principle of universal human rights justifiable by reason in the service of self-government.”⁴³ Now that really is thin. If pressed to answer while hopping on one foot, like Hillel, Tushnet could probably reduce it all to the Golden Rule.

But what if the problem were not what the Constitution consisted of, or who was interpreting it, but constitutional interpretation itself? In other words, what good is constitutional law of any sort? Why bother? Not why bother with human rights or the Golden Rule, but why cast them in the form of constitutional law, populist or otherwise? I am not sure Tushnet even sees this question, because he writes:

We could defend populist constitutional law defined in this way by explaining why the idea of universal human rights is a good one.⁴⁴

No we couldn’t. To defend populist constitutional law, we would have to say why the good idea of defending human rights (let us forget the monumental question begging in this for a moment) should be carried on in the form of constitutional law (whatever that would mean without the courts). We can’t seriously think we’re

42. *Id.* at x.

43. *Id.* at 181 (footnote omitted) (emphasis added).

44. *Id.*

going to have a whole symposium about whether the idea of human rights is a good one. We would have to argue why this way is a good way of struggling for human rights, human liberation, human equality or however we might want to put it. Because a lot has been happening in the last 200 years. People have been struggling and learning and thinking about "human rights" in many nonconstitutional ways. They have been organizing and fighting and writing, not constitutions, but manifestos, books, articles, poems, songs, plays, movies and so on. If I were looking for blueprints or signposts, that is where I would look, not in the Declaration of Independence or in the Golden Rule.

Not only that, for almost all of this period, constitutional law has been just another obstacle in these struggles. We have to know why we should expect better of any other form of constitutional law than the one we've had. We have to at least be given some suggestions.

But Tushnet does not choose to answer any of these questions or even any version of them: "That would be a philosopher's task rather than a lawyer's."⁴⁵ So he gives us what he takes to be a lawyer's defense of populist constitutional law. And what is that?

There is another way of justifying populist constitutional law. The idea of universal human rights resonates powerfully with the historical experience of the people of the United States. Our public policies have been guided by that idea, imperfectly to be sure but consistently through our history. . . .

Astute observers have understood that the Constitution *was* a populist document, in the sense that the American people were constituted by our adherence to the thin Constitution.⁴⁶

So popular constitutional law based on the thin Constitution is legally justified by the fact that we are constituted by it (It's our constitution on account of we're constituted by it! "*Gee, Officer Krupke . . .*"). There's a legal argument for you: we're bound by it, like precedent.

There are two very serious problems with this. The first is whether we can even for a moment be thought to be constituted by a commitment to the idea of universal human rights. Ask yourselves, in what sense does this characterize American history?

45. *Id.*

46. *Id.* (footnote omitted).

Tushnet's proof is all of one page long and consists of quotes from Abraham Lincoln, Hector St. John Crevecoeur, and Frances Wright.⁴⁷ But aren't things a little more complicated than that? Aren't we leaving a few things out? Like the Ku Klux Klan, Joe McCarthy and the whole American Right, for example? Is American history not *also* characterized by slavery, racism, exploitation, imperialism, and the systematic violation of human rights?⁴⁸

Here is another, rather more true-to-life view of what "constitutes" American history from Eric Foner's recent review of the American twentieth century as it appeared in the pages of the *Nation*:

The first [central development] is the triumphant growth of American corporate capitalism (overcoming disasters like the Great Depression and the challenge posed by socialism and communism) and the concomitant emergence of the United States as the world's pre-eminent power, striving, sometimes with calamitous results for the rest of mankind, to remake the globe in the American image. The second is the unfinished struggle between the powerful and the disempowered, the free and the less free, the haves and the want-to-haves, over what kind of country this hegemonic power is and ought to be.

....

As this century turns, America's historic sense of mission has been redefined to mean the creation of a single global free market in which capital, natural resources and human labor are nothing more than factors of production in an endless quest for ever-greater productivity and profits, while activities with broader social aims are criticized as burdens on international competitiveness.

....

Even as the United States has risen to become the predominant international power, however, conflict has persisted over the nature of American society itself and what its role in the world should be. This debate has involved not only political leaders and captains of industry but the struggles of anonymous men and women protesting their exclusion from the "pursuit of happiness" promised by the Declaration of Independence and the "blessings of liberty" enshrined in the Constitution. Often in the face of powerful opposition and government repression, popular social movements of workers, feminists, civil libertarians and many others have done much to shape the twentieth

47. *See id.* at 182.

48. Is it really necessary to give citations for this proposition? Just read anything by Noam Chomsky.

century, extending American rights and freedoms into realms inconceivable in 1900.

....

History, however, is not a linear narrative of progress. Rights may be won and taken away; gains are never complete or uncontested, and popular movements generate their own countervailing pressures. As the century draws to a close, long-discredited ideas (social Darwinism, belief in inborn racial inequality and the “natural” differences between the sexes) again occupy respected positions in public discourse. Today’s attacks on affirmative action, abortion rights, freedom of expression and the separation of church and state remind us that, as the abolitionist Thomas Wentworth Higginson put it during the Civil War, “revolutions may go backwards.” Nonetheless, America at the turn of this century is a far freer, more egalitarian society than in 1900, the result not of the immanent logic of a supposed American Creed of justice and equality but of struggles on picket lines and at lunch counters, in polling booths and even in bedrooms.

....

From the Spanish-American War to Vietnam, citizen movements have also challenged the dominant imperial vision of American power and the ways the United States has ridden roughshod over others’ rights of self-determination. Today’s challenges to the ideology of globalization by a revitalized labor movement, environmentalists and others are heirs to a long tradition that imagines this country’s worldwide role as the promotion of greater social equality rather than military power and corporate profits.

....

Of the questions that have preoccupied Americans for the past two centuries none are more pressing than the vast inequalities in wealth, income and power spawned by capitalism’s heedless expansion. . . .

....

. . . Yet in our own country, democracy is in disarray: Fewer than half the population bothers to vote, and distrust of government as an alien and intrusive force is pervasive. Much of this disillusionment stems from the popular belief (not unreasonable, based on recent experience) that our political system is so corrupted by money that only wealthy individuals and giant corporations can expect to have their interests attended to by the state. The challenge of the new century is whether this disillusionment with the functioning of our democracy can become the basis for a revitalization of the traditions of American radicalism.⁴⁹

49. Eric Foner, *The Century: A Nation’s-Eye View*, NATION, Jan. 10, 2000, at 5-7.

If this analysis rings as true as Tushnet's rings false, it is because nothing could be clearer than that American history is "constituted" by a complex and contradictory reality, much closer to Marx's and Engels's history as "the history of class struggles" than a commitment to "the idea of universal human rights." And, thick or thin, the Constitution has been most often on the dark side of this struggle: legitimating racism, fighting affirmative action, and corrupting the political system with wealth.

It is the farthest thing from the truth to say that the thin Constitution, no matter how thin you make it, is what "constitutes" us. It's almost like saying *The West Wing* is what the American Presidency is all about, instead of what some people would like us to think it's all about.

Is it not, at least, a "noble lie"? Should we not be "constituted" by our best aspirations instead of by our ugly realities? I have no problem with aspirations. I have a problem with them masquerading as reality. Then they degenerate into apology and legitimation. I want to keep the "is" and the "ought" separate. It promotes clear thinking (remember the famous debate on this between Hart and Fuller⁵⁰) and clear thinking is essential if one is going to do battle effectively. But separating the ideal from the real is what constitutional lawyers seem to find impossible. They take an ugly reality and dress it up in abstract principle and then tell us we are powerless to change it. We are bound by it (it's the law!). That's how the real constitutionalism has been able to make itself an obstacle to human rights. A fancy way for lawyers to tell us we can't have them: you can't abolish debt, that's impairment of contracts; you can't abolish slavery, that's interference with property rights; you can't enact the ten-hour day, that's a violation of due process; you can't have affirmative action, that's a violation of the equality clause; you can't put limits on campaign spending, that violates freedom of expression.

Tushnet doesn't want to use his populist constitutional law in this way, of course; he wants to take the ugly reality, dress it up in principle and use it to advance human rights, not obstruct them. Does that make any difference?

50. See H.L.A. Hart, *Legal Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 598 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

As I said earlier, I am convinced that Tushnet's project of taking the Constitution from the courts will fail. Because as long as there is universal suffrage on the one hand and an oligarchy of property on the other, the oligarchs will want their lawyers in place to police the boundaries. Democracy of the "one person, one vote" variety is just too dangerous to the oligarchy of private property without lots of what the Italian Socialist Nenni called "diaphragms."⁵¹ It seems to me that the only way to fight this is to fight the premise: that constitutionalism is anything more than ideology seeking to mask itself as interpretation.

Tushnet has gone half way but not all the way. He has challenged the courts' final say but he has not challenged the project of constitutional law itself. In this sense, his achievement is in the Dworkinian tradition of making some room for the legal intellectual to engage in constitutional argument free of any "standing" issues or inferiority complexes. Dworkin's problem was democracy, because he wanted to defend an activist liberal court from the claim that it was undemocratic.⁵² Tushnet's problem is the different one of how to wrest the constitutional monopoly from a politically conservative court. Exit Dworkin, enter Tushnet.

But the method of the old constitutionalists and the new constitutionalists is the same. It's a method that allows them to avoid debate on the real issues (right and wrong, good and bad, left and right, what to do?) and, instead, to dress up their positions as constitutional interpretations. Far be it from them to duke it out with mere mortals on an equal footing. They are going to tell us why we are constitutionally *bound* to do what they are advocating, whether we like it or not. It's the same old phony constitutional project that the judges and lawyers have used, mostly against, but sometimes, though in a very limited way, in favor of Tushnet's conception of human rights (which, in substance, is probably not far from my own). And my objection to it is not only that the Right-

51. One could say that the secret vice of this constitution is the same one that can be found at every stage of our history, from the Risorgimento on: distrust of the people, fear of the people and sometimes terror of the people; the need to place between the expression of the popular will and its execution as many obstacles, as many diaphragms, as possible.

Pietro Nenni, *La Costituzione della Repubblica nei lavori preparatori dell'Assemblea Costituente Roma* (Mar. 10, 1947), in *COSTITUENT ASSEMBLY 324* (1970) (original source in Italian, translation provided by author).

52. See generally RONALD D. DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); RONALD D. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

constitutionalists will always outnumber the Left-constitutionalists (because that's the class nature of the legal profession), but that its very method is one that excludes everybody else. And that really dooms the project from a human rights point of view, dooms it to forever reproduce only those human rights solutions that make sense to the legal profession.

Constitutional law can no more be populist than the Pope can be Jewish or the Chief Rabbi Catholic. This populism business is, in the end, just a way for the professors to legitimate themselves in their arguments with the courts. They're not going to actually leave anything up to the people. Populist constitutional law, in or out of Tushnet's Utopia, will be like the old joke about the Soviet definition of an automobile ("a four-wheeled motorized vehicle driven by the toiling masses in the shape of their freely elected representatives"): constitutional law interpreted by the people in the shape of their freely elected law professors.

So thanks for the critique of the courts, Mark, but no thanks for populist constitutional law.

