such an atmosphere and thus become the first victim of the Tragedy of the Commons.

The *novus ordo seclorum* that the founders founded was new precisely in that it expected people to behave self-interestedly. Unlike older political systems that had aimed at the perfection of human nature ("laws make men better"), the American system was designed to frustrate zealotry through what we should call sublimation. Commerce, not Christianity, was to be the established all-American religion. In Europe, the dominant fact of political life for hundreds of years had been sectarian conflict—poor, nasty, brutish, and long. Our Constitution would turn loose this fertile source of libidinal energy on a nobler objective than the honor of God or the salvation of the soul, namely, getting rich.

Whether or not historians of the Federalist period will be persuaded by this interpretation of events, the worthiness of Berns's vision cannot be denied. A world in which commercial competition replaces religious strife has everything to be said for it. Wise governors will, if they have the wits, create a civic environment in which people may behave "naturally"—as human beings, not angels—and yet at the same time constructively. This is the great consequentialist argument for property rights.

A review can seldom do justice to a serious book, and I fear having judged Berns's very serious book too harshly. Much of my criticism probably boils down to the different perspectives that lawyers and political theorists have of the subject. Unlike most lawyers, Berns is concerned less with the problem of interpretation than with understanding larger questions of democracy. It is refreshing to get these crosslights on a Constitution that is equally the property of all serious people and, to our good fortune, our fundamental law as well.

RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW. By Mark Tushnet.[1] Cambridge: Harvard University Press. 1988. Pp. x, 318. $35.00.

Earl M. Maltz[2]

Professor Mark Tushnet is one of the most prolific and articulate critics—from the left—of mainstream constitutional theory.

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This book is an ambitious effort to integrate and expand his critique of modern constitutional scholarship. The book is divided into two parts. In Part I Professor Tushnet appraises the major competing "grand theories" of constitutional law; in Part II, which draws on the currently fashionable theory of "classical republicanism," he analyzes a series of specific doctrinal problems.

As Tushnet acknowledges, few of the insights in Part I are new. By contrast, much of Part II is extremely interesting; his discussion of the Court's approach to procedural due process is particularly enlightening. The difficulty with Part II is that the analysis would apply equally well to similar policy decisions adopted by the legislature on the same issues; Tushnet fails to address institutional concerns generated by the fact that the *judiciary* is imposing the relevant standards.

In a sense this criticism is unfair; Tushnet purports only to be treating the doctrinal developments "as a social phenomenon, the expression of a technocratic vision of society." But a plausible analysis of constitutional doctrine must go beyond the simple question of whether the doctrine is "good" in the abstract; it must also ask whether the federal judiciary should impose that doctrine in the face of contrary decisions by other branches of government. Tushnet's answer seems to be that courts are simply another locus of political power, whose actions are to be judged by the same criteria that apply to other governmental bodies. This argument in turn is a natural outgrowth of his critique of grand theory in Part I.

Either implicitly or explicitly, Tushnet's critique raises three basic, interrelated issues.

1. *Why is Grand Theory of Interest?*

The first key question is whether a grand theory of constitutional adjudication is necessary. Tushnet claims that the current interest in grand theory "reflects, indeed is the reflection of, the crisis of contemporary liberal political theory." In fact, however, the basic idea of a grand theory addresses more general concerns. The Constitution is invoked as a device to allow judges to avoid the normal operation of legal conventions. The competing convention most often discussed is that judges are required to follow the statutes adopted by the legislature. One possible approach would be to allow judges to ignore all statutes that they believe unjust; at the other extreme, we might require judges to enforce all statutes of whatever character. To my knowledge, neither Tushnet nor any other American legal scholar seriously advocates either of these extreme positions. (Even the most "realistic" of realists will want the Court to eschew *some* just causes, if only to preserve its time.) The

only remaining alternative is to allow or require judges to ignore statutes under a limited set of conditions. A theory of constitutional law is simply a description and explanation of those conditions; if it purports to cover a wide range of circumstances it is, in Tushnet's lexicon, a "grand theory."

Viewed from this perspective, grand theory responds to concerns that transcend liberal political theory. Of course, the content of particular grand theories may reflect the concerns of liberalism, republicanism, Marxism, or some other political philosophy. But to associate the general idea of constitutional theory with any particular school of political thought only confuses the basic problem of the relationship between the courts and other power centers in society.

2. *Is Construction of a Coherent, Useful Grand Theory Possible?*

Tushnet suggests that the answer is no. He posits the following test for constitutional theories:

> [D]etermine the best and worst politically feasible outcomes you can imagine from legislatures following the time that you are applying the theory. An approach to constitutional law . . . is indefensible if it would allow judges to uphold the worst and invalidate the best politically feasible programs that legislatures are likely to devise in the near future.

Although I do not agree with Tushnet on this point,[3] I will concede arguendo that none of the currently popular constitutional theories passes this test. It does not follow, however, that no coherent, useful grand theory can be constructed.

Consider an approach which might be labeled the "minimal representation" theory. This theory would consist of two simple rules. First, courts would require all legislative decisionmakers to be selected according to the principle of one person, one vote. Second, courts would enforce all statutes adopted by legislatures so constituted—irrespective of contrary constitutional provisions.

The minimal representation approach would not be my first choice as a grand theory of constitutional adjudication. Nonetheless, it clearly passes Tushnet's test for grand theories. Following minimal representation analysis, the courts would not invalidate the best politically feasible program that is likely to be adopted in the near future (unless one's favorite program is one that requires legislatures to be malapportioned). Moreover, the theory would obviously have important consequences for the structure of American

3. *See* Maltz, *Foreword: The Appeal of Originalism*, 1987 UTAH L. REV. 773.

government. As this example demonstrates, construction of a coherent, useful, grand theory is possible.

3. *Is Construction of an Uncontroversial Grand Theory Possible?*

Here the answer must be no. Any grand theory will reflect fundamental premises about the proper role of government and the appropriate function of courts. These premises are likely to be controversial; moreover, as premises, they are not susceptible to logical proof. Therefore, the grand theories generated by the premises will inevitably be controversial as well.

Here again, the minimal representation theory provides an instructive example. The theory rests on two premises. First, that effectuating the decisions of a properly chosen legislature is invariably of paramount importance to the legal system. And second, that even in the absence of an explicit constitutional mandate, the courts are the appropriate agency to police the legislative selection process. Nearly everyone rejects the first premise; some, including most originalists, disagree with the second. Thus we would all reject the minimal representation theory. Because our reasons involve basic premises, however, none of us would be demonstrably either right or wrong in doing so.

* * * *

Although Tushnet fails in his effort to totally discredit the search for grand theories of constitutional law, his analysis contains important lessons for those who would construct such theories. Grand theorists must be more precise, both in specifying their premises and describing the content of the theories themselves. Such precision will not end the debate over the theories; it will, however, at least make clear what the debate is about.

FEDERALISM: THE FOUNDERS' DESIGN. By Raoul Berger.[1] Norman, Oklahoma: University of Oklahoma Press. 1987. Pp. viii, 223. $16.95.

Donald O. Dewey[2]

Professor Raoul Berger says he came reluctantly to his advocacy of states' rights. He was somewhat embarrassed by the company he had to keep, for he had long associated the doctrine with

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