Book Reviews

HAS THE HOUR OF DEMOCRACY COME ROUND AT LAST? THE NEW CRITIQUE OF JUDICIAL REVIEW

ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT. By Cass R. Sunstein.[1] Harvard University Press. 1999. Pp. 290. $29.95. (Hardcover)

TAKING THE CONSTITUTION AWAY FROM THE COURTS. By Mark Tushnet.[2] Princeton University Press. 2000. Pp. 242. $17.95. (PB)

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After a period in which inquiries into constitutional interpretation reigned supreme in American constitutional theory, the institutional and political questions raised by judicial review are again occupying the attention of American constitutional scholars. The new scholarship on judicial review discloses a subtle shift in the well-worn (some would say worn-out) argument over the legitimacy of judicial review in a democracy. The most sophisticated scholarly contributions are avoiding the old dispute over whether judicial review is countermajoritarian.[4] They

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4. For a useful history of the debate over judicial review, see generally Laura

are asking a different question: what kind of judicial review can be justified in a deliberative democracy? This shift is important because it offers the potential to move away from a stale debate in which believers in constitutionalism and rights face off against believers in democratic accountability.

The immediate background of this theoretical shift is the new, complex environment of American politics at the turn of the century. The Supreme Court is emphasizing anew that the Constitution provides for a limited government of enumerated powers rather than giving broad grants of plenary authority.[5] At the same time, the Court is arguably de-emphasizing its post-New Deal role as a defender of individual rights, especially rights of racial and religious minorities. Moreover, it is increasingly apparent that the Court is only one actor in broad political and social debates over the scope of rights and the limits of democratic decisionmaking.

The new environment for judicial review is reflected in Cass Sunstein's *One Case at a Time* and Mark Tushnet's *Taking the Constitution Away from the Courts*. Although Sunstein and Tushnet have different takes on what the Court is doing and, especially, on what should become of the power of judicial review, their theories nonetheless illuminate each other. Significantly, both Sunstein and Tushnet examine the Supreme Court from an institutional perspective, rather than focusing on theories of constitutional interpretation. Their books are therefore well suited to help us understand the legal and political context of judicial review at the turn of the century.

In this review, I will first sketch the main elements of the new politics of judicial review; a politics that influences the way Sunstein and Tushnet approach the Supreme Court. I will then discuss the main theoretical arguments advanced by each book.[6] In the final part, I will offer some thoughts about how the new democratic critique of judicial review should proceed amid the context of what I shall call our contemporary "democracy of rights."

Kalman, *The Strange Career of Legal Liberalism* (Yale U. Press, 1996).

5. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995).

6. Theoretical, that is, as opposed to doctrinal arguments. In particular, Sunstein's book contains lengthy doctrinal discussions of recent Supreme Court opinions that are beyond the scope of this review.

I. THE NEW POLITICS OF JUDICIAL REVIEW

On a familiar understanding of the American polity, the primary danger to constitutional rights originates from ignorant state legislatures and an occasionally whimsical Congress. The Supreme Court stands ready to strike down statutes that infringe civil rights and civil liberties. The contemporary politics of rights is far more complex than this simple picture allows. First, the Court appears to be retreating from its role as a stalwart defender of constitutional rights. Tushnet begins his book with the Court's invalidation of the Religious Freedom Restoration Act[7] (RFRA) in *City of Boerne v. Flores*[8] and it is my impression that many scholars were taken aback, not only by the Court's role in diminishing the rights of religious groups, but by the Court's emphatic insistence on judicial supremacy. The Court's retreat is especially evident with respect to civil rights. The cases involving affirmative action such as *City of Richmond v. J.A. Croson Co.*[9] are certainly examples, but scholars have been especially critical of the course the Court has charted in voting rights, beginning with *Shaw v. Reno*[10] and *Miller v. Johnson*.[11]

At the same time that the Court has retreated, Congress has been busy expanding on its past legacy of protection for civil rights by attempting to redress arguable violations of rights by the Court itself. During the Bush administration, one of Congress's main achievements was the Civil Rights Act of 1991,[12] an act that served to reverse several Court decisions that hurt civil rights in the area of employment discrimination. Congress was not satisfied with simply reversing the Court's statutory decisions, however. It also enacted important new laws such as the Americans with Disabilities Act[13] that created new legal rights in an area of discrimination in which the Court has never been active.

Any fair description of the institutional environment of judicial review has to account therefore for the phenomenon of Congress at least on occasion having greater solicitude for indi-

7. Pub. L. No. 103-41, 107 Stat. 1488 (1993).
8. 521 U.S. 507 (1997).
9. 488 U.S. 469 (1989).
10. 509 U.S. 630 (1993).
11. 515 U.S. 900 (1995). For a comprehensive critique of these cases, as well as an excellent bibliography, see J. Morgan Kousser, *Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction* (U. of North Carolina, 1999).
12. Pub. L. No. 102-166, 105 Stat. 1071 (1991).
13. Pub. L. No. 101-336, 104 Stat. 327 (1990).

vidual rights than the supposedly rights-conscious judiciary. This concern has continued through the 1990s. In 1994 alone, Congress and the President approved the Freedom of Access to Clinic Entrances Act,[14] the Violence Against Women Act,[15] and the Drivers' Privacy Protection Act.[16]

The Court's new reluctance to vigorously defend individual rights and the steady action by the political branches to protect rights has important implications for traditional justifications for judicial review. Under the famous justification that derives from footnote four of *Carolene Products*,[17] judicial review, especially review based on the more ambiguous clauses in the Constitution, is justified if it serves to open the political process to citizens who are excluded or protects racial and religious minorities from legislation based on prejudice. If, however, the Court acts to *restrict* the political process and *refuses* to acknowledge the operation of racial and religious prejudice in the political system, any justification of judicial review based on the protection of the rights of minorities is seriously damaged. Since this justification has arguably provided the main source of legitimacy for the Court's activism in the post-New Deal period, this poses a serious theoretical problem for scholars, as well as a practical political problem for the Court.

At the same time, no one doubts that the Court stands ready to protect individual rights in a wide variety of contexts. In the course of his argument for judicial minimalism, Sunstein provides a very useful list of ten core principles now recognized by nearly everyone that constitute the foundation of contemporary constitutional law. Sunstein's principles include protection against unauthorized imprisonment, protection of political dissent, the right to vote, religious liberty, and protection against physical invasion of property. (pp. 64-65) Sunstein is certainly correct that the Court stands ready in some sense to vindicate all of these rights. What he does not point out is that the political branches stand ready as well, and have even acted to preserve such rights through legislation.

It might be objected that Congress has very recently enacted legislation that is deeply problematic from the standpoint of these core principles. While the 1990s saw significant con-

14. Pub. L. No. 103-259, 108 Stat. 694 (1994).
15. Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (1994).
16. Pub. L. No. 103-322, Title XXX, 108 Stat. 2099 (1994).
17. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938).

gressional action to protect individual rights, it also saw the passage of legislation that was severely criticized by legal liberals, such as the Illegal Immigration Reform and Immigrant Responsibility Act[18] (IIRIRA), the Antiterrorism and Effective Death Penalty Act[19] (AEDPA), and the Prison Litigation Reform Act[20] (PLRA). No less a civil libertarian than Anthony Lewis recently criticized President Clinton for signing all three laws and argued "the years since 1992 have been as bad a period as any in memory for civil liberties in the United States."[21]

The enactment of this legislation actually confirms the existence of the new politics of judicial review. For it is very unlikely that the Rehnquist Court will severely hamper the operation of any of these laws.[22] We may agree with Lewis that we do not have a civil libertarian Congress or President, but we do not have a Court conscious of civil libertarian values either. All three branches of government are arguably dominated by a certain bloody-mindedness when it comes to the rights of aliens and prisoners. This does not help justifications of judicial review that depend on positing a unique role for the Court in protecting individual and minority rights.

The new politics of judicial review, then, is not one in which a majoritarian, rights-violating Congress faces off against a minoritarian, rights-conscious Court. Rather rights, to borrow a term from the financial world, are "in play." They are an arena for competition, cooperation, conflict, and consensus among the branches of government, seemingly all at the same time. Since no government institution has a strong comparative advantage in protecting fundamental rights, traditional justifications for judicial review are giving way to new arguments and concerns. The books under review here exemplify this trend. As I shall argue below, however, they certainly do not exhaust the argumentative possibilities.

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18. Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 (1996).

19. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

20. Pub. L. No. 104-134, 110 Stat. 1321, 1321-66 (1996).

21. Anthony Lewis, *A Bad Time for Civil Liberties*, 5 Ann. Surv. Int'l & Comp. L. 1, 10 (1999); see also *Symposium: United States Immigration Policy at the Millennium*, 113 Harv. L. Rev. 1889, 1889-1998 (2000).

22. Among other reasons that could be cited, AEDPA and PLRA were intended to codify decisions made by the Burger and Rehnquist Courts that restricted rights of appeal by prisoners. See generally Mark Tushnet and Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 Duke L.J. 1 (1997). The Court is not likely to overturn statutes that ratify its decisions.

II. SUNSTEIN'S JUDICIOUS MINIMALISM

In *One Case at a Time*, Cass Sunstein provides a theory of judicial review that captures something of the zeitgeist and provides a blueprint for the future of judicial review. Sunstein defends "judicial minimalism," the idea that in controversial constitutional cases, the Court should usually refrain from making sweeping, Warren Court-style statements of principle and also abstain from rulings that apply across the board. Unlike believers in judicial restraint, a judicial minimalist is perfectly comfortable with invalidating laws that conflict with the Constitution, but in doing so, he leaves many issues undecided. Since minimalist decisions do not decide all of the relevant issues, they leave a considerable space for political debate and discussion. Judicial minimalism thus promotes democratic deliberation. (p. 4) One of Sunstein's best examples is *Washington v. Glucksberg*.[23] The Court certainly did not foreclose further deliberation over the right to physician-assisted suicide because the case did not affect any decision by individual states to either encourage or prohibit this practice.

An account of Sunstein's position which emphasized nothing but its minimalism and contrasted it with more "principled" theories of judicial review would miss the institutionalist and fallibilist character of his theory. Sunstein reminds us many times that judges, no less than legislators, are human and prone to error. It is a signal virtue of his theory that it takes this reality into account in a way not approximated by any other popular theory of judicial review.

At the same time, as I noted in Part I, Sunstein gives minimalism a "substantive core" of constitutional commitments, in the form of a list of lines that cannot be crossed. (pp. 63-68) Sunstein develops his theory of minimalism with care in the first four chapters, but most of the book consists of explorations of recent Court decisions (in very long chapters that read like law review articles). Sunstein also defends minimalism against legal theorists like Justice Scalia, who would apply constitutional rules as widely as possible across different areas of constitutional doctrine, and Ronald Dworkin, who favors a theory grounded in deep principles worked out by Herculean justices.

The strengths of this book are several. Sunstein performs a very useful service in identifying minimalism as an alternative to

23. 521 U.S. 702 (1997).

both judicial activism and restraint in the debates over judicial review. I think there is little doubt that Sunstein has, in his idea of minimalism, captured something important about the way the Supreme Court has operated in certain recent decisions. At the same time, Sunstein has advanced the argument over judicial review by stressing the institutional context in which the justices operate. This is a perspective too often ignored by scholars who approach the Court from the standpoint of a theory of interpretation, as if the Court simply consisted of one Supreme Justice. Finally, the idea of a substantive core to minimalism is useful in reminding us that there is a great deal of agreement over the substance of contemporary constitutional law.

As an approach to understanding the Supreme Court in a certain mode, then, Sunstein's book is helpful. But as a broader account of what the Court has been doing to constitutional law during the 1990s, his theory must be accounted a failure. Indeed, while Sunstein's general orientation as a scholar is empirical and practical, he neglects to make an empirical case for his central claims that "[t]he current Supreme Court embraces minimalism".... [J]udicial minimalism has been the most striking feature of American law in the 1990s." (p. xi) These are sweeping generalizations, yet Sunstein makes no attempt to back them up by showing that most recent constitutional decisions have been minimalist.

Sunstein defines minimalism along two dimensions: whether decisions are narrow or wide and whether they are shallow or deep. Ideally, minimalist decisions are both narrow and shallow. (p. 10) They are narrow in that the Court simply decides the instant case without anticipating how other analogous cases might be resolved. They are shallow in that they do not attempt to justify the result through a discussion of basic constitutional principles. By contrast, maximal decisions are wide and deep. Sunstein's best twentieth century examples of maximal decisions are *Brown v. Board of Education*[24] and *Reynolds v. Sims*.[25] (p. 17)

While Sunstein discusses a number of important recent constitutional cases, not many of them actually fit his definition of minimalism. One of his principal examples of minimalism, *United States v. Virginia* (VMI),[26] fails his own test in that it was a deeply theorized opinion, although deciding a narrow ques-

24. 347 U.S. 483 (1954).
25. 377 U.S. 533 (1964).
26. 518 U.S. 515 (1996).

tion. (pp. 18-19) As I will show below, other examples he gives of minimalist decisions such as *United States v. Lopez*[27] are open to serious question. This leaves Sunstein with just three cases that meet his definition of minimalism: *Washington v. Glucksberg*,[28] *Romer v. Evans*,[29] and *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.[30] Whatever else one may think of Sunstein's theory, he makes no serious attempt to substantiate his claim that the current Court is mostly or typically minimalist.

In addition, Sunstein makes little effort to argue against some obvious counterexamples to his thesis of the current Court's devotion to minimalism. He makes testing his thesis more difficult by refusing to specify when the period of "minimalism" began. For example, did it begin before *Planned Parenthood of Southeastern Pennsylvania v. Casey*?[31] *Casey* was clearly a wide and deep opinion in Sunstein's terms, yet he does not even mention it. He does not discuss the recent racial redistricting cases such as *Shaw v. Reno*[32] and *Miller v. Johnson*.[33] These decisions are especially significant counterexamples to Sunstein's thesis in that they established a brand new cause of action based on the idea of "racial gerrymandering."

Sunstein does discuss briefly the Court's commerce clause decision in *Lopez*, regarding it as "emphatically both narrow and shallow" because the Court "justified its decision by reference to a set of factors, not by a broadly applicable rule, and it gave no deep account of federalism." (pp. 16-17) This is far too quick. In the first place, *Lopez* is not primarily concerned with federalism, but with the limits of the power of Congress. The opinion starts with an invocation of "first principles,"[34] and the fundamental doctrine that "[t]he Constitution creates a Federal Government of enumerated powers."[35] It provides a historical review of all significant commerce clause precedents and organizes them into three general categories.[36] The Court then announces a test to resolve the constitutionality of legislation asserted to

27. 514 U.S. 549 (1995).
28. 521 U.S. 702 (1997).
29. 517 U.S. 620 (1996).
30. 518 U.S. 727 (1996).
31. 505 U.S. 833 (1992).
32. 509 U.S. 630 (1993).
33. 515 U.S. 900 (1995).
34. 514 U.S. 549, 552 (1995).
35. Id.
36. Id. at 552-59.

substantially affect interstate commerce: if "economic activity"[37] is regulated, then the legislation is constitutional. In defending its test, the Court argues that allowing more leeway to find substantial affects on interstate commerce would mean that "Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example."[38] The Court implied that any future legislation involving such regulation would be found unconstitutional.[39]

Lopez thus poses a more complicated problem for Sunstein's theory than his brief discussion of the case reveals. The Court clearly signaled that the "economic activity" test would be applied to future cases, which makes the opinion "wide" in Sunstein's sense. More damaging, the opinion was (emphatically) not shallow, but deep in its wide-ranging discussion of precedent and fundamental reliance on the old principle that Congress is limited to the powers enumerated in Article I of the Constitution. There is therefore little reason to think that the current Court typically inclines toward minimalism in Sunstein's terms.

One of Sunstein's minimalist justices is Justice O'Connor. Sunstein has to be aware that many constitutional scholars (including Tushnet, his casebook co-author)[40] regard Justice O'Connor as one of the more unprincipled justices in recent history, yet he does nothing to defend her record. In this respect, the argument presented in *One Case at a Time* is much more a defense of the position of Justice Sunstein than any justice currently on the Court. O'Connor, in fact, is barely mentioned. Sunstein is far more comfortable with Justices Ginsburg and Breyer, reviewing some of their key opinions at length. As noted, however, Justice Ginsburg's important opinion in VMI does not fit Sunstein's definition of minimalism.

I conclude reluctantly that Sunstein's book does not meet the high standard he set in his first major effort on constitutional theory, *The Partial Constitution*.[41] Judicial minimalism is indeed defined carefully and Sunstein has a few good examples of

37. Id. at 559.

38. Id. at 564.

39. The Court followed up on its insistence on the link to economic activity in striking down a provision of the Violence Against Women Act in *United States v. Morrison*, 529 U.S. 598 (2000).

40. See Mark Tushnet, *Taking the Constitution Away from the Courts* 112 (Princeton U. Press, 1999).

41. See Cass R. Sunstein, *The Partial Constitution* (Harvard U. Press, 1993).

minimalism in action. That is not enough, however, to constitute what he seems to want—a general theory of judicial review in the 1990s.

III. TUSHNET'S THIN CONSTITUTION

In *Taking the Constitution Away from the Courts* Mark Tushnet concentrates on making his title theoretically plausible. He does not present a well-worked out plan to eliminate judicial review, but that is not his main purpose. Tushnet is trying to get scholars to "think beyond the box" in imagining a world in which the task of providing authoritative (as opposed to merely advisory) constitutional opinions is far more widely distributed than it is now. In doing this, he immediately faces the problem of how to conceive of constitutional law. For if that law is defined by the doctrines issued by the Supreme Court, then Tushnet's theoretical position will be frustrated at the outset. Under a Court-centered definition of constitutional law, any constitutional opinions offered by those outside the Court will only have validity to the extent that the Court recognizes them. Since such a definition is contrary to the project Tushnet wants to develop, Court-centered constitutional law has to go.

To achieve an understanding of constitutional law that does not depend on the Court, Tushnet introduces the idea of the "thin" Constitution interpreted through "populist" means. (pp. 9-14) By the thin Constitution Tushnet means the abstract principles articulated in the Declaration of Independence and the Preamble to the Constitution. Tushnet argues that these principles, however general they may be, still have great persuasive force in public discussions of the Constitution's meaning. They can therefore serve as the building blocks of an alternative understanding of constitutional law, alternative, that is, to the Supreme Court's understanding.

Tushnet begins his substantive discussion by taking up the question of how to interpret the Constitution outside the federal courts. He compares the respective abilities of Congress and the Court to interpret the Constitution because he knows that many doubt the ability of Congress to take the Constitution seriously. Here, however, Tushnet seems to ask a question that is at odds with the larger purposes of his enterprise. Asking whether members of Congress can offer sophisticated interpretations of the Constitution (as Tushnet does in his discussion of the flag burning cases), assumes that Court-like, legalistic interpretations

of the Constitution should constitute the baseline for comparison. Since the whole notion of populist constitutional law is not particularly legalistic to begin with, this misses the mark.

A better question, one consistent with Tushnet's introductory discussion of the invalidation of RFRA in *City of Boerne*,[42] is whether Congress takes constitutional rights seriously. Members of Congress may not reason in the same manner as justices, but politics may have a logic of its own, a logic that is equal to the task of providing constitutional meaning, even as it may discomfit legal scholars who are comfortable with the more formal style of reasoning characteristic of legal briefs and Court opinions. Tushnet should have spent more time reviewing Congress's record on fulfilling the broad purposes of our constitutional order (such as the protection of individual rights) rather than apologizing for the inability of its members to mimic the judicial style.

Tushnet hits his stride when he asks whether the Constitution is "incentive compatible" or self-enforcing. (pp. 95-96) He argues that with respect to federalism and separation of powers matters such as impeachment, the Constitution has indeed proven to be self-enforcing. That is, the constitutional order has preserved itself over time without the need for intervention from the Court. At this point, I can imagine many scholars objecting that the Constitution cannot be expected to be self-enforcing with respect to fundamental rights. After all, they might say, one characteristic feature of majoritarian democracy is its routine use of power to violate the rights of minorities. That's what majorities *do*. They cannot be left with the responsibility of enforcing constitutional rights when their self-interest is antithetical to that very task.

It is here that conventional wisdom meets current political reality and Tushnet's best arguments. As I observed in Part I, it can be argued that the Supreme Court has lost its comparative advantage over Congress and the President in creating and enforcing constitutional rights. This is why Tushnet finds the invalidation of RFRA to be at once disturbing and suggestive. In RFRA, Congress attempted to provide additional protection for the constitutional rights of all religious groups, arguably in service of its power under section five of the fourteenth amendment. But the Court threw out Congress's action in the name of

42. 521 U.S. 507 (1997).

preserving judicial supremacy. When push came to shove, the Court preferred protecting its exclusive right to articulate authoritative constitutional meaning to the task of protecting individual rights.

Tushnet's way of advancing this argument is to turn the tables on legal liberals by showing that at the same time the Court refuses to help racial and religious minorities, it uses its power to further the predominantly majoritarian interests of business groups through doctrines such as commercial speech under the first amendment. The Court has created other problems for legal liberals. Liberals often believe in the desirability of campaign finance reform, but *Buckley v. Valeo*[43] stands in the way. Liberals want to see those accused of crimes treated fairly and the death penalty abolished while the Court has shredded Warren Court protections for criminal defendants and wants death row inmates executed faster. Finally, if you belong to a group that has been historically discriminated against, such as African-Americans, the Rehnquist Court is not your friend.[44]

What about areas in which the Court obviously votes in favor of liberal positions, such as abortion, school prayer, and the right of free speech in cyberspace? Here Tushnet usefully highlights the subtle negative effects of even undoubted liberal victories. He observes that legal conservatives who are on the losing side in all of these cases do not simply go away, accept the Court's opinion, and join the liberal consensus. Rather, they generate an unexpected side effect: the new politics of constitutional rights. They lobby for legislation that would nullify the Court's decisions in practical terms. They articulate "counter-rights" founded in constitutional interpretation that the Court may someday recognize. They fund legal foundations to advance their point of view through continuous litigation. And, most important, they attempt to affect the judicial appointment process so that, in the fullness of time, their point of view will prevail.

So even liberal victories do not provide closure in the new politics of rights. They seem rather to generate more controversy and efforts to overturn them. At best, liberals who rely on the Court to protect individual rights must be watchful of the appointment process to ensure that conservatives prone to over-

43. 424 U.S. 1 (1976).

44. See, e.g., Girardeau A. Spann, *Race Against the Court: The Supreme Court and Minorities in Contemporary America* (New York U. Press, 1993).

turn precedents are not placed on the Court. Liberals have tended to react to the new politics of rights by being defensive rather than thinking creatively about new constitutional problems. This defensiveness means that liberals have had difficulty articulating a new agenda for constitutional law beyond simply protecting the past. In defending a Court that does not defend them, liberals have lost their way.

Since I have been doing more explicating than criticizing, it should be evident that I find Tushnet's book more stimulating than Sunstein's sometimes labored effort. While I do not think anyone could fairly accuse Sunstein of writing unclearly, he tends to burden his argument for minimalism with so many qualifications that his real position becomes opaque. Tushnet's vigorously argued book leaves no such impression.

IV. TOWARD A NEW DEMOCRATIC CRITIQUE OF JUDICIAL REVIEW

For quite some time, the debate over the proper role of the Supreme Court in American democracy has been understood in terms of the "countermajoritarian difficulty."[45] While Sunstein and Tushnet strongly favor democracy as a value, it is notable that their critiques of judicial review are not based on this famous argument. Sunstein's theory is founded on the idea of "deliberative democracy," which is explained in much greater detail in his earlier work than in *One Case at a Time*.[46] As described earlier, Tushnet favors "populist" constitutional law and notes that contemporary legal liberals seem inordinately afraid of submitting any constitutional issue to a vote. (p. 177-81)

To understand the possibilities that both of these books open for a new democratic critique of judicial review, I begin with the observation that the countermajoritarian objection was presented in the main as an external critique of the Court. That is, the critique posited that there was a norm (democratic accountability or majority rule) that the Court should comply with but could not due to the fact that it was not elected. Defenders of judicial review replied that the democratic norm was not the only norm in the game. Judicial review upheld the principles of

45. See Stephen M. Griffin, *American Constitutionalism: From Theory to Politics* 107 (Princeton U. Press, 1996).

46. In particular, see Sunstein, *Partial Constitution* (cited in note 41).

constitutionalism and individual rights either against democratic rule or as a more abstract fulfillment of it.

By contrast, the new critique of judicial review is an internal critique. It starts by accepting the assumption of the Court's defenders that constitutional and legal rights, especially those that protect minority racial and religious groups, are inherently valuable and deserve promotion and defense. So Sunstein and Tushnet in effect embrace the view that rights and democracy are compatible, not conflicting. But they do not draw the conclusion many scholars would: that the Court should be supreme in defining what rights we have. Sunstein's and Tushnet's arguments point toward the idea that a space has opened in American government in which constitutional rights can be safely defined *through the democratic process itself.* We now live in what could be called a "democracy of rights." Here, my argument in Part I that the Court has lost its comparative advantage over the political branches in the promotion and defense of individual rights has particular significance. Congress is now just as adept as the Court at protecting individual rights. Indeed, some of the most important statutory protections of basic rights adopted during the past twenty years have been the consequence of congressional reactions to Court decisions *restricting* statutory and constitutional rights.[47]

From the standpoint of legal liberals, perhaps the most important reason the current Supreme Court does not have a sterling reputation in defending individual rights is that it has, in effect, been penetrated by majoritarian interests. Here a sea change in the Supreme Court appointments process has been especially significant. As Mark Silverstein and David Yalof have demonstrated in their studies,[48] the appointment process has undergone a qualitative change centered on a new awareness that took root in the 1960s that the Supreme Court was playing an important role in setting the national policy agenda. As Silverstein argues, "[t]he current [Supreme Court confirmation] process is disorderly, contentious, and unpredictable. In short, it is now a thoroughly democratic process, and the increased public

47. See, e.g., Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071; Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488.

48. See Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* (W.W. Norton & Co., 1994); David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (U. of Chicago Press, 1999).

participation in the selection of federal judges and Supreme Court justices is a consequence of profound changes in American politics and institutions. The most important development is the heightened activism of the modern federal judiciary."[49]

Yalof's account of the Reagan administration's effort to anticipate vacancies on the Supreme Court is particularly instructive. When Edwin Meese became Attorney General at the beginning of Reagan's second term, he created a task force to find potential nominees to the Court should a vacancy open up.[50] The task force identified twelve factors they considered in assessing nominees. Among them were such items as: "'awareness of the importance of strict justiciability and procedural requirements'"; "'refusal to create new constitutional rights for the individual'"; "'deference to states in their spheres'"; "'recognition that the federal government is one of enumerated powers'"; and "'respect for traditional values.'"[51] The task force looked for federal judges who met the requirements and produced a report for each judge reviewing their opinions. Yalof notes, "[n]ever before in history had there been such an excruciatingly detailed examination of judicial rulings by the Justice Department in anticipation of a Supreme Court nomination."[52]

When the Supreme Court is subject to this sort of minute scrutiny by the executive branch, as well as interest groups, it is no longer possible for it to maintain any consistent posture with respect to the protection of individual rights.[53] Indeed, it is arguable that under such scrutiny, the Court cannot maintain consistently any sort of institutional role at all (other than to preserve the doctrine of judicial supremacy). So the current Court has become another forum in which political battles over individual rights and the power of government are played out. It is closely balanced between the contending sides and each presidential election and potential vacancy is monitored for its potential impact on constitutional issues.[54]

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49. Silverstein, *Judicious Choices* at 6 (cited at note 48) (footnote omitted).

50. Yalof, *Pursuit of Justices* at 142-43 (cited in note 48).

51. Id. at 143-44 (quoting internal Justice Department task force report).

52. Id. at 144.

53. I am assuming, of course, that the presidency tends to rotate between Republicans and Democrats. It is worth keeping in mind that the last president who was able to appoint a five-member majority to the Court was Franklin Delano Roosevelt. Recent presidents have not been as fortunate.

54. See, e.g., Stuart Taylor Jr., *The Tipping Point*, Nat'l J. 1810 (June 10, 2000).

While I suggested above that from a legal liberal standpoint, the Court has been taken over by majoritarian interests, obviously this is too simple. When all three branches of government are in the business of protecting at least some constitutional rights, the vocabulary of the "countermajoritarian difficulty," with its contrast between majoritarian legislatures and a minoritarian Court no longer makes sense. In the new democratic critique of the judicial review, the issue becomes not under what circumstances fundamental rights should be protected against legislative incursion, but rather *what* rights should be created, *who* should enforce them, and *which institution* should have the last word with respect to their scope and meaning. Sunstein and Tushnet both realize this at least implicitly, which is why they do not even mention the famous difficulty in developing critiques (and, in Sunstein's case, a justification) of judicial review.

For veteran observers of the debate over judicial review, however, I imagine that this new democratic critique will seem somewhat puzzling. Since by my description the new critique accepts the importance of individual rights and judicial review to protect them, what is left to argue about? The countermajoritarian difficulty led at least some scholars to argue against certain kinds of judicial review, such as the use of the substantive due process doctrine.[55] By contrast, the new critique does not seem to have any democratic bite.

The broad point made by the new democratic critique is that judicial review today is exercised in a "democracy of rights." In defining a democracy of rights in a practical sense, three characteristics seem especially salient: (1) individual constitutional and legal rights are viewed as important and useful by all; (2) all three branches of the national government, as well as state and local governments, have had some success creating, promoting, and enforcing such rights; and (3) the judicial branch is recognized clearly as a key forum for testing rights claims by political interests who support or oppose judicial nominations to advance their rights agenda. This last characteristic is especially important. The politicization or democratization of the Supreme Court appointment process means that it is difficult for the Court to have a special role, beyond that enjoyed by any other branch of government, in advancing the rights agenda of any particular group. Indeed, it makes it unlikely that the Court can

55. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 14-18 (Harvard U. Press, 1980).

perform a special function in educating the citizenry or assuming a vanguard role to promote a national dialogue on rights.[56] Instead, the democratization of the Court means that it is ensnared in the same contentious politics of rights that occupies the political branches.

One substantial implication of the new critique is that judicial review should never be exercised to restrict the scope of any constitutional right.[57] That is, the "one-way ratchet" of *Katzenbach v. Morgan*[58] should be reinstated: if Congress acts to provide rights protection beyond that afforded by judicial doctrine, the Court should give way (provided that Congress does not accomplish its goal by infringing on some other constitutional right). This means that *City of Boerne* was wrong and should be overruled by the political branches acting through future Court appointments.

The new democratic critique replaces the emphasis of the countermajoritarian difficulty on the need for government institutions to be majoritarian with an emphasis on creating and enforcing constitutional and legal rights. During the heyday of the difficulty, for example, scholars argued over whether Congress was really majoritarian and whether the Supreme Court was really unaccountable to anyone.[59] The terms of the debate were thus set by the value assumption that government institutions had to be majoritarian. The new democratic critique creates a different arena for debate: which branch or level of government does best in creating and enforcing rights?

Of course, even (and especially) in a democracy of rights, what rights we should have is a controversial question. The fact that rights are debated about in a democratic way is no guarantee that justice will prevail. Some might see the idea of a democracy of rights as a cruel joke in the light of such statutes as IIRIRA, AEDPA, and the PLRA. Legislatures can refuse to create rights and repeal others assumed to exist. They can subtly alter the balance of power among litigants in the judicial system

56. For an argument that the Court can perform these roles, see, e.g., 1 Laurence H. Tribe, *American Constitutional Law* 27 (Foundation Press, 3d ed. 2000).

57. For a detailed argument on this score, see Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 Cornell L. Rev. 1529 (2000).

58. 384 U.S 641 (1966).

59. See, e.g., Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* 4-59 (U. of Chicago Press, 1980). Some scholars are still doing this. See, e.g., Tribe, *American Constitutional Law* at 307-09 (cited in note 56).

by restricting the jurisdiction of the courts. Congress can indeed do all of these things, but the Senate, along with the President, also happens to appoint everyone who sits on the federal bench. Once politicians are aware of the Supreme Court as a significant player on the political scene, it is unwise to expect it to be immune from their influence. Thus like Congress, the Court sometimes refuses to create rights that would assist those lacking justice (at least, lacking justice from a particular political point of view) and occasionally declares that rights thought to exist do so no longer.

That rights claims are controversial does not constitute an objection to the idea of a democracy of rights; it rather confirms it. What is the best way to decide what rights should be created and how they should be enforced? As a result of the democratization of the judiciary, we could look at this question as a *fait accompli*: since there is no alternative in a broad sense to debating about rights politically, we might as well accept our circumstances and get on with the task. But the concept of a democracy of rights is more attractive than this.

The justification of a democracy of rights stands at the intersection of three strands of complementary argument: the first practical and political, the second theoretical, and the third historical. In this review, I have been concerned only with sketching the first argument—that a survey of our contemporary political circumstances shows that all three branches of the national government are interested in creating and enforcing rights. To make a democracy of rights truly plausible, I need to explain its theoretical basis in terms of a normative argument about the desirability of democratic government and its historical basis in an argument that the United States has only recently become a "democracy" worthy of the name.[60]

I hope, however, that I have at least introduced the idea of a democracy of rights with sufficient clarity to show that there is an alternative way of critiquing judicial review from a democratic perspective. This alternative does not depend on the countermajoritarian difficulty or any assumption that the American constitutional system is based on majority rule or popular sover-

60. I hope to accomplish both of these tasks in a forthcoming article. See Stephen M. Griffin, *Judicial Review in a Democracy of Rights* (paper presented at the 2000 meeting of the American Political Science Association) (on file with author). I did advance the historical argument I refer to here in Griffin, *American Constitutionalism* at 102-04, 116-18 (cited in note 45).

eignty. It is, instead, based on the practical plausibility of the idea that in our contemporary democracy, rights and politics go hand in hand.

OUTSIDER VOICES ON GUNS AND THE CONSTITUTION

FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866-1876. By Stephen P. Halbrook.[1] Westport, Ct. Praeger Publishers. 1998. Pp. xiii, 230. Hardcover. $55.00

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If there is any good justification for the economic cartel in legal services, perhaps it lies in our aspirations as a learned profession. In recent years, those aspirations—or pretensions—have been looking insecure. On one side, the practice of law has become harder to distinguish from other business ventures, for it is increasingly specialized and ever more openly oriented toward profit maximization. On another side, legal academics seem to have less and less to do with the practicing bar and the concerns of its members. At least in law schools where scholarship is rewarded, success is practically defined as getting yourself taken seriously by other academics at similar institutions. When someone is said to deserve tenure on the basis of a "widely cited" article, it's usually assumed that this does not refer to citations in CLE materials or legal briefs.

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