

# IS IT THE RIGHT REVOLUTION? ON TUSHNET'S *THE RIGHTS REVOLUTION IN THE TWENTIETH CENTURY*

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## INTRODUCTION

This is yet another manuscript by one of the most interesting and prolific American constitutional law professors that the Critical Legal Studies movement has produced. Mark Tushnet has written extensively and influentially in the fields of both American and comparative constitutional law.<sup>1</sup> He is a known expert on twentieth century American legal history, bringing this expertise to bear in writing his ambitious and most recent book, *The Rights Revolution in the Twentieth Century*.

This review of an early draft of the book will consist of three parts.<sup>2</sup> The first portrays Tushnet's descriptive enterprise in a nutshell. The second discusses the historical dimensions of Tushnet's work. The last evaluates its contribution to legal theory along the lines suggested by Alon Harel.<sup>3</sup>

## I. TUSHNET'S DESCRIPTIVE ENTERPRISE

Tushnet asserts that "something distinctive appears to have happened to the idea of rights over the course of the twentieth century."<sup>4</sup> He strives to portray the changes as twofold: a modification of the content of rights and a shift in the institutions promoting

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<sup>1</sup> His Harvard bibliography enumerates 161 publications, including 34 books, notable among them are the famous text books, GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW: CASES, TEXT, MATERIALS* (5th ed. 2005); VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999).

<sup>2</sup> MARK TUSHNET, *THE RIGHTS REVOLUTION IN THE TWENTIETH CENTURY* (2009) [hereinafter TUSHNET, *RIGHTS REVOLUTION*].

<sup>3</sup> See *infra* note 40.

<sup>4</sup> See this issue Mark Tushnet, Précis, *The Rights Revolution in the Twentieth Century*, 42 *ISR. L. REV.* 446, 446 (2009).

rights over the last century. This division between content and structure has long pervaded constitutional law.<sup>5</sup>

Tushnet argues that the first third of the twentieth century was the time of classic liberalism with “libertarian leanings.”<sup>6</sup> The Old Court was a strong defender of economic liberty, striking down progressive legislation as a violation of constitutional rights to property and freedom of contract. Thus, the leaders of the Labor movement sought to protect workers’ rights through collective bargaining or legislation, believing the courts to be unfavorable to their rights. Similarly, Congress enacted statutes creating new agencies to administer progressive legislation rather than trust the courts. Progressives also attacked the Old Court’s jurisprudence on pragmatic and realist grounds, finding the decisions arbitrary or even political and the courts not better equipped than legislatures at balancing competing social interests, including rights.

The middle third of the twentieth century was the age of the New Deal. The New Deal Court reversed the holdings of the Old Court, by deferring to the legislature in regulating the economy. However, it carved a new judicial review theory, known as “Footnote four” of *Carolene Products* jurisprudence.<sup>7</sup> Under this theory, courts would be justified in striking down statutes if the “legislation interfered with or resulted from defects in the democratic process.”<sup>8</sup> In such a case, no deference to the legislature was warranted. The Court, as defender of democracy, placed freedom of speech and racial equality at the center of its rulings.

Tushnet characterizes the last third of the twentieth century as the era of modern liberalism. The Court recognized individual autonomy as a central right to be protected especially in the fields of sexual conduct, freedom of speech, and criminal justice. This was the result of the political and societal impact of several historical developments on the national stage, most prominently World War II, the Cold War, and the sexual revolution. It also flowed naturally from the Court’s commitment to protect democracy itself. Under modern liberalism, equality no longer was a mere formality that could be satisfied by simply omitting statutory language that distinguished among individuals on the basis of suspect categories. Rather, equality was measured in outcomes or substance. Substantive, not formal, equality was used to justify affirmative action or

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<sup>5</sup> Constitutional law professors usually divide their syllabi to issues of structure (such as federalism and separation of powers) and rights.

<sup>6</sup> Tushnet, *Précis*, *supra* note 4, at 451.

<sup>7</sup> *United States v. Carolene Products*, 304 U.S. 144 (1938).

<sup>8</sup> Tushnet, *Précis*, *supra* note 4, at 452.

accommodations, and it also enabled the rise of identity politics and assertions of group rights. Tushnet argues that “modern liberalism could be given conservative as well as liberal interpretations.”<sup>9</sup> Thus, for example, when conservatives rejected affirmative action programs, they argued that those programs negated equality. Tushnet then laments the fact that the century ended with no serious competitive constitutional theory on the horizon and with the courts as the central, almost exclusive, forum for the protection of rights.

In Tushnet’s narrative, three institutional engines enabled the rights revolution outlined above. First were the lawyers who acted through civil rights organizations, such as the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP). These organizations used strategic litigation as a technique for bringing about the recognition of “new” rights in the courts. As a well established authority on the NAACP strategy, Tushnet provides a rich historical account of the way these organizations developed long-term plans to litigate rights in the courts through a gradual campaign.<sup>10</sup> This technique was manifested, for example, in undermining segregation (*Brown v. Board of Education*)<sup>11</sup> and in fighting discrimination against women (*United States v. Virginia*).<sup>12</sup>

Political parties served as the second engine for promoting the rights revolution. Each party adopted social movement agendas to the extent that those were viewed as increasing the party’s political base of support among its natural constituencies. The Democratic Party, for example, adopted the civil rights movement’s agenda of the 1950s and 1960s, and the feminist movement’s agenda of the 1970s and 1980s. In contrast, the Republican Party adopted the Christian Right social movement’s agenda. Each political party attempted to influence Supreme Court jurisprudence on rights through the justices it nominated.

The last, and most important engine, of the rights revolution was the Court. Tushnet argues that a shift of power has occurred: While legislatures dominated in the beginning of the century, by its end “it seemed to many almost incoherent to seek to assert rights in any venue other than the courts.”<sup>13</sup> This judicial success is both symbolized by, and largely attributed to, the Supreme Court’s decision in *Brown v.*

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<sup>9</sup> *Id.* at 456.

<sup>10</sup> MARK TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987).

<sup>11</sup> *Brown v. The Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>12</sup> *United States v. Virginia*, 518 U.S. 515 (1996)

<sup>13</sup> Tushnet, *Précis*, *supra* note 4, at 447.

*Board of Education*. While Tushnet predicts that courts will continue to dominate in the twenty-first century, he is less certain on the direction and content that the rights revolution will take.

## II. THE ROBUSTNESS OF AMERICAN CONSTITUTIONAL CHANGES

Tushnet proclaims that a revolution has occurred in the twentieth century. He does not, however, define what he means by “revolution.” Was there a sharp departure in the twentieth century from past constitutional development? Do each of the tripartite periods discussed by him amount to three separate constitutional revolutions or is “the whole greater than the sum of its parts”? Was the revolution along the axis of rights or of the rise of the courts’ power, or of both, or maybe only the combination amounts to the rights revolution? Below I attempt to explore the revolutionary possibilities along each of these suggested directions.

Many scholars have portrayed the twentieth century, and more accurately the second half of the twentieth century, as the era of the rights revolution.<sup>14</sup> The atrocities of both World Wars led different democratic countries to adopt the American model of a formal constitution with an accompanied bill of rights and a judicial review mechanism to guarantee the enforcement of the Constitution against even democratic tyranny. This process was first evident in the countries that lost the war (notably Germany and Japan) but also in other Western European countries. With the fall of the Soviet Union, this process spread to Eastern Europe as well.<sup>15</sup> Even Commonwealth countries eventually chose an intermediate model that grants stronger protection to individual rights against legislative encroachments than their traditional parliamentary sovereignty model allowed.<sup>16</sup> Moreover, the centrality of individual autonomy found by Tushnet in current American constitutional law may be seen as part of a wider discourse, in which other western democracies place human dignity as the fundamental value of their constitutional systems.<sup>17</sup> Though Tushnet chose not to

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<sup>14</sup> See, e.g., CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

<sup>15</sup> See, e.g., Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447 (1991).

<sup>16</sup> See, e.g., Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001); Rivka Weill, *Sui Generis? The Hybrid Israeli Constitutional Experience* (May 8, 2009), available at SSRN: <http://ssrn.com/abstract=1401360>.

<sup>17</sup> See, e.g., THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE (David Kretzmer & Eckart Klein eds., 2002); George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U.W. ONTARIO L. REV. 171 (1984).

discuss the American rights revolution in comparative terms, his book may be seen as part of this literature.

But the U.S. had its model of a formal Constitution with a bill of rights and judicial review since its founding. So what has changed? Tushnet points to the expansion of rights and right-bearers in the twentieth century.<sup>18</sup> Yet the direction of expansion was evident also in the nineteenth century, with the adoption of the Reconstruction amendments guaranteeing equality to former slaves following the Civil War.<sup>19</sup> Still, perhaps the revolution lies in the famous “switch in time” of the New Deal Court from jurisprudence centering on property and freedom of contract, to jurisprudence that allowed the rise of the social welfare state and eventually enabled the recognition of autonomy rights by later courts. This is indeed an outstanding revolutionary development, and Tushnet beautifully portrays the way it unfolded. However, if this is the revolution, then we should keep in mind that its main engines were the President and Congress, with the Court succumbing, rather than leading, the constitutional moment.<sup>20</sup>

A different way of understanding Tushnet’s work is that the revolution lies in the rise of the Court’s power as the central forum for recognizing “new” rights. From curtailing the recognition of new rights in the beginning of the century, the Court became the forum that right claimants address first for recognizing new rights. This development is well documented in comparative constitutional scholarship as well and amounts to a global phenomenon. Scholars have strived to understand why the locus of political power shifted from elected to unelected branches of government.<sup>21</sup> If Tushnet’s work should be understood along these lines then it would be interesting to analyze the rise of American courts’ power in general, as evidenced for example in *Bush v. Gore*.<sup>22</sup> The Court even decided, in a majority of 5 against 4, the winner of a contested presidential election, when a majority of its justices were appointed by presidents who belonged to the political party with whom the new president

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<sup>18</sup> Tushnet, Précis, *supra* note 4, at 446.

<sup>19</sup> U.S. CONST. amnds. XIII-XV.

<sup>20</sup> See, e.g., BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998).

<sup>21</sup> See, e.g., RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGIN AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000); THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995).

<sup>22</sup> *Bush v. Gore*, 121 S. Ct. 525 (2000).

was affiliated.<sup>23</sup> This decision may reflect the rise of the Court's power as a general political actor, and not just in the individual rights arena. Arguably, this is as strong a court as one can imagine.

In the individual rights arena, the story of the Court's growing power may actually be more complicated. It is perhaps a story of the rise, demise, and rebirth of the Court's power. In the beginning of the twentieth century, the Court was a stronghold of property and contract rights defending against progressive state, and national legislatures. During the New Deal, the Court was forced to retreat under threat of "packing the court," but it reinvented itself again as the protector of democracy and eventually of individual autonomy and rights.

But it may be the combination of expansion of individual rights and the rise of judicial power that together comprise the twentieth century rights revolution identified by Tushnet. The ultimate effect is definitely overwhelming. As a supporter of "taking the Constitution away from the courts,"<sup>24</sup> I believe that Tushnet would not object to a narrative that gives greater emphasis to the other branches of government than that suggested in his book. It would thus be interesting to explore the interplay and dialogue between the different branches of government—the courts, legislature, and president—rather than focus on the courts.<sup>25</sup> For example, the legislatures, not the courts, were the ones who pushed toward progressive rights in the beginning of the century. The century also started with enfranchising women, democratizing senate elections, and authorizing progressive income taxation through formal constitutional amendments—all of which are not discussed by Tushnet.<sup>26</sup> President Roosevelt and the New Deal Congress first, and President Lyndon Johnson and the Great Society Congress second, were responsible for the enactment of a partial "Second Bill of Rights," dealing with economic and welfare rights, such as the Social Security Act of 1935.<sup>27</sup> The Civil Rights Act of 1964 and the Voting Rights Act of 1965 were no less crucial to the expansion of substantive equality than *Brown v. Board of Education*.<sup>28</sup>

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<sup>23</sup> See, e.g., Jack M. Balkin, *Bush v. Gore and the Boundary between Law and Politics*, 110 YALE L. J. 1407 (2001); Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721 (2001).

<sup>24</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

<sup>25</sup> For an emphasis on the executive branch, see in this issue Margit Cohn, "Everything Flows": *On Mark Tushnet's Rights Revolution*, 42 ISR. L. REV. 472 (2009).

<sup>26</sup> U.S. CONST. amnd. XVI, XVII & IX.

<sup>27</sup> See, e.g., William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001).

<sup>28</sup> See Jack M. Balkin, *Symposium: 50 Years of Brown v. Board of Education: Essay: What Brown Teaches Us about Constitutional Theory*, 90 VA. L. REV. 1537 (2004).

And even at the close of the century, the Americans with Disabilities Act of 1990, for example, should be noted for promoting individual rights.<sup>29</sup> Needless to say, these are but partial examples of the importance of other branches of government to the unfolding American rights revolution, not an attempt to cover thoroughly U.S. twentieth century constitutional history.

Tushnet identifies three institutional engines that enabled the twentieth century rights revolution: lawyers, political parties and the courts. He suggests that both lawyers and political parties interacted with and responded to social movements' agendas but they often took over and reshaped the agendas to fit their own needs and desires. The involvement of political parties may suggest that the legislature played a more substantial role in the development of the rights revolution than accounted so far by Tushnet.

Furthermore, it is unclear from Tushnet's account at what stage did the lawyers and political parties take over the social struggle, how substantial a contribution was made by the social movement's grass-roots activities and whether the outcome achieved by the intermediaries (lawyers and political parties) was successful in terms of the social struggle's original aims. It may actually be the case that social movements' grass roots activities were more important for the ultimate success of their demands than depicted in Tushnet's narrative.

In addition, Tushnet treats the courts as the main focus of social movements' activities. To be successful, he suggests, a social movement should rely on strategic litigation. However, even apart from the literature skeptical of the courts' ability to serve as the main engines of social change due to their institutional characteristics,<sup>30</sup> Tushnet's account should discuss additional literature elaborating on the tension between social movements' desire for change and the law.<sup>31</sup> This literature emphasizes that courts should be the last, rather than first, place for social movements to target their energy and activities, if social movements desire to achieve their agendas.

But maybe the story should be read as evolutionary after all. Tushnet writes that "rights assertions seem to come in waves, with some succeeding and others failing (at least for the moment). Each receding wave leaves its residue in ideas about rights and

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<sup>29</sup> *But see* Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522 (2008) (discussing the Supreme Court's narrow interpretation of the statute).

<sup>30</sup> *See, e.g.*, GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

<sup>31</sup> *See, e.g.*, Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005).

in institutions for asserting them, and sometimes those residues may have important effects later on.”<sup>32</sup> Tushnet may, in fact, believe that constitutional changes occur gradually rather than through revolutions. In such a case, the “rights revolution” he identifies means that indeed the whole is greater than the sum of its parts. That is, when judged in retrospect, the evolution of ideas and institutions throughout the twentieth century amounts to a revolution. But, if this is the case, he offers us a tripartite analysis of ideas of rights without suggesting any criteria, however informal, that may assist us in assessing why only those periods should be singled out for discussion. Additionally, he does not give clues to how he identifies the end of one period and the beginning of another.

It may also be interesting to discuss the changes in American constitutional law that occurred under the leadership of the different chief justices: Warren, Burger, and Rehnquist. The legal literature is full of discussions, some contributed by Tushnet himself, differentiating between the jurisprudence of the different courts.<sup>33</sup> Such an analysis, focusing on the development of constitutional law attributed to the different composition of the Court, may actually fit Tushnet’s claim that the main engine of the rights revolution were the courts.

Tushnet also leaves us curious regarding the looming question of how we should assess President Bush’s second term. Did he succeed in mobilizing a right wing constitutional revolution? As of yet, Tushnet is loyal to the position he advanced in *The New Constitutional Order* that no major constitutional changes have occurred under the Rehnquist Court due to a divided government.<sup>34</sup> But Bush’s last nominations to the Supreme Court may well change that too. In such a case, Bush’s presidency may have enabled the formation of a new constitutional era.

The twentieth century treatment of rights may be evolutionary in other respects as well and it may not be such a celebratory story after all. Tushnet bemoans the fact that many times the granting of rights to some can generate the decreasing of rights to others making society’s goals hard to attain.<sup>35</sup> But individual rights were compromised at each national emergency, with the Court failing to undertake the task of protecting individual rights against legislative and executive encroachments in the name of national security. This was evident time and again in War World

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<sup>32</sup> TUSHNET: RIGHTS REVOLUTION, *supra* note 2, at 14.

<sup>33</sup> For an interesting *Symposium on the Chief Justice and the Institutional Judiciary* see 154 U. PA. L. REV. 1463 (2006).

<sup>34</sup> MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003).

<sup>35</sup> *Id.* see especially chs. 2-3.



I with *Debs v. United States* (upholding conviction under the Espionage Act),<sup>36</sup> in War World II in *Korematsu v. United States* (upholding the internment of West Coast Japanese citizens),<sup>37</sup> during the McCarthy era,<sup>38</sup> and most recently in the ongoing war on terrorism.<sup>39</sup>

Having read the book, the reader is left with a desire to better understand the relationship between the development of the content of rights and the institutional changes that enabled this development. That is, Tushnet discusses separately the changes in both ideas and institutions but has not, as of yet, offered us an explicit analysis of how they interrelate. Thus, for example, the tripartite periods pertain to the content of rights but not to the institutions that brought about the vindication of rights. Tushnet explains how access to the courts was democratized throughout the twentieth century, yet does not discuss any of the changes in the doctrines of justiciability or standing that enabled that development. Tushnet also refrains from discussing the changes in doctrines of federalism, states' rights, and separation of powers, which have occurred over the course of the twentieth century, despite the fact that they may have affected individual rights as well.

Especially in constitutional law, history matters. There is a need for constant assessment of the relevance of theory to constitutional law as it is actually practiced. At times, however, theory's role is to lead and shape constitutional law rather than describe it. In this crucial interplay between theory and history, I believe that Tushnet's *Rights Revolution* will surely play an important function in the discourse appraising the twentieth century's contribution, both substantively and institutionally, to American constitutional law.

### III. THE RIGHT TO JUDICIAL REVIEW

Let me now turn to explore Harel's interesting thesis in light of Tushnet's work.<sup>40</sup> Harel asserts that judicial review is justified as a matter of one's right in a democracy

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<sup>36</sup> *Debs v. United States*, 249 U.S. 211 (1919).

<sup>37</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>38</sup> See, e.g., Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: the Tension between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1 (1991).

<sup>39</sup> For an interesting empirical study of this phenomenon, see Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005) (arguing that during war times courts decide war cases by shifting their focus to institutional process concerns but decide cases unrelated to the war in a more conservative fashion).

<sup>40</sup> See in this issue Alon Harel, *The Vices of Institutional Instrumentalism: A Comment on Tushnet, The Rights Revolution in the Twentieth Century*, 42 ISR. L. REV. 464 (2009); Yuval Eylon & Alon

rather than because it achieves desired outcomes, such as protection against legislative or even popular tyranny, as traditionally theorized. In exercising judicial review, Harel explains, courts are the legislature's partners rather than its superiors. When enacting statutes, the legislature is capable of considering only the general case. Courts supplement its work by considering the statute in light of individual circumstances. In a democracy, Harel states, individuals have a right to a hearing of alleged infringements of their individual rights and reconsideration of the statutes in light of their particular cases. Judicial review fulfills this function and thus promotes rather than sacrifices equal participation in a democracy. How does Tushnet's book fit Harel's democratic right to judicial review?

Tushnet provides a thorough description of the way constitutional law changed over the course of the twentieth century through court adjudication rather than formal amendments. In the best tradition of the Critical Legal Studies movement, he does not offer us any explicit justifications as to why courts should enjoy such authority to transform constitutional law. Tushnet may in fact believe that they should not, as implied in his suggestion that we should "take the constitution away from the courts."<sup>41</sup> But Tushnet attributes the rights revolution of the twentieth century to the courts more than any other political body, such as the legislature or president. His tripartite periods are, in effect, defined according to judicial jurisprudence. Advocates of individual rights may therefore find in his book a compelling justification of judicial review on consequentialist grounds. Though Harel criticizes twentieth century politicians and scholars alike for having developed constitutional theories on an "instrumental" basis,<sup>42</sup> Tushnet's *Rights Revolution* is above all a celebration—however unintended—of the achievements of the American judiciary over the last century.

Harel may well have used Tushnet's work to support his theory of "the right to judicial review" on more direct grounds than he does in this volume. While Harel suggests that we should justify judicial review due to its exclusive ability to provide individuals with a forum in which to hear and adjudicate claims of infringements

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Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006). See also Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, available at <http://ssrn.com/abstract=1272493>.

<sup>41</sup> TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS, *supra* note 24.

<sup>42</sup> Harel, *The Vices of Institutional Instrumentalism*, *supra* note 40, at 465:

According to institutional instrumentalism, institutions, including courts and legislatures, are exclusively perceived by individuals as instruments to realize substantive political and social goals. Hence individuals are disposed to grant more powers to institutions that they perceive are favorable toward their goals and fewer powers to institutions that they perceive are unfavorable toward their goal.

on individual rights, Tushnet supplies him the historical ramifications attributable to wider court access. The rights revolution of the twentieth century was made possible, according to Tushnet, only through the “thickening of the support structure” for asserting rights.<sup>43</sup> No longer did only corporate America have the money and resources required to curtail labor interests in courts, but African Americans, women, and other minority groups have also gained access to the courts through civil rights movements and public law advocates. Harel did not utilize this historical lesson, since he distinguishes his theory from those of others as being non-consequentialist in nature. But surely he would not object if his theory is shown to produce unintended, but desired, consequentialist outcomes.

Harel asserts that his is a non-consequentialist theory, offering justification for judicial review as an institution necessary in a democracy, even independently of its *de facto* achievements (or failures) in promoting individual rights or other values. Yet a careful reading of Harel’s thesis may suggest that his, no less than others, is a consequentialist justification for judicial review after all. This is so on the most basic level because Harel legitimizes judicial review not for its own sake but to enable the right to a hearing. On a more substantial level, his is a consequentialist theory because Harel justifies judicial review only with regard to assertions of infringements of rights. That is, judicial review is ultimately defended in a society that takes rights seriously. It is needed for the protection of rights even under Harel’s thesis thus revealing the thesis’ instrumental nature.

What I found most difficult with Harel’s newly-found right-based justification for judicial review is his clever maneuvering of majority rule. Instead of the right to equal participation in a democracy, he speaks of the equal right to participate, and, I may add, unequally. We are all aware of the many historical instances when legislators or interest groups who failed to achieve their will through bargaining and coalition-building in the legislature, attacked (directly or indirectly through NGOs) the constitutionality of the very statute in courts.<sup>44</sup> Courts have become an easier way, to paraphrase Tushnet, of achieving political ends that do not enjoy legislative majority, by interest groups that cannot gather enough political support in the legislature. Harel celebrates this

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<sup>43</sup> Tushnet, Précis, *supra* note 4, at 460.

<sup>44</sup> See Yoav Dotan & Menachem Hofnung, *Legal Defeats—Political Wins: Why Do Elected Representatives Go to Court?*, 38 COMP. POL. STUD. 75 (2005). See also Gal Dor & Menachem Hofnung, *Litigation as Political Participation*, 11 ISR. STUDIES 131 (2006). Some constitutional systems prevent legislators from challenging statutes in courts, see NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM 133-36 (2003).

outcome regardless of whether courts achieve greater protection for individual rights than do legislatures. Instead of dealing with the “counter-majoritarian difficulty,”<sup>45</sup> Harel celebrates this very outcome as a matter of one’s right in a democracy.

To justify judicial review, Harel establishes that courts have institutional capabilities that are unavailable to the legislature. The very nature of the judicial process, Harel suggests, is to focus on the individual rather than the general case. Harel further argues that only courts as unelected bodies that are not duty-bound to represent, may consider the individual case, free of prior ideological and political commitments. Harel does not claim though, as others have, that courts also have the institutional capabilities, like the legislative branch, to make general policy. Thus, he does not establish why the judicial decision should trump the legislative decision in constitutional matters. In other words, even if there is a need to provide, in a democracy, the right to a hearing of an alleged infringement of one’s individual rights, it is unclear why considerations of the particular case should overcome the general policy considerations that formed the basis of the legislature’s action. Though Harel attempts to justify judicial review as it is actually practiced, his description ignores its “trumping” nature.

Harel’s analysis also seems to negate the manner in which modern courts, especially high courts, actually perceive their job. While he assigns them the task of deciding the particular case at hand, they believe it is their role to make general policy.<sup>46</sup> Furthermore, those petitioning the courts often view them as an alternative forum for making general policy decisions.<sup>47</sup> In addition, Harel’s description does not align with the way in which law is actually made by the courts. The doctrine of *stare decisis*—superior courts bind lower courts—also applies in constitutional cases. Thus, judicial review as practiced in the U.S. may ultimately negate, rather than promote, an *individual* right for a hearing.

Harel strives hard to provide a non-consequentialist justification for judicial review, fearing that courts may not necessarily be better protectors of individual rights. Yet he may find comfort in Tushnet’s work, which suggests that overall the courts did a decent job over the last century in promoting these rights.

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<sup>45</sup> See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986).

<sup>46</sup> See, e.g. AHARON BARAK, *THE JUDGE IN A DEMOCRACY* (2006).

<sup>47</sup> See, e.g., David Feldman, *Public Interest Litigation and Constitutional Theory in Comparative Perspective*, 55 MOD. L. REV. 44 (1992); Shlomo Mizrahi & Assaf Meydani, *Political Participation through the Judicial System: Exit, Voice and Quasi-Exit in Israeli Society*, 8 ISR. STUD. 118 (2003).