A COMMENT ON MARK TUSHNET'S *SOME NOTES ON CONGRESSIONAL CAPACITY TO INTERPRET THE CONSTITUTION*

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Much of Professor Mark Tushnet's essay in this symposium is devoted to the conceptual and institutional difficulties in assessing Congress's capacity for constitutional interpretation.[1] In his account of the conceptual problems, Tushnet argues that we cannot establish Congress's capacity by comparing its performance against judicial interpretations, taking the latter to be the standard of correct interpretation.[2] I agree with Tushnet that this form of argument is obviously circular. I further agree with Tushnet's more particularized "conceptual" argument – that when the Court's judicial review is deferential, the fact that the Court does not set aside Congress's implicit judgment is insufficient evidence that Congress's interpretation is correct.[3] In these cases, the Court's lack of disapproval does not demonstrate congressional correctness.[4]

In Tushnet's account of the "institutional problems," he argues more broadly that Congress's actual performance is not comparable against some standard of correctness.[5] He ascribes this to what he calls the "judicial overhang."[6] As Tushnet formulates the problem, Congress "[k]now[s] the courts are available to correct (some of) their constitutional errors," and so "legislators have little incentive to expend great effort in enacting only constitutionally permissible statutes."[7] The judicial overhang is not just a problem of metrics for those who would determine Congress's capacity for constitutional interpretation. It is also, more important, a circumstance that likely prevents Congress from developing its capacity. Tushnet's account of the judicial overhang is an extraordinarily important contribution.

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[1] *See generally* Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499 (2009).

[2] *Id.* at 500.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 504.

[6] *Id.*

[7] *Id.*

While I agree with Tushnet's diagnosis of the difficulties in determining Congress's capacity for constitutional interpretation, I question both of his "candidate responses to this problem."[8] Tushnet first suggests:

> [C]ongressional performance is adequate, and congressional capacity to engage in good constitutional analysis is demonstrated, when those who refer to constitutional questions speak in "constitutionalist" terms – connect their constitutional concerns and analyses to some broader ideas about constitutionalism, the separation of powers, and the rule of law, make reference to relevant constitutional provisions, and the like. The criterion, that is, is whether those participants who deal with constitutional questions appear to be thinking about those questions in the right way, with the Constitution and constitutionalism in mind.[9]

This seems to me plainly too weak a criterion. Reference to constitutional issues and concerns is a necessary, but not sufficient, criterion for adequate constitutional analysis. Having "the Constitution and constitutionalism in mind" is not enough.

Tushnet's second suggested criterion for congressional capacity asks "whether the statute as enacted is consistent with some plausible constitutional interpretation, or is instead inconsistent with the Constitution on any reasonably available construal."[10] Tushnet is right to observe that this criterion is "extremely 'weak,'"[11] in the sense of being extremely generous to Congress – particularly because it is presumably neutral to the choice among interpretive methods, allowing for any plausible interpretation generated by any plausible interpretive method. Further, it would not require that any member of Congress actually consider the question of constitutionality – just that the statute be consistent with "some plausible constitutional interpretation."[12]

Given the difficulty in demonstrating Congress's capacity for constitutional interpretation, Tushnet's suggestion at the close of his essay's introduction is surprising: "It may be – though I express no view on the question – that the imperfect congressional capacity to interpret the Constitution is nonetheless better than the perhaps more imperfect judicial capacity to do so."[13] Tushnet is not claiming here to demonstrate superior congressional capacity; he says only that it "may be" the case that judicial capacity is "perhaps more imperfect."[14] But Tushnet's essay, as I understand it, gives little reason for hope that congressional interpretive capacity is superior to judicial interpretive capacity.

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[8] *Id.* at 503.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 500.
[14] *Id.*

Thus, Tushnet's apparent withdrawal, at the end of his essay, of his initial hope:

> For present purposes I am willing to assume that the judicial capacity to engage in constitutional interpretation should set the benchmark against which the *capacity* of other institutions should be measured. I am reasonably sure that congressional capacity is lower than the courts', and that we are unlikely to see institutional innovations that increase congressional capacity.[15]

Perhaps because this conclusion seems to undermine the "populist constitutionalism" Tushnet has been advocating for a decade,[16] Tushnet then suggests that relative performance,[17] rather than relative capacity, is the issue. He ultimately concludes:

> It might well be the case – indeed, I think it is – that congressional and judicial *performance* of constitutional interpretation is of roughly equal quality (subject to the observation made earlier that we should not take what courts actually do as our benchmark for performance). Put another way, both Congress and the courts fall short of their capacity, but the courts' shortcomings might be greater than Congress's.[18]

But if we have insufficient reason to believe in Congress's superior *capacity* for constitutional interpretation, and if the judicial overhang cautions against concluding that Congress's present *performance* is the best it can do, I see little basis for Tushnet's comparative judgment. I agree even less with his suggestion that we turn our attention away from proposals to improve Congress's performance.[19] Indeed, I found Tushnet's discussion of these proposals to be illuminating and reason for hope.[20]

Tushnet could strengthen his argument by developing more clearly, as he has in prior published work, what lies beneath his account of the judicial overhang.[21] This is the theme of democratic self-governance. In prior work, Tushnet argues that "strong-form" judicial review – judicial insistence on

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[15] *Id.* at 508.

[16] *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 181-82 (1999) (defining "populist constitutional law" as "treat[ing] constitutional law not as something in the hands of lawyers and judges but in the hands of the people themselves"); MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 15 (2008) [hereinafter TUSHNET, WEAK COURTS] (comparing "strong-form" and "weak-form institutions of judicial review" to determine which "better accommodate[s] the competing interests in constitutionalism and self-government").

[17] Tushnet, *supra* note 1, at 508.

[18] *Id.* at 508-09.

[19] *See id.* at 509.

[20] *See id.* at 504-08 (discussing problems facing various institutional reforms for Congress such as "revisions in Congress's committee structure").

[21] *See, e.g.*, TUSHNET, WEAK COURTS, *supra* note 16, at 81-82.

having the final and supremely authoritative word on constitutionality, notwithstanding Congress's reasonable constitutional judgment to the contrary – takes the Constitution from the hands of the people's representatives and stunts democratic self-governance.[22]

This theme, it seems to me, is essential to any defense of congressional constitutional interpretation. It counsels against simply assigning the defender of congressional authority the burden – despite the conceptual and institutional difficulties Tushnet identifies – of showing that Congress's present interpretive capacity and performance is superior to that of the courts. One might accept some degree of technical inferiority in interpretation for the sake of promoting self-governance. Further, even if one ultimately concludes that the present division of interpretive authority is justified, at least one will have to recognize that it comes at a cost – and that accordingly, institutional fixes that might aid Congress in its duty of constitutional interpretation are well worth considering.

[22] *See id.* at 22-23.