I. Introduction

Mark Tushnet, the William Nelson Cromwell Professor of Law at Harvard Law School, is widely known for his engagement with comparative constitutional law and judicial review. Nearly a decade since he argued against the judicial review of legislation, primarily because it undermines democracy and sovereignty of the people and ultimately the goal of self-governance, he has gone to the extent of even suggesting an amendment to the U.S. Constitution expressly debarring judicial review from it. In the book under review, instead of advancing his earlier argument any further, he gives it a twist perhaps in the context of developments in comparative constitutional law noticed since then. He does not argue for debarring or complete exclusion of judicial review from the Constitution but seems to recommend the adoption of its different version, namely, weak-form judicial review. This shift leaves the reader guessing if Tushnet stands converted. It may not be safe to draw such a conclusion because nowhere in the book does he clearly support judicial review. In the light of reactions to his earlier stand and perhaps his own realization of the insurmountable difficulties in doing away with judicial review from the U.S. Constitution, he seems to be opening a new window in its exercise in U.S. His primary grievance against the existing practice of judicial review in U.S. appears to be its alleged unsuitability to recognize and enforce the social and economic or social welfare rights. The courts are not only reluctant to enforce these rights but also refuse to recognize them as rights primarily because they are not suitable for judicial enforcement. In the book under review he explores the possibility of overcoming that situation. From the exercise of judicial review in a few countries, primarily of the common law family that share the same traditions as U.S., he tries to...
persuade his American readers that judicial review is not incompatible with the enforcement of social and economic rights if we resort to its weak form.

Tushnet categorizes the model of judicial review exercised by the U.S. Supreme Court as strong-form review that has numerous variants, but

"[a]t its heart is the power of courts to declare statutes enacted by a nation's highest legislature unconstitutional, and to make that declaration practically effective by using the standard weapons at a court's hands – injunctions against further enforcement of the statute by executive officials, dismissal of prosecutions under the statute, awards of damages on behalf of people injured by the statute's operation backed by the potential to seize the defendant's property."

In the weak-form judicial review too the courts have the power to declare legislation unconstitutional; however, that power is modified in a number of ways such as expecting the courts to interpret legislation consistently with the Constitution so as to avoid unconstitutionality, or by not giving any power to enforce the declaration of unconstitutionality, or to suspend the enforcement of declaration for a number of years to enable the legislature to bring the legislation in harmony with the Constitution or even by giving the overriding power to the legislature to ignore judicial decision. Tushnet seems to be in agreement with the proponents of weak-form judicial review who "describe it as an attractive way to reconcile democratic self-governance with constitutionalism." In his view, while strong-form review could somehow manage to deal with first generation rights, weak-form review is much more suitable for second and third generation rights. With the fast spread of democracy and constitutionalism around the globe since World War II, with additional momentum since 1989, most of the constitutions incorporate within their body the second generation or social and economic rights as well as the third generation rights. They also provide for the judicial enforcement of these rights. But instead of following the U.S. model of strong-form review for their enforcement, they follow the weak-form review, which is much more suitable for the enforcement of these as well as the first generation rights consistent with the democratic principle of self-governance. Among the Western constitutions, apparently the German Constitution has led the movement towards the introduction of weak-form review which many constitutions have introduced since then in preference to the U.S. model of

4. Id. at xi.
strong-form review. In order to avail of several advantages associated with the weak-form review, especially in the enforcement of socioeconomic rights and to remove the incongruity between the democratic self-governance and judicial review without resort to constitutional amendment, Tushnet presents a perspective before the U.S. scholars for fresh thinking in the complex and contentious debate on judicial review to consider the possibility of availing the advantages associated with it.

The debate extends to all countries around the world that care for democracy and constitutionalism. It may have not acquired as much intensity, articulation and sophistication in other countries as in the U.S. but it is one of the most contentious and illusive issues in the constitutional discourse. In India, for example, we have been as much part of the debate ever since our Constitution came into force in 1950 even though we have devised and utilized both strong as well as weak-form judicial review. Germany, which Tushnet describes as a popular model of weak-form review followed by many countries, is also not free from this debate.

II. Contents

The book is divided into three parts sub-divided into eight chapters. The first chapter deals with the relevance and importance of studying comparative constitutional law. Dealing with several kinds of comparisons and their objectives, Tushnet argues for utilizing comparative constitutional law for the better understanding of and thinking about ones own Constitution in general rather than for interpreting any specific provisions. Dealing specifically with judicial review, he concludes that the design of judicial review in the U.S. Constitution has always remained indeterminate because neither was this issue clearly settled during the Constitution making, nor was it expressly introduced in the constitutional text, nor has it ever been settled since the making of the Constitution. It has always been a matter of debate and different arguments have been given from time to time in support of weak-form review. In this scenario, Tushnet suggests, the comparative constitutional law could help in developing an agreeable model of weak-form judicial review in U.S.

5. Apart from immense literature that has appeared on the subject, for the latest debate shared by top legal luminaries, see, 35 The Indian Advocate (2007). I have also contributed in one of the other recent works on the subject: M.P. Singh, Inconclusive Overview of Judicial Activism in India, in B.D. Dua, M.P. Singh, Rekha Saxena, Indian Judiciary and Politics: The Changing Landscape, 121 (Delhi, Manohar, 2007).

The second chapter deals with different forms of judicial review concentrating basically on the theme of the book, i.e. the weak and the strong forms of judicial review. "Strong form is a system in which judicial interpretations of the Constitution are final and unreviseable by ordinary legislative majorities" though they "can be rejected by the special majorities required for constitutional amendment, and they can be repudiated by the courts themselves". Weak form review allows the legislature and the executive to reject constitutional rulings by the judiciary so long as they do it publicly. "The basic idea behind weak-form judicial review provides mechanism for the people to respond to decisions that they reasonably believe mistaken that can be deployed more rapidly than the constitutional amendment or judicial appointment processes." Both forms of review authorize courts to interpret the Constitution vis-a-vis the legislature. Both these interpretations may be reasonable. But while in the case of strong-form judicial review the court's interpretation becomes irrevocably final, in the weak-form judicial review the legislative interpretation has the scope of prevailing. In view of this difference between the two forms of review i.e. - while the former creates a tension between review and democratic self-governance the latter holds out the promise of reducing such tension, Tushnet seeks to evolve a different conclusion. Tushnet, as noted above, takes into account the trend in constitutionalism since World War II, and points out that "today constitutionalism requires that a nation be committed to the proposition that a nation's people should determine the policies under which they will live, by some form of democratic government." He explains his point with reference to the Human Rights Act, 1998 of U.K., which authorizes the courts only to declare a law "incompatible" with the European Convention of Human Rights, and not to declare it null and void, as well as that of the Canadian Charter of Rights, 1982 which, apart from authorizing "such limitations as are demonstrably justified in a free and democratic society", authorizes the legislature to make statutes effective for renewable five-year periods, "notwithstanding" their inconsistency with a large number of important charter provisions. Both these forms of review open the possibility of a dialogue between the legislature, executive and the judiciary. This dialogue, however, results in much sounder and more acceptable decisions within a short time in the weak-form judicial review, while it takes a much more tedious and longer route in strong-form judicial review. The dialogue

7. Id. at 33-34.
8. Id. at 23.
9. Id. at 18.
10. Id. at 31-32.
in the weak-form review is also much more democratic and representative of people than it is in strong form review. Therefore, Tushnet suggests that U.S. could also adopt weak-form judicial review for which enough ground exists in the Jeffersonian and Thayerian thesis of review.\(^\text{11}\)

Elaborating his point that “[w]eak-form review purports to promote a real-time dialogue between courts and legislatures”\(^\text{12}\) from the examples of Canada, Great Britain and New Zealand of the functioning of weak-form review in Chapter 3, Tushnet draws the conclusion that in the course of time weak-form review may get converted into strong-form review. But such a conversion may evolve “in ways that a constitutional democrat can endorse because strong-form review comes to have popular support.”\(^\text{13}\) Thus “strong-form review can be chosen in a nation committed to constitutionalism and democratic self-governance”\(^\text{14}\) and it “is compatible conceptually with constitutional democracy as it has developed in the United States.”\(^\text{15}\) At this point Tushnet seems to be giving up his earlier stand that the courts should keep away from determining the validity of legislation because meddling with legislation is undemocratic.

Part II of the book comprising of chapters 4 and 5 deals with the legislative responsibility of enforcing the Constitution and commences with the assertion that the “[w]eak-form review clearly should enhance the role legislators and executive officials play in constitutional interpretation and development”\(^\text{16}\) while the judicial overhang that the courts are there to invalidate an unconstitutional legislation “sometimes promotes legislative disregard of the constitution.”\(^\text{17}\) Strong-form review also encourages legislators to take tough positions.\(^\text{18}\) In such cases, courts also may withdraw from certain areas such as political questions. In countries that are shaped by the constitution and not by ethnicity or nationality, reliance is often placed on constitutional traditions for understanding the meaning of the constitution which legislators are no less competent to know than the judges. For retaining their job the legislators would try hard to understand and represent the constitutional traditions of the electorates than the judges, which is possible only in weak-form review. “In that way, weak-form judicial review might

\(^{11}\) Id. at 36-41.
\(^{12}\) Id. at 42.
\(^{13}\) Id. at 66.
\(^{14}\) Id. at 71.
\(^{15}\) Id. at 75.
\(^{16}\) Id. at 79.
\(^{17}\) Id. at 81.
\(^{18}\) Id. at 82.
increase the incentives legislators have to take constitution seriously."19 Examining various arguments taken in favour of judges as better protectors of the constitution and countering them with equally strong arguments in favour of the legislators in doing so, Tushnet analyses in detail the empirical studies done on the legislators and judges and the ways and means through which the former ensure that their proposals and actions are consistent with the constitution. The legislators also seek opinion of the best lawyers for their legislative proposals and so do the executive officers. He concludes that the legislators do their job more responsibly in weak-form than in the strong-form review and that many assumptions about the difference in the interpretation or understanding of the constitution between the legislators and courts are not as strong as they appear to be.

In support of his foregoing arguments in chapter 4, in succeeding chapters Tushnet offers "several relatively informal case studies, with the hope of providing some information that will be useful in considering whether weak-form review's confidence in non-judicial constitutional decision making is justified."20 Taking up the constitutional interpretation by the Congress in impeachment cases, in exercise of war powers, and in Senate motions raising constitutional questions and by the executive through the Department of Justice's Office of Legal Counsel in the United States, along with the British executive's response to the Human Rights Act, the executive and legislative response in Canada to the Charter, and also, with regard to Portugal, the issue of unconstitutionality by omission where the legislature has failed to take appropriate or enough action expected by the constitution, he comes to the conclusion that "the performance of legislators and executive officials in interpreting the constitution is not ... dramatically different from the performance of the judges."21

Part III of the book is devoted to the enforcement of social and economic rights. Chapter 6 "lays out the basics of the state action doctrine in U.S. constitutional law."22 It appears as if the state action doctrine is raised as a tool to enforce the constitutionally protected right only when the state takes a step against such a right. But as a matter of fact all these rights which are founded on the common law principles of tort, contract and property can be violated as much by omission as by action. Tushnet gives several prominent examples of the courts having enforced constitutional rights in which no

19. Id. at 91.
20. Id. at 111.
21. Id. at 157.
22. Id. at 162.
positive action of the state was involved except that it failed to act where it should have acted. Through these examples, he tries to establish that the common law principles of tort, contract and property, which are the foundation of rights in the West, are as affected by non-action of the state as by action. For example, the principle of equal protection of laws is violated not only when the state makes unequal distribution of the property but also by not doing anything to remove the existing inequalities.23 "Again," he says, "minorities can be burdened not only by affirmative governmental acts but also by governmental failures to act -- that is, by radically distributive consequences of the exercise of background entitlements."24 Social and economic rights are primarily about removal of such inequalities. "The state action doctrine thus serves to carve out areas in which legislative action is permissible ... from areas in which judicial action is required when legislatures have not acted."25 Therefore, Tushnet argues that the state action doctrine should not be perceived as a weapon against positive state action only and if we change our perception we find that the constitutional protection of rights is as much available for social and economic rights as for first generation rights.26

Tushnet pursues the state action theme further in Chapter 7, suggesting ways and means evolved in other systems to circumvent its limitations. He refers to "indirect horizontal effect" test developed by the German Constitutional Court for resolving the state action problem, which many constitutional courts around the world have followed.27 He also gives examples of the Canadian Supreme Court and the courts in UK having overcome the State Action Doctrine in the application of Charter and the Human Rights Act provisions even without resorting to the German test. While admitting the difficulties in applying a horizontal effect test because of the special federal structure of the U.S. constitution and its impact on courts' powers, he, however, argues that the U.S. courts could also abandon the State Action Doctrine. In fact, Tushnet considers the State Action Doctrine as nothing but an excuse not to enforce social and economic rights. "The state action doctrine obscures the question courts are actually confronting, which is the extent to which a nation's constitution guarantees social welfare rights."28; in

23. Id. at 181. He says: "Accordingly, the state is responsible for the distribution of wealth, not only in the ex post decision whether to redistribute, but also in the ex ante ways that wealth is created by recognizing certain interests and not others as worthy of protection. The state is complicit in creating the distribution of wealth in society whether it "acts" affirmatively or whether it does nothing but enforce the background rules of property and contract law."

24. Id. at 193.
25. Id. at 181.
26. Id. at 195.
27. Id. at 198.
28. Id. at 219.
fact, he ascribes that to be the reason that Germany and Canada, along with many other countries which are committed to social welfare rights, have found a solution to it. Tushnet thinks that the conventional wisdom that acknowledges only strong-form judicial review unsuitable for enforcing social welfare rights has played a role in developing the state action doctrine. With the invention of the weak-form judicial review since the 1980s this conventional wisdom could be revised and the state action doctrine could be given a goodbye. 29

In the last chapter, after citing the disapproval of a few authors to the inclusion of social and economic rights in the East European constitutions, primarily because of courts' inability to enforce such rights, Tushnet discounts the enforcement argument with reference to the relaxation of State Action Doctrine and the indirect horizontal effect enforcement mechanism. The fact that enforcement of social and economic rights would require allocation of funds for which courts are not suitable has not deterred the courts from enforcing such rights. In fact, in certain areas courts have done that even in the U.S. This has occurred, according to Tushnet, because "the Constitution imposes a moral or political obligation on legislatures to secure social and economic rights, but that obligation does not necessarily have to be judicially enforceable – or, at least not judicially enforceable through strong-form judicial review." 30 He substantiates his argument with reference to Ireland, India and South Africa that have been using different versions of weak-form review for the enforcement of social and economic rights. He also examines different forms of articulation of these rights- including the terms “merely declaratory” and “non-justiciable” and emphasizes that even if the courts may not enforce them for any reason, legislators take them seriously, and might feel obliged to enforce them through political action in order to achieve what the constitution ordains. However, he argues that this can happen only in countries with a democratic culture and commitment to welfare. Enforcement of social and economic rights requires a civil society, which also gives adequate weight to judicial declarations. Tushnet substantiates his argument with examples of judicial decisions from Ireland and South Africa in which social welfare rights such as education and care of children, right to housing and the right to access to life-saving drugs have been upheld by the Constitutional Court by the mechanism of weak-form review which were not suitable for enforcement through strong-form review. 31 Tushnet suggests that weak remedies could be explored for enforcing strong substantive rights.

29. Id. at 227.
30. Id. at 230-31.
Admitting that modern constitutions recognize that the courts must enforce the first generation rights and that all constitutions must also provide for social and economic rights, he finds the strategy of enforcing the latter by weak remedies attractive. As enforcement of socio-economic rights even by weak remedies may not always be workable and weak remedies are also likely to be converted into strong ones, "which in turn will lead courts to transform the strong rights into weak ones", Tushnet approves "the Irish model of declaratory but otherwise non-justiciable rights - analogous to the British Human Rights Act approach - ... because it at least allows for the permanent articulation of the view that social and economic rights should be strong." In conclusion, Tushnet suggests "that weak-form review can be replaced by strong-form review when enough experience has accumulated to give us - judges, legislators, and people alike - confidence that giving the judges the final word will not interfere with our ability to govern ourselves in any significant way." So long as that stage is not reached, democracy and constitutionalism justify extension of weak-form review even to the first generation rights.

III. Analysis

Tushnet, with his eminence of engagement with serious constitutional issues enters into fine issues- some of which are likely to be missed out by someone like me unfamiliar with all his writings and their style. Knowing his engagement with judicial review and comparative law and from the spirit of the book under review, though, I take him to be a champion of democracy and constitutionalism. He also subscribes to the role courts play in upholding these values. He is not, however, at ease with the power of judicial review of legislation as exercised in the U.S. According to him, in many instances such review undermines democracy without promoting constitutionalism. Therefore, he has sided with those who would not support the inclusion of judicial review in the constitution of the U.S., were it to be rewritten afresh. But as that eventuality is merely hypothetical, neither desired nor even realisable, Tushnet presents other alternatives to the U.S. lawyers that could help him get out of the current situation. The book is an attempt in that direction. Even though it appears to be an exercise in comparative constitutional law it almost exclusively addresses an American audience. As the U.S. legal system has attained a high degree of advancement and precision
and is time-tested, especially in general and Constitutional law, not much reason or incentive to learn from others exists. The U.S. courts as well as scholars, therefore, avoid reference to other legal systems in finding a solution to their problems. That could also be the reason for Tushnet to confine his comparison to systems with which the U.S. lawyer has familiarity as well as historical affinity such as the U.K. and Canada and, marginally, Ireland. Reference to other systems, including South Africa that evokes interest among Western scholars in a non-Western country, is marginal and incidental. Even Germany, acknowledged as the most influential model of constitutional review since World War II, does not find place in any discussion except on the point of indirect horizontal effect.

As a comparative lawyer is free to pick up any two or more systems for comparison, Tushnet cannot be faulted for having made his choice for the one or the other legal system. He could decide on the basis of relevance to and receptivity by the U.S. lawyer of his comparison as well as his own limitations in respect of the understanding and availability of relevant material for comparison. But as someone who is propounding a dialogical model through weak-form review in a localizing context, he could have made his arguments more persuasive and convincing by adding a few more examples of emerging trends in constitutionalism and democracy in Europe, Latin America and Asia. Even if such examples would have not have helped in convincing the U.S. lawyer, they would have given a fillip to a worldwide understanding of constitutionalism and democracy; the lawmakers and judges in all those countries could have been alerted to his point.

Though Tushnet is not the first to draw the difference between the weak and strong form reviews, he has tried hard to convince the U.S. readers of the advantages weak-form review has over strong-form review for the U.S. At the end of his exercise he, however, leaves us guessing as to whether he prefers weak-form review to strong-form review as such, or only as an interim measure until a particular stage is reached. As already quoted, in the conclusion of the book he says: “My suggestion, that is, is that weak-form review can be replaced by strong-form review when enough experience has accumulated to give us – judges, legislators, and the people alike – confidence that giving the judges the final word will not interfere with our ability to govern ourselves in any significant way.”37 Having said that, he reiterates that “weak-form judicial review is generally attractive” because it lets the “reasonable interpretations of the constitution” by people’s representatives

37. Id. at 263-64.
through legislation prevail “even if those interpretations differ from those the courts offer.”38 He ends by saying: “Nervousness about extending weak-form review to first generation rights is misplaced.”39 Remaining unsure on highly contested and controversial issues is not a sign of weakness, rather it is a sign of the spirit of liberty that is not too sure to be entirely right. Tushnet has presented his point of view in support of weak-form review for the consideration of the U.S. lawyer. He admits, however, at the same time that their affinity to strong-form review is not totally misplaced. If they are not agreeable to conceding replacement of strong-form review by weak-form review for ever or in general, they must, at the very least, agree to it as an interim measure in the interest of welfare rights to facilitate and expedite realization of a society in which the difference between the reasonable interpretation of the constitution by the people’s representatives and the courts will get dissolved. In such an ideal situation, the courts could have the last word. For expeditious realization of that stage of society weak-form review could be conceded, as demonstrated in several other societies that let all three-generation rights be interpreted and enforced through weak-form review.40

As my views on judicial review coincide with Tushnet’s, I do not feel the need of going into the veracity and sufficiency of data that Tushnet has presented. I support his argument that the legislators care as much, rather, more, as the judges do for the constitution and that the legislators have a better understanding of constitutional traditions than the judges.41 My own guess about the understanding of the constitution vis-a-vis the legislators and judges in India is the same as of Tushnet. Therefore, even if technically his analysis may be found wanting in some respects of research methodology, I consider it a useful exercise to make a point. Examples may be found of judges having drawn attention of legislators to many issues of importance in the constitution. However, this does not undermine Tushnet’s argument.42

Although, as I have noted above, a comparative lawyer has the freedom to decide what to compare with for different reasons, as a part of a

38. Id. at 264.
39. Id.
40. Cf. B.M. Kaufman, Weak Courts on Steroids: Improving Weak-Form Judicial Review, 87 Texas L. Rev. 639, 644: “These analytical limitations lead to conclusions that – despite Tushnet’s admirable attempt to formulate something of substance from this murky, somewhat abstract field – are sometimes disappointingly general, though that does not at all mean they are not useful in thinking about judicial review.”
41. Id. at 641.
42. For a few examples from India see M. P. Singh, supra n. 5.
constitutional system which heavily draws from the same traditions as U.S., I believe a few examples from India could have very well supported Tushnet's point. The Constitution of India was drawn up at a time when the movement for democracy and realization of socio-economic rights was already in full swing. From the very moment the idea of having a modern constitution germinated towards the end of the nineteenth century until the constitution making in late 1940s, these conceptions had been thoroughly examined and re-examined before getting concretized in the constitution. Consequently democracy based on universal adult franchise along with justiciable, non-justiciable, positive as well as negative rights with independent and competent courts for giving them effect in case of need was enshrined in the Indian Constitution. Being aware of difficulties faced in other constitutions, especially in U.S., in the interpretation of unconditional rights, the Constitution of India provides for express limitations or grounds for limitations on the Fundamental Rights. Socio-economic rights in the form of directive principles are made non-justiciable but “fundamental in the governance of the country”; the state is duty bound “to apply these principles in making laws.” As the courts' initial interpretation of the rights belied the hopes of the constitution makers of a fair balance between first and second-generation rights, apart from making a few specific adjustments, a provision similar to section 33 of The Canadian Charter of Rights giving finality to legislative interpretation in matters of rights was introduced through the very first amendment of the Constitution in 1951. This provision – Article 31-B – could be called a precursor of weak-form review later adopted in other constitutions.

Though the story of judicial review did not take an unequivocally favourable turn even after these amendments, the courts started rethinking their stand particularly after the 1975-77 emergency and suspension of rights which led to the adoption of formal and substantial weak-form review from 1978 onwards. Instead of invalidating legislation for violation of rights the courts started issuing directions, mandamus and other suitable remedies for

43. The first amendment to the Constitution introduced, among others, Article 15(4) authorizing special provisions for certain classes, modified cl. (2) of Article 19, introduced Article 31-A, primarily curtailing right to property and Article 31-B, giving overriding power to legislations included in the IX Schedule to the Constitution.

44. Article 31-B reads: “Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provision thereof shall be deemed to be void, or even to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.”
the enforcement of socio-economic rights where the state failed to take appropriate steps for the realization of any right. The courts also converted some of the non-justiciable directive principles into justiciable rights by incorporating them into or in association with the latter. They also devised appropriate remedies for the enforcement of different rights including perpetual or continuing mandamus and monitoring through independent commissions or through state agencies. For the enforcement of rights of those who, for reasons of different kinds of disabilities, are incapable of approaching the courts, the requirement of standing was relaxed and any person having sufficient interest in the matter is allowed to approach the court on behalf of such person.

Depending upon the nature of the claim and feasibility of its realization the courts have devised and tried appropriate remedies especially for the second and third generation rights. No doubt India's law and legal process have not acquired the level of precision and sophistication of the U.S., the U.K. or Canada, but they have produced a model worth considering for the developing societies and emerging democracy and constitutionalism. This may not, though, be helpful to a U.S. scholar and therefore Tushnet has a valid justification for not taking it into account. On the other hand, in a theoretical division of review into two forms based on observed facts and law from the U.S. to New Zealand, reference to developments in some of the developing societies would have been encouraging for not only those societies but also to the American scholar because he could also have a more rounded picture of the world. But irrespective of U.S. scholar's interest in the rest of the world and whether he is interested in learning anything from the rest of the world, an Indian student like me must continue to note developments around the world, not necessarily for mimicking them but to learn that the most advanced and sophisticated systems also have their problems and we should instead of following them blindly, learn from them, while relying upon and inventing our own solutions.45

This brings me to a related but my last point. In recommending his dialogical model for the enforcement of socio-economic rights through weak-

45. Cf. Kaufman's criticism, supra n. 40 at 651 and 654-660 that Tushnet should have taken into account the developing societies in Latin America where his thesis fails. Also see Theresa J. Squatrito, Book Review, 22 Comparative Political Studies, 1, 3 (2008). I have avoided burdening this part of the comment from numerous references of judicial decisions and legal literature in India. These issues and matters are so well known that they can be found in any book on the Constitution of India. See, e.g. M. P. Singh, Shukla's Constitution of India (Lucknow, Eastern Book Co., 11th Ed. 2008) particularly comments on Articles 21, 32 and 37. An evolutionary perspective can also be found in my paper, supra n. 5.
form review, Tushnet speaks of civil society as a precondition.\textsuperscript{46} If civil society refers only to the existence of Non-Governmental Organisations (NGOs) that come forward to take up and enforce socioeconomic rights of the disadvantaged sections of society, it is not problematic and many developing societies, including India have many such organizations that regularly take up such causes in the courts and legislatures. However, if ‘civil society’ refers to a class of society which by education, profession and manners is considered different from the rest, making the existence of such a class as a precondition for the realization of socioeconomic rights smacks of the ideas of a bygone era- the Darwinian notion of survival of the fittest, Sir Henry Maine’s division of progressive and static societies, or Mill’s civilized and barbaric societies spring to mind. I am not attributing any motives to Tushnet, simply because it may not have been considered even in his wildest dreams. But the argument seems absurd- for the reason that if a strong civil society, as it is normally defined, is already extant, socio-economic rights shall already substantially have been realized. Secondly, such an enlightened society would not require any kind of judicial review because all differences will stand removed by dialogue.\textsuperscript{47}

\textbf{IV. Conclusion}

As a student of the law engaged in legal education for a sufficiently long time I have been pointing out to my younger colleagues that in relying upon any legal literature from any scholar from any corner of the world, they should remember that every such literature has a context. As the saying goes, necessity is the mother of invention. A scholar situated in his or her natural surroundings notices certain incongruities or matters of contention disturbing social harmony or his or her vision of a smooth living. That scholar looks for the resolution or elimination of those aberrations and looks all around as far as his or her search and imagination can go. These efforts may result in presenting a solution to some or all of the aberrations which the scholar is faced with. The aberrations and their solutions often give the impression of being universal, but they are rarely so. Therefore, they cannot be mechanically lifted and transplanted anywhere and everywhere. We must learn from the experience of others in facing the problems and finding their solutions, but we should not blindly believe that our problems and their

\textsuperscript{46.} Supra n. 3 at 253.

solutions are the same as of others. This is the message that Tushnet's book clearly gives. He notes a perennial problem in U.S. society, for the resolution of which he presents certain solutions in the light of lessons others have learnt. He is not addressing any other society. His book must be assessed on that basis. So assessed, it presents a new line of thinking which is worthy of appreciation.