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Ronald Kahn

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THE CONSTITUTION RESTORATION ACT, JUDICIAL INDEPENDENCE, AND POPULAR CONSTITUTIONALISM

Ronald Kahn[†]

INTRODUCTION

Mark Tushnet's observations about the Constitution Restoration Act of 2005 (CRA)¹ reveal his belief that if the Act were to pass through Congress and be signed into law by the President, it would not have an earthshaking effect on the power of the Supreme Court to interpret the Constitution, on the process of judicial review, or on the impeachment process. It simply would be no big deal for Tushnet, either as a political or legal act. I explain why the passage of the CRA, which seeks to limit the use of non-U.S. materials by federal courts, is not a big deal to Mark Tushnet. I do this through an analysis of Tushnet's theories of "popular constitutionalism," "constitutional law as political law," and "taking the Constitution away from the courts."² I center on Tushnet's vision of the relationship of courts and law to political institutions and politics.

I critique Mark Tushnet's civic republican vision of the American political system and the place of the Supreme Court and the rule of law in that vision. I conclude that there may be far more serious implications of the passage of the CRA than he admits, especially if it were part of a continuing and serious effort by political bodies to curtail the discretion of the Supreme Court and lesser courts through

[†] James Monroe Professor of Politics and Law, Oberlin College; I thank Sara Chatfield '06, for her superb research assistance.

¹ Constitution Restoration Act, H.R. 1070, 109th Cong. (2005), 2005 CONG US HR 1070 (Westlaw).

² I center my analysis on Mark Tushnet's symposium article, *The "Constitution Restoration Act" and Judicial Independence: Some Observations*, 56 CASE W. RES. L. REV. 1071 (2006) [hereinafter, Tushnet, *Constitution Restoration Act*]. See also Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI-KENT L. REV. (forthcoming 2006) [hereinafter Tushnet, *Popular Constitutionalism*]; MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

limiting the materials they may use and the analogies they may employ in defining individual rights and limitations on governmental power.

At the core of my argument is the proposition that decision-making, institutional norms, and majoritarian values are far more different in the Supreme Court (and legal institutions) as compared to more directly politically accountable institutions than is recognized in Tushnet's theory of popular constitutionalism. Failure to recognize these differences leads him to undervalue the importance of judicial independence to the protection of individual rights, the place of the Supreme Court in American political development, and the unique role of the Court as a check and balance in American politics. In the final section of this article, I offer an alternative approach to Supreme Court decision-making and the understanding of court and political institution roles in doctrinal change. This approach views the Supreme Court and political institution interactions as bidirectional in a way that takes seriously the notion that the Supreme Court and courts in general are different from political institutions, and that the independence of courts must be maintained to ensure their proper place in our nation's system of separation of powers and the protection of individual rights.³

THE CONSTITUTION RESTORATION ACT OF 2005 IS NO BIG DEAL

At the core of this Act is a statement of opposition to the use of non-U.S. materials of any sort by federal judges. The Act states:

In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.⁴

Nor may any decision based on such materials be used as a binding precedent in state courts: "Any decision of a Federal Court which has

³ See Ronald Kahn, *Social Constructions, Supreme Court Reversals, and American Political Development: Lochner, Plessy, Bowers, But Not Roe*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 67-113 (Ronald Kahn & Ken I. Kersch eds. 2006) [hereinafter *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT*] (arguing the bidirectional nature of Supreme Court decision-making).

⁴ Constitution Restoration Act § 201, H.R. 1070, 109th Cong. (2005), 2005 CONG US HR 1070 (Westlaw).

been made prior to, on, or after the effective date . . . that the decision relates to an issue removed from Federal jurisdiction . . . as added by this Act, is not binding precedent on any State court.”⁵ Finally, if a justice of the Supreme Court or a judge of a lesser federal court or state court uses such cases which employ non-U.S. materials, such use shall constitute an offense and a breach of the standard of good behavior, for which a judge may be impeached. The Act reads:

To the extent that a justice of the Supreme Court of the United States or any judge of any Federal court engages in any activity that exceeds the jurisdiction of the court of that justice or judge, . . . engaging in that activity shall be deemed to constitute the commission of—(1) an offence for which the judge may be removed upon impeachment and conviction; and (2) a breach of the standard of good behavior required by article III, section 1 of the Constitution.⁶

Mark Tushnet’s contribution to this Symposium argues that we should not be concerned if the CRA were to become law. Tushnet offers many reasons why the passage of such an Act would, in my words, be “no big deal.” The first reason Tushnet offers is that the statute’s language is quite vague. Tushnet emphasizes that there is a difference between court “reliance” on non-U.S. sources and “reference” to them. For example, he would categorize the Court’s use of foreign materials in *Atkins v. Virginia*⁷ and *Roper v. Simmons*⁸ as reference rather than reliance because it “[confirms] a judgment already reached by checking it against judgments made elsewhere.”⁹

With regard to the relationship of law and politics, one could conclude from Tushnet’s remarks that the difference between reference to and reliance upon would be a powerful defense for a judge who was caught up in impeachment proceedings if the CRA were to become law. A judge and members of political bodies could use the vagueness of these terms to limit the effect of the CRA on their institutional decisions. Moreover, the Act’s vague language would present interpretive discretion both to justices and judges and to political officials as to what constitutes “reliance upon.” Tushnet argues that we should not worry that the CRA has established a rule of law that the use of non-U.S. materials, public acts, documents, and cases will have a

⁵ *Id.* § 301.

⁶ *Id.* § 302.

⁷ 536 U.S. 304 (2002).

⁸ 43 U.S. 551 (2005).

⁹ Tushnet, *Constitution Restoration Act*, *supra* note 2, at 1075.

major effect on precedent and the impeachment of judges. We should not worry about the pragmatic impact of the Act on judicial independence or on the making of constitutional law itself.

Tushnet then asks whether the CRA would be constitutional if our reading of the statute's language and Congress's intentions results in the conclusion that the statute does apply to *Roper* and similar instances of Court reliance upon of non-U.S. materials. Tushnet first accepts the precedent in *United States v. Klein*¹⁰ that "Congress cannot dictate a 'rule of decision' about a constitutional provision's meaning" and assumes that "the choice of methods of constitutional interpretation, is at the heart of the judicial enterprise."¹¹ Tushnet then places *Klein* at the extreme end of a continuum of possible congressional limits on the interpretive powers of courts.¹² However, *Klein* is not a deciding factor in the constitutionality of the CRA because it does not answer the question of the constitutionality of the Restoration Act, since Tushnet "doubt[s] . . . that Congress [lacks] *all* power to [prescribe interpretive methods]."¹³

Tushnet emphasizes that the question of the legal and political power of courts compared to more directly politically accountable institutions is a matter of degree. Congress may dictate interpretive methods so long as it does not prevent the Court from performing its function of constitutional interpretation.¹⁴

He then concludes that Congress has not overreached its power by impairing the ability of courts to engage in constitutional interpretation. However, this conclusion seems to be based on a view that the practice by Congress to impair courts in this way "has played a rather small role in recent constitutional interpretation," so that the Supreme Court and lesser courts would not be "substantially limit[ed] [in] their ability to do the job the Constitution gives them."¹⁵

Tushnet has even less concern that the CRA might unduly limit the Supreme Court's ability to interpret statutes. Tushnet argues that differences in the canons of constitutional and statutory construction provide Congress with even more resources and authority to limit

¹⁰ 80 U.S. (13 Wall.) 128 (1871).

¹¹ Tushnet, *Constitution Restoration Act*, *supra* note 2, at 1077.

¹² *Id.* at 1077-78.

¹³ *Id.* at 1078. Tushnet writes, "[F]or example, a statute purporting to ban the federal courts from using Latin phrases other than those commonly found in legal dictionaries, adopted, for example, to ensure that federal court decisions would be accessible to ordinarily literate Americans," would make him "hard-pressed to deploy my intuition about the core judicial function against such a statute." *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1078-79.

courts' use of non-U.S. materials with regard to its power to influence the process of statutory interpretation.¹⁶

The "enforcement" clauses of the CRA are of even less concern to Tushnet than the effect of the Act on courts' power to interpret the constitution and statutes. For Tushnet, they raise separate and different questions than those which arise from the CRA's constitutionality. To Tushnet, the enforcement clauses merely "provide a legal justification for impeachment."¹⁷

For Tushnet, the Chase precedent against basing a vote on impeachment because of disagreement with the propriety of the judge's rulings is not a sufficient legal basis to stop the impeachments of judges who rely upon non-U.S. law in constitutional interpretation.¹⁸ Tushnet argues that the CRA is not saying that a judge should be impeached for the decision she makes in a case, but rather for her use of non-U.S. materials no matter the decision that is reached, since such a use constitutes a disregarding of law.¹⁹

Tushnet's analysis of the enforcement clauses of the CRA introduces the reader to his view of the relationship between law and politics and courts and political institutions as a reason for why he has little concern about the passage of the CRA. On the question of whether Congress can enforce the substantive provisions of the CRA by subjecting those who violate its terms to removal from office, Tushnet rejects the view that impeachment is a purely political process in which the grounds of impeachment are whatever a majority of the House of Representatives considers them to be. He writes, "impeachment is a process that at least *combines* politics and law, so that representatives must have some argument that a judge's performance constitutes bad behavior (or a high crime or misdemeanor) as a predicate for impeachment."²⁰

The fact that the impeachment process "*combines* politics and law" means that if Congress draws upon the CRA it does not undermine what Tushnet agrees the failed impeachment of Samuel Chase has established: "the legal proposition that Congress may not remove a federal judge from office *merely* on the basis of disagreement with the judge's rulings."²¹ As I explore below, Tushnet's analysis of what will happen in the impeachment process were the CRA to be enacted provides a forum to explore the core elements of his theory of popular

¹⁶ *Id.* at 1077 n.27.

¹⁷ *Id.* at 1072.

¹⁸ *Id.* at 1080.

¹⁹ *Id.*

²⁰ *Id.* at 1079 (footnote omitted).

²¹ *Id.*

constitutionalism, and thus helps us understand why the passage of this Act would be “no big deal.”

STUDYING JUDICIAL INDEPENDENCE

To understand why Tushnet is not concerned about the impact of the passage of the CRA on the independence of the Supreme Court, one first needs to ask what is required and what must be known in order to understand what constitutes the “independence” of the judiciary: One must first have a theory of the role of courts and more directly politically accountable institutions in the making of constitutional law. One must have a vision of institutional difference between courts and political institutions, and a conviction that these differences are important to the overall constitutional system. One must have a concept of how decision-making processes and institutional norms differ in courts and political institutions, and that these differences are important to the place that courts and political institutions play in the process of making constitutional law. One must also have a theory of how courts and political institutions relate to each other when constitutional issues are before the nation, and the nature of the directionality of the impact on each other of courts and political institutions. One must have a view that the study of institutional difference is possible both in short time periods and on specific issues of public policy, as well as over long periods of time. Moreover, the concept of judicial independence requires that one have a theory as to why courts should be independent of political institutions. Finally, there must be some bright lines about when a court or political institution has transgressed its proper institutional role, so that a claim can be made as to whether the independence of courts or political institutions has been violated. The premises of Mark Tushnet’s theory of popular constitutionalism result in a lack of concern about the passage of the CRA and similar acts infringing on the independence of the Supreme Court and lesser courts.

THE CRA AND POPULAR CONSTITUTIONALISM

To see why Tushnet is not concerned about the impact of the CRA on the Supreme Court’s power to interpret law and the Court’s place in American political development, we need to delve more deeply into his theory of popular constitutionalism. Why is Tushnet not concerned about the impact of this Act on the independence of the Supreme Court and lesser federal courts? The key to answering this question is to understand why Tushnet views adjudicated law and political law as simultaneous and not categorically different, and how

the similarity he sees in courts and political institutions, empirically as institutions, is related to his view that courts must not be viewed as morally superior institutions for making constitutional choices. To answer this question, we must consider his concept of courts and political institutions as being in a dialogic relationship. This analysis suggests that there is far less law than politics in his view “that constitutional law is a distinctive or special kind of law,” which he calls “*political law*.”²²

This discussion will also ask why larger questions of the place of courts and law within the American political and legal system are not central to Tushnet’s concerns. I will explore the following questions: Why does Tushnet look simply at individual judges and political leaders making limited, nonconclusionary decisions and acts, one at a time? Why is there little concern for larger questions of the appropriate place of courts, and the Supreme Court with its power of judicial review, as compared to the place of Congress and other more directly politically accountable institutions as venues for the making of constitutional law? Why does the passage of the CRA, or a statute like it, fail to foment a discussion about the “power of judicial review” and the powers of Congress to limit judicial discretion? To understand why this is so, and the implications of not asking such questions, we need to explore what Tushnet means by “constitutional law as political law,” both in his discussion of the CRA and his theory of the popular constitutionalism.

This analysis will be done in stages. First, I will explore Tushnet’s view of the place of differences in the internal institutional practices of courts and more directly political institutions, such as Congress. Second, I will analyze what Tushnet views to be the relationship of courts and political institutions. Third, I will explore the relationships between these characteristics of courts and political institutions within Tushnet’s theory of popular constitutionalism and his view that courts are not in a normatively or morally superior position to political institutions in defining constitutional law. Fourth, I will explore whether it is possible to systematically study if courts are morally superior to political institutions as forums for making constitutional law. Fifth, I will explore the implications of the above findings for the standards upon which the legal-political system for making American constitutional law is to be evaluated. And finally, I briefly explore an alternative method for evaluating the legal-political system through which constitutional law is made, one which allows the determination of whether the passage of laws such as the CRA would affect the inde-

²² Tushnet, *Popular Constitutionalism*, *supra* note 2 (manuscript at 1, on file with author).

pendence of courts, and the implications of the loss of such independence for the protection of individual rights.

DECISION-MAKING WITHIN COURTS AND POLITICAL INSTITUTIONS:
INDICATIONS OF DIFFERENCE

Mark Tushnet's contribution to this Symposium and his article *Popular Constitutionalism as Political Law* offer some evidence that the Supreme Court and courts in general are different from political institutions when they decide constitutional questions. In his Symposium contribution, Tushnet emphasizes the importance of the process of interpretation in Supreme Court decision-making.²³ Another indication that there is a special quality to what constitutes the legal in legal institutions is emphasized in Tushnet's argument that constitutional law is not simply political but is both legal and political.²⁴ Moreover, Tushnet is not simply an attitudinalist²⁵ because inherent in his view is that there is something happening in the judicial decision-making process that is not simply a reflection of the attitudinalism of judges or the direct effects of new appointments to the Court. That is, for Tushnet, the justices' preformed political ideologies and policy desires cannot explain their legal decisions on the Court. For the Court to avoid simply reflecting the policies and ideological predispositions of presidents and majority coalitions or the demands of social movements, there must be something in Supreme Court decision-making that allows constitutional law to change that is not directly related to election returns or even to mobilization politics.

Tushnet offers some suggestions as to the difference between law and politics to orient our thinking and to get us in the general area where he thinks scholars should be.²⁶ One difference Tushnet highlights is that constitutional law and legal institutions are primarily "retrospective."²⁷ Tushnet then qualifies this view by arguing that

²³ Tushnet, *Constitution Restoration Act*, *supra* note 2, at 1077 ("The intuition is that constitutional interpretation, and the choice of methods of constitutional interpretation, is at the heart of the judicial enterprise.").

²⁴ Tushnet, *Popular Constitutionalism*, *supra* note 2 (manuscript at 2-3, on file with author) ("That constitutional law is to some substantial degree political is now largely uncontroversial, but many efforts to analyze the 'political' part of constitutional law strike me as simplistic, at least in that they treat constitutional law as *only* politics, and understand politics to be the expression of unanalyzable preferences.") (footnote omitted).

²⁵ *Id.* (manuscript at 15, on file with author) ("Judges observing the social movement and its effects on society change their views about what the Constitution means.").

²⁶ *Id.* (manuscript at 4, on file with author).

²⁷ *Id.* ("This retrospective character makes legal analysis an exercise in interpretation – of texts, of practices, of history. In contrast, politics is to a large degree prospective: Decision-makers today make judgments about what would be best for the society going forward, without essential reference to prior events or practices.").

politics can be (and are primarily) entirely forward-looking,²⁸ but courts cannot be solely forward-looking. I presume this is so because courts must compare the cases they are considering with precedents—and that is backward-looking.²⁹ Tushnet does admit that politics at times may be backward-looking, because legislators can use precedents, such as in *Klein* or the prior passage of the CRA, to make arguments for or against the impeachment of judges who use non-U.S. materials.³⁰ However, he concludes that the distinction between courts as backward-looking and political institutions as forward-looking is a valid generalization to make.

The validity of Tushnet's view of courts as backward-looking and political institutions as forward-looking needs to be considered in light of his views that law and politics must be viewed as simultaneous. It also must be viewed in light of his views on whether the systematic study of the place of courts and political institutions (and of law and politics) on the development of constitutional law is possible, as explored below.

One must ask at what level law and politics are simultaneous—at the level of Court and political institution decision-making or at the level of the outcomes from the processes of legal and political institutions as a summation of choices by both legal and political bodies. This is important because one's view of the nature of simultaneity within and between courts and political institutions has much to do with whether one places trust in courts and political institutions to make constitutional choices, especially with regard to individual rights and governmental abuse of its powers. It also has much to do with whether one thinks courts or political institutions should be the final arbiter of individual rights.

"THE LEGAL" IN COURTS AND POLITICAL INSTITUTIONS

Tushnet finds that the similarities in the decision-making processes of courts and political institutions are far greater than the differences, and it is this emphasis on the similarities between courts and political institutions that is at the core of his theory of popular constitutionalism. Tushnet assumes that constitutional scholars know what law and the legal is. Therefore, rather than explicating the role of law and the legal process in "constitutional law" or the role of law and legal decision-making in legal institutions, much of the process of the role of

²⁸ *Id.* (manuscript at 5, on file with author) (explaining that "politics *can* involve decisions that are entirely forward-looking").

²⁹ *Id.*

³⁰ Tushnet, *Constitution Restoration Act*, *supra* note 2, at 1077.

the law and legal in courts is left to the reader to figure out. Perhaps this is based on the notion that all lawyers, jurists, and constitutional scholars are knowledgeable in this area and there is thus no need to discuss it. In an ode to the "law," Tushnet writes, "That constitutional law is to some substantial degree law used to be entirely uncontroversial, and we therefore have a reasonably good sense of how to think about the 'law' part of constitutional law."³¹

Tushnet again makes the assumption that constitutional scholars are familiar with "law" when he compares his theory to those of Larry Kramer, Bruce Ackerman, and others, and writes, "As I have said, scholars are familiar with how political law—that is, constitutional law—is law. Kramer's primary goal is to delineate the political [not legal] component of political law."³² And Tushnet agrees with this emphasis.

Tushnet makes a far greater effort to discuss what constitutes the legal in political institutions than in courts. For example, Tushnet emphasizes that "[Constitutional law] sometimes induces decision-makers to make decisions that are inconsistent with their 'pure' preferences, that is, those they would hold in the absence of law."³³ Most importantly, for Tushnet, the legal in political institutions usually refers to the use of legal arguments to make policy choices. We can see the minimal definition of the legal when Tushnet argues that proponents of an anti-torture law engage in "an interpretive enterprise," that is, a legal enterprise where arguments are made by those proposing a statute to ban further use of such techniques because "their use [is] a betrayal of who we [are] as Americans."³⁴ This example is used to demonstrate that "constitutional law [interpretation may occur] in the context of prospective [political] decision-making"³⁵ For Tushnet, therefore, resting arguments on an interpretation of American values equals "legal" arguments.

On the question of whether Congress can enforce the substantive provisions of the CRA by subjecting those who violate its terms to removal from office, we see again the lack of clarity as to what constitutes law and politics, and a quite minimal statement of the legal in politics. Tushnet says he does not subscribe to the view that impeachment is a purely political process because "impeachment is a process that at least *combines* politics and law, so that Representatives

³¹ Tushnet, *Popular Constitutionalism*, *supra* note 2 (manuscript at 2-3, on file with author).

³² *Id.* (manuscript at 10, on file with author).

³³ *Id.* (manuscript at 1-2, on file with author) (footnote omitted).

³⁴ *Id.* (manuscript at 6, on file with author).

³⁵ *Id.*

must have some argument that a judge's performance constitutes bad behavior (or a high crime or misdemeanor) as a predicate for impeachment."³⁶

We also see this minimalist conception of the legal in politics when Tushnet argues that the failed impeachment of Samuel Chase "has been taken to establish the legal proposition that Congress may not remove a federal judge from office *merely* on the basis of disagreement with the judge's rulings."³⁷ However, for Tushnet, in politics, the Chase precedent is not a sufficient legal basis to stop impeachments of judges who rely upon non-U.S. law in constitutional interpretation.³⁸ Tushnet argues the impeachment debate is "legal" because supporters of impeachment can use the argument that by impeaching a judge for use of non-U.S. materials they are making a legal determination. Therefore, what constitutes the legal in politics is the statement that an action is illegal, made by an institution with the authority to make such a statement.

Politics also is legal according to Tushnet because the debate over the removal of a judge will center on "the interpretive ambiguities associated with the [CRA], and its possible unconstitutionality."³⁹ The debate will also be legal because it will be over whether a judge relied on or simply referenced non-U.S. law and whether the statute is an unconstitutional intrusion on core judicial functions. At the core of Tushnet's analysis is that the politics of impeachment is legal because the CRA now provides "a legal rather than a merely political basis for their actions."⁴⁰

This is a low threshold for what constitutes the legal in a political institution because to say that the fact that the CRA exists constitutes a "legal" argument for impeachment does not signal that Congress is acting in a legal way, except in the most formal of senses. The "legal" as a debating point in an impeachment hearing is far too meager a definition, given the quite different institutional processes and norms in courts and legislative bodies.

³⁶ Tushnet, *Constitution Restoration Act*, *supra* note 2, at 1079 (footnote omitted).

³⁷ *Id.*

³⁸ *Id.* at 1080. Tushnet writes,

After all, are not members of Congress who would vote to remove a judge for relying upon non-U.S. law simply disagreeing about the propriety of the judge's rulings"? Not quite. . . . After the adoption of the Constitution Restoration Act, a member of Congress can say of a judge who relies on non-U.S. law, "I am not simply disagreeing with the reliance on non-U.S. law, which is bad enough. Worse, this judge defied *the law*, which certainly ought to be ground for removal."

Id.

³⁹ *Id.*

⁴⁰ *Id.*

One also witnesses Tushnet's low threshold of the concept of the legal in politics when he views legislators' commitments to policies as being equivalent to "constitutional commitments." Tushnet writes,

[E]nacting the Social Security system and the Endangered Species Act were decisions about what the Constitution, properly interpreted, requires. And yet, the courts have never said that such statutes have constitutional dimensions. Taking the courts' assertions about what our constitutional rights are as providing the criteria for comparing how institutions perform will omit by fiat alone a comparison on the issues of income security and environmental protection.⁴¹

This definition of the legal as acts of Congress, as policy commitments, now labeled "constitutional commitments," is a quite different conception of the legal, when one considers that definitions of the legal are far more disciplined and complex because of the far different institutional norms of courts and legislative bodies.⁴²

I question whether commitments to a policy by political institutions using such legal arguments are the same as commitments to legal arguments and principles by courts in their making of constitutional law. If the argument is that political institutions can sometimes be more reformist than courts, then Tushnet is correct; yet this conclusion is obvious. It would be more precise to say that environmental protection has become a policy in the United States, sometimes furthered by politics and other times not. Political support for social security or environmental protection is at the level of policy, not constitutional rights. If one were to ask Tushnet what it means for the Supreme Court to define a right to environmental justice, and what that right would mean as compared to a policy decision by Congress or a political institution, then we would secure a more precise measure of the differences between the Supreme Court and political institutions as venues for the specification of what constitutes the legal or constitutional law.

⁴¹ Tushnet, *Popular Constitutionalism*, *supra* note 2 (manuscript at 25-26, on file with author).

⁴² This low threshold for what constitutes the legal in political institutions may be part of the reason why Tushnet argues we should trust political institutions, not simply courts, to make constitutional choices of significance, and to trust the open interaction among political institutions and courts to make constitutional law, that is, political law. Because if the legal in courts and political institutions is viewed as present in both venues, with no significant differences, there is little reason for arguing for court over political institution power in the American system of government with regard to asking constitutional questions.

One could then ask whether the Supreme Court's definition of a right would change the debate in the political system. Would the definition of a right to environmental justice by the Supreme Court affect the long-term staying power of the values behind it and the outcomes from such values? Does the Supreme Court's definition of a right, given the nature of the Supreme Court decision-making process, including the application of precedent, the process of analogy, and the social construction process (all of which are both backward- and forward-looking) mean that the chance of a right becoming a settled expectation to be built upon in the future is a greater possibility than with a policy made in a political institution?

If the question is how courts and political institutions differ in their definition of rights, then that is asking something quite different. Or, if the question is what impact the Court following law rather than majoritarianism plays in the definition and sustainability of rights, then such a weak definition of the legal must be rejected as a beginning hypothesis. In a sense, Tushnet has defined away important institutional differences that affect the role of institutions in American political development. Thus, Tushnet's criticism of courts and acceptance of constitutional law in political institutions is made at the policy level—not at the institutional level.

There is no discussion about the impact of the differences in the nature of legal arguments and institutional norms in courts and political institutions or their impact on the nature of normative views about the place of courts as compared to political institutions as venues for making constitutional law. The use of legal arguments and, more importantly, their quality and authority within courts and political institutions, is so different that their impact on institutional choices and the nature of the choices themselves will differ greatly between institutions.

By having such a minimal standard of evaluation as to what counts as "law" or the legal in politics and political institutions and by not exploring the difference between courts and political institutions in terms of institutional norms and rules, Tushnet denies the possibility that the Supreme Court and lower courts could or should have a different role in making constitutional law than political institutions.

LAW AND POLITICS AS COMBINED AND SIMULTANEOUS

The view that all constitutional law is "simultaneously political and legal," and "constitutional law combines politics and law"⁴³ is

⁴³ Tushnet, *Popular Constitutionalism*, *supra* note 2 (manuscript at 3, on file with author).

another reason why the difference between law and courts is obscure and not central to Tushnet's theory of popular constitutionalism, but is crucial to the way he approaches whether the CRA is constitutional. This lack of analytic clarity undercuts the arguments he makes in support of the constitutionality of the CRA and his lack of concern for the independence of courts.

Tushnet's minimalist conception of the definition of "legal" in political institutions becomes a greater concern because of his view that law and politics cannot be analytically separated, and that if they could be separated it would be unwise to do so. This definition of the legal in politics is the weak linchpin of his analysis as to why the CRA is constitutional and its enforcement would not violate canons of statutory construction. Tushnet writes, "We cannot expect sharp analytic distinctions to be available when our interest is in the actual practice of constitutional law throughout U.S. history."⁴⁴ The lack of analytic clarity as to what Tushnet means by constitutional law combining politics and law undercuts his argument supporting his statutory interpretation of the CRA as well as its constitutionality.

SIMILAR TOOLKITS IN POLITICAL INSTITUTIONS AND COURTS

The failure to explore the legal in court decision-making, the existence of a very low threshold for the finding of legal decision-making within political institutions, and the finding that decision-making in both courts and political institutions is simultaneously political and legal leads Tushnet to conclude that the "toolkits" of courts and political institutions in the making of constitutional law are not significantly different; nor are the domains of legal and political institutions categorically different.⁴⁵ Tushnet writes,

The toolkits, so to speak, of adjudicated law and political law (the law of impeachment) are the same. Perhaps adjudicated law uses a wrench—reference to precedent, for example—

⁴⁴ *Id.* (manuscript at 4, on file with author).

⁴⁵ Tushnet, *Constitution Restoration Act*, *supra* note 2, at 1081. Tushnet writes, The Ford position failed to acknowledge that impeachment (like the rest of constitutional law, I believe) is simultaneously political *and* legal—that constitutional law is a special kind of law, a political law. The toolkits, so to speak, of adjudicated law and political law (the law of impeachment) are the same. Perhaps adjudicated law uses a wrench—reference to precedent, for example—more often than political law does, although the Chase example shows that political law uses precedent too. And perhaps political law uses a screwdriver—reference to sound public policy—more often than adjudicated law does, although judges sometimes predicate their legal interpretations on judgments of what would be good public policy. Despite these differences around the edges, the two domains are not categorically different.

Id. (footnotes omitted).

more often than political law does, although the Chase example shows that political law uses precedent too. And perhaps political law uses a screwdriver—reference to sound public policy—more often than adjudicated law does, although judges sometimes predicate their legal interpretations on judgments of what would be good public policy. Despite these differences around the edges, the two domains are not categorically different.⁴⁶

This similarity in toolkits means that one cannot argue that courts are normatively superior to political institutions in making constitutional choices. Moreover, the width of discretion in courts and political institutions is not that different. The width of discretion of court choices is a product of the extreme width as to what is a permissible argument to use in a case.⁴⁷ We see this when Tushnet argues that one cannot predict whether the law is constitutional, how it will be used politically, and its impact on society, simply by reading it. Nor can one really make clear statements about its use as a basis for the impeachment of justices. Anything is possible. Precedents lead one in many different directions. Therefore, one cannot know beforehand what their significance will be. For example, Tushnet emphasizes that the vagueness of the language in the CRA makes it unclear whether “reference to” meets judicial standards of court “reliance upon”; thus, there is considerable discretion for courts. What constitutes an impermissible aggrandizement of power by Congress will rest both on courts’ interpretation of it and how Congress uses the Act in the politics of impeachment.

Moreover, whether Congress is aggrandizing its power at the expense of courts, or the other way around, is a matter of degree, not a violation of principle, with some bright line limits. It is a matter of degree in part *because* both courts and political institutions are simultaneously political and legal, and the difference between the place of preference (discretion and policy choice) and law is not significant in political and legal institutions, either empirically or normatively, under his theory of popular constitutionalism.

According to Tushnet, it is all a matter of degree, with the line of constitutional violation never made clear. While the choice of interpretive methods is at the core of the judicial function, depriving

⁴⁶ *Id.* (footnote omitted).

⁴⁷ Charles Geyh supports this view when he argues that there must be a smoking gun of the judge not caring at all about precedent and by explicitly stating it, if judges are to be sanctioned for unprofessional behavior. Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911, 928-29.

courts of the use of non-U.S. materials would not substantially limit the role that the Constitution has given courts. However, because Congress does not lack all power to prescribe all interpretive methods, some limitation is possible; it is all a matter of degree as to whether a particular law substantially impairs courts' ability to perform their core judicial functions. Canons of statutory construction are different than canons of constitutional construction, and different in ways that increase the authority of Congress to prescribe or proscribe interpretive methods of courts. With regard to the enforcement powers of Congress, the CRA gives Congress "legal" reasons to impeach judges who refer to non-U.S. materials, in part because the impeachment "at least combines politics and law." In this analysis, what constitutional law is in regard to this act is a product of the politics and legalities of its analysis by courts and by Congress and other political actors. It is not possible to say more than this at the present time. Unless one explores the difference between courts and more directly politically accountable institutions in institutional norms, as well as the effect of these differences on the boundary mechanisms (or predispositions) of such institutions as they interact with other institutions, we cannot know the impact of the simultaneity of the legal and the political within each institution.

Thus, it is difficult to explore the important question of judicial independence if the basic premises about decision-making in courts and political institutions are not viewed analytically as significantly different. Unless there is clarity and rigor as to what constitutes the legal and the political in courts and political institutions, and how the two are related, either it is difficult to make any judgments about judicial independence or the question of independence is not an important issue for discussion. Either conclusion leads to a view that the CRA is "no big deal."

COURTS AND POLITICAL INSTITUTIONS IN A DIALOGIC RELATIONSHIP

Up to this point, the analysis of why the CRA (and judicial independence) are no big deal has centered on Mark Tushnet's analysis of the similarity of courts and political institutions with regard to the place of law and politics to their internal decision-making. I will now explore the place of Tushnet's view of the external relationships between courts and political institutions within his theory of popular constitutionalism with regard to the same scholarly issues.

First, Tushnet properly views popular constitutionalism as involving courts and political institutions in a dialogic relationship. Tushnet writes,

Finally, we come to popular constitutionalism as a dialogic process. Here the conversation takes place in real time, much as in Ackerman's model. In popular constitutionalism everyone—the mobilized people, their political representatives, and the courts—offers up constitutional interpretations all at once. The interactions among these political actors, that is, their conversation, produce constitutional law.⁴⁸

Moreover, there is no reason conceptually that the Court or a political institution should end the constitutional debate.⁴⁹ One can see Tushnet's acceptance of the dialogic relationship between courts and political institutions in his analysis of different models of legal change. For example, Tushnet explores what he calls the social movements model as one approach that seeks to explain how judges' interpretations of the Constitution are affected by events external to the Court.⁵⁰

In accepting a dialogic relationship, however, Tushnet suggests that we should not have a priori views favoring courts or political institutions as venues for making constitutional choices. Tushnet believes that to favor courts over political institutions will result in scholars dismissing the important role that political institutions play in making constitutional law. Tushnet writes,

One form of failing to do so is quite common, and often unnoticed. The failing takes the form of assuming that only

⁴⁸ Tushnet, *Popular Constitutionalism*, *supra* note 2 (manuscript at 17, on file with author).

⁴⁹ *Id.* (manuscript at 17-18, on file with author). Tushnet writes, "Sometimes the conversations will end with the legislature and executive, and the people, accepting the judges' decisions. But, sometimes the conversations will end with the legislature or the executive going their own way, ignoring the imprecations hurled at them by the courts and supporters of judicial supremacy." *Id.* (footnote omitted).

⁵⁰ *Id.* (manuscript at 15, on file with author). Tushnet writes,

According to this view, the people influence constitutional law by organizing social movements that offer distinctive constitutional visions, typically oppositional to the vision dominant in the courts when the movements begin. Social movements influence constitutional law in two ways. One returns us to the political scientists' model: The movements affect electoral politics, which in turn affects the composition of the courts. But, the social movement model offers an alternative mechanism: Judges observing the social movement and its effects on society change their views about what the Constitution means.

Id. For Tushnet, "the political science model" was introduced in Robert A. Dahl's, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957), and subsequently updated by legalist Barry Friedman. Tushnet, *Popular Constitutionalism*, *supra* note 2 (manuscript at 14 & nn.24-25, on file with author). Tushnet writes, "In the end, the dominant coalition comes to live with judicial supremacy because, once it has taken control of the Court, it then finds the issue of judicial supremacy irrelevant." *Id.* (manuscript at 14, on file with author).

those values the Supreme Court takes seriously count as admissible in discussing what the Constitution, properly interpreted, means. . . . This approach fails to take into account the possibility that there might be interpretations of constitutional provisions that the Supreme Court does not admit into discussion. One might think, for example, that the U.S. Constitution committed the nation to guaranteeing income security for all even though that position has little purchase in contemporary adjudicated constitutional law. Holding that view, one might rank the Supreme Court's constitutional performance well below that of Congress.⁵¹

He rejects the importance of differences between legal and political institutions in part because of his premise that courts, and especially the Supreme Court, should not be viewed as normatively superior at making constitutional law. Thus, one can see the lack of respect for the special qualities of Court decisions when Tushnet agrees with Larry Kramer that "[p]eople *perform* constitutional law as political law through (some of) their mobilizations in politics," and "[n]ot all popular mobilizations are performances of constitutional law, although many, perhaps most, are."⁵² Thus, in politics generally, and more specifically in the politics of impeachment with regard to the CRA, we see the centrality of the low threshold of what constitutes the legal in politics informing Tushnet's theory of popular constitutionalism.

That differences between courts and political institutions are not normatively important (and thus should not be emphasized in constitutional theory or studies of American political development) can be seen when Tushnet evaluates Bruce Ackerman's constitutional theory. Tushnet disagrees with Ackerman's view that when more directly politically accountable institutions assert their equality with courts on constitutional issues it occurs in a "constitutional moment" and not in periods of "normal politics."⁵³ Tushnet writes, "What makes constitutional law as political law different is that the legislative and executive participants explicitly insist that the courts' view of what the existing Constitution means has no special weight as law, but only the value that attaches to that view as a rational matter,"⁵⁴ and this can happen at any time and continuously, not only as the

⁵¹ Tushnet, *Popular Constitutionalism*, *supra* note 2 (manuscript at 24-25, on file with author) (footnotes omitted).

⁵² *Id.* (manuscript at 6, on file with author).

⁵³ *Id.* (manuscript at 10-11, on file with author).

⁵⁴ *Id.* (manuscript at 11, on file with author).

result of “constitutional moments.”⁵⁵ Constitutional and political law are not distinct under Tushnet’s popular constitutionalism; this leads to the lack of normative differences between the decisions legal and political institutions make.

DIALOGUE AND PERIODIZATION: THE SUPREME COURT IN AMERICAN POLITICAL DEVELOPMENT

Most importantly, we must analyze the nature of the dialogue in light of the similarity of court and political institution decision-making processes if we are to understand why the passage of the CRA and court independence are no big deal for Tushnet. For Tushnet, the study of constitutional law as political law cannot make assumptions about important starting and stopping points by courts, political institutions, or social mobilization politics. The process of dialogue is continuous, that is never ending, and thus little useful can be said as to the importance of differences in timing among political and legal institutions as part of the process of making constitutional law. Under this conceptualization, such important questions as whether path dependence by courts and more directly political institutions is the same or different are not important or even possible. Thus, scholars would have little to say about the place of the Supreme Court and Congress or the President in American political development.⁵⁶ Nor are questions about the differential effects of institutional rules and norms in legal as compared to political institutions important with regard to how they decide constitutional law. It is the conflation of politics, evaluation, and the legal, and the lack of analytic distinctions between politics and law and between courts and more directly politically accountable institutions that make explanation of doctrinal change impossible in Tushnet’s theory of popular constitutionalism. Tushnet writes,

Bruce Ackerman has offered a model with an even shorter time frame. Important to his account of constitutional transformation is the “switch in time.” Facing a mobilized public and its political leadership, the courts abandon their previous

⁵⁵ *Id.*

⁵⁶ There are few instances where law and legal institutions structure politics as part of the dialogic process. Tushnet, like Ackerman, Kramer, and many scholars, historians, political scientists, and constitutional scholars, centers on the effect of external events on courts, not the bi-directionality of their interaction. See Ronald Kahn & Ken I. Kersch eds., *Introduction, THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 1-30, *supra* note 3 (arguing that too many historians and political scientists emphasize the effect of external events on courts, rather than the bi-directionality of the relationship).

interpretation of the Constitution and adopt the one offered by their conversational partners (here, more like adversaries). The interactions that produce the switch in time occur within a compressed time period, which is of course consistent with Ackerman's metaphor of "moments," that is, short periods of time in which important political and constitutional developments take place. . . . [L]ike [the social movements] model, the conversation ends when the Court comes to agree with its adversaries. For Ackerman, after the Court changes, a new period of normal politics takes hold until the next constitutional moment.⁵⁷

It is this acceptance of starting and end points by Ackerman and other scholars of law and American political development, as well as their respect for the impact of institutional differences, which Tushnet opposes under his conception of constitutional law as a process of infinite regression.

Thus, at the core of Tushnet's popular constitutionalism is not an explanation of American political development and change; rather it is an argument, an advocacy, for allowing and morally approving of political institutions, rather than courts, as forums for making constitutional law, in part because such a minimal notion of the legal means that constitutional arguments in courts have no greater moral authority than in legislatures and other political institutions. The application and legitimacy of constitutional principles are assumed by Tushnet to be *sui generis* to all institutions, no matter whether they have legal or political responsibilities under the Constitution.

Moreover, the rejection of periodization and big theories of legal and political change, if done correctly, would find not simply that the relationship of law and courts is dialogic, as Tushnet grants, but would require one to explain this dialogic relationship as bi-directional.⁵⁸ Explanations of change based only on factors in the external political environment deny the continuous dialogic nature of law and politics. However, since the separation of the legal and political is not possible under Tushnet's model, neither is it possible to study the full contours of this dialogic relationship between courts and political institutions.

While I agree with Tushnet that there is a problem with the unidirectionality of change, Tushnet misrepresents the nature of the dialogic relationship and the idea that legal and political elements cannot

⁵⁷ Tushnet, *Popular Constitutionalism*, *supra* note 2 (manuscript at 16-17, on file with author) (footnote omitted).

⁵⁸ See Kahn *supra* note 3, at 67-113.

be separated and that empirical conclusions cannot be made as to the place of courts and external politics in doctrinal and constitutional change. Thus, both Tushnet's and Ackerman's models are unidirectional in the sense that there is little or no place for exploring the unique qualities of courts as agents in political change.

Tushnet rejects the importance of such institutional differences even more than Ackerman does. One can see that Tushnet (and Larry Kramer and Bruce Ackerman, to a lesser degree) refuse to see the special qualities of law and politics in courts as compared to more directly politically accountable institutions. All institutions, legislatures, executive officials, and courts, consider and treat matters of constitutional significance. Tushnet writes, "What matters to Kramer is that in these interactions, unlike those of normal politics, the legislative and executive participants clearly assert their equality with the courts on questions of constitutional interpretation."⁵⁹

Tushnet sees law and the legal as present in courts, but does not emphasize the uniqueness of legal institutional norms in the Supreme Court and lesser courts. By putting political institutions and policy-makers on the same plane as courts and law interpreters, and by looking at the combined outcomes of institutional dialogue, there is no consideration of how the internal-legal and the external world outside the Court are different, and how this difference informs not only the dialogue, but whether the dialogue itself is important to what the Constitution means.

Unless one studies such differences, or at least starts out with the scholarly assumption that such a difference is a possibility, one cannot understand the relationship of law and politics in the making of constitutional law as well as the impact of constitutional law on the lives of citizens and whether we should trust courts as compared to political institutions with the making of constitutional choices.

Most importantly, Tushnet emphasizes that it is impossible to systematically study the dialogic relationship between courts and political institutions. The definitions of the legal and political in political institutions, the failure to define the legal in courts, and the concept of constitutional law as "simultaneously politics *and* legal" make it impossible to study and explore the nature of this dialogic relationship and its centrality for explaining change in constitutional law, as well as the place of legal and political institutions in that explanation. Why this dialogic process cannot be successfully studied will tell us much about why the CRA, and judicial independence, is not a big deal.

⁵⁹ Tushnet, *Popular Constitutionalism*, *supra* note 2 (manuscript at 10-11, on file with author).

As explored above, Tushnet provides a minimal concept of “legal” in political institutions and his analysis lacks specifics as to what constitutes the legal in courts versus political institutions. In comparing courts and political institutions, Tushnet writes, “we would have to specify what counts as advancing a constitutional value.”⁶⁰ The answer to this proposition is in part revealed by how Tushnet would proceed with such an analysis employing his quite minimal view of what counts as law and the legal. Because of Tushnet’s minimal definition that all interpretations and discussion of legal norms in politics and political institutions constitute constitutional values, and the impossibility of separating law from politics, the difference between the Supreme Court saying what a right or government power is as compared to legislatures, executives, and legal advocates is not important. If what is considered legal in popular constitutionalism is simply advocating some legal interpretation, and all such interpretations count equally, then differences among institutions as authoritative definers of rights and powers are not important to explaining constitutional law as political law.

Because Tushnet’s definition of what constitutes the legal is so minimal, and really is more like what usually counts as an argument for policy in politics, and because Tushnet repudiates scholarly analysis comparing how courts and political institutions make decisions internally and in relationship to choices and political acts by institutions at their borders, one is left with the view that such differences are not important when considering whether the outcomes of courts and political institutions have the same legitimacy as to what the Constitution means, and thus confuses their places in American political development. While it is correct that politics and institutions influence Court decisions, how they do so is very different from that process in political bodies, and this difference should be part of the analysis of the proper role for courts and political institutions in deciding what constitutes constitutional law, which is different from a policy desire with constitutional ramifications.

For Tushnet, the legal is the use of cases and any other legal materials as an argument in politics, whether one is debating the passage of the CRA, how it should be implemented, or its place as a basis for arguments in an impeachment proceeding and a subsequent trial by the Senate. Thus, it is the rejection of (or lack of consideration of) institutional differences among courts and directly politically accountable institutions, supported by the very minimal definition of what it means to act legally, that is a major failing in Tushnet’s ap-

⁶⁰ *Id.* (manuscript at 24, on file with author).

proach to the CRA. The argument here is that the passage of a law by Congress makes that act legal, and not simply political, for there is "a law." Moreover, while viewing the CRA as constitutional, permissible under canons of statutory interpretation, and now legal may add legitimacy to political arguments, it does not transform more directly politically accountable institutions into legal ones.

Tushnet writes, "Interpretation, the legal component of constitutional law as political law, is here inextricable from the forward-looking, political component of constitutional law as political law."⁶¹ Therefore, to Tushnet, the "legal," which means interpretation based on past precedents, cannot be extricated from the forward-looking "political" component of the law. This definition of the legal and political is wanting, both analytically and as a statement of the primary difference between courts and political institutions. Moreover, support for the inextricability of interpretation as a legal component from the political, and the assumption that courts are primarily backward-looking and political institutions are primarily forward-looking, makes it impossible to even study the degree to which courts especially are forward- or backward-looking; one is left to simply counting the outcomes of courts, to see if they are more forward-looking than political institutions. Such counting tells us nothing about the impact of legal and political factors on those outcomes.

JUDICIAL INDEPENDENCE

The importance of the premise that there is no normative difference between courts and political institutions placed inside a vision of popular constitutionalism leads to a very weak view of the importance of judicial independence as a value in the American political system. We can see this when Tushnet considers whether Congress can limit how federal courts use non-U.S. materials. He finds it to be a close call, and argues that the answer should be left up to the interplay of judicial and legislative politics, rather than be left up to courts. For Tushnet, courts have the interpretive power to decide whether the use of such materials in cases and by a judge constitutes a mere reference to them with no force of law or the court's/judge's reliance upon them and thus a basis for the violation of the will and commands of Congress. However, the political process, in this case the impeachment process, is also seen as an appropriate venue to sort out whether a judge has referred to or relied upon non-U.S. materials.

⁶¹ *Id.* (manuscript at 6, on file with author).

Thus, Tushnet's approach to the question of whether the CRA is legal, an approach of leaving it up to the interplay of courts and political institutions, undercuts support for the normative premise that the independence of the judiciary is important and that courts, not political institutions, should play the central role in the determination of the constitutionality of the CRA in the real world, as well as in normative premises about that world in constitutional theory. Tushnet's position here either constitutes permission for politicians to seek to limit the discretion of the Court in its decision-making or a call for them to do so.

Tushnet's primarily externalist (outside courts) explanation of constitutional change added to the view that law and politics are combined and should not be separated analytically leads to premises that are questionable. In order to encourage us to think about constitutional law as political law, Tushnet calls on us to look at history.⁶² He emphasizes that we need to look at history in order to witness "the inevitable fuzziness of the distinction between the legal and political components of constitutional law"⁶³ because "not all popular mobilizations are performances of constitutional law, although many, perhaps, most, are,"⁶⁴ and because not all performances of constitutional law occur in courts, or on the Supreme Court. After noting that we need better criteria for when politics is constitutional law and after criticizing Larry Kramer for not providing them, Tushnet admits that "crisp" criteria are unlikely to be available to explain how to identify candidates for popular mobilizations that would count as being both political and legal in Tushnet's terms.⁶⁵

⁶² *Id.*

⁶³ *Id.* (manuscript at 4, on file with author).

⁶⁴ *Id.* (manuscript at 6, on file with author).

⁶⁵ *Id.* (manuscript at 6-7, on file with author). Thus Tushnet's explanation of the relationship of law and politics as uni-directional, that is, from external politics to court decision-making, leads not only to an analytically suspect concept of "constitutional law as political law" and to questionable views on the CRA. In his analysis of constitutional law as political law and in his groundbreaking books *Taking the Constitution Away from the Courts* and *The New Constitutional Order*, the discussion centers on either the politics of constitutional issues outside the courts on courts, or the impact of external politics or factors after courts act. The tilt in the analysis is in one direction, from the outside in, rather than from the inside out. The argument is not the outdated, "law" versus "politics" analysis. Tushnet's argument really is all about politics: law and legal institutions, and the difference between politics and law that he admits exist are simply not particularly important with regard to our understanding of constitutional law as political law. See TUSHNET, *supra* note 2; MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003).

THE IMPOSSIBILITY OF INSTITUTIONAL COMPARISON
AND EVALUATION

Most importantly, there is no way to evaluate any single institution, and for Tushnet, this may be another reason why we should not be overly concerned about the passage of the CRA and its effect on the courts. According to Tushnet, we cannot evaluate what an individual institution has done because the "goodness" or "badness" of policy choices cannot be known until we witness what other institutions do with such choices, in terms of the many standards of evaluation possible given the breadth of constitutional, moral, and political theory.⁶⁶

This question, of "goodness" and "badness" must be answered says Tushnet not by "anecdotes," but rather by "systematic analysis of comparative institutional operation."⁶⁷ However, Tushnet argues that such analysis is at the least difficult, and most likely is impossible, because of the impact of the timeline chosen for analysis and the normative bases on which scholars make such choices.⁶⁸

This problem of evaluation is even greater for Tushnet when choices are made for a timeline in which to evaluate constitutional reform. Tushnet writes,

Those interested in addressing proposals for constitutional reform should aim for a forward-looking analysis. . . . But, of course, the only basis they have for evaluating likely future performance is past performance. Ad hoc choices of past time periods are likely to be misleading, and yet we have to be

⁶⁶ Tushnet, *Popular Constitutionalism*, *supra* note 2 (manuscript at 23, on file with author). Tushnet writes,

I have argued that evaluation of legislative capacity to interpret the Constitution should focus on completed legislative actions and those examples, rare in U.S. constitutional practice, of constitutional provisions that impose affirmative duties on legislatures. That argument is unavailable with respect to popular constitutionalism more broadly understood, because there is no obvious way of knowing when a popular mobilization is "completed." Once again, judgment rather than a measuring rod is what we will need.

Id. (footnotes omitted).

⁶⁷ *Id.* (manuscript at 21, on file with author).

⁶⁸ *Id.* (manuscript at 21-22, on file with author). Tushnet writes,

Institutions always operate imperfectly, and the time-line for imperfect operation will differ across institutions even if the institutions are equally good (or bad) overall. That means that it will usually be possible for an author to find some time period in which her favored institution operated well according to her criteria and the alternative institution operated badly. Examining only that time period might be quite misleading.

Id.

alert to the possibility that institutions now operate differently from the way they did in the past.⁶⁹

Tushnet is arguing that the social science of institutional difference is impossible. It is impossible to separate the legal and the political in his definition of constitutional law as political law. It is also impossible to make any generalizations that constitutional scholars could accept about the role of courts and political institutions in political, social, and legal change. Standards of evaluation for institutional performance are inexorably tied to whether one is forward- or backward-looking when making such determinations, as well as differences as to what is "good or bad," and presuppositions as to whether legal or political institutions are better for making constitutional choices.

Moreover, for Tushnet, there is not a search for an analysis of the place of courts (and interpretation and legal thinking) as compared to more directly political institutions or of how these differences affect American political development; there cannot be such analyses because of the minimal definition of the "legal" in politics, the failure to view the institutional norms of legal and more directly politically accountable institutions as different in significant ways, and the central premise that law and politics are intertwined. All one can do is accept the fluidity of history. One can ask whether or not there exists the possibility that courts and law can structure politics and outcomes even though political actors do not accept their decisions in legal principle or policy terms. Thus, to accept Tushnet's popular constitutionalism, and "taking the Constitution away from the courts," one must reject the notion that the rule of law and how courts make decisions compared to political institutions are important considerations for scholarly analysis.

Tushnet concludes, "Needless to say, no one really tries to do a serious comparison of institutions as they actually operate. I have already pointed out that popular constitutionalism includes a range of institutional interactions. . . . [W]hat we see in purported comparative evaluations of popular constitutional and judicial supremacy are disagreements about substantive political theory."⁷⁰ Thus, Tushnet makes an argument that social science with respect to evaluating courts and political institutions is all but impossible. Describing complexity is all that is possible.

This viewpoint undervalues the contributions that scholars of law and courts and American political development have made in system-

⁶⁹ *Id.* (manuscript at 22, on file with author).

⁷⁰ *Id.* (manuscript at 28, on file with author).

atically comparing the relationship of courts and politics over time in the making of constitutional law and the outcomes from such studies.⁷¹ The possibility of comparing the results of courts and political institutions on the lives of citizens, which is the bottom line that all scholars seek to address, is real. The lack of agreement among scholars is not contingent on differences over the time periods chosen for comparison, but is instead related to how one analytically defines what law and politics means in such studies.

Tushnet is correct in noting that Robert Dahl fails to see the dialogic relationship between Court and politics and that the process may be continuous and incremental, rather than divisible into periods in which majority coalition control of the Court is and is not present. However, even though Tushnet views the dialogue between courts and political institutions as continuous, it is the nature of that dialogue and whether it can be studied as a problem of law and politics with which I disagree. Such a dialogue can be studied and institutional roles can be analyzed if we view the relationship as truly bi-directional between political and legal institutions, each with institutional characteristics that mean that the legal and political are quite different, and are so viewed as different by public officials and citizens. These differences are central to what constitutes constitutional law both for these institutions and for the nation as a whole.

RELATIVISM: OUTCOMES AS STANDARDS OF EVALUATION

Why this rejection of periodization, theories of American political and/or legal development, and the study of constitutional law as conceptual? One reason is Tushnet's lack of faith in concepts because he sees both empirical study and theory as normative. Theory and concepts cannot provide the basis for empirical truth. For Tushnet, there is no way to overcome the problem that facts and values cannot be separated in scholarship, and the more comprehensive the theory, the more value-laden it is. Therefore, no systematic empirical statements as to the role of legal and political institutions in the development of constitutional law are possible, nor should we make them, because they will necessarily be value-laden. All one can do is describe history, and when one does so in different episodes of constitutional/political law, sometimes one institution (courts, legislature,

⁷¹ See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* (2004); John C. Jeffries, Jr., *Bakke Revisited*, 2003 SUP. CT. REV. 1 (2003); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000); Paul Pierson, *The Limits of Design: Explaining Institutional Origins and Change*, 13 GOVERNANCE 475 (2000).

executive, advocacy group) wins in the sense of having the greater impact on constitutional law, in another episode there are other institutional winners and losers.

However, this conclusion says nothing about the effect of institutional difference on sustainability or change in values, rights, power, and goods. We saw with regard to sustaining the right of abortion choice in *Planned Parenthood v. Casey*⁷² and the extension of rights of sexual intimacy to gay men and lesbians in *Lawrence v. Texas*,⁷³ two decisions that rejected the wishes of the majority coalition in power over several decades. The Supreme Court's legal decision-making is fundamentally different from that of political institutions in important ways that are either rejected or at least ignored in the consequentialist arguments used by Tushnet in support of popular constitutionalism.

Without comparative studies of institutions over time, we cannot know whether reliance on law and principle can be considered morally superior to raw political power. For Tushnet, no statements about law, principles, or rights have more authority than any others; all institutions have equal moral authority to make such statements and have them accepted through Tushnet's popular constitutionalism. This is because all principles, laws, and processes are simply talking points, arguments in political choices, without regard to the institution in which they are made. Because we cannot agree on the values, facts, or time periods upon which such evaluations are possible, no real knowledge is possible; everything is arguments and vignettes.⁷⁴

According to Tushnet, no one scholar's findings can be accepted because the process of analysis of policy outcomes from court and political institutions as analytic markers is complex, and legal and political markers are intertwined to a degree that all we have is interpretation rather than knowledge about the impact of law and politics as identifiable empirical categories. That all is politics, policy wants, and not institutional difference is evident when Tushnet concludes his article on the theory of popular constitutionalism:

⁷² 505 U.S. 833 (1992).

⁷³ 539 U.S. 558 (2003).

⁷⁴ Tushnet, *Popular Constitutionalism*, *supra* note 2 (manuscript at 27-28, on file with author). Tushnet writes,

Finally, it bears emphasizing that we have to develop *arguments* for what goes on the list as a constitutional provision, for the rankings we give the items on the list, and for the weights we assign to particular actions and inactions. These are going to be arguments in substantive political theory. It is quite unlikely that we will find substantial agreement among scholars about the list, ranking, and weights, given the existence of real disagreements about substantive political theory.

Id. (footnote omitted).

The idea of something that is simultaneously law and political is obviously unfamiliar to U.S. constitutional theorists today . . . [all one can do is] tell a story about politics operating in real historical time. . . . In short, it would be an argument about constitutional theory made by means of a historical analysis of constitutional politics.⁷⁵

Again, everything is up to politics, in the arguments public officials and legal advocates of different stripes choose, as if there are not institutional concerns to which most if not all justices would subscribe as they make decisions. Tushnet is misguided in the assumption that legal decision-making and political decision-making are intertwined and that there is little difference between the two. Because of this, the CRA does not overstep the limitation on Congress's power to substantially impair the courts' ability to perform their job of constitutional interpretation. Moreover, since Tushnet's theory of popular constitutionalism does not see the need for the Supreme Court to formally invalidate the acts of Congress, but only requires the judiciary to be one interpreter of the Constitution among a number of institutions on an equal plane of legitimacy, one would expect Tushnet to be quite solicitous of the power of Congress to prescribe the interpretive powers of the Supreme Court and lesser courts.

Tushnet offers what is essentially an outcomes analysis as to whether courts are better at constitutional conversations and decisions than political institutions—with the bottom line being which has been better historically for the protection of individual rights and equality in distribution of rights and material goods. Tushnet asks, even if anarchy does not occur, “might not [the people’s] constitutional interpretations be systematically worse than those proffered by the courts?”⁷⁶

Tushnet's analysis is at the level of institutional performance in policy terms, not at the level of the place of the Supreme Court and the law in American political development.⁷⁷ He overstates the degree

⁷⁵ *Id.* (manuscript at 28-29, on file with author).

⁷⁶ *Id.* (manuscript at 21, on file with author).

⁷⁷ *Id.* (manuscript at 26, on file with author). Tushnet writes,

[W]e have to compare institutional performance across the entire range of (what we regard as) constitutional provisions. To continue the example, we might find that, in some time period, courts performed reasonably well on issues of free expression while legislatures performed badly, *and* that, in the same period, legislatures did a very good job of promoting income security. We would then have to identify some ranking and weighting scheme so that we could determine which institution operated better overall.

to which politics and law or political institutions and courts are the same. It is not simply a problem of rejecting the view that change stops at courts; we must ask whether a policy is the same as a right. Tushnet continues:

To use a single-institution example: Suppose the Supreme Court got a minor First Amendment question “right” while failing to invalidate a massive denial of racial equality. We could say that the Court operated badly, or well, only if we had some measure of relative importance. Now add the necessary comparative institutional focus, and the analysis becomes even more complex. Suppose Congress enacts a relatively minor statute that violates principles of free expression (as we understand them), and at the same time enacts a large-scale program enhancing income security. The First Amendment has to reduce the “goodness” we attribute to Congress because of the income-security legislation. Now we have to compare the imperfect operation of the courts with the imperfect operation of Congress.⁷⁸

This suggests that both are judged as outcomes rather than the rule of law. This analysis is not about the role of the Court and law in American political development; it is about whether courts and political institutions support policies or outcomes with which the reader agrees. But it is more; Tushnet assumes that whether outcomes are “good” or “bad,” rather than what it means for something to be constitutional law (not a policy), is the key question for constitutional scholars. Moreover, the impossibility of standards of evaluation that we can agree on with regard to policy (and thus institutions, given the minimal definition of “legal”) make any findings suspect.

One can see that Tushnet’s theory is basically a consequentialist one from his discussion that legislatures but not courts have guaranteed income security. From this observation, one can assume that constitutional rights can be attained in popular constitutionalism, that is, in political institutions, even when courts do not accept these rights. Thus popular constitutionalism is better than reliance on constitutional law in courts. However, this is not an argument about how courts and political institutions differ in how they decide what is legal. Instead, it should be viewed as an argument as to whether one prefers the public policies made in institutions of popular constitutionalism as compared to the Supreme Court, which is subject to prior

⁷⁸ *Id.* (manuscript at 26-27, on file with author) (footnotes omitted).

decisions, where there is no per se right to income security, but where inequality has been a factor in deciding rights.⁷⁹

Moreover, the standard of evaluation for any institution, legal or political, is the policy outcomes of that institution, in light of those of other institutions in the three-dimensional system through which our nation makes constitutional choices. Tushnet writes,

[W]e have to take account of all types of good and bad performance. A court can perform badly by invalidating a statute that it "should have" upheld, or by failing to invalidate one that it should have struck down. Popular mobilizations can perform badly by inducing political leaders to introduce and enact bad statutes, or by failing to mobilize effectively enough to induce those leaders to enact good statutes.⁸⁰

The relativism which is implicit to Tushnet's theory of popular constitutionalism leads to problems of empirical and normative analysis of the place of courts and political institutions in American political development in the twenty-first century that are similar to those found when social scientists and political theorists viewed the overall political system as a process of interest group liberalism since the 1960s.

POPULAR CONSTITUTIONALISM AS INTEREST GROUP LIBERALISM

Tushnet's theory of popular constitutionalism examines outcomes and then simply counts up the winning and losing visions of constitutional law after the implementation of the decisions of all such bodies. Tushnet accepts that the study of the role of law and courts in American politics should be conducted under an analytic scheme not unlike what Theodore Lowi has called "interest group liberalism," where everything is simply power politics.⁸¹ In this view, how and on what basis institutions make choices is not of interest to the scholar. Democracy is properly the sum total of outcomes; there are no moral

⁷⁹ See landmark cases in the area of fundamental rights and interests, *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (declaring unconstitutional the poll tax in state elections); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (durational welfare requirements); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969) (fundamental right to vote); *Plyer v. Doe*, 457 U.S. 202 (1982) (denial of free public education to illegal alien children).

⁸⁰ Tushnet, *Popular Constitutionalism*, *supra* note 2 (manuscript at 23, on file with author).

⁸¹ See THEODORE J. LOWI, *THE END OF LIBERALISM* (2d ed. 1979) (providing a brilliant analysis of this concept).

standards of evaluation separate from the process itself.⁸² The evaluative standard for whether the political system has performed properly is simply the outcome of power politics. For Tushnet, “constitutional law” or what he calls political law equals the outcomes of the political system, in which the Supreme Court is one actor among many with its own policy desires. In the end, all is politics, preferences, and institutional outcomes.

Tushnet falls prey to interest group liberalism’s misguided assumption that there are so many access points for influence as to what constitutional law is that the overall system is as democratic as possible.⁸³ This produces a false sense that the political system is open to change and a false sense that each institution acting politically on constitutional questions will produce the best end. The assumption that multiple access points exist and that where a group has access—to courts, legislatures, the executive, or mobilization politics—makes no important difference to success or failure as to their rights is mistaken. It provides an inaccurate picture of how courts and political institutions operate because it assumes access to all is open and that institutions deal with demands in a sufficiently similar way so that the institution involved does not result in any important difference to success or to the process of political and constitutional change. Thus, for Tushnet, constitutional law is simply the outcome of a complex, continuous, and open process, with no institution having a greater legitimacy as to whether what it says is a right should be considered a right.

The normative ramifications of accepting “interest group liberalism” as a definition of the American political system are enormous, and I would argue are detrimental to understanding politics and political development in our nation.⁸⁴ So have been the ramifications in how we studied American politics in the 1950s and 1960s, the reaction to interest group liberalism. Looking at the work of Lowi and McConnell, their intellectual children Stephen Skowronek and Ken Kersch,⁸⁵ and numerous other scholars of American politics and po-

⁸² See RONALD KAHN, *THE SUPREME COURT AND CONSTITUTIONAL THEORY, 1953–1993* (1994) (arguing that the Supreme Court, in contrast to political institutions and election officials, rejects viewing the political system in terms of interest group liberalism).

⁸³ For classic statements of the problem of viewing the American political system as a process of interest group liberalism, see LOWI, *supra* note 81; GRANT MCCONNELL, *PRIVATE POWER AND AMERICAN DEMOCRACY* (1966).

⁸⁴ See KAHN, *supra* note 82; EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE* (1973).

⁸⁵ See KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW* (2004); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE* (1982).

litical development, their studies of the relationship between law and politics and the place of institutions in preference formation reveal the limitations of consequentialist standards not only for the evaluation of politics, but more importantly for its study.⁸⁶

Without the possibility of a social science that is not simply consequentialist but is also explanatory in institutional terms, we cannot fully understand the relationship of law and politics. The premise that law and politics are intertwined, without an analysis of how the terms may be used analytically as a product of institutional difference and institutional preference formation that makes actors, justices and elected officials different in how they make decisions, cannot explain what these terms mean with regard to how they influence the lives of citizens.

Without the possibility of a social science that is not simply consequentialist but is also explanatory in institutional terms, we cannot fully understand the relationship of law and politics. The premise that law and politics are intertwined, without an analysis of how the terms may be used analytically as a consequence of institutional differences, is a real failing in Tushnet's theory of popular constitutionalism. How law and politics are related to each other is a product of institutional differences between legal and political institutions; these result in quite difference processes of preference formation and decision-making. Institutional differences between courts and political institutions cause decisions that are quite different at any point in political time and impact the lives of citizens and institutional roles for decades to come.

COURTS AND POLITICAL INSTITUTIONS AS BIDIRECTIONAL

One can study differences between what constitutes the legal and political in courts as compared to more directly political institutions; one can study the impact of how differences in institutional norms impact the type of constitutional choices that are made, what values go into the choices, and whether the choices made by courts or in political institutions are cumulative. The study of these differences will help us answer questions about whether courts and political institutions are the same as to their openness to influence by pressures from outside institutions and processes. Only through such study can we determine which institutions, or groups of them, are (or are not)

⁸⁶ See PAUL PIERSON, *POLITICS IN TIME* (2004); KAREN ORREN & STEPHEN SKOWRONEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* (2004); THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT, *supra* note 3.

engaging with a concern for both constitutional values and democracy.

Comparisons of institutions are possible and such studies have discipline; they are not simply about what we as scholars want or value in policy terms. However, serious comparisons are only possible if a scholar views institutional difference as important and possible to study, and if he is willing to do more than compare outcomes in policy terms.⁸⁷

To see whether the CRA substantially impairs the courts' ability to perform its institutional mission in our system of government, one must examine Court decision-making more deeply. The Court must be studied in light of what I call the social construction process (SCP), a key element to what some scholars have called "the interpretive turn." The SCP is a core part of how courts, especially appellate courts, and clearly the Supreme Court, make decisions. I question Tushnet's position that it is impossible to study differences between courts and political institutions. I question that the relationship between politics and historical events and Court decision-making is serendipitous, rather than explainable.

The problem with Tushnet's theory of popular constitutionalism is the lack of a filigreed model of Supreme Court decision-making, one that relates internal Court institutional norms and decision-making to external historical, social, political, and economic factors. Such a model of Supreme Court decision-making would explore how polity and rights principles, precedent, the process of analogy, and the SCP, in which the outside world comes into Court decision-making, are related to one another.⁸⁸ This process results in the Supreme Court making decisions that look at the past, present, and future in ways that are different from legislatures and other political institutions. It is based on the premise that our nations' constitutional values and their interpretation, as well as our institutions, are not only based on majoritarian principles.

Moreover, this decision-making process is bidirectional, and takes seriously the importance of both courts and political institutions, and their differences, in the making of constitutional law. When one views Supreme Court decision-making as bidirectional as the above model does, then the distinction between political institutions as prospective and legal institutions as retrospective cannot be sustained; it

⁸⁷ See THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT, *supra* note 3 (including numerous case studies that detail the two-way relationship between courts and political, social, and economic institutions external to courts, and also view as important the different institutional norms and practices of courts and political institutions).

⁸⁸ See Kahn, *supra* note 3.

is the important ways in which courts and political institutions differ as to how they use retrospective and prospective insights as part of quite different decision-making processes and institutional rules that is important to the development of doctrine and the place of legal and political institutions in American political development.

The lack of emphasis on differences between courts and political institutions may in part be due to Tushnet not seeing Court decisions as primarily forward-looking, or as taking the external social, economic, and political world into its legal decision-making. These premises are questionable given the aspirational qualities of "rights talk" and the way in which the Supreme Court makes its decisions through the presence of an interpretive turn and the SCP.

However, even if we admit that politics and law may be both prospective and retrospective in decision-making, the importance of this finding means little unless we consider how courts and political institutions differ in how they evaluate past and present history, legal precedents, and elements of American political culture. Moreover, the failure to see the forward-looking nature of court decision-making may be the result of Tushnet emphasizing the place of external rather than internal court factors in constitutional change.

This problem is also evident when Tushnet finds little difficulty with Congressional limitations of courts' use of non-U.S. materials and, as I have argued, this leads to a lack of full recognition of the importance and reality of the independence of the Supreme Court. When one explores Supreme Court decision-making as bidirectional, the CRA, and other laws like it (even the hypothetical law banning the use of non-common Latin phrases), may be viewed as intrusions on the ability of courts to make decisions independently.

Thus, I disagree that separating the legal and political is impossible; many Supreme Court decisions engage in the analysis of precedent and principles in prior cases, with the SCP providing the tools of analogy and comparison to past social constructions. In doing so, we can see both the backward- and forward-looking aspects of Court decision-making at work, as I have done with regard to examining the conditions under which the Court overturns landmark decisions and chooses to define new rights, even when such rights are in conflict with the wants of public opinion and the majority coalition.⁸⁹

Thus, when we consider whether Congress can (or should) dictate core elements within judicial decision-making, we must ask whether Congress's entry into that process by forbidding the use of non-U.S. materials will substantially impair courts' ability to perform the job of

⁸⁹ *Id.*

constitutional interpretation, given this model of Court decision-making that emphasizes the presence of an SCP and its bidirectionality.

In doing so, the constitutional principle that Congress may not substantially impair the Court's ability to perform its job of constitutional interpretation provides a standard for evaluating whether the CRA opens the way for Congress to tie the hands of federal courts, while Tushnet's theory of popular constitutionalism rejects the possibility of testing such standards on court independence. The failure to have a model of bidirectionality in the dialogue between courts and political institutions, and the emphasis on external factors, rather than on both external and internal court institutional norms mean that Tushnet fails to provide an adequate basis on which to evaluate both the CRA and questions of judicial independence. Because Tushnet's explanation of doctrinal change is primarily in the realm of politics, and political institutions are viewed as legal in ways little different from courts, Tushnet's model of popular constitutionalism supports congressional limitations on the Court's power to interpret the Constitution, laws, and the actions of government. Tushnet's theory of popular constitutionalism simply provides no defense for courts from congressional intrusions on its powers under the Constitution.