2008

Can Constitutionalism be Leftist?

Louis Michael Seiman
Georgetown University Law Center, seidman@law.georgetown.edu

26 Quinnipiac L. Rev. 557-577 (2008)

CAN CONSTITUTIONALISM BE LEFTIST?

Louis Michael Seidman[*]

Mark Tushnet has been my friend and mentor for over thirty-five years. For a substantial part of that time, to its permanent discredit, much of the legal academy remained ignorant of or, worse, dismissive of his prodigious accomplishments. I admire Tushnet for many reasons, but one of them is because of his persistence and integrity during the long years when many legal academics refused to take him seriously. I have written previously about the ways in which his personal and professional commitments have served as a model for me.[1] On this occasion, rather than repeating what I have already said, I think that the most appropriate way to honor his achievements is by giving a portion of his work the kind of sustained and serious attention that it should have received in the past.

The question that I have asked in the title of this Essay is also a kind of tribute to Tushnet. One of the reasons legal academics did not take Tushnet seriously in the early part of his career was because of his uncompromising commitment to leftism. Although he has not abandoned that commitment, in the latter part of his career he has also committed himself to a version—characteristically idiosyncratic, but a version nonetheless—of constitutionalism. His case for constitutionalism is set out in his powerful and subtle book, *Taking the Constitution Away from the Courts*,[2] which I will use as the basis for this Essay. Does this book succeed in reconciling constitutionalism with leftism?

---

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center. With characteristic generosity, Mark Tushnet helped me sharpen the arguments I make here. I also received help from Lama Abu-Odeh, Randy Barnett, David Fontana, Judith Mazo, and participants at the Quinnipiac Law School Colloquium on the work of Mark Tushnet. I am especially grateful to James Branda and Richard Harris for outstanding research assistance.

1. *See* Louis Michael Seidman, *Mark Tushnet: A Personal Reminiscence*, 90 GEO. L.J.127 (2001).

2. MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (2000).

If there is anyone who could accomplish that task, it is Tushnet. He is without question our most thoughtful constitutional leftist. Yet, I argue in this Essay, the book, at least taken at face value, fails to achieve its goal. To the extent that the book argues for constitutionalism, it abandons leftism, and to the extent it is leftist, it abandons constitutionalism. Tushnet's proposal can be both leftist and constitutional only by reconceiving what constitutionalism amounts to in ways I suggest at the conclusion of the Essay. The failure to reconcile leftism with constitutionalism as it is more commonly understood teaches us something important: if Tushnet cannot produce this synthesis, then no one can.

I. TUSHNET'S THESIS

The thesis of *Taking the Constitution Away from the Courts* is a good deal more subtle and complex than its pugnacious title implies. Still, the broad outlines of Tushnet's position are easy to summarize. He argues for a populist constitutionalism, which would "treat[] constitutional law not as something in the hands of lawyers and judges but in the hands of the people themselves."[3] On a populist conception, "the Constitution belongs to us collectively, as we act together in political dialogue . . . in the streets, in the voting booths, or in legislatures as representatives of others."[4] This populist image stands in sharp contrast to traditional constitutionalism, which is the special preserve of judges deliberately shielded from popular control. Hence, Tushnet calls for an end to our two-century long experiment with the judicial review of statutes; he calls for us to finally "take the Constitution away from the courts."

Tushnet's proposal is subject to two obvious and interlocking objections. First, opponents will argue that politicians cannot be trusted to fulfill our long-term constitutional commitments, especially when they run up against immediate political imperatives. Second, opponents will claim that ordinary politicians lack the expertise and interest to work through the baffling complexities of constitutional doctrine.[5]

3. *Id.* at 182.

4. *Id.* at 181.

5. *See, e.g.*, Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676, 680 (2005) ("There are reasons to question whether the executive branch is itself equipped to guide and constrain its own policy objectives by attending, for example, to the Constitution's allocation of some powers elsewhere, or its limitations on governmental power in recognition of individual rights.").

A good part of Tushnet's book is devoted to a detailed and largely convincing refutation of these objections. The refutation begins with a definition of the kind of constitutionalism about which we should be concerned. There is no reason, Tushnet claims, to bind ourselves to all the details of the "thick" constitution.[6] What matters—what constitutes us as a nation and commands our respect—is not the deadening minutiae of constitutional law, but the "thin" constitution, which consists of the ideals embodied in the Declaration of Independence and the Constitution's Preamble.[7]

Tushnet powerfully argues that ordinary political actors have the incentive and ability to enforce the thin constitution. On the one hand, elected politicians no less than the courts can feel the tug of constitutional obligation—a fact presently obscured by the "overhang" of judicial review, which leads to dependence on courts for constitutional enforcement. There are also built-in political incentives favoring political enforcement of constitutional rights.[8] On the other hand, a clear-eyed review of the spotty history of judicial enforcement of constitutional values suggests that we would be giving up very little if we took judges out of the constitution business.[9]

II. THE PROBLEM THAT CONSTITUTIONALISM PURPORTS TO SOLVE

Is Tushnet's case convincing? We cannot answer that question without asking another one: Exactly what problem is constitutionalism supposed to solve? It turns out that there are at least two different problems, and that people engaged in constitutional theorizing often talk past each other because they are not talking about the same problem.

One project for constitutionalism is the creation of political arrangements that will promote substantive justice. We might call this substantive constitutionalism. Most of the great goals of the Constitution's Preamble that form the center of Tushnet's thin constitution—to "establish Justice . . . promote the general Welfare, and secure the Blessings of Liberty"[10]—address this problem. A theorist

6. TUSHNET, *supra* note 2, at 9 ("The thick Constitution contains a lot of detailed provisions describing how the government is to be organized . . . ."). In contrast, "[w]e can think of the thin Constitution as its fundamental guarantees of equality, freedom of expression, and liberty . . . ." *Id.* at 11.

7. *Id.* at 9-14.

8. *Id.* at 95-128.

9. TUSHNET, *supra* note 2, at 129-53.

10. U.S. CONST. pmbl.

preoccupied with this first project might ask whether a system of separated powers best protects private property,[11] whether requiring congressional approval for war making helps to keep the peace,[12] or whether the nonestablishment of religion encourages vibrant religious communities.[13]

A second project for constitutionalism starts with the observation that not everyone in our political community wants to protect private property, avoid war, or encourage religion. This form of constitutionalism takes as its task the creation of political arrangements that can command respect and obedience from people who disagree about substantive justice. We might call this project political constitutionalism.[14] It is reflected in the Preamble's goals of "form[ing] a more perfect Union" and "insur[ing] domestic Tranquility,"[15] which, apparently, also play a role in Tushnet's thin constitution. A theorist preoccupied with this second project might ask what procedures or allocations of power would be acceptable ex ante to people with different goals and conceptions of the good who nonetheless want to remain within a unified community.

Each form of constitutionalism has important difficulties. Substantive constitutionalists must confront the problem that any answer they offer is likely to be temporally contingent. What works in some times and places to produce substantively just results will not work in others. Does judicial review promote or retard socially just policies? The answer must be that it depends on who the judges are.

Because constitutionalism is associated with entrenchment, constitutionalists often try to force us into an "all-or-nothing" answer.

---

11. *See, e.g.*, Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 503 (1988) (arguing that separation of powers raises transaction costs and thereby hinders the passage of redistributive legislation).

12. For example, George Mason argued on the floor of the Constitutional Convention that he was against "giving the power of war to the Executive, because not [safely] to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 319 (Max Farrand ed., rev. ed. 1966) (modification in original).

13. *See, e.g.*, Steven H. Shiffrin, *The Pluralistic Foundations of the Religion Clauses*, 90 CORNELL L. REV. 9 (2004) (arguing that religion clauses prevent government intervention putatively favoring religion because of risk of dependence on government).

14. This label is meant to evoke the project undertaken by John Rawls, while simultaneously bracketing the specific means by which he pursues it. *See* JOHN RAWLS, POLITICAL LIBERALISM (1993).

15. U.S. CONST. pmbl.

They want us to commit to a particular arrangement because, over the range of cases, it will produce substantively just outcomes even if, in some times and places, alternative arrangements would do better.[16] But this formulation begs an important question: Why is constitutionalism committed to entrenchment? Why not use particular institutional arrangements only when, and to the extent that, they produce substantively just outcomes?

The entrenchment question points us toward the second difficulty with substantive constitutionalism, which, in turn, leads to constitutionalism's political version. The problem, of course, is that we live in a society where there is pervasive and deep disagreement about issues of substantive justice. Without that disagreement, we could indeed simply adjust institutions whenever the adjustment was likely to produce the results that we all want. In the real world, where there is disagreement, these adjustments will be resisted by the losers they produce. The losers will rightly believe that they are playing a game deliberately fixed to make them losers. If we are to preserve "domestic Tranquility,"[17] we must design rules for the game that are acceptable to everyone, and then stick with those rules.

Political constitutionalism has well-known problems of its own. First, it is not obvious why the initial agreement embedded in the Constitution should command our respect. The shape of the agreement will be determined by the entitlements the parties possess before they come to the bargaining table. If these entitlements are unfairly distributed at the start, then the resulting agreement will be unfair as well.

Second, even if the initial agreement is in some sense fair, it is not clear how we can force people to stick to the deal. If the deal is to make any real difference, it must be enforced in cases where, but for constitutional obligation, a group could secure its goals respecting substantive justice. Often, people who are unwilling to respect the deal in these circumstances are characterized as "unprincipled," but this is a very odd use of the word. These are precisely the people unwilling to sacrifice their deepest substantive principles for the sake of mere political justice.

16. Tushnet explicitly adopts this view. *See* TUSHNET, *supra* note 2, at 141 ("[W]e have to remember that we buy judicial review wholesale: In getting the decisions we like, we run the risk of decisions we despise.").

17. U.S. CONST. pmbl.

The problem of enforcement is especially acute if constitutions are entrenched over generations. The people asked to abide by the deal are then not the people who made the deal. Moreover, the contours of the deal itself become increasingly indeterminate as society grows further removed from the social conditions that produced it. For example, both sides of the modern abortion debate are able with equal good faith to invoke the commands of the equal protection and due process clauses to support their position on a question the authors of those commands simply did not consider.[18]

Which problem does *Taking the Constitution Away from the Courts* try to solve? Answering that question turns out to be quite difficult. Much of the book is written as if the intended audience shared the substantive goals of the left. The book argues that courts have done much less, and political institutions much more, to advance those goals than commonly supposed.[19] One might think, then, that Tushnet is arguing for a leftist version of substantive constitutionalism.

At several points in the book, however, Tushnet seems to explicitly disclaim this reading of his thesis. In his preface, he explains that his book provides a defense of constitutional *law* because populist constitutionalism "is not in the first instance either the expression of pure preferences by officials and voters or the expression of unfiltered moral judgments. In short, it is not 'mere' politics, nor is it 'simply' philosophy."[20] Later, he expresses doubt that the right question to ask is

18. *Compare, e.g.*, John A. Robertson, *Gestational Burdens and Fetal Status: Justifying* Roe v. Wade, 13 AM. J. L. & MED. 189, 200 (1987) (arguing that the Constitution protects a woman's right to abort), *with* Martin Rhonheimer, *A Constitutionalist Approach to the Encyclical Evangelium Vitae*, 43 AM. J. JURIS. 135, 148 (1998) (arguing that the Constitution protects a fetus's right to life).

19. *See* TUSHNET, *supra* note 2, at 129-33, 151. *Compare id.* at 152 ("On balance, the question of whether judicial review benefits progressive and liberal causes more than it harms them seems rather difficult."), *with id.* at 154 ("On balance, eliminating [judicial review] is likely to help today's liberals a bit more than it would hurt them.").

20. *Id.* at xi. Tushnet does not elaborate on his qualification that populist constitutionalism is separated from pure preferences and unfiltered moral judgments only "in the first instance." In Part IV, *infra*, I suggest a reading of the book that ultimately grounds its claims on just such preferences and judgments. Similarly cryptic is Tushnet's assertion, in the following paragraph, that he is not arguing that

> populist interpretation is the only, or even the best, interpretation of the Constitution. Rather, my argument opens up issues that thoughtful voters and elected officials should think about, and that are obscured by the elitist constitutional law that dominates contemporary legal thought.

TUSHNET, *supra* note 2, at xi. This passage is deeply puzzling. If Tushnet is really not arguing that populist constitutionalism is the best interpretation, then why has he written a book-long defense of it? The passage at least suggests the possibility that his embrace of

"whether liberals or conservatives benefit from judicial review," and suggests that "[w]e might try to evaluate judicial review in a principled rather than a political way."[21] In addition, in an important footnote, Tushnet explains that although his "argument takes as its audience liberal supporters of judicial review," that is "largely because they have been [its] most prominent defenders," and that his conclusion that judicial review "makes rather little difference, is equally applicable to conservative defenders—or critics—of judicial review."[22]

In Part III, I will assume that Tushnet favors a political constitution and ask whether his political constitutionalism is leftist. I conclude that it is not. Ultimately, though, for reasons that I will make clear, I do not think that this is the best reading of the argument. Accordingly, Part IV evaluates the substantive version of his thesis. That version purports to be leftist, but I have some doubts as to whether it really is. Moreover, to the extent that it is in fact leftist, I argue that it forsakes the goals of constitutionalism. A brief conclusion, in Part V, suggests a way of reformulating constitutionalism so as to make Tushnet's proposal both leftist and constitutionalist.

III. TUSHNET'S POLITICAL CONSTITUTION

The main problem with a leftist version of political constitutionalism should be obvious from what I have already written. A leftist adherent to a political constitution must subordinate the substantive goals of the left whenever they come into conflict with constitutional commitments. It is important to emphasize again that these constitutional commitments will take hold at precisely the moment when leftist goals are within reach, because if they are not within reach, the constitutional commitments are irrelevant. Suppose, for example, that the political constitution prohibits redistribution of property to the dispossessed. This prohibition will hardly matter to leftists as long as they lack the power to effect such redistribution. At the moment they have the power, though, political constitutionalism requires that they forego this achievement for the sake of an agreement that purports to be politically neutral as between left and right. What kind of a leftist would do that?

---

populist constitutionalism is conditioned on its efficacy in achieving the goals of the left—a possibility that is also explored *infra* in Part IV.

21. TUSHNET, *supra* note 2, at 152.

22. *Id.* at 215 n.3.

In one sense, this problem is not confined to leftist adherents to a political constitution. Such a constitution forces people of all substantive persuasions to subordinate their substantive views to constitutional requirements. The problem is especially acute for the left, though, because the left has typically not been at the table when the agreements were formulated. Marxists and advocates of Critical Legal Studies (who did not exist at the time), not to mention women, people of color, and the poor (who existed in great numbers), were conspicuous by their absence from Philadelphia in 1787.

Conservatives have it much easier. For example, libertarian scholar Randy Barnett defends originalism and constitutional obligation even in circumstances when this approach conflicts with the substantive goals of libertarianism.[23] He does so, however, precisely because of his view that the Constitution, taken as a whole, advances libertarian goals. For just the reason that Barnett favors constitutional obligation, leftists should oppose it, at least if Barnett is right about the Constitution's ideological valence.

Of course, Tushnet does not defend the same political constitution that Barnett defends. Tushnet's thin, populist constitution does not prohibit the redistribution of property. Perhaps, then, the thin constitution functions in the same way for leftists that the thick constitution functions for libertarians like Barnett. But just as a leftist should not sign on to Barnett's constitution, so too a conservative should not sign on to Tushnet's. If in fact Tushnet's constitution tilts the playing field toward the left, then it is substantive rather than political, and those with different substantive views will not agree to it.

One might respond to this argument by claiming that I have ignored just how thin the populist constitution is. Perhaps the left and right can both agree to Tushnet's constitution because it establishes very little. At some points, Tushnet suggests as much with respect to the abolition of judicial review. Tushnet points out that over the course of our history, judicial review has rarely produced results that vary much from those that would have been produced in any event by powerful political actors: "judicial review basically amounts to noise around zero."[24]

If judicial review amounts to very little, then it follows that its abolition would not amount to much either, and if this is true, then left

23. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89-117 (2005).

24. TUSHNET, *supra* note 2, at 153 ("It offers essentially random changes, sometimes good and sometimes bad, to what the political system produces.").

and right can agree to the proposal. But why, then, would Tushnet bother to write a book arguing for its abolition? Tushnet's answer is that abolition "may contribute to serious thinking about the Constitution outside the courts."[25] Abolition, in other words, clears the way for populism. Whether or not substantive outcomes changed, the "people themselves" would be involved in the task of constitutional construction. Moreover, this populism is political rather than substantive because the sweeping language of the Declaration and the Constitution's Preamble, which give content to the thin Constitution, are capacious enough to encompass the programs of both right and left.

I have some sympathy for a constitution of this sort. Indeed, I have written a book-length defense of a version of a constitution sufficiently elastic to allow all sides of political disputes to claim it as their own.[26] For the reasons that follow, however, Tushnet's effort to marry a thin constitution to leftism and populism leads to a dilemma. Either the thin constitution constrains or it does not. To the extent that it constrains, it is not populist, and to the extent that it does not constrain, it is not leftist.

Assume first that the thin constitution meaningfully constrains political actors. Imagine as well that judicial review has been abolished and that the constitution has been left "in the hands of the people themselves."[27] Would such a regime be populist? Oddly, Tushnet's own argument helps demonstrate why it would not be. Tushnet takes as one of his targets a group of legal scholars and practitioners who formulated a set of guidelines designed to constrain what one of them called "amendmentitis,"[28] that is, the adoption of what in their view were unnecessary, unwise, or poorly drafted constitutional amendments.[29] Tushnet thinks that this effort to constrain the amendment process was elitist because it attempted to take constitutional politics out of the hands of the people.[30]

There is something very odd about this argument. At first blush, at least, it would seem that the authors of the guidelines were doing

25. *Id.* at 174 (noting that "[t]hinking about a world without judicial review" may contribute to the goal of the distribution of constitutional responsibility throughout the population).

26. *See* LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW (2001).

27. Tushnet, *supra* note 2, at 182.

28. Kathleen Sullivan, *Constitutional Amendmentitis,* AM. PROSPECT, Fall 1995, at 20.

29. I must note here that I was the legal advisor for the group that authored these guidelines. *See* CITIZENS FOR THE CONSTITUTION, GREAT AND EXTRAORDINARY OCCASIONS: DEVELOPING GUIDELINES FOR CONSTITUTIONAL CHANGE (1999).

30. TUSHNET, *supra* note 2, at 179-80.

precisely what Tushnet recommends. After all, they were not going to courts and asking judges to enforce their version of constitutional obligation. Instead, just as Tushnet urges, they were using ordinary political processes to convince the public that the thin constitution was inconsistent with the sorts of amendments then being considered.[31]

And yet there is surely something to Tushnet's claim that advocacy of the guidelines was in tension with populist constitutionalism. Even though "the people" were the ultimate arbiters of whether the guidelines should be followed, the guideline authors were insisting that failure to follow them was in some sense illegitimate because such a failure would be inconsistent with constitutional obligation. That insistence was anti-populist in the sense that it denied the legitimacy of decisions that "the people themselves" might otherwise have made.

I think that this example demonstrates that Tushnet has misdiagnosed the problem. It is not judicial review that is inconsistent with populism, but rather constitutionalism itself. Judicial review is one way to enforce constitutional obligation, but unless one denies constitutional obligation itself, the obligation would have to be enforced in some other way in the absence of judicial review—perhaps, for example, by elites intimidating people into believing that high principle makes their first-order choices illegitimate.[32] But to the extent that it is enforced, whether by judicial review or by some other means, the "people themselves" will be constrained, and the Constitution will not be populist.

Perhaps, then, the thin constitution is not meant to constrain. On this view, it requires no more than that people think seriously and deeply about their political judgments, and in no way dictates their substantive content. Such a constitution would be populist, at least in a certain sense, but it would not be leftist. At first, this assertion may seem odd.

---

31. The guideline authors acknowledged that there were not formal legal constraints on constitutional amendments, but identified themselves with the position that "even dominant majorities should hesitate before using this power." CITIZENS FOR THE CONSTITUTION, *supra* note 29, at 1-2. Their stated ambition for the guidelines was to "draw attention to some aspects of the amendment process that have been ignored too frequently . . ., provoke discussion of when resort to the amending process is appropriate, and . . . suggest an approach that ensures that all relevant concerns are fully debated." *Id.* at 6.

32. One might claim that this sort of argument ought not to count as enforcement so long as the people retain the right to ignore the argument. But if this is true, why does Tushnet think that the argument made by opponents of "amendmentitis" is anti-populist? More to the point, if the people really are free to ignore the argument, then constitutional obligation does not constrain, in which case, for reasons explained in the next paragraph of text, Tushnet's constitution is not leftist.

From time immemorial, the rhetoric of the left has been about empowering the people and disempowering elites. The trouble, though, is that "the people" is an abstraction. There is not a "people" of the United States, but different people, with different ends engaged in a political struggle for primacy. There is no *a priori* reason to think that leftists will always win that struggle. When they lose, rhetoric about the will of the "people" is anti-leftist.

The matter is further complicated by the fact that there is no way of measuring or discovering the "general will" without filtering it through institutional structures that at once give it expression and distort it. We can think of these structures as consisting of both political institutions and extra-political distributions of power.

Consider first political institutions. Tushnet conflates the will of the people with outcomes produced by real bodies like the House of Representatives, the United States Senate, and state legislatures. But why these institutions? Relying on Madisonian theory, Tushnet goes to some length to show that members of these political bodies have incentives compatible with constitutional enforcement.[33] The trouble, though, is that these incentives, to the extent that they in fact exist, are creations of the thick constitution that Tushnet disparages.[34] If, as Tushnet claims, the thick constitution does not warrant our respect and obedience, then the present shape of these institutions should be up for grabs. It is not hard to imagine a different set of institutions—a Senate with seats distributed proportional to population, or a federal system of recall, referendum, and initiative, for example—that would be more compatible with populist constitutionalism. When Tushnet asks us to support the real institutions we presently have, he is aligning himself with an unjust and anti-populist status quo.

The problems run still deeper. Suppose we had in place political institutions that more accurately reflected the "popular will" as it presently exists. It is a large mistake to suppose that this will exists independent of a matrix of power and suppression that forms it—or, at least, so the left has traditionally argued.

---

33. *See* TUSHNET, *supra* note 2, at 95-128.

34. The thick constitution not only establishes the incentives that Tushnet depends upon, but also provides rules for the creation of the authoritative political acts to which he would defer. This fact creates serious conceptual problems for his thesis. How are courts supposed to defer to the political branches without consulting and enforcing constitutional provisions that determine when these branches are appropriately acting in their official capacity? *See generally* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105 (2003).

Historically, the argument has taken two forms. One tradition claims that it is naive and romantic to believe that there is such a thing as a pure expression of popular will independent of omnipresent assertions of power. A more optimistic tradition claims that an inherently good human nature would emerge if only the yoke of domination were removed.

Whichever tradition one adheres to, few self-respecting leftists would claim that political outcomes under present conditions should be treated at face value. One need not associate oneself with all the excesses produced by the doctrine of "false consciousness" to see that many of these results are a reflection of, rather than a determinant of, current economic and political arrangements. For example, the kind of constitutional law "the people" of the United States will currently favor is surely heavily influenced, if not entirely determined by, the current distribution of media ownership, current levels of education, our methods of running and financing elections, and the current distribution of economic power. If these background conditions were changed, "the people" might well have very different constitutional preferences. Taking those arrangements as a given instead of problematizing them is deeply conservative.

It is true, of course, that Tushnet's thin constitution might permit changes in these background conditions. Importantly, however, the changes would have to be accomplished with the background conditions in place. And it is just these conditions that prevent the changes from occurring. None of this is to say that change is impossible. Ultimately, whatever the obstacles, it is always open to people to say that they have had enough. Still, change is more likely in some circumstances than in others. A constitutional theory that valorizes existing political conditions and the outcomes that these conditions produce does more to entrench the status quo than change it.

IV. TUSHNET'S SUBSTANTIVE CONSTITUTION

These difficulties with Tushnet's argument suggest that I may be misreading it. Perhaps Tushnet is arguing for substantive constitutionalism after all. It is a little hard to take at face value the claim that the many pages of the book devoted to convincing leftists of the virtues of his proposal are really also intended for conservative

eyes.[35] Moreover, the book contains several hints—albeit no more than hints—that Tushnet's proposal is intended to further a particular version of substantive justice.[36] It is striking, for example, how tentative Tushnet's embrace of populist constitutionalism is. At one point, he suggests that his support for abolition of judicial review is highly contingent.[37] At another point, he suggests that he is not really supporting abolition at all, but rather only serious thought about the *possibility* of abolition.[38] These passages at least hint at the possibility that his embrace of populist constitutionalism is contingent on it having beneficial effects.

Other passages suggest somewhat more explicitly that he is advocating a substantive constitution. Consider, for example, the following statement:

> The very structure of judicial review in the United States thrusts the "Who benefits" question to the fore. More generally: Judicial review is an institution designed to help us run a good government. It cannot be defended except by

35. It must be noted as well that Tushnet's book is one of numerous works written by people on the left celebrating the virtues of nonjudicial constitutionalism at an historical moment when the left has less power on the Supreme Court than it has had in generations. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

36. *See supra* notes 19 & 20.

When Tushnet writes for an audience that he knows is progressive, much of the ambiguity falls away and he argues in a straight-forward fashion that we should abolish judicial review because abolition is good for the left. *See* Mark Tushnet, *Democracy Versus Judicial Review*, DISSENT, Spring 2005, at 59, *available at* http://www.dissentmagazine.org/article/?article=248.

37. Tushnet writes:

> *If* we accepted the controversial empirical judgments about how the political system actually operates, and
>
> *if* we thought that a stable constitutional system could be founded on such judgments, and
>
> *if* we were able to free ourselves from our obsession with courts, and
>
> *if* we paid attention to the thin Constitution of the Declaration's principles,
>
> *then* we would find that the idea of a self-enforcing Constitution describes an attractive way of distributing constitutional responsibility throughout the government.

TUSHNET, *supra* note 2, at 128.

38. "Populist constitutional law seeks to distribute constitutional responsibility throughout the population. Thinking about a world without judicial review, toting up the costs and benefits of the institution, may contribute to that goal. A modest conclusion, perhaps, but probably the only one an academic's analysis can provide." *Id.* at 174.

> seeing how it operates—whether in fact the government is better with it than without it.[39]

Surely, it has not escaped Tushnet's attention that in a heterogeneous society, there will be disagreement about what constitutes "good government." As he himself acknowledges, "[t]he real question is whether . . . in general legislatures or courts make more, and more important, constitutional mistakes."[40] But we cannot evaluate whether a court or legislature has made a mistake without a substantive theory. Tushnet is therefore right in asserting that "we *must* have a decent theory of constitutional interpretation outside the courts even to be able to pose that as a question."[41]

If we take Tushnet as advancing a substantive theory, then what are we to make of his disclaimers? I cannot be sure, but I think it possible to read his book as a strategic intervention designed to make the best of a very bad situation. On this reading, Tushnet as leftist confronts a political culture extremely hostile to progressive change. Absent armed revolt, the only hope for rearranging institutions to promote leftist causes is to convince the conservatives presently in power that they have nothing to fear from this rearrangement. In effect, Tushnet tells these conservatives that they can have their cake and eat it too. They, too, can be on the side of the people by endorsing populist constitutionalism without actually having to give up any of their prerogatives. Populist constitutionalism, he insists, is political rather than substantive; its embrace does nothing to tilt the playing field one way or the other.

Of course, Tushnet, as a leftist, does not himself believe this; if he did, he would have no reason to make the argument. He must nonetheless make his constitutionalism appear substantively neutral to get his substantive opponents to buy into his argument.

To be clear, I have no way to know whether this is in fact Tushnet's strategy. Whether it is or not, though, we need to evaluate it to decide whether his proposals can qualify as both constitutionalist and leftist. What, then, are we to make of the strategy?

Most obviously, it puts on the table important issues about candor. Is it right to advance an argument for populist constitutionalism in bad faith? Writing more than twenty years ago, Paul Carrington accused advocates of Critical Legal Studies (C.L.S.) of "train[ing] crooks" and

39. *Id.* at 152.
40. *Id.* at 57.
41. TUSHNET, *supra* note 2, at 57.

teaching "the skills of corruption: bribery and intimidation."[42] In the overheated atmosphere of the time, Carrington's opponents were quick to express outrage at the charge.[43] In retrospect, though, I wonder whether they should have displayed it as a badge of honor. With Michael Walzer[44] and Jorge Luis Borges,[45] they might have suggested that dirty hands are the mark of courage and commitment. A willingness to sacrifice even one's own integrity for the sake of the cause is what it means to give true primacy to leftist goals.

If this is indeed Tushnet's project, then it is authentically leftist. Unlike the position of political constitutionalists, it does not subordinate leftist ends to other values. The trouble, though, is that it is not a constitutional project. Carrington's anger and panic were triggered by C.L.S. precisely because he understood (correctly, in my judgment) that it refused to subordinate substantive justice to rule of law values. Obviously, this failure is inconsistent with political constitutionalism. Indeed, Tushnet concedes as much when he says in his introduction that in order to count as constitutional law, his proposal must not be "'mere' politics, nor is it 'simply' philosophy."[46] Perhaps less obviously, bad faith arguments are also inconsistent with the brand of substantive constitutionalism that Tushnet advocates. If the people are, indeed, to rule, then presumably, they should be treated as capable of autonomous choice. In other words, they should be accorded the respect that bad faith manipulation denies them.

Of course, saying that the strategy is in tension with constitutionalism is not to say that it is wrong. Perhaps we should be leftists rather than constitutionalists. But if one is really going to get one's hands dirty, then at least one should have something to show for the effort. On the level of strategy, I am very doubtful that populist constitutionalism is in fact the best means to advance us toward the goals of the left.

We have already explored one problem with the strategy. Under present conditions, it is far from obvious that "the people themselves"—

42. Paul D. Carrington, *Of Law and the River,* 34 J. LEGAL EDUC. 222, 227 (1984).

43. *See* Peter W. Martin, *Of Law and the River, and of Nihilism and Academic Freedom*, 35 J. LEGAL. EDUC. 1 (1985) (collecting correspondence in response to Carrington's article).

44. *See* Michael Walzer, *Political Action: The Problem of Dirty Hands*, 2 PHIL. & PUB. AFFAIRS 160 (1973).

45. *See* JORGE LUIS BORGES, *Three Versions of Judas, in* LABYRINTHS: SELECTED STORIES AND OTHER WRITINGS 95 (Donald A. Yates & James E. Irby eds., 1962).

46. TUSHNET, *supra* note 2, at xi.

or, more precisely, political institutions that may or may not represent "the people themselves"—will favor the programs of the left. Tushnet responds to this problem by pointing out that we need to make comparative judgments. He couples this response with a deflationary account of the history of judicial review. Together with many other scholars,[47] he is rightly skeptical of the claim that courts have often or successfully defended the disempowered. Leftist advocates of judicial review make the mistake of imagining a court populated by the justices they would choose. But there has not been, and will not be, such a court. Rather than waste resources on trying to produce the *deus ex machina* of a leftist court, Tushnet urges progressives to do the hard work of building political support for their programs.

Tushnet is right to insist that we need to make comparative judgments, but I think that the comparison actually cuts the other way. Yes, it is hard to imagine the sudden emergence of a leftist court, but it is even harder to imagine that Tushnet's proposal to take the Constitution away from the courts will be put in place.[48] In making this comparison, we must start by acknowledging that any strategy designed to create progressive change is a long shot. Still, I think that Tushnet underestimates both the difficulty in securing the adoption of his program and the potential for judicial review.

Consider first the possibility that current political institutions might actually take the Constitution away from the courts. How likely is it that this will come about any time soon? Tushnet imagines the Justices abandoning their own power,[49] but everything that we know about human nature and political actors makes this highly unlikely. Are the other branches likely to take the power from them? For reasons that are admittedly difficult to understand, the Supreme Court remains the most

47. *See, e.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996).

48. Tushnet himself provides reasons why "[f]inding the political support for [proposals to abolish judicial review] is . . . . likely to be quite difficult." TUSHNET, *supra* note 2, at 172. As he points out, effectuating his proposal would require a talented political leader, who might not emerge. Moreover, people see themselves as potential beneficiaries of Supreme Court rulings, and this hope may blind them to the possibility of losses in the Supreme Court. And even if judicial review harms a given political group on balance, at a particular moment, it may be helping some members of that group, and these members will see proposals for abolition as a threat. *Id.*

49. *See* TUSHNET, *supra* note 2, at 154.

popular governmental institution in the country.[50] In the teeth of the current Court's incompetence, venality, and pomposity, Americans continue to prefer judges to legislators and presidents.

If I have correctly identified Tushnet's strategy, he imagines that somehow the people who presently hold power can be tricked into relinquishing it by the claim that populist constitutionalism is politically neutral. Even if they are so convinced, however, that accomplishment at best eliminates one strand of conservative opposition. It does nothing to change America's baseline infatuation with courts.[51] Moreover, it is always a mistake to imagine that our opponents are stupid. For reasons outlined above, I have doubts that populist constitutionalism tilts leftward, but assuming *arguendo* that it does, conservatives are just as able to perceive the tilt as are progressives. Why, then, would they agree to it?

Oddly, in this regard, Tushnet makes the same mistake that he accuses his opponents of making. Like his opponents, he starts by imagining a political alignment where his proposal would be plausible. But if there were such an alignment, the proposal would not be necessary in the first place.

Progressives make this same mistake when they propose procedural changes like campaign finance reform. It may be true that if only we had fair financing of elections, it would be possible to enact progressive legislation. But the same forces that block the progressive legislation also block meaningful campaign finance reform. Occasionally, a coalition can be formed that creates procedural reform when it would be impossible to assemble a coalition that backs the substantive changes made possible by the procedural reform. More often, though, people understand that procedures have substantive consequences, and those people are unwilling to agree to procedural changes that are likely to produce substantive outcomes they oppose. Given this fact, and as

50. Although confidence in the Supreme Court has been declining along with confidence in all institutions of government, the Court remains far ahead of Congress and the Presidency. Polling data reported in June, 2007 indicated 34% of Americans voicing a "great deal" or "quite a lot" of confidence in the Supreme Court, as compared to 25% voicing similar views of the Presidency, and 14% voicing similar views of Congress. *See* Frank Newport, *Americans' Confidence in Congress at All-Time Low; Confidence in Most Institutions Drops*, GALLUP, June 21, 2007, http://www.gallup.com/poll/27946/Americans-Confidence-Congress-AllTime-Low.aspx.

51. Even Larry Kramer, a strong defender of popular constitutionalism, concedes that "[p]ublic acceptance of judicial supremacy pervades constitutional law and politics." KRAMER, *supra* note 35, at 233. Accordingly, "trying to build opposition to the Court by decrying judicial supremacy will not go down well with most Americans." *Id.* at 232.

difficult as the fight may be, it makes sense for progressives to use their scarce resources to change people's minds about their substantive programs rather than to fight procedural battles, whether they be over campaign finance or the power of judges.

For these reasons, I think that the prospects of taking the constitution away from the courts are less encouraging than Tushnet imagines. What about the complementary prospect of putting in place a leftist Court? This too is an uphill fight to say the least. Tushnet is right to claim that the history of judicial review offers little in the way of encouragement. But although the prospects are surely bleak, there are reasons to think that the odds of seeing a leftist Court are better than the odds of Tushnet's strategy succeeding.

The main reason for optimism is that the Supreme Court is populated by only nine people who are appointed for life. True, the chance of an authentic leftist surviving the appointment and confirmation process is close to zero, but people change over time, especially when political pressures are removed. It is worth pondering the fact that perhaps the most radical, independent, and iconoclastic justice in the Court's history—William O. Douglas—began his judicial career as a politically cautious jurist without a well-defined jurisprudential philosophy.[52] No other justice has moved as far left as Douglas, but there are many other examples—Harry Blackmun, John Paul Stevens, and David Souter come to mind—of justices who have ended up being more progressive than they were thought to be at the time of their confirmation. Is it really impossible that five people might undergo such a transformation at the same time?

Even if the Court turned strongly left, it is not at all clear that it could actually put in place a leftist program. As many others have pointed out, the Court's power is sharply constrained and its very few efforts to effect meaningful social change have had, at best, mixed results.[53] Once again, though, we have to ask the "compared to what"

52. During his early years on the bench, Douglas was preoccupied with positioning himself to become President. *See* BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS 203-21 (2003). He "showed little interest in developing a long-term jurisprudential philosophy," and decided issues raised in cases based on "his own best interests" and "his political future." *Id.* at 201-02.

53. *See generally* ROSENBERG, *supra* note 47; Klarman, *supra* note 47. *Cf.* Jane S. Schacter, *Sexual Orientation, Social Change, and the Courts*, 54 Drake L. Rev. 861, 863 (2006) ("[Although] any romanticized picture of judges as countermajoritarian revolutionaries, single-handedly making public policy more progressive, is empirically unsustainable . . . . The notion that the institutional properties of courts disable them from ever driving social change in a significant way has its own caricatured qualities.").

question. It is not just the Court, but progressive politicians as well, who have failed to prevent the slide into oligarchy and imperialism. Judges have at their disposal the myth of constitutional obligation that politicians lack. A judge so inclined might make substantial good use of a rhetoric and mystique that continues to have a hold on the American people.

It is doubtless the case that the self-conscious choices of politicians or judges produce little social reform. It is most often the unintended consequences of large scale social forces—of wars, migrations, and changes in material conditions.[54] Romanticizing either judicial review or political mobilization is surely a mistake. My claim, then, is very modest: if we are to choose between politicians and judges, there is no good reason to count judges out, especially in a world where judicial review is already in place and where it will take a great deal of effort to dislodge it.

V. OUR UTOPIAN CONSTITUTION

Tushnet's failed effort at a leftist constitutionalism puts the question to us: if we must choose between constitutionalism and leftism, what choice should we make? As much as I hate to confirm the cliché, I must say that as I grow older, I become more ambivalent about the right answer. I have a friend who refers to herself as a "retired Marxist." I know what she means. Being a real leftist is a full time job.[55] It requires courage, commitment, sacrifice, and an endless appetite for lost causes.

---

54. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 174 (2004) ("World War II's contribution to progressive racial change cannot be overstated. Earlier wars had had similarly egalitarian consequences.").

55. *Cf.* IRVING HOWE, STEADY WORK (1966). The epigraph to Howe's book wryly evokes the quixotic patience that is necessary for left utopianism—a patience that, if we are not very careful, shades into passivity and irrelevance:

> Once in Chelm, the mythical village of the East European Jews, a man was appointed to sit at the village gate and wait for the coming of the Messiah. He complained to the village elders that his pay was too low. "You are right," they said to him, "the pay is low. But consider: the work is steady."

Id. at iv. For Howe himself, however, "steady work" meant something quite different. As his friend and colleague, Michael Walzer, wrote upon Howe's death:

> I often asked myself: why did a man of such high talent, so cultured, so insightful, who used the English language with such power, devote himself for forty years, day in, day out to . . . political/diplomatic/editorial drudgery? Why the endless phone calls? . . . Why the constant fund raising, which he was never good at and certainly never enjoyed? Why the stream of notes and postcards, suggesting

Perhaps more to the point, being a leftist means always being a pain in the ass. A political constitution provides a way for people to get along with each other. It is a template for political pluralism that allows for the possibility of companionship and common ground among people who might otherwise be at each other's throats. These are large virtues, especially given the fact that foregoing them would barely increase the dismal chances for large-scale social change in any event.

There are days—many of them—when I am drawn to these virtues. And yet I cannot quite shake my commitment to the left. I think of my own leftism (on the days, that is, when I think of myself as a leftist at all) as consisting of a more or less involuntary temperamental disposition rather than allegiance to any real program. Being a leftist in this sense is being temperamentally drawn to permanent critique. It is never having a home, always being dissatisfied, always haunted by the knowledge that the wrong people have power and that things are not as they should be.

This sort of leftist temperament leads to a paradox, which, in turn, might explain why Tushnet's constitutionalism is leftist after all. A frequent charge leveled against leftists of this sort is that they lack a positive program.[56] The paradox is that a positive program is actually necessary to sustain permanent critique—albeit the program must be one that can never be achieved. Leftist utopianism provides an important motivation for critique. To imagine a goal that might actually be achieved is to give up the permanence of the criticism. To concede that one has no goal at all is to slide into cynicism. The only alternative is to adhere to a goal that is forever out of reach, all the while claiming—to oneself and to others—that, if only we hang together and are strong, we can reach it after all.

> projects, reminding us of deadlines, hammered out one after another, every day, while the essays he wanted to write and the books he wanted to read lay waiting? . . .
>
> The answer is the man, a man of the left and a socialist, who knew that this work, exactly this work, was what we were here for, that we did not have to finish it but could not give it up, that someone had to pay attention even to the smallest matters—and if someone, then us, then him.

Michael Walzer, *Irving Howe: 1920-1993*, DISSENT, Summer 1993, at 275, 276. Although Walzer was describing Howe's years of service as editor of *Dissent*, he might well have been speaking of Tushnet's years of service as secretary to the Conference of Legal Studies, not to mention his work in thankless jobs like Associate Dean of the Georgetown University Law Center and President of the Association of American Law Schools. Both men understood that revolutions require selflessness as well as ego, organization as well as spontaneity, attention to detail as well as to vision.

56. *See, e.g.*, Carrington, *supra* note 42, at 227.

Perhaps this leftist utopian vision provides the best way to understand Tushnet's constitutionalism. I have been treating it as a serious proposal, which is, of course, how Tushnet treats it, and how utopians must always treat their own proposals. But perhaps this is a misunderstanding of what the proposal is all about. Returning the Constitution to the people is not something that actually will be—that we would actually want to be—achieved. It is, instead, a platform on which we can stand so as to see over the heads of those now in power to an imagined world where the corruption, evil, and obfuscation that are the hallmarks of modern, mainstream constitutionalism no longer exist.

Seeing the deficiencies in our current situation—seeing them clearly and unsparingly—is surely leftist. Imagining a different world might also be taken to be constitutionalist, not in the ordinary sense of the word, but in the sense that religious millenarianism is constitutional. People can be constituted by such imaginings. One can organize a mode of living around a commitment to critique and to the hypothetical world that grounds the critique.

Such a commitment can provide rules of conduct and a basis for cooperation with others who share the same vision. That is certainly not the sort of constitutionalism that mainstream theorists talk about, but it is not nothing either; and it is, perhaps, all that we can expect of a constitutionalism that is authentically leftist.