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## A RESPONSE TO PROFESSOR TUSHNET

JOHN M. ROGERS\*

In this essay, Professor Rogers responds to an article by Professor Mark Tushnet, *Principles, Politics and Constitutional Law*. In that article, Professor Tushnet argued that in the confirmation process, the constitutional scheme authorizes a senator to act solely with regard to partisan concerns. He argued that politics in this sense is built into the Constitution, as reflected in the political questions doctrine. He concluded by stating that "all the Constitution really requires is that politics be given its ordinary range of operation, that ambition be set to counter ambition," all other arguments are sophistry.

Mark Tushnet has argued in an essay in the *Michigan Law Review* that it is appropriate for United States Senators to vote for or against judicial nominees entirely on narrow partisan grounds.<sup>1</sup> His essay can be refuted in a few paragraphs, and perhaps should be.

Tushnet's argument goes like this: The largest part of public policy is made through—and limited only by—the operation of ordinary politics.<sup>2</sup> The political questions doctrine, under which some constitutional questions are not judicially reviewable, remits such questions to this political process.<sup>3</sup> The justification for doing so is the combined "unavailability of external evaluative criteria and the general trustworthiness of the ordinary political process" in those cases where the doctrine applies.<sup>4</sup> Examples are the House of Representatives' determination of the qualifications of members, the Senate's action in impeaching a President, and fed-

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<sup>1</sup> Mark Tushnet, *Principles, Politics, and Constitutional Law*, 88 MICH. L. REV. 49, 50 (1989).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 52.

<sup>4</sup> *Id.*

eral legislation regulating the states "as States." Critics of the Senate's treatment of Judge Bork imply "that it is in some sense constitutionally improper for ordinary politics to play a role in the confirmation process,"<sup>5</sup> but Tushnet argues that questions of the proper scope of senatorial inquiry are also political questions.<sup>6</sup>

Therefore, according to Tushnet, "the Constitution authorizes a senator to act solely with reference to political concerns."<sup>7</sup> He argues that the political questions doctrine applies both to the scope of senatorial inquiry and to the ultimate confirmation decision.<sup>8</sup> A Senator is therefore "free to take a position on that question [whether to confirm] solely with reference to electoral considerations."<sup>9</sup> This conclusion is supported by Tushnet's contentions that constitutional norms applicable to the confirmation question are difficult to identify, and that senatorial reliance solely on electoral considerations would not lead to undesirable consequences.<sup>10</sup> Tushnet goes on to criticize those of "Judge Bork's supporters who claimed that the political process was insufficiently respectful of constitutional norms," for making an argument inconsistent with the political questions doctrine when those same supporters would normally advocate the separation-of-powers policies underlying the political questions doctrine.<sup>11</sup>

Tushnet concludes by rejecting any scholarly legal argument that, for instance, senators should confine their inquiries to a nominee's character and ability. "[A]ll the Constitution really requires is that politics be given its ordinary range of operation, that ambition be set to counteract ambition."<sup>12</sup> Other arguments are sophistry.<sup>13</sup>

Put simply, Tushnet fails to distinguish between the issue of whether a branch has the *power* to interpret the Constitution, and the issue of what *is* the proper interpretation. The distinction is

<sup>5</sup> *Id.* at 66.

<sup>6</sup> *Id.* at 76-78.

<sup>7</sup> *Id.* at 68.

<sup>8</sup> *See id.* at 77. "Most of the political considerations that justify treating the scope of inquiry as a political question apply as well to the confirmation issue." *Id.*

<sup>9</sup> *Id.* at 76.

<sup>10</sup> *Id.* at 78-79.

<sup>11</sup> *Id.* at 80.

<sup>12</sup> *Id.* at 81.

<sup>13</sup> *Id.*

## Tushnet Mixing Levels

obvious if we look at the Supreme Court. It is almost a tautology to say that if the Supreme Court has the final constitutional power to interpret certain constitutional issues, then it has the power to interpret them “wrong” under some independently applied standard. If one argues, for instance, that it is wrong for Justices to interpret the Constitution on purely political grounds, it is simply no answer to say that the Court has the power to do so. Of course the Court has the power to do so, but that power doesn’t make the decision correct. Otherwise, all criticism of Supreme Court decisions would be meaningless.

Yet this is precisely the argument that Tushnet makes with respect to the Senate when he relies upon the political questions doctrine to justify confirmation decisions based upon political grounds. It is unexceptionable—one might say obvious—to interpret the Constitution to give the Senate the final power to answer the question of what is the scope of its inquiry into judicial nominees. But how the question should be answered is an entirely different issue. The “right to decide” simply does not imply that “any ground is as good as another.” If we can criticize the Supreme Court for a badly reasoned decision, we certainly can do the same for the Senate when it exercises its Constitution-applying (and therefore necessarily Constitution-interpreting) function.

The political questions doctrine keeps certain issues out of the courts, and thereby gives to the political branches the final say on those issues. But it does not tell the political branches *what* to say. Tushnet uses three examples where Congress makes decisions that are arguably not reviewable by the courts under the political questions doctrine: whether a member of the House of Representatives is qualified, whether a President should be impeached, and to what extent the states should be regulated “as States.”<sup>14</sup> Logical constitutional arguments can be marshalled for permitting these decisions to be made finally by the political branches rather than by the courts. But that does not mean that Representative Doe should vote to exclude an allegedly 29-year-old member that Doe believes to be 31 simply because Doe objects to the new member’s politics. Nor should a Senator vote to convict a Presi-

<sup>14</sup> *Id.* at 53-62.

dent who has been impeached on the charge of committing a high crime or misdemeanor merely because the Senator objects to the President's politics, even though, of course, the Senator has the power to do so. Nor should Congress pass legislation effectively eliminating state government, even if the Court has made clear that Congress would be permitted to do so. "Political question," in other words, does not mean that politics is the appropriate basis for decision.

Tushnet effectively concedes that there are objectively determinable limits on what a governmental branch may do even though no other branch is given the power to review.<sup>15</sup> For instance, he talks about politics as a "constraint," but the very meaning of "constraint" connotes a limit. If a branch goes too far, then something must determine what is "too far." The constraint that Tushnet talks about is thus a meaningless concept unless there is some line within which the branch should be constrained. It is even clearer that Tushnet concedes the existence of limits upon what an unreviewable branch can do when he talks about "normatively troubling outcomes."<sup>16</sup> "Normatively troubling outcomes" apparently contain "constitutionally erroneous" ones as a subset.<sup>17</sup>

Once we have concluded that there *are* right and wrong decisions to be made by the Senate about judicial nominees, then we should demand that our Senators make right (i.e., constitutional) decisions about nominees, and criticize them when they don't, all the while preserving the Senate's right to make such decisions. If the Senate votes on political grounds and that is not "right," it is no answer to say that the Senate has the power to do so. This is simply mixing levels, confusing who can decide with what is the right answer.<sup>18</sup>

<sup>15</sup> *Id.* at 70 n.69.

<sup>16</sup> *Id.* at 68-71.

<sup>17</sup> *Id.* at 70 n.69.

<sup>18</sup> *See id.* at 79. At one point Tushnet does defend his position on grounds that at least may be said to cut in his favor: first, that the President's consideration of politics in selecting a nominee justifies the Senate's doing so, and second, that the Senate's power vis-a-vis the Supreme Court would better reflect appropriate checks and balances if the Senate considered a nominee's likely actions on the Court. *Id.* These standard arguments are but cursorily made and hardly justify the elaborate but illogical reliance on the political questions doctrine to establish that politics is the constitutional norm for Senate evaluation of judicial nominees.

## Tushnet Mixing Levels

If Tushnet is only arguing that the Senate has the *power* to consider judicial nominees on purely political grounds, then the argument is unexceptionable, but obvious. But if he is arguing that a Senator complies with his or her constitutional duty by doing so—as he appears to be<sup>19</sup>—then his argument simply does not support his conclusion.<sup>20</sup>

<sup>19</sup> See *id.* at 81. “[A]ll the Constitution really requires is that politics be given its ordinary range of operation, that ambition be set to counteract ambition.” *Id.*

<sup>20</sup> That Tushnet is doing the latter is confirmed by his finding “something anomalous” in Judge Bork’s supporters’ having “objected to the sort of political behavior [on the part of Senators] that they expected Judge Bork to approve if confirmed.” *Id.* at 80. There is no anomaly here. Had he been confirmed, Judge Bork may have found a greater number of constitutional decisions to be finally determinable by Congress; that doesn’t mean that such congressional decisions can be made on any ground. Indeed, the more that constitutional decisions are committed to Congress, the more the Congress has a responsibility to decide correctly. By using the word “approve” in the above quote, Tushnet suggests that a Supreme Court Justice agrees with a constitutional decision that he or she finds Congress has the power to make. Again, saying a body has power to make a decision does not imply agreement with the decision. Law professors, for instance, disagree all the time with the Supreme Court decisions that they would concede the Court has the power to make.

