I construct Professor Tushnet’s article as offering an account of societies on a legal continuum. At one end lies the classical liberal state. Here the legal system articulates a thin set of background rules that regulate the market transactions through which goods are distributed. Courts enforce rules against force, fraud, and breach of contracts. By means of police power courts have some discretion to identify forms of force, fraud, or breach of contract not explicitly articulated by legislated code. In the classical liberal state, courts also strike down laws that intentionally deprive a class of people of goods they would normally receive through market transactions in the absence of these restrictions.

At the other end of this continuum lies the social democratic state. Constitutional rules and legislation set out a wide system of entitlements, for example, to goods such as pensions, healthcare, education, nursery care, basic income support, and protection for union organizing. These goods are either provided directly by the state and publicly-owned enterprises through tax revenues and income, respectively, or by regulated private institutions. Whatever form the implementation of social democratic entitlements takes, the state has well developed, legally coherent, and democratically legitimate bureaucracies for doing so. In the social democratic state the system of entitlements is a central aspect of the state’s constitution, with which its other provisions must be consistent. The system also conditions the background rules of property, contract, and tort throughout the legal system.

Between these extremes lie societies in which the state takes a more active role in regulating the distributive effects of market processes than in the classical liberal state, but are not fully social democratic states. These are societies that evince an “increasing commitment ... to social democratic norms,” but where legislative entitlements and executive institutional capacity do not guarantee fulfillment of substantive welfare

---

2. Id at 438.

---

*Professor, Department of Political Science, University of Chicago.*
rights. I construct this as a continuum; the degree to which legal rules or legislative programs express or instantiate social democratic norms and regulate distributive effects varies, as does the extent of state activism, as exercised by courts or other branches of government. In these societies courts come under pressure to reform background rules of property and tort to correct for market outcomes in which people do not have “enough” according to prevailing democratic norms. Professor Tushnet seems to think, and I agree, that most liberal democratic societies and legal systems today fall somewhere on this continuum.

In his article, Tushnet reflects primarily on a tension within legal systems located between the two poles of the continuum. These legal systems seem to be committed to three principles that they cannot hold simultaneously: “[W]e think we know that courts can develop background rules of property and contract acceptably; we know that courts must develop some doctrine of state action or horizontal effect; we may believe that courts cannot develop social welfare rights acceptably.” As I understand Tushnet’s account, this trilemma tends to be resolved by moving toward one end of the continuum. Courts can “avoid elaborating social welfare rights by adopting the view that the constitution has no horizontal effect.” This solution requires the kind of sharp separation between the constitutional court and ordinary courts that Tushnet finds unique to the United States, coupled with a passive or weak form of judicial review. In this option courts effectively do not recognize welfare claims as affecting private activity. “Alternatively, a thick system of legislatively developed social provision coupled with passive or weak-form judicial review eliminates much of the pressure on courts to elaborate social welfare rights.” In this second option, the need for courts to promote welfare rights is obviated by the legislative provision.

I am sympathetic to Professor Tushnet’s aims and commitments in this paper. I understand him to be trying to resolve the tensions he identifies by pushing legal theory and practice more toward the realization of the social welfare rights end of the continuum. Nevertheless I have several questions about his concepts and arguments as articulated in this essay.

I. HOW DO COURTS KNOW WHEN THERE ARE SOCIAL DEMOCRATIC NORMS?

Professor Tushnet suggests that societies on the continuum between the classical liberal state and the realized social democratic state contain commitments to “social democratic norms” even though these norms do not guide public or private law to a significant degree. As I understand his argument, it is the presence of these social democratic norms that can justify a court’s interpretation of the doctrine of state

3. Id at 443-44 (emphasis in original).
4. Id at 453.
5. Id.
action/horizontal effect to conclude that social welfare requirements limit background rules of private law. This raises a question that Tushnet does not address, namely, how does a court know when its society has a commitment to social democratic norms that warrant its welfare promoting action? Tushnet's Canadian and South African examples suggest one possibility. Certain provisions of a constitution may express principles that embody social democratic norms, even though much of private law conflicts with those norms. Courts are then warranted to limit the background rules of private law to conform to social democratic norms.

Some of Tushnet's American examples, however, are more ambiguous. In Shelley v. Kraemer, the Court relied on the Equal Protection Clause of the Fourteenth Amendment to decide that states could not enforce racially restrictive covenants. The Equal Protection Clause, however, does not express a "social democratic norm" in any obvious way. The clause can and often has been interpreted as a principle of formal equality rather than one that mandates substantive outcomes, as Tushnet suggests it does in Shelley v. Kraemer. So it would seem that at least sometimes courts take the prerogative of interpreting a constitutional principle as expressing a "social democratic norm." Just what entitles the courts to do so? It would seem that in many cases a court believes itself justified in such an interpretation because it finds some non-legal institutions and practices in the society, or some public discourse expressing social democratic norms. This point leads to my next question.

II. WHERE DOES THE PRESSURE ON COURTS TO RECOGNIZE SOCIAL DEMOCRATIC NORMS COME FROM?

According to Professor Tushnet, the trilemma that courts in societies in the middle of the continuum face apparently arises from a "pressure on courts to elaborate social welfare rights." I take it that such pressure comes partly from state action. The state has "entered the field" of a certain welfare good, for example, by protecting a right to organize unions, and as a result citizens can make claims on the state to do more. I think that Tushnet's analysis would benefit from more explicit consideration of the pressures the political context creates on courts.

Societies that lie on the continuum between the classical liberal state and the social democratic state do not express social democratic norms unambiguously. These norms, rather, are in contest. Political actors have differing opinions about whether

---
6. As an example of a court attempting to determine social norms see Ring v Arizona, 122 S Ct 2428, 2443 (2002) (finding that a jury, rather than a judge, must decide a death sentence).
the state should actively promote equality and welfare. Some of those actors try to bring their claims before courts, and courts can then decide to hear the claims or not, and they may rule for or against those claims. Whatever the courts do in response to claims that the state ought to restrict private actors from bringing about disadvantageous outcomes, or that the state ought to directly provide certain welfare protections or goods, directly involves those courts in politics. Tushnet's analysis shows that in societies where social democratic claims are made and contested, courts are one of the arenas of contest, and courts usually cannot avoid taking a position on the political issues. Even when courts attempt to distance themselves from the political context by insisting on principles and practices of the classical liberal state, this usually counts as a political position in the contest.

III. WHAT KIND OF SOCIAL DEMOCRATIC NORM IS NON-DISCRIMINATION?

Tushnet characterizes social democratic norms as concerned with the level and distribution of important goods, such that everyone in the society should have enough. In only some of his case examples, however, does pressure come to the state to correct a distribution of goods. For example, the Canadian example of a hospital that denies interpreting service to a hearing impaired person in the context of a state that guarantees health services falls within this class.

More of Tushnet's cases concern non-discrimination, in which a court's finding in favor of the plaintiff does not imply directly redistributing goods. When the farm workers win state protection for their unionization efforts, neither the state nor their employer directly distributes anything to them. Similarly, when the state declines to enforce protective covenants, I do not think that this amounts to the state condemning an inadequate distribution of housing, as Tushnet suggests. Instead, it condemns the limited opportunities that African-Americans have to access certain housing markets.

Tushnet's argument tends to collapse state actions aimed at changing the background rules of property and tort regarding actions and policies with discriminatory results, on the one hand, with those aimed at ensuring the provision of certain goods and services, on the other. He seems to think that both equalizing opportunities and guaranteeing the provision of certain goods constitute social democratic principles. I think that they both are, but they are not the same kind of social democratic principles. We at least need more argument for why they are properly conceptualized together.

If we disengage these two kinds of principles, then it is possible that the trilemma is not quite so strong as Tushnet sets out. In societies and legal systems with anti-

---

10. Id at 441.
discrimination norms, courts properly enforce those norms against most private actors, and the same courts may well retreat from enforcing the provision of any goods or services by right. This seems to be the situation in the United States for the last twenty years. It might be interpreted as a relatively stable solution to the trilemma that Tushnet’s analysis does not consider.

Moreover, if we disengage norms of anti-discrimination from norms of welfare provision, then some of the European legal systems may look less socially democratic, to the extent that their legal systems historically have not embodied or enforced principles of non-discrimination. This situation may be changing with legislation at the European Union level, and if so it will encounter significant legal contestation.

IV. CAN WE THINK MORE ABOUT THE ROLE OF COURTS IN ENLARGING THE DEMOCRATIC PROCESS?

Professor Tushnet appears to think that courts ought to try to resolve the trilemma and use their power to promote social welfare rights when the legislative activism of the state and the political contest over these rights pressure them to do so. Part of the point of his analysis is to show, however, that courts often cannot resolve the trilemma in non-arbitrary or effective ways. I take it that this is largely because courts have a limited role in democratic societies that falls short of making or changing laws. This role ought to be reserved for legislatures.

There are good reasons in a democracy to be cautious in using courts as the primary tool to realize social democratic principles, instead of using them to preserve or enforce these principles. For example, in my opinion, justice requires access to healthcare for all, but the strongest right is attained when citizens press for it through the legislative system. Using courts to try to produce healthcare policy reform is likely to result in piecemeal or legally arbitrary results.

If courts decline to enforce welfare rights in the absence of legislation, it does not mean that they must be passive in relation to these issues. Where claims come before them that concern equality and welfare, they can use judicial decisions to note the absence of the legislation, and call on the legislative and executive branches to take action. Perhaps this thinking is along the lines of the experimentalist weak form of review that Tushnet discusses.11

Courts might also weigh in on the power inequalities of the political process. Returning to the healthcare example, there appears to be considerable popular support in the United States for some system of universal healthcare access. Many analysts believe that a major reason we do not have any such system, and we are not likely to have one soon, is the power of the medical insurance industry. A relatively few well-organized and wealthy private organizations are able to exert inordinate

---

11. See id at 449–50.
influence in the political process. Courts might play a more effective and legitimate role by correcting such issues of procedural unfairness, so that more thoroughly democratic republics might be able to pursue social welfare rights in the legislative process. Similarly, there might be more of a role for legal theoretical analysis to reflect on judicial cases that have considered such issues of unequal power or influence in political contests concerning social welfare, and in developing arguments to promote more procedural fairness.