Book Review

America's Aristocracy

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Taking the Constitution Away from the Courts. By Mark Tushnet.*

The courts occupy a rather privileged place in the hearts of most Americans, almost on the level of baseball, apple pie, and Mom. Whether it's desegregation, Miranda warnings, or birth control, the judiciary has played a seminal role in safeguarding our rights and liberties. Of all government officials, judges in particular are well-respected and largely viewed as models of fidelity and integrity. They often seem like the last bulwark standing athwart the hordes of unprincipled pols who would betray the Constitution at the first sign of a campaign contribution. To be sure, there are a few folks like Alcee Hastings on the bench—those who are corrupt or have committed some petty crime. But these jurists eventually get their just deserts and join Congress.

In Taking the Constitution Away from the Courts,† Professor Mark Tushnet takes on America's favorite branch. Perhaps the brightest star in a movement that seems to have fizzled out,‡ Tushnet is particularly well-suited to play the lone child who bares to the bewildered populace the truth about their judicial emperors. After all, the Left has never been reluctant to speak (or shout) the truth to power. Tushnet requests that we reorient ourselves toward a “populist constitutional law,” in which the people and

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2. Critical Legal Studies.
their elected representatives vindicate the Constitution and the courts have absolutely no enforcement role. To relegate the judiciary to the status of constitutional ciphers, Tushnet advocates a cogstitutional amendment that would provide that “[t]he provisions of this Constitution shall not be cognizable by any court.”

Tushnet’s project is not limited to knocking the courts from their lofty perch by means of the ultimate jurisdictional strip. He also urges Americans to forsake their “thick” Constitution and embrace a “thin” Constitution. The thick Constitution consists of specific constitutional provisions like the Emoluments Clause, the First Amendment, and the Equal Protection Clause. Though familiar, the thick Constitution does not command our allegiance, claims Tushnet. Rather, we pledge allegiance to the principles underlying such provisions.

Those fundamentals are found in the thin Constitution: the Constitution’s Preamble and the Declaration of Independence. The Preamble reflects our shared and abiding commitment to principles such as justice, the general welfare, and liberty. Even more than the Preamble, the Declaration’s principles of equality and unalienable rights inspire public reverence and loyalty. Because the thick Constitution supposedly exists to fulfill the Declaration’s project, Tushnet argues that the Declaration (along with the Preamble) ought to occupy center stage in constitutional interpretation.

Tushnet’s book is refreshing. Though law professors make a comfortable living criticizing the courts, their complaints are usually quite tame and narrow: “Perhaps the judiciary ought to have supported its creation of some right with a reference to Rawls or the Universal Declaration of Human Rights.” Notwithstanding such important criticisms, however, professors generally admire the courts. By contrast, Tushnet moves beyond the typical academic tinkering. He invites us to step back and survey the big picture. Would our world be very different without

3. TUSHNET, supra note 1, at 175.
4. U.S. CONST. art. I, § 6, cl. 2 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time.”).
5. The Preamble recites:
   We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.
   U.S. CONST. preamble.
6. In his preface, Tushnet notes that the book builds upon some of his earlier work and cites various articles and lectures. See TUSHNET, supra note 1, at xi-xii. In considering Tushnet’s book, I have not examined any of this preceding material.
7. Perhaps professors have an affinity for a branch that has life tenure and seems to pose a lot of questions without having to answer many itself.
judicial review of constitutional claims? Tushnet says no, and concludes that we should abandon judicial review. If we eliminate judicial review, how should we fulfill our commitment to the Constitution? Tushnet points to his thin Constitution as a guide.

When you swing for the fences, you often strike out. Judged by whether Tushnet will persuade people to subscribe to his two theories, the book disappoints. Most will neither welcome the demise of judicial review nor champion his thin Constitution. Judged by more realistic standards (for example, does the book provoke thought and the reappraisal of settled opinion?), the book appears in a better light. In the end, however, I suspect that many will find his theories deficient and even problematic.

With respect to his thin constitutional project, Tushnet would replace our already compact and vague Constitution with something even more nebulous and unhelpful. We may be attached to justice, the general welfare, and liberty, but that does not mean that we share many meaningful commitments. A KKK member might claim that justice entails the eradication of all racial minorities. A Communist Party cadre would find the general welfare served by the abolition of private property. As should be obvious, Tushnet’s thin Constitution can be made to mean absolutely anything in practice, which signifies that it actually constitutes nothing. Such an anorexic, yet cavernous, document would neither enjoy any obvious advantages nor attract any genuine allegiance.

His populist constitutional project fares much better but still falls short. Tushnet does not carry his burden of persuasion when he argues that the courts should play absolutely no role in enforcing the Constitution. His strongest argument rests on his claim that the courts are largely inconsequential because they usually follow the election returns. But if the judiciary does not really matter, he must explain why we should bother abolishing judicial review. Indeed, if the judiciary follows the election returns, perhaps we already have an unintended populist constitutional law regime. Paradoxically, his arguments might dispel the misgivings that certain quarters have about judicial review.

Notwithstanding all this, Tushnet’s radicalism has highlighted a fatal flaw in a system purportedly based on the principle that the people rule: America has an elitist constitutional law in which only the judgments, opinions, and perspectives of the courts matter. While we could make our constitutional law more responsive to the people by eliminating judicial review, we would thereby eliminate the benefits that flow from having an institution that specializes in interpretation and from having an independent check on the other branches. Perhaps the better means of ushering in a populist constitutional law would be to abolish life tenure for federal

8. See TUSHNET, supra note 1, at 153.
judges. If we eliminated life tenure, judges would no longer seem infallible and we would no longer place them on a pedestal. Nor would they have complete freedom to pursue their own agendas. Instead, we could hold them accountable for their biases, failings, and errors. Most importantly, eliminating life tenure would serve as a concrete sign that judges, like all public servants, serve at the pleasure of the people.

I. TUSHNET ON THE COURTS AND THE CONSTITUTION

Tushnet’s tome has two objectives. First, he invites us to abandon our slavish commitment to an “elitist constitutional law” that depends upon the courts for the Constitution’s vindication. In place of the current regime, Tushnet would substitute a “populist constitutional law” in which the people interpret (or construct) the Constitution themselves. Second, he argues that when the people engage in populist constitutional law, they should focus on the “thin” Constitution rather than the “thick” one. The thick Constitution is the one most professors of constitutional law quibble about: the First Amendment, Article III, the Necessary and Proper Clause. In contrast, the thin Constitution—consisting of the Constitution’s Preamble and the Declaration of Independence—commands the people’s attachment.

A. Tushnet’s Takes on the Judiciary

Chapters six and seven form the heart of Tushnet’s book. Chapter six concludes that judicial review has little effect on the real world. Chapter seven explains why Tushnet supports an amendment banning judicial review.

In chapter six, “Assessing Judicial Review,” Tushnet attempts to debunk outdated liberal conceptions about the courts. While the judiciary may have been engines for liberalism in the 1960s, they now primarily espouse conservative or libertarian principles. For instance, free speech law has abandoned its tilt to the left and now leans to the right. Free speech cases were once replete with principled heroes like Mary Beth Tinker and Barbara Elfbrandt. Now the leading cases defend the right of businesses to advertise and the right of the moneyed class to donate funds to conservative
Likewise, with respect to affirmative action and school desegregation, liberals have lost hard-fought gains because of a judiciary that seems bent on eradicating race-conscious programs. More generally, his assessment of the judiciary boils down to a remarkably simple calculus: "At the moment, progressives and liberals are losing more from judicial review than they are getting."  

The judiciary has changed its stripes over time because it has always reflected "a sustained national political majority." From President Nixon to President Clinton, there has been a general drift rightward in the national center of political gravity. With appointments to the bench dominated by conservatives and moderates, the courts have naturally drifted to the right as well. Because the courts follow the election returns, the Left can hardly expect to rack up ideological victories without first winning the electorate's hearts and minds.  

In describing the judiciary's propensity to follow election returns, Tushnet adopts a metaphor from electrical engineering to illustrate the judiciary's rather marginal constitutional role. "[J]udicial review basically amounts to noise around zero: It offers essentially random [and minor] changes, sometimes good and sometimes bad, to what the political system produces." In a word, judicial review is a wash.  

In chapter seven, "Against Judicial Review," a decidedly radical proposition follows from this rather timid conclusion: Amend the U.S. Constitution to provide that "[t]he provisions of this Constitution shall not be cognizable by any court." In plain English, the courts could no longer hold federal or state actions and legislation unconstitutional. They would continue to construe statutes, monitor executive action to ensure conformity with statutory authority, and settle private disputes, but they would not act as a constitutional enforcer of last resort. That task would be left to the people and their elected officials. In effect, under Tushnet's proposal, judges would have even less influence on constitutional interpretation and analysis than law professors currently do.  

12. Tushnet recognizes instances to the contrary when he cites anonymous pamphleteer Margaret McIntyre, see McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995), flag burner Joey Johnson, see Texas v. Johnson, 491 U.S. 397 (1989), and a few others, see Tushnet, supra note 1, at 130.  
13. See Tushnet, supra note 1, at 133. Tushnet also discusses instances in which the Left secured ideological victories that, he believes, actually meant very little. See id. at 143-52.  
14. Id. at 172.  
15. Id. at 134.  
16. See id. at 135.  
17. See id. at 134.  
18. Id. at 153.  
19. Id. at 175.  
20. As an alternative, Tushnet suggests that we simply ignore the judiciary's constitutional interpretations. See id. at 222 n.53.
Tushnet dismisses those who complain that judicial review would be fine if we just had the “right judges.” There are simply too many different theories of how to make sense of the Constitution. Many have enough substance and plausibility to justify resort to them. To complicate matters further, many theories, when applied to concrete situations, do not point to a single answer. More fundamentally, we cannot ensure that all judges will subscribe to the “right” theory and honestly apply it. Tushnet maintains that judges typically embrace a desired result and then select whichever theory plausibly permits them to reach that result. This is the “any stick to beat a dog” theory of judicial decisionmaking.

He dislikes judicial review so much that he would not preserve it even for the fundamental rights necessary for his populist constitutional law to succeed, such as voting, criticism of the government, and a sphere of privacy to develop views about the good. Tushnet does not want to let the camel’s nose back under the tent. In a power grab, the judiciary could subvert limited judicial review by pressing for ever-expanding review of tangential concerns. Maybe the judiciary would insinuate itself into unauthorized areas by asserting that economic inequality has a “substantial effect” on speech or that property rights are fundamental to a sphere of privacy. Better to drive a stake through the heart of judicial review, Tushnet believes, lest the judiciary rise to haunt us again.

Tushnet does his best to describe a world without judicial review. He cites Great Britain, the Netherlands, and Ireland as democratic countries that have individual rights without full-fledged judicial review. We could be like them. Citing Seth Kreimer, Tushnet believes that other tools could be used to regulate official misconduct. For instance, the judiciary could declare that it will narrowly construe statutes that do not explicitly acknowledge possible constitutional tensions. Likewise, courts could adopt limiting constructions of statutes authorizing executive action that might run up against the Constitution and thereby declare the executive action to be ultra vires, as the British apparently do.

In chapter three, “The Question of Capability,” Tushnet speculates as to how Congress would engage in constitutional decisionmaking without a judicial backstop. Interestingly, he asserts that the “judicial overhang” lingering over congressional deliberations actually impoverishes these
discussions. Sometimes Congress simply passes the constitutional buck to the courts. When Congress attempts to take its constitutional responsibilities seriously, it spends far too much time on the Court’s numerous six-part formulae and far too little on the Constitution itself. In a world without judicial review, however, Tushnet believes that the number of members who took their constitutional duties seriously would increase from already lofty levels, especially if the public were to demand no less. With respect to the supposed superiority of judges in legal interpretation, Tushnet argues that Congress could develop the expertise to help it interpret the thin Constitution’s commands.

Tushnet goes so far as to argue that the Constitution could be self-enforcing, and thus that we need not rely upon any governmental enforcement. Chapter five, “The Incentive-Compatible Constitution,” discusses various provisions that he considers to be currently self-enforcing. Echoing Herbert Wechsler, Tushnet believes that federalism is self-enforcing because of the federal government’s structure. He adds the separation of powers to the list. Once the courts are out of the picture—once we eliminate the judicial distortion—the whole Constitution may become self-enforcing through the people’s vigilance.

Though some might conclude that populist constitutional law has a decidedly pinkish tinge, Tushnet claims that it will not necessarily usher in a liberal utopia. “Populist constitutional law offers no guarantees that we will end up with progressive political results.” Indeed, he admits that in a populist constitutional system, both sides could invoke the Declaration’s universalistic principles to debate issues such as affirmative action:

Reasonable people can disagree with the judgments I make about what the Declaration’s principles require. . . . But the simple fact that on some issues people would adopt policies—or constitutional interpretations—I disagree with is hardly bothersome. It establishes

28. See id. at 57-65.
29. See id. at 58-61.
30. See id. at 57.
31. See id. at 66.
32. See id. at 62.
34. See TUSHNET, supra note 1, at 99, 123.
35. See id. at 98, 123.
36. See id. at 111, 126.
37. Id. at 186.
38. See id. at 185. One side would argue that to ensure that all men are treated equally, we need to be conscious of race; the other would proclaim that if all men are created equal, race should never be a factor. See id.
instead that if I care enough I ought to try to persuade people that a different policy would better advance the Declaration's project.\

Tushnet concludes that many arguments against populist constitutional law smack of elitism. Many believe that the people (and their elected representatives) simply cannot be trusted to safeguard the Constitution. Yet if this is truly so, he wonders how the courts can ever "save us from ourselves." Whether we have judicial review or not, we will enjoy only the constitutional liberties we deserve.

B. Tushnet's Takes on the Constitution

Tushnet believes that his populist constitutional project is inextricably intertwined with his concept of the thin Constitution. Comprising the conventional Constitution's Preamble and the Declaration of Independence's principles, the thin Constitution is what constitutes us as a distinct people. "More specifically, it is a law committed to the principle of universal human rights justifiable by reason in the service of self-government." As noted earlier, the thin Constitution consists of fundamental principles and not merely particular renditions of those principles. Thus, the First Amendment and the Equal Protection Clause are not part of the thin Constitution, while the "fundamental guarantees of equality, freedom of expression, and liberty" are.

In contrast to the thin Constitution, the thick Constitution consists of those provisions that describe government organization, such as Article I or the Written Opinions Clause. Perhaps it also includes all parts of the conventional Constitution not part of the "thin" version, such as the First Amendment and the Equal Protection Clause.

According to Tushnet, when we divide the Constitution into thick and thin, we begin to realize that Abraham Lincoln was correct about the Constitution's relation to the Declaration of Independence. "The Union and

39. Id. at 31. Tushnet acknowledges that he would rethink his commitment to democracy if it regularly produced disagreeable results or occasionally produced vile policies. See id.
40. Id. at 71.
41. See id. at 9, 13.
42. See id. at 12, 53.
43. Id. at 181.
44. Id. at 11. These apparently fundamental provisions do not make it into the thin Constitution because if they did, we would run the risk that people would focus on what the judiciary has said about these provisions rather than on the underlying principles themselves. See id.
45. See id. at 9, 33 (citing U.S. CONST. art. II, § 2).
46. Tushnet does not state whether the provisions that seem to stem from the thin Constitution's principles (such as the First Amendment or the Equal Protection Clause) are part of the thick Constitution or are instead in some state of limbo, neither thick nor thin. They clearly are not part of the thin Constitution. See id. at 11.
the Constitution" constitute the "picture of silver," the "frame[]" around the apple of gold—the Declaration of Independence. As President Lincoln put it, "The picture was made for the apple—not the apple for the picture." Thus, the Constitution exists to vindicate the Declaration's principles, such as the equality of man and the inalienability of rights.

Of course, neither the entire Declaration nor the complete Preamble makes its way into Tushnet's thin Constitution. Although Tushnet's thin Constitution seems to include the entire Declaration of Independence, he makes no reference to the Declaration's lengthy list of specific grievances against the English King. Moreover, he does not refer to the basis for the Declaration: the right of people to alter governments that are destructive of the legitimate ends of civil society. The only portion of the Declaration that clearly makes its way into his thin Constitution is the first sentence of the second paragraph: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness." Even here, however, he makes some deletions. He jettisons the principle that we are endowed by God with certain rights for a secular defense of rights.

Likewise, he excludes the Preamble's reference to a "more perfect Union" from the thin Constitution because the phrase does not "resonate" with the Declaration. Along with states' rights and the separation of powers, federalism ("Union," as Lincoln put it) is merely part of the silver frame. It is but a means to an end. Consequently, Tushnet's thin Constitution more accurately consists of the majority of the Preamble and Tushnet's thin Declaration—most of the first sentence of the Declaration's second paragraph.

Apart from recognizing the thick Constitution as the means toward fulfilling the thin Constitution, Tushnet identifies other advantages of dividing the conventional Constitution into thick and thin. Perhaps the most important benefit is that the division enables us to separate those parts of the Constitution that we cherish from those that are merely instrumental.

47. Id. (quoting GARY JACOBSOHN, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES 3 (1993)). The original quotation may be found in ABRAHAM LINCOLN, Fragment on the Constitution and the Union, in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 169 (Roy P. Basler ed., 1953).

48. See TUSHNET, supra note 1, at 11 (quoting JACOBSOHN, supra note 47, at 3). The original quotation may be found in LINCOLN, supra note 47, at 169.

49. See id.

50. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

51. See TUSHNET, supra note 1, at 11.

52. Id. at 14. Tushnet's repeated references to the Declaration's principles when discussing his thin Constitution, along with his willingness to sacrifice part of the Preamble, make clear that the Declaration is really at the heart of his thin Constitution and that the Preamble is at the periphery.

53. Id at 11. (quoting JACOBSOHN, supra note 47, at 3).
Tushnet insists that “ordinary people” are committed to the thin Constitution, as it forms “the material out of which Fourth of July speeches” can be fashioned. We support equality and the concept of fundamental liberties. We want the government to promote the general welfare and establish justice. In contrast, the thick Constitution consists of provisions that neither “thrill the heart” nor generate impassioned declarations. Only a professor could be thrilled by the Presentment Clause or the Tenth Amendment.

Once we discover our true attachments and stop poring over and polishing the frame—the thick Constitution—we can better understand how the thick Constitution must give way to the thin. In chapter two, “The Constitution Outside the Courts,” Tushnet concludes that individuals and government officials can choose to ignore the thick Constitution when they “are guided by constitutional principles as articulated in the Preamble and the Declaration of Independence.” Making his claim concrete, Tushnet asserts that if senators were faced with a hypothetical nomination of Senator George Mitchell to the Supreme Court, they could vote to confirm him even if his serving as a Justice would violate the Emoluments Clause. So long as the conscientious Senators sought to “establish Justice... promote the general Welfare, and secure the Blessings of Liberty,” they are “license[d]” to disregard the “best understanding of the most directly applicable constitutional provision.” When senators vote in such a manner, they are “not acting in a way inconsistent with the rule of law”; rather, they do “what the law requires”—what is consistent with the thin Constitution even though it is inconsistent” with the thick one. When the Declaration’s principles are at stake, the thin Constitution sometimes requires us to disregard the provisions of the thick Constitution.

Finally, a thin Constitution liberates us by enabling a more robust constitutional debate. First, we could sweep away the clutter of balancing and six-factor tests. Instead, we would look to the principles enunciated in

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54. Id. at 12.
55. Id. at 10.
57. TUSHNET, supra note 1, at 51.
58. See id. at 51-52.
59. Id.
60. Id. at 52.
61. At times, Tushnet limits who may violate the thick Constitution in the name of the thin Constitution. Sometimes he suggests that only a politician capable of transforming “our constitutional self-understanding” should be able to violate the thick in favor of the thin. See id. at 51. Other times, he suggests that anyone may violate the thick Constitution when “conscientiously” pursuing the thin Constitution. See id. at 51-52.
62. In this regard, Tushnet approvingly cites Robert Nagel’s criticism of the courts’ predilection for multi-factor balancing tests. See id. at 11 (citing ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 121-55 (1989)).
the Declaration and the Preamble. Second, the thin Constitution moves us beyond tired conceptions of the Constitution’s relation to politics. The Right apparently believes that the Constitution says nothing about almost everything (for example, abortion or the right to die). Liberals, by contrast, try to constitutionalize everything. Tushnet’s thin Constitution would lie in the happy medium and simply have a bearing on “many political issues.” At the same time, because its principles are sweeping, the thin Constitution would pervade much of politics and “set[] the terms of discourse.”

Adopted separately, either of Tushnet’s projects would trigger vast changes in practice. Undertaken together, Tushnet’s two proposals would transform the legal landscape beyond recognition. His thin constitutional project would revolutionize constitutional and political discourse. Likewise, ending judicial review would terminate an almost two-centuries-old tradition. Judges would no longer be viewed as the Constitution’s guardians, and the people and their representatives properly would assume the role of vindicating the Declaration’s principles.

II. TAKING ON TUSHNET’S SOMEWHAT THIN THEORIES

I approached this book with relish. The title tickled me. The fact that it was written by Mark Tushnet was all the more tantalizing. One of the Left’s leading lights seemed to be challenging the judiciary’s very foundations. He was not calling on the courts to be the handmaiden of the ACLU or the NAACP Legal Defense Fund. Neither was the book merely another instance in which someone, without a trace of embarrassment or self-consciousness, gleefully employed supposedly indeterminate language to deconstruct the Constitution or judicial opinions. Instead, the book

63. See id. at 187.
64. See id. at 186.
65. Id. at 185.
66. See id. at 187.
67. Id. at 185.
68. Tushnet’s remaining chapters have various themes. The first chapter attacks the view that the Constitution enshrines judicial supremacy. The chapter is rather curious given the amendment Tushnet later proposes. If the Constitution’s provisions were not cognizable in any court, any pretensions to judicial supremacy would be destroyed rather quickly. More generally, the chapter seems unnecessary because the book discusses a desired state of the world and does not really purport to be an analysis of current law. In any event, there is a better treatment of an issue that seems somewhat tangential to his overall project. See Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power To Say What the Law Is, 83 Geo. L.J. 217 (1994). Chapter four discusses the Establishment Clause from the perspective of populist constitutional law. Unfortunately, Tushnet never reveals how he derives a non-establishment principle from his thin Constitution. He just assumes that the thin Constitution supports a non-establishment principle. A justification of his derivation would have proved illuminating as it would have put his thin Constitution into action.
promised to be a full-frontal assault on the very institution of judicial review.

After reading the book, one readily concludes that Tushnet should be lauded for his courage. We do not expect such broadsides from the academic Left, many of whom have put food on their tables by providing an intellectual veneer to some of the more wobbly judicial opinions. Tushnet lobs bombs when many progressives and liberals would reflexively genuflect. Because this book marches to a different beat, he will receive an earful from some customary allies. Not surprisingly, serious disagreement arose even before he published his book: His ACLU-employed wife disagreed with “almost everything” in his “Against Judicial Review” chapter.69

Notwithstanding Tushnet’s daring, the book does not fulfill its promise. On an extremely superficial level, one ought not tease the Right with a title like Tushnet’s and then write a book intended almost exclusively for the Left. He gestures to his target audience early on in his preface: “The tension between celebrating a Supreme Court decision finding abortion laws unconstitutional and extolling popular political power is my theme here.”70 Chapter six in particular is devoted to ridding liberals of their false consciousness when it comes to judicial review,71 and is replete with statements like “the Court’s position in recent years ought not comfort liberals.”72 At its worst, the book occasionally reads like a petulant call to take the constitutional ball away from the courts because lately they have not been playing fair with progressives.73

On a more meaningful level, Tushnet simply does not advance his two objectives. Tushnet is at his best when he indirectly indicts the current regime of elitist constitutional law in which the people and their representatives have only a passive, secondary role in constitutional interpretation. But his constitutional amendment seems too ambitious given the rather narrow conclusion he draws. If all he can establish is that judicial review does not matter much, the most that can be said against it is that we may be misallocating resources. This is hardly the stuff of which

69. TUSHNET, supra note 1, at 174.
70. Id. at ix.
71. See id. at 129.
72. Id. at 133; see also id. (describing how liberals lose in balancing tests and how liberals cannot like the libertarianism of free speech cases); id. at 143-44 (stating that even when liberals win a court case, the victory is rather limited). Chapter six does have scattered references to conservatives not gaining much from judicial review either. But these intermittent discussions are so perfunctory that they seem as though they were added during the end stages of the editing process at the behest of some editor.
73. In truth, one can hardly fault Tushnet for writing a book intended for the academic Left. He has simply followed the time-tested adage: Know your audience. His audience consists of other law professors (constitutional law professors at that) and thus largely comprises those on the vast liberal-to-left spectrum. With conservatives, libertarians, and moderates on law school faculties eligible for endangered-species status, many would not bother with such niche audiences.
revolutions are made. Moreover, many who find judicial review problematic precisely because it seems undemocratic may take solace in his conclusion that judicial review is a wash. If the courts track the election returns, maybe we already enjoy a de facto populist constitutional law. Perhaps we ought to leave well enough alone.

His second objective never gets off the ground. When I first came across his notions of the thin Constitution and the thick Constitution, I was rather dubious. After reading his arguments for the thin Constitution, my misgivings gave way to hostility. He would discard the already rather slim Constitution (warts and all) and replace it with an anorexic, yet hugely capacious, constitution. For some reason, he desires a constitution that establishes nothing, but that can be made to mean everything and apply to virtually every aspect of life. Although Tushnet clearly welcomes such a constitution, I rather doubt that he will have much company.

A. Against Tushnet’s Thin Constitution

1. A Surprisingly Colossal “Thin” Constitution

In championing his thin Constitution, Tushnet wishes to turn our Constitution on its head. Our Constitution, indeed any constitution, is based on a set of fixed rules. These rules establish one vision of what constitutes good government. Without fixed rules meant to endure across time you cannot have law, let alone a constitution. After all, provisions that establish nothing cannot be said to “constitute” anything. Indeed, what distinguishes our Constitution from others, what makes it familiar to us, is its particular collection of rules, uninspiring or not. While these rules are rooted in principles, the Constitution is the set of fixed rules and not the many, often mutually conflicting, principles that may be reflected only dimly in the rules.

In place of our solid and unique Constitution of rules, Tushnet would substitute a thin gruel of vague principles based on the Preamble and the Declaration of Independence. Take out the phrase “We the People of the United States,” and the Preamble is a non-entity. You probably could find it or something similarly meaningless in the old Soviet Constitution and in the constitutions of ninety-nine out of a hundred countries. For instance, the pursuit of justice and the desire to secure the blessings of liberty tell us nothing about the rights of the accused. These principles generate much heat but shed precious little light on whether the accused should have a right against self-incrimination or a right to counsel.

The Declaration has a little more substance, but that is not saying much. Though it gets the patriotic juices flowing, it hardly qualifies as a blueprint for government. Just try to run a government merely on the principles that
all men are created equal and that they have inalienable rights. One could
not discern the proper scope of federal power. Nor could one divine the
proper division of powers between executive and legislative branches. No
doubt, ingenious minds can make these principles mean many things.
Ultimately, however, these principles tell us nothing concrete.

Indeed, one can accuse Tushnet of reducing our Constitution to a
handful of unhelpful catch phrases: Government should do good things (this
summarizes the Preamble); people should be treated equally; there should
be some freedom of expression; and the government should not violate
liberties. Tushnet admits as much when he acknowledges that his thin
Constitution really boils down to the promotion of the general welfare.
While the Reagan tax cuts may have had their genesis in Arthur Laffer’s
scribbling of a parabola on a napkin, I doubt that we will have a revolution
in favor of Tushnet’s Napkin Constitution.

Nevertheless, Tushnet is so taken by these phrases that he would allow
not-too-clever constructions of them to trump the actual Constitution.
Perhaps drawing upon Abraham Lincoln, Tushnet would have us ask
whether the unloved thick Constitution must be preserved at the cost of
violating the beloved thin Constitution. His answer is a resounding no.
Recall that in Tushnet’s world, senators may confirm George Mitchell to
the Supreme Court in violation of the Emoluments Clause so long as they
believe doing so would help establish justice or promote the general
welfare. Applying the same logic, President Clinton could ignore the
Twenty-Second Amendment and run for a third term if he thought his
continued stewardship would promote the general welfare by putting people
first. Likewise, Congress could decide that presentation of tax bills to a tax-
and-spend president was unnecessary as long as Congress was working to
“insure domestic Tranquility” with tax cuts. Parroting Tushnet’s argument,

74. See TUSHNET, supra note 1, at 11. Why Tushnet believes that freedom of expression can
be derived from the text of his thin Constitution is something of a mystery. Because most people
like the idea of protecting expression, perhaps he feels no reason to defend his derivation. Yet
there are those who would favor censoring all sorts of expression on the grounds that such
regulation would conduce to the general welfare or ensure domestic tranquility.

75. See id. at 52.

76. Lincoln once questioned whether he should allow “all the laws but one to go unexecuted,
and the Government itself go to pieces, lest that one be violated?” ABRAHAM LINCOLN, Message
to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM
LINCOLN, supra note 47, at 430. The best account of the incident is in Michael Stokes Paulsen,
The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation, 15

77. Presumably, Senators might appoint Mitchell even without a presidential nomination,
notwithstanding the Appointments Clause. See U.S. CONST. art. II, § 2, cl. 2. By the same token,
others might ignore a lawful nomination and confirmation on the ground that the appointee would
harm the general welfare. Thus, if you dislike a Justice’s vote in a particular case, just ignore his
vote.
both branches might even insist that their constitutional violations were compelled by the imperative to advance the thin Constitution.\textsuperscript{78}

Though Tushnet is fairly casual about tossing aside our Constitution, the one that we have celebrated, criticized, and dissected for over two hundred years, he does pause to consider why the Framers ("particularly intelligent people") would include all of the Constitution’s thick provisions when they would have to give way to Tushnet’s thin principles.\textsuperscript{79} He asserts that perhaps the Constitution’s provisions are "default rules" and "ought to be followed unless it seems worth expending the political energy to displace those rules, in circumstances where . . . the default rules appear to obstruct the promotion of the general welfare."\textsuperscript{80}

Such suppositions are simply incredible. Like everybody else, the Framers knew how to adopt default rules.\textsuperscript{81} The existence of a few rather obvious default rules does not indicate that the Constitution contains only default rules of similar clarity. Yet it is absolutely clear that the existence of these specific default rules means that the Constitution as a whole is not a continuous series of default rules.

Tushnet never should have attempted to defend his thin Constitution on historical grounds or speculated about why people would have bothered ratifying a default Constitution. Lincoln may stand head and shoulders above other presidents, but he was not a framer, let alone a ratifier, of any constitutional provision.\textsuperscript{82} His comments about the Declaration’s historical relation to the Constitution deserve whatever weight comes from their persuasiveness and no more.\textsuperscript{83} Moreover, someone as smart as Tushnet cannot possibly believe that the Constitution merely establishes a long chain of default rules. It is a fanciful and makeweight argument made to respond to concerns about which Tushnet evidently does not care.

His discussion of thick and thin Constitutions also manufactures a constitutional conflict where there is none. There simply can be no conflict between the Preamble and a specific constitutional rule because the

\textsuperscript{78. See TUSHNET, supra note 1, at 52.}
\textsuperscript{79. Id.}
\textsuperscript{80. Id.}
\textsuperscript{81. See, e.g., U.S. CONST. art. I, § 10, cl. 2 (banning state taxes on exports or imports, except where authorized by Congress); id. art. II, § 2, cl. 2 (stipulating that the Senate must confirm officers except where Congress vests appointment authority with the President, courts, or department heads).}
\textsuperscript{82. Tushnet never declares that we should adopt his thin Constitution because Abraham Lincoln subscribed to it, but he does cite Lincoln approvingly for his claim that the Constitution (and the Union) were created to vindicate the Declaration. See TUSHNET, supra note 1, at 11. This is a historical claim and should be evaluated as such. Unfortunately, all Tushnet puts forth is Lincoln’s assertion.}
\textsuperscript{83. In any event, Tushnet is not exactly faithful to Lincoln. Tushnet’s apple—his thin Constitution—consists of the thin Declaration and the Constitution’s Preamble. Lincoln’s apple consisted only of the Declaration. The entire Constitution (including the Preamble) and the Union formed Lincoln’s frame.}
Preamble neither requires nor forbids anything. The Preamble merely lists the reasons why the Constitution was “ordained and established.” For instance, when a member of Congress votes for a particularly porkish public works project simply to benefit her district and in the knowledge that none of the Preamble’s goals would be advanced, that member does not violate the Constitution. Likewise, if the President decides to veto a bill to satisfy some constituency in his coalition even though he believes that the country would be better off had the bill made its way into the law, the President has not breached the Constitution. Similarly, the Declaration is not law. By its terms, the Declaration does not purport to create or even recognize a right against the government and once again neither requires nor forbids anything. After all, it is a “Declaration” that catalogues “self-evident” truths and stands as an effective list of complaints against the English King. Assuredly, the Constitution should be read in light of the Declaration because some of the grievances listed in the Declaration eventually formed the basis for federal constitutional provisions (like laments about an independent military, quartering soldiers, and trial by jury). Nevertheless, not all of the Declaration’s grievances help flesh out our Constitution. For example, a statute that cut off immigration would not be unconstitutional, notwithstanding the colonists’ grievances about the King’s similar actions. The Declaration is not part of our Constitution.

Even if we accepted Tushnet’s claim that the Preamble and the Declaration created mandatory duties, his assertion would still stumble. If we interpret the Constitution, rather than construct it as we go along, the conscientious pursuit of the thin Constitution’s vague principles can never justify the violation of specific constitutional rules. In textual interpretation, the specific language trumps the general. Accordingly, even if one

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84. The Preamble assuredly could mandate certain ends for government actors and perhaps have legal effect: “We the People of the United States command and require a Perfect Union, the establishment of Justice, the insurance of domestic Tranquility, the provision of a common defense, the promotion of the general Welfare, and the securing of the Blessings of Liberty to ourselves and our Posterity.” Of course, such a provision would more likely be called “Article I” than a preamble.

85. This is not merely a claim about the Preamble’s judicial enforceability. The Preamble can never be the basis for a claim that someone acted unconstitutionally. One presumably could not accuse someone of “violating” the Preamble because it neither requires nor forbids any action. It is merely a list of reasons that motivated the Constitution’s adoption.

86. See THE DECLARATION OF INDEPENDENCE paras. 14, 16, 20 (U.S. 1776).

87. See U.S. CONST. art. I, § 8, cl. 4 (providing Congress with the authority to establish uniform rules of naturalization).

88. See THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

89. For instance, if I tell my daughter to stay away from animals and then, in the very next breath, permit her to pet the neighbor’s puppy, she would be justified in cuddling the pooch. Of course it is possible to draft rules where the general trumps the specific: “Notwithstanding anything that could be construed to the contrary herein, the federal government shall always strive to form a perfect union, establish justice, insure domestic tranquility, provide for the common
somehow thought that there was some tension between the Preamble’s “requirement” of promoting the general welfare and the right to confront witnesses, the specific provision would triumph.90

In many ways, Tushnet’s thin Constitution is so unrecognizable that it is simply wrong for him to associate his thin Constitution with the more familiar one, a sort of illegitimate legitimacy-by-association. To be sure, his thin Constitution contains the Constitution’s Preamble and includes the Declaration of Independence—a document that no doubt influenced the drafters and ratifiers of the Constitution. But he has drained the Constitution of so much that it ceases to be the Constitution.91 You might as well drain a can of Coke of its unique elixir and fill it up with a few of the same ingredients but in random, unknown proportions. You can call the resulting concoction “Coke,” but you are in for a public relations disaster. If truth-in-labeling laws applied to constitutional theories, Tushnet would have run afoul of them.92

If one must use “Constitution” to describe Tushnet’s preferred regime, a far more appropriate description would be the “statist Constitution.” Those who love liberty on the Left and the Right should be extremely wary of a scheme that establishes no obvious limits on governmental power and that explicitly safeguards no rights. Indeed, conniving executive officers and legislators should have no problem using the thin Constitution as an all-purpose shield and sword to justify governmental mischief. Because it has a monopoly on the use of force, government already has the deck stacked when it comes to disputes about governmental authority. We need not lend a helping hand by cleansing the Constitution of the precious few limitations and rights mentioned therein. We can count on government to aggrandize itself without our active assistance.93

90. Tushnet’s mandatory Preamble would still have an impact because where there was not a specific rule laid down elsewhere in the Constitution, the Preamble’s general commands would prevail.

91. To be sure, we could amend the Constitution by adding Tushnet’s thin Declaration and by providing that every provision after the Preamble was a default rule. Perhaps we would be justified in calling the resulting document the “Constitution.” More likely, however, we would call this regime “The U.S. Guidelines for Good Government” because these principles settle absolutely nothing. Unlike a real constitution, these words do not ordain, establish, or constitute anything, but merely exhort us to do good.

92. Here’s a more fitting analogy: A group of citizens enamored of the Second Amendment advocates a legal regime comprising only the Second Amendment and the Declaration’s principle of justified armed rebellion against a tyrannical government. Though these folks might call their constitution the “armed Constitution,” most would find another label to describe this hypothetical legal regime.

93. Anti-Federalists warned of the consequences of the Constitution’s failure to include a bill of rights and were able to secure the subsequent passage of the first ten amendments. One can only imagine how much faster federal authority would have ballooned without the Tenth Amendment’s reaffirmation of first principles. Likewise, one can only shudder at how individual
By insisting on the thin Constitution’s primacy and arguing that the thick Constitution must give way in cases of conflict, Tushnet leaves no real place for the familiar Constitution. When you transform the Constitution into a series of default rules that can be overcome by the conscientious pursuit of the general welfare, the Constitution regularly will be trumped and become beside the point. Few of us entertain much doubt about our seemingly infinite capacity to do good. As a result of such tendencies, Tushnet effectively has taken our parchment-barrier Constitution and done his best to remove the already feeble barriers. Anything goes so long as one pursues the general welfare. You need not be a dyed-in-the-red-wool deconstructionist to appreciate that this is not a constitution. It’s a free-for-all.

2. Why Tushnet Bothered with His Thin Constitutional Project

One may wonder why Tushnet goes to such extremes, inviting seemingly obvious criticisms. The primary reason is his belief that the people are attached to his thin Constitution and are indifferent to the thick one. Yet Tushnet puts forth no real evidence to support his assertions. For claims that seem essential to his thin-constitutional mission, he cites no polls or any other basis for his beliefs.

Americans probably know very little about Tushnet’s thin Constitution, especially as compared to the actual Constitution. While many may be familiar with the first sentence of the Declaration’s second paragraph, “We hold these Truths to be self-evident,” I suspect that the vast majority know little else about the Declaration. The Preamble may be more well-known than the Declaration, but it is extremely unlikely that anyone is genuinely moved by the Preamble’s generic objectives such as “promoting the general Welfare” and “insuring domestic Tranquility.” People are more likely to be moved by the words “fat-free” and “clearance sale.”

In contrast, most know more about at least some of our constitutional liberties: Free speech shall not be abridged; the right of the people to keep and bear arms shall not be infringed. Occasionally, many grow attached to the judiciary’s rendition of constitutional rights. Thus, the familiar Miranda rights seem to have a special place in many people’s hearts (“Read him his

94. Most of us know little about the specific laundry list of grievances against the English King. For example, most probably do not know that the Declaration inveighed against impressment, whereby England’s navy forced sea-faring Americans into English military service. See The Declaration of Independence para. 28 (U.S. 1776). Of course, Tushnet does not need to worry about whether the people feel committed to ensuring that these wrongs never occur again. As noted earlier, his references to the Declaration are actually shorthand for only some of the principles in the Declaration’s second paragraph.
rights”) as does the Fourth Amendment’s supposed warrant requirement (“Where’s your warrant, officer?”).

Though the structural Constitution generally does not provoke much excitement, more than a few people are attached to some of its features, such as bicameralism. Some value such a mechanism because they view it as an American tradition; this is the way things are run in this country. Others may value it for its supposed ability to moderate drastic swings in policy and to foster some measure of deliberation. Because no one could be similarly attached to phrases like “provide for the common defense,” Tushnet’s claims about the public’s affection and allegiances seem unreal.

Tushnet also peddles his thin Constitution because he believes it crucial to his populist constitutional regime. Yet one could agree with his populist constitutional project and still vehemently oppose his thin Constitution. The two theories are really quite divisible, and each stands (or falls) on its own merit.

Despite his assertions to the contrary, Tushnet seems to realize that his two objectives really are not bound together at all. Though he speaks of taking the Constitution away from the courts, he is merely referring to the thick Constitution in this context. After all, no one would bother to take away his thin Constitution from the judiciary when the courts have never purported to enforce it. Taking away the thin Constitution would have no greater impact than taking away Isaac Asimov’s Laws of Robotics from the courts. Moreover, when considering constitutional discourse outside the courts, Tushnet consistently references his thin Constitution; the thick Constitution materializes only when it must be overcome in pursuit of the thin Constitution’s principles. Once one understands that Tushnet wants to take the thick Constitution away from the courts and bestow a remarkably

95. Only one state (Nebraska) lacks a bicameral legislature. See BLACK’S LAW DICTIONARY 153 (7th ed. 1999).
96. Although Tushnet’s claims about public support for the thin Constitution lack solid grounding, his preferred constitution is not much worse off than anyone else’s in this regard. In particular, the Constitution itself may not have the current public support that might be thought necessary to legitimate it. Nevertheless, the point is that if Tushnet wishes to push his thin Constitution, he must rely on something other than the consent of the people.
97. See TUSHNET, supra note 1, at 9, 13.
98. Theoretically, one could champion Tushnet’s thin Constitution but reject his populist constitutional law. Then the judiciary would be charged with enforcing the thin Constitution.
99. The only way the two proposals could be thought complementary is if one views Tushnet’s thin Constitution as an endorsement of having absolutely no Constitution. Once one eliminates the Constitution, judicial review no longer is possible. Yet Tushnet cannot make this connection because he views his thin Constitution as a real constitution.
100. To my knowledge, courts have never attempted to “enforce” the Preamble. Nor has any court suggested that the Declaration is part of the Constitution. Thus it is fair to say that Tushnet merely wants to withdraw the thick Constitution from the courts.
thin Constitution upon the people, one can see more easily that his projects are unrelated. 101

Given that the stated reasons for advocating a thin Constitution are rather thin, cynical readers may believe that Tushnet must have some hidden motive for putting forth his thin theory. Such suspicions are not entirely unfounded. By substituting the thin Constitution for the more familiar and libertarian thick one, many arguments and claims that are not available to the Left may finally gain a patina of respectability. For instance, though the thick Constitution certainly does not require the welfare state, the thin one may actually demand its expansion. 102 Constitutional rights to child care and paid vacations are surely not far behind.

Tushnet also raises suspicion by excising portions of the Declaration and the Preamble. We all suffer from various degrees of Cafeteria Constitutionalism—the tendency to pick and choose among the Constitution’s provisions and conveniently reject or ignore disfavored ones. 103 Tushnet takes Cafeteria Constitutionalism to new heights. Not only does he effectively scrap most of the Constitution; he also trashes parts of his beloved Preamble and Declaration.

When it comes to the Declaration, God ends up on the cutting-room floor. Tushnet insists on supplying a supposedly superior secular justification for the principle that people are endowed with inalienable rights. 104 Curiously, he seems to think that excising God from the Declaration’s defense of inalienable rights makes his argument stronger. Yet many people find secular defenses of rights unhelpful, if not impossible. By whiting out God, Tushnet eliminates portions of the religious Left and Right and, in the process, loses the very consensus he sought to secure. For Heaven’s sake, Tushnet should have recognized the religious sentiments that pervade public spheres. Congressional and Supreme Court sessions open with requests for divine intervention; the Pledge of Allegiance declares that the nation is “under God”; and the currency—perhaps the most sacred of seemingly secular objects—includes

101. One more sign that Tushnet has two unrelated objectives is that his thin Constitution already permits us to eliminate judicial review and to institute a populist constitutional law regime. Armed with Tushnet’s thin Constitution, proponents of populist constitutional law need only declare that judicial review is only a default rule and that ending judicial review would establish justice or secure the blessings of liberty. Indeed, if he can muster support for his amendment, surely he can attract support for his interpretation of the thin Constitution (assuming people accept his thin constitutional arguments).

102. See TUSHNET, supra note 1, at 169-72.

103. Some conservatives tend to treat the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment as printing errors. Likewise, some liberals are prone to ignoring the protections for property rights and greatly exaggerating federal power, notwithstanding the Constitution’s obviously limited and narrow enumeration.

104. See TUSHNET, supra note 1, at 11.
a motto proclaiming trust in God. As it stands now, Tushnet’s deletions will alienate a large portion of the population that expects God to have a place in the public square.

He similarly lops off the Constitution’s first objective—“to form a more perfect Union”—because it does not “resonate with the Declaration’s principles as the other purposes recited in the Preamble do.” This also is a curious cut. After all, the chief complaints in the Declaration relate to the distant English King’s mistreatment of local governments that were far closer to the people. The Declaration of Independence resounds with concerns about a failed union and a proper federalism.

Perhaps these complaints about Tushnet’s supposed Cafeteria Constitutionalism are all rather silly in the end. Under Tushnet’s thin Constitution, a committed theocrat or a determined federalist would have no problem sneaking God or federalism back into the thin Constitution. The theocrat could claim that a religious state would ensure heavenly justice, while the federalist could assert that federalism would secure the blessings of liberty. Neither would have any difficulty conscientiously asserting that his preferences would further the general welfare. Tushnet actually subscribes to a rather catholic Constitution that establishes nothing and that is capable of accommodating all tastes and preferences. Yet because his thin Constitution permits or forbids whatever we desire, one wonders what Tushnet thought he was gaining politically by cleansing these references from his thin Constitution.  106

Tushnet strips the Constitution of its flesh and bone, the provisions that make it concrete and real. All he leaves is an extremely malleable and plastic Constitution, one that can be used clumsily to “support” any claim. The only advantage—if one can call it that—of his thin

105. Id. at 14. Had establishment Christians promoted a “thin” version of the First Amendment that omitted the Establishment Clause, one could imagine the hue and cry. Yet concerns about the scope of federal power are so outside the academic mainstream that Tushnet feels completely comfortable making the analogous move to the Preamble’s first objective.

106. Among other things, the King had forbidden governors to pass laws without his approval, had suspended state legislatures, had withdrawn state charters, and had fundamentally altered the forms of government. See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776).

107. The extremely cynical may believe that Tushnet’s thin constitutional proposal is part of some nefarious deconstructionist agenda: “I believe that words are meaningless and to prove my point, I will advocate a hollow document that proves me right.” A careful reading of his book suggests that this is not his agenda. He does not seem to realize that his theory would trade away relatively concrete rights and powers for elegant puffery. In fact, Tushnet believes that one can divine some meaning from his thin Constitution. In addition to the welfare state, Tushnet somehow extracts an anti-establishment rule, an anti-segregation principle, and a right to free expression. See TUSHNET, supra note 1, at 72-73 (anti-establishment), 14 (anti-segregation), 11 (free expression).

108. As hinted at earlier, Tushnet adopts contradictory positions about his thin Constitution. He praises its “thinness” because it does not “produce results across the entire domain of politics.” Id. at 185. In the same breath, he claims that the thin Constitution “has some bearing on many political issues.” Id. In fact, he seems proud of the fact that the thin Constitution will
Constitution is that it would fit on the back of a postcard. In the process, however, we would have “dumbed down” the Constitution. Even more than the actual Constitution, the thin Constitution could become whatever we wished it to be. The only limit would be our imagination.

B. Against Tushnet’s Version of Populist Constitutional Law

Tushnet’s populist constitutional law has far more going for it. He persuasively argues against an elitist constitutional regime in which the people are irrelevant to constitutional interpretation. In the end, however, he never succeeds in convincing the reader that the courts should play absolutely no role in constitutional interpretation. If he is correct in concluding that the courts do not matter much, perhaps there is no need for any reform. Moreover, in assessing judicial review, he inadequately gauges its considerable benefits. Given these weaknesses in his argument, I believe that most will choose to retain judicial review.

1. Praise for Populist Constitutional Law

At its best, populist constitutional law exhorts us to take the Constitution into our own hands, to engage in constitutional self-help. As citizens, we must monitor our elected officials and their appointees to ensure that they stay true to the Constitution. In turn, our political agents must take their constitutional oaths seriously by carefully considering the constitutional implications of their actions. Neither the citizens nor their representatives should shirk their duties and rely upon the judiciary for the Constitution’s vindication. Everyone must be responsible for the Constitution’s defense.

Tushnet also paints a compelling picture of the unintended and unwanted consequence of “judicial overhang.” Judicial review may make it safe for politicians to pass the buck to the judiciary. Judicial opinions may distort legislation as lawmakers focus on the Court’s balancing or five-factor test rather than on the Constitution itself. Judicial review may even distort legislative and executive discussions as these officials feel a compulsive need to track the judiciary’s jargon and to cling

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influence all sorts of political decisions. See id. Tushnet’s latter impulse is the correct one; it is the one he clearly succumbs to as well. Everything can and will be subject to constitutional wrangling in a regime dedicated to his thin Constitution. Indeed, one can imagine legitimate but rather thin constitutional disputes regularly arising out of library-fine schedules and stop-sign placement. That Tushnet does not realize the resulting poverty of his thin Constitution is quite astounding.

109. Id. at 57-65.
110. See id. at 57-58.
111. See id. at 58-60.
to the courts’ pronouncements. Judicial review should not crowd out meaningful constitutional interpretation by the people and their representatives.

2. *Leave Well Enough Alone*

While Tushnet deserves this praise, I believe that most will not advocate his proposed amendment. Although he complains about the courts quite a bit, Tushnet feels comfortable making only the tepid claim that judicial review “offers essentially random changes, sometimes good and sometimes bad, to what the political system produces. . . . The effect is not obviously good, which makes us lucky that it is probably small anyway.” Judicial review is nothing to be feared or despised. It is like a gnat: pesky but inconsequential. Such an argument could motivate only bean counters concerned about the inefficient allocation of resources to an endeavor that does not matter much in the end.

Many more readers are likely to have the following reaction: If judicial review does not matter one way or the other, we should not bother eliminating it. We should leave well enough alone. Tushnet is aware of this concern and attempts to meet it head on. We cannot adopt the “apparently attractive strategy” of combining judicial review and a more populist constitutional law because judicial review ought to exist only when the politicians have the wrong incentives vis-à-vis the fundamental rights that must be protected. Because politicians’ incentives change over time, the manner in which judicial review is conducted should change as well. The scope and intensity of judicial review cannot automatically change with the times, however, so we cannot combine judicial review and populist constitutional law.

One can criticize Tushnet’s assertion on many levels. First, it is not obvious that we would want “situational” judicial review of rights, in which courts would step in only when it seemed that the politicians were predisposed to violate certain rules. Precisely because we know that politicians respond to shifting sentiments and passions, we have a system of rules that will be (or rather should be) applied with uniform intensity across

112. See id. at 60-61.
113. Id. at 153.
114. Tushnet approvingly cites Cass Sunstein’s argument that constitutional protections ought to vary with the level to which those protections seem necessary. See id. at 125. According to Sunstein, because Eastern European countries are more likely to infringe upon property rights, they need protections for such rights. In contrast, these countries probably do not need social welfare rights inscribed in their constitutions because they are likely to take care of such rights legislatively anyway. The situation in Western Europe is the reverse. See Cass Sunstein, Against Positive Rights, E. EUR. CONST. REV., Winter 1993, at 35, 35-36.
115. See TUSHNET, supra note 1, at 125.
The very fact that our Constitution does not provide situational judicial review is a telling indicator that others did not share Tushnet's unusual preference.

Second, Tushnet's analysis presents us with a false choice. Even if we preferred situational judicial review as described by Tushnet, this would not mean that we should reject judicial review as it currently exists merely because it cannot accommodate this preference. The choice is not between some perfect form of judicial review or none. In particular, we can choose to continue the judicial review we have now even if it does not match Tushnet's preferred form of precisely calibrated and modulated judicial review. We should not allow a quixotic pursuit of perfect judicial review to be the enemy of the relatively good judicial review we already enjoy.  

In a perverse way, Tushnet's claims about judicial review's impact may end up losing the very people who might have been favorably disposed toward his populist constitutional law. There are many who regard judicial review as antimajoritarian. To the extent that Tushnet successfully argues otherwise (by insisting that the courts do in fact follow the election returns), many people troubled by judicial review are likely to feel quite comforted. Maybe we already enjoy a poorly understood populist constitutional law, they might say with a sigh of relief.

3. Structural Difficulties with the Populist Constitutional Project

Apart from failing to make his case for abandoning judicial review, Tushnet's populist constitutional law also suffers from some rather severe structural difficulties. As Tushnet suggests in chapter three, perhaps Congress can police itself in a reasonably competent manner. But the state legislatures are different creatures entirely. I suspect that most of the Left would not wish to turn over the Constitution to the entities that they seem to mistrust and fear the most. Indeed, progressives have been the driving force behind the centralization of power for more than sixty years. The states were deemed indifferent, incompetent, or too corrupt to handle welfare,

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116. For instance, we probably do not want the enforcement of the First Amendment to depend upon whether a particular Congress or state seemed generally solicitous of the freedom of speech. Nor would we want the Presentment Clause to be enforced either more vigorously or less so depending upon how Congress generally treated the President. Our own Constitution's treatment in the courts may provide a powerful example of the problem with addressing only existing difficulties. The Framers and Ratifiers had the foresight to include many different forms of protection for property (Contracts Clause, Takings Clause, Legal Tender Clause) at a time when governments were probably more solicitous of property rights than they are today. Had they not set these rights in stone at the beginning, one can only shudder at the prospect. Though these limitations are a shadow of their proper scope (or gone altogether), even these slender restrictions would not exist.

117. Cf. THE FEDERALIST NO. 65, at 401 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (observing that the Constitution should not be rejected merely because it is imperfect). As discussed infra Part III, I think we can improve our system of judicial review.
unemployment, or health care. Take away the courts, and the dreaded rallying cries of states’ rights, interposition, and nullification are not far behind.

Tushnet might claim that Congress could superintend the state legislatures and pass legislation to void any state laws that transgressed his thin Constitution. Given the enormous breadth of the Preamble’s principles, Congress legitimately could claim to be promoting the general welfare or ensuring domestic tranquility. Unfortunately, state legislatures could resist on precisely the same grounds. Even more devastating, state legislators could resist the entire Constitution, thin or otherwise, by rejecting the Supremacy Clause and the Oaths Clause. After all, these uninspiring housekeeping provisions are part of the thick Constitution and can be overcome by conscientious invocations of justice. All this merely underscores the plasticity of Tushnet’s thin Constitution. If we are crafty enough, there is either no limit to federal authority or no federal authority at all.

Tushnet also stumbles in describing how executives fit into a populist constitutional regime. He seems to believe that the courts can continue to check the executive through statutory means. Thus, if a DEA agent were to break down someone’s door and search the abode, courts could find that the officer went beyond the scope of her authority. Yet whatever that officer’s statutory authority, she may always cloak herself in all the authority she needs and more by invoking the malleable thin Constitution: “The thin Constitution made me do it; I had to break down his door to ensure domestic tranquility.” In such circumstances, it would be impossible to reach that officer’s conduct without construing the Constitution.

Perhaps more troubling, executives (both state and federal) could ignore the thick Constitution, federal statutes, and judicial judgments. After all, without the oath to the Constitution, without a duty to execute the laws and without the history-laden judicial power, why should the various executive branches care about these constraints? Thus, the thin Constitution

118. Many might endorse Holmes’s famous assertion: “I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States.” O Li ver Wendi ll Ho lm es, Co llec ted Le ga l Pa per s 295-96 (1920).
119. To his credit, Tushnet recognizes this problem with populist constitutional law. See Tushnet, supra note 1, at 54 (discussing the problem of state legislatures or city councils). Unfortunately, he does not provide a solution.
120. U.S. Const. art. VI.
121. Id.
122. With respect to the federal executive, he seems willing to let that branch interpret the Constitution without judicial supervision. See Tushnet, supra note 1, at 114-20. He does not indicate how state executives fit into his world without judicial review.
123. See id. at 163-65.
not only authorizes police-state intrusiveness; it also liberates executives from the Constitution, the law, and judicial judgments.

None of these problems is insurmountable. If people gave up their mistrust of state officials and their fear of an executive simultaneously invested with the judicial power, perhaps they would embrace a world without judicial review.\(^\text{124}\) Tushnet never adequately addresses these problems, however, and thus his analysis suffers. Even worse, he does not acknowledge that the combination of his thin Constitution and his populist constitutional law would liberate each branch and level of government to pursue whatever agenda would maximize its own power and prestige.

One problem is insurmountable, however. The combination of Tushnet's thin Constitution and populist constitutional law makes it possible (perhaps probable) that the courts will ignore his anti-judicial-review amendment. If members of Congress can ignore the Incompatibility Clause\(^\text{125}\) based on a desire to promote the general welfare, federal judges could overcome his proposed amendment on similar grounds. After all, his amendment is no less a default rule than any other provision.

4. *Tushnet's Partial Populism*

Though Tushnet's book is about the Constitution, his populist crusade need not be so limited. We could usher in a far-reaching “populist public law,” in which the courts would be barred from hearing any cases involving statutes or government action. Courts would still hear private disputes, but cases concerning federal law would be left to the people and their political branches. Many of the benefits of a populist constitutional law would apply to a populist public law as well. In particular, unaccountable elites would not be responsible for reviewing the actions and statutes of the representative branches. Moreover, judicial constructions of statutes and regulations would no longer distort how legislators and executives go about their duties. Because Tushnet never considers the question, one cannot say whether he would support a populist public law or distinguish it from his pet project.

\(^{124}\) Though the textual discussion lumps state and federal executives together, many particularly fear state executives. The Left is unlikely to stomach state executives interpreting or constructing the thin Constitution without some federal judicial review; images of state governors resisting desegregation are too vivid. Perhaps the President would superintend the state executives. After all, he is in charge of the execution of federal law, and the Constitution is the supreme law of the land. Unfortunately, in Tushnet's thin constitutional world, Article II, the Supremacy Clause and the Oaths Clause go out the window at the invocation of the general welfare. The states do not need to follow the thick Constitution or the President it creates.

\(^{125}\) U.S. CONST. art. I, § 6.
5. Costs of Tushnet’s Populist Constitutional Law

One of the drawbacks of Tushnet’s populist project is that it abolishes a cadre of constitutional specialists. While the people and their politicians can be made more sensitive to constitutional niceties, they will never enjoy the advantages arising from a single-minded attention to constitutional limits and liberties that comes from specialization in legal interpretation. In contrast, judges are experts in the business of interpretation. After all, it is their primary job. Their job descriptions do not include ensuring the country’s defense, establishing and spending a federal budget, or responding to constituent demands for legislation. Instead, the judiciary continuously garners valuable experience construing text in the highly charged context of disputes that often arise years after the legal text was enacted.

Perhaps the most troubling drawback of Tushnet’s proposal is that it ignores the most famous lesson drawn from Montesquieu: the need to separate the judicial power from the executive and legislative powers. Most conscientious executive officials cannot hope to guard completely against the bias that comes from initiating a civil or criminal process and then being asked to throw out or to modify the process on the basis of an alleged unconstitutionality. The temptation to brush aside the complaint is too strong and too tempting. A judge who is independent of the executive generally lacks a similar stake in the government’s action and therefore is likely to approach the dispute with less prejudice. Likewise, judges scrutinize congressional legislation for constitutional problems, thus providing a layer of independent review. Backup systems like judicial review help preserve liberty, build up confidence in the entire system, and display the Constitution’s genius of checks and balances.

To be sure, legislators and executives interpret the Constitution and other laws, but their contact is episodic and generally quite rare. In today’s world, legislators primarily provide constituent service and occasionally propose (and infrequently pass) legislation in response to the demands of constituents. While constitutional questions occasionally arise in the legislative process, most legislation does not raise any such concerns. Likewise, while executives interpret the law, their energies are primarily focused on the mechanics of enforcement.

126. BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS ch. 6 (Thomas Nugent trans., Hafner Publ’g 1947) (1748) (stating that when the judiciary unites with the other powers, liberty ends), cf. THE FEDERALIST No. 78, supra note 117, at 467 (Alexander Hamilton) (observing that the judiciary serves as an “intermediate body” between the people and the legislature in order to keep the latter in check).

127. More accurately, most legislation is not thought to raise any constitutional concerns.

128. The vast majority of executives carry out routine law-enforcement or administrative tasks for which interpretational skills are hardly necessary. For these executives, the “law” comes
Though there may be particular issues for which legislators and executives regard judicial review as unwelcome, one suspects that these officials generally are relieved that the Constitution provides for this extra layer of review conducted by experts. Such officials are not intellectually lazy or simply trying to duck responsibility. Rather, they correctly recognize that even conscientious officials benefit from a second or third opinion.

Tushnet would eliminate this extra layer of constitutional review. He would destroy the advantages of judicial specialization and of an independent constitutional check on the government’s enforcement and legislative arms. Given the slight benefits from eliminating judicial review identified by Tushnet, the costs seem far too high. His radical cure seems far worse than the relatively mild disease he diagnoses.

III. AN ALTERNATIVE POPULIST PUBLIC LAW:
TAKING LIFE TENURE AWAY FROM THE COURTS

Fortunately, there is another way to usher in a populist constitutional law, one in which we can have our cake and eat it, too. Without eliminating judicial review, we can bring the judiciary much closer to the people. At the same time, we can enjoy judges who specialize in the interpretation of the law, and who are relatively independent of the executive and the legislature.

We could achieve this happy combination by adopting a constitutional amendment eliminating life tenure for federal judges and establishing fixed terms of office. Whether the terms are three, four, or more years probably does not matter. A fixed term would ensure that the judge would be dislodged automatically after a set number of years unless the President and the Senate wished to reappoint him. In addition to instituting terms of office, perhaps the amendment would provide that judges could be removed by the Senate, by the President, or by ordinary legislation. Thomas Jefferson outlined a similar proposal over 175 years ago:

Let the future appointment of judges be for four or six years and renewable by the President and Senate. This will bring their conduct at regular periods under revision and probation and may keep them in equipoise between the general and special governments . . . . That there should be public functionaries

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from easily comprehensible manuals and circulars. However, a small subset of executives are quite expert in legal interpretation: prosecutors, government lawyers, and attorneys general. Like judges, they are specialists in legal interpretation. As discussed in the text, however, most such executives would have rather obvious biases in favor of the expansion of government power and in particular of the executive branch.

129. Though the proposal is limited to eliminating life tenure for federal judges, some, if not all, of the arguments apply equally to state judges with life tenure.
independent of the nation . . . is a solecism in a republic of the first order of absurdity and inconsistency.\textsuperscript{130}

Jefferson was absolutely right. A truly populist public law must hold the agents who make constitutional decisions accountable for those decisions to the people.\textsuperscript{131}

Undoubtedly this admittedly sketchy proposal\textsuperscript{132} will strike many as academic tilting at windmills. First of all, there is no clamor to eliminate life tenure. In fact, most reflexively support it. Even if there were a groundswell for eliminating life tenure, overcoming the procedural hurdles would be tough. Nevertheless, the proposal is worth considering and, conceivably, advocating. We should not sit on our hands merely because the amendment would be difficult to pass; all amendments face long odds. Moreover, if conventional wisdom were our only compass, we all would have found independent prosecutors clearly constitutional eleven years ago\textsuperscript{133} and patently unconstitutional today. Fortunately, most are not such prisoners of the reigning orthodoxy that they cannot step back and take a fresh perspective. Once we gain the proper distance, we may begin to apprehend life tenure’s drawbacks and take the measures necessary to end this aristocratic feature of our generally republican Constitution.

\textsuperscript{131} Quite obviously, replacing life tenure with fixed terms and possibly instituting a recall mechanism are just two means of reforming federal judgeships. Other methods exist as well. Focusing on Supreme Court Justices, Judge Laurence Silberman has suggested an automatic demotion from the Court to a federal circuit after a period of five years. See Term Limits for Judges, 13 J.L. & POL. 669 (1996) (transcript of a panel presentation in which Judge Silberman presented his proposal). He believes that his appealing proposal would mitigate the tendency of justices to act as “platonic guardians.” Id. at 687. Although Judge Robert Bork now supports the elimination of judicial review, see Robert H. Bork, Tenth Anniversary Banquet Speech to the Federalist Society Symposium (Nov. 14, 1996), in 13 J.L. & POL. 519 (1996), he originally sought to vest Congress with the power to override judicial decisions, see ROBERT H. BORK, SLOUCHING TO GOMORRAH 117 (1996). Over 200 years ago, Robert Yates proposed that the people elect a separate institution charged with supervising and reining in the judiciary. See BRUTUS No. XVI (Apr. 10, 1788), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 442, 443 (Herbert J. Storing ed., 1981) (asserting that the people should elect officers to supervise the judiciary). Other possibilities include instituting recall votes, whereby the public could vote out federal judges, or making judgeships elected offices and bringing political competition to bear.

\textsuperscript{132} This Part only hints at the broad outlines of a populist public law. In particular, it does not propose the precise language necessary to institute terms of office or to remove judges. Rather, it discusses reasons for and against moving toward such a regime.
\textsuperscript{133} See Morrison v. Olson, 487 U.S. 654 (1988).
A. An Affirmative Case for a Populist Public Law That Lacks Life Tenure

As alluded to earlier, my reasons for supporting a populist constitutional law are slightly different from Tushnet’s. Though I firmly believe that the judiciary’s opinions are littered with the remains of obliterated constitutional provisions, and thus believe that the courts have done a rather poor job of enforcing the Constitution, such an argument will not get me very far. One cannot hope to convince the many people who believe that the courts have done a reasonable job of vindicating the Constitution, not to mention those who celebrate the judiciary’s handiwork. Persuading people that the courts have done a poor job of defending the Constitution would require an analysis of the Constitution’s actual provisions, and there are, unfortunately, far too many people who would disagree with me. For instance, few shed any tears over the judiciary’s trashing of the Contract Clause or over its nearly total evisceration of the bedrock doctrine of limited and enumerated federal power.

No matter. There are more universal reasons for eliminating tenure. For odd historical reasons, we entrust our most essential rights (for example, the freedoms of speech and free exercise of religion) and our most important legal rules (those found in the Constitution) to unaccountable judges, and then meekly accept whatever judgments and opinions they render. As one distinguished federal judge put it, a federal judge

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\text{can be lazy, lack judicial temperament, mistreat his staff, berate without reason the lawyers who appear before him, be reprimanded for ethical lapses, verge on or even slide into senility, be continually reversed for elementary legal mistakes, hold under advisement for years cases that could be decided perfectly well in days or weeks, leak confidential information to the press, pursue a nakedly political agenda, and misbehave in other ways}\]

and still retain his office. Whatever the judiciary’s traits, however, the political branches and the people generally follow their decisions. The only leaders who enjoy more authority and who are less accountable (and only slightly so) are tin-pot dictators of ill-fated countries.

Unlike such nations, however, America is supposed to be a constitutional republic in which the officials answer to the people. To ensure accountability to the people, members of Congress must go back to the people periodically to secure renewed support. Likewise, the President and Vice-President must seek such popular reaffirmation as well. Even the most independent of those appointed officials charged with the execution of

\[\text{U.S. Const. art. I, § 10.}\]
federal law must seek renomination and reconfirmation if they are to stay in office beyond their initial limited terms. Finally, our Constitution guarantees the states republican governments. How truly odd and perverse it is that our Constitution explicitly promises republican governments to the peoples of the several states but implicitly denies such a right to the people of the United States. An elitist public law—in which the only checks on judges’ (mis)constructions of the law are their imaginations and a seemingly weak sense of shame—is in fundamental tension with a republic in which the people ultimately rule.

Of course, this uncomfortable tension existed from the beginning. More than 200 years ago, Americans fought against a monarch with life tenure who felt free to do as he wished because there were few real checks on his authority. A few years after securing independence, Americans willingly reestablished an aristocratic regime by granting federal judges life tenure. This cadre of superior and virtuous men supposedly would safeguard our most fundamental legal rules and rights. In effect, they were charged with protecting us from ourselves, comfortably secure in the knowledge that they could never be removed.

In the ensuing years, federal judges charged with the task of divining the Constitution have acted like high-and-mighty secular priests. Like Pythia, the Delphic oracle who revealed Apollo’s will, judges at times act as if they have some unique ability to ascertain the Constitution’s true meaning. Others are welcome to take a crack, but the courts must prevail in the end. After all, the Constitution supposedly says as much, or so we are told. Even if the Constitution says nothing on the subject, the judiciary is at liberty to misread its own opinions in order to prove judicial supremacy. The courts are truly supreme when they can cite themselves to prove their supremacy and others nod in agreement.

Eliminating life tenure and substituting fixed terms of office would make federal judges less haughty and more accountable. Presidents would not bother attempting to reappoint lazy, senile, or incompetent judges. Moreover, it would be easier for the President or the Senate to...

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136. See U.S. CONST. art. IV, § 4. The prohibitions against titles of nobility, see id. art. I, §§ 9-10, are also meant to ensure republican governments. See THE FEDERALIST NO. 39, supra note 117, at 242 (James Madison).

137. See THE FEDERALIST NO. 78, supra note 117, at 471 (Alexander Hamilton); THE FEDERALIST NO. 81, supra note 117, at 483 (Alexander Hamilton).


139. See id. (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

140. Impeachment can never be used as a means of keeping judges accountable. Its hurdles are far too high. It seems inconceivable that judges will be impeached and convicted for merely adopting a view of the Constitution at variance with the majority (or supermajority) in Congress. More importantly, it is improbable that judges will be impeached and convicted for explicitly and obviously breaking faith with the Constitution and pursuing their own agendas. Impeachment is a phantom menace.
repudiate those judges who might pursue political or ideological agendas.\textsuperscript{142} These folks could be told that the nation no longer needed their services. If a removal option were part of the proposed amendment, it might even be possible to discharge judges rather painlessly. At the first sign of mendacity or bias, we could remove judges. We could even remove judges who conscientiously advocated an interpretation that seemed wrong to us as a matter of constitutional interpretation. For example, if we did not like a court’s treatment of qualified immunity for executive officers, we could boot out the appropriate judges.

Ridding ourselves of life tenure also would result in an across-the-board populist public law.\textsuperscript{143} As noted earlier, Tushnet’s populist constitutional law program is only partly populist; it leaves an elitist statutory and regulatory law in place. Elitist, unaccountable judges would still have the ability to wreak havoc with the laws and regulations enacted by the people and their representatives. In sharp contrast, eliminating tenure replaces an elitist public law with a populist public law. Judges would feel less empowered to construct their own statutes and constitutions because they would know that judicial self-indulgence could be punished with removal or failure to reappoint.

As it stands now, all that the people and their representatives can do is watch from the sidelines. When it comes to the Constitution (and sometimes even federal law), the American public and their representatives are relegated to the status of interested, but passive, bystanders. To be sure, they can try to overcome the procedural barriers and pass an amendment that attempts to wrest control of some area away from a wayward judiciary. But even if they achieve the improbable, the people run the risk that the judiciary will misconstrue the very amendment meant to correct a particular decision.\textsuperscript{144} Thus, even error-correction becomes problematic because the unaccountable judiciary has the last laugh.

\textsuperscript{142} To some extent, Senators can do that now because they can evaluate the track records of those judges whom the President nominates to a higher court. Still, a fixed term of office would make such ex post review available for all federal judges. In particular, it would enable a performance review of those who are not promoted. These judges may be more likely to be problematic than the ones who are promoted; after all, one of the reasons for failing to secure a promotion might be their own failings as judges. Moreover, those stealth judges who might mute their predilections in the hope of securing a higher seat would no longer be able to transform themselves freely once promoted. Even the stealth candidate will eventually reveal her true colors, and the President or the Senate would then be able to evaluate whether reappointment would be appropriate.

\textsuperscript{143} In truth, eliminating life tenure would usher in not merely a populist public law, but a populist law generally. Private disputes brought before federal courts would also benefit from having accountable judges. The very same problems that afflict judges when they decide public-law cases (such as incompetence, senility, bias, mendacity) obviously impact their private-law decisions as well.

\textsuperscript{144} For some, the Eleventh Amendment may come to mind as an amendment meant to correct the judiciary but that actually metastasized into a monster. Many believe that the courts have strained and stretched the Eleventh Amendment beyond the meaning its text will bear. See.
These observations and criticisms are hardly novel. In fact, the basic critique has a long and rich pedigree. From the time there was a public proposal for federal judges with life tenure, there were those who raised their voices in opposition. Robert Yates, a.k.a. Brutus, attacked federal judges as “independent, in the fullest sense of the word” and as being so liberated that they would feel independent of “heaven itself.” After ratification, Thomas Jefferson colorfully denounced life tenure as a canker and an absurdity in a republic. Continuing the tradition, Judge Learned Hand attacked “the fatuity of the system” that granted life tenure. Thus, my criticisms merely amplify and update the objections that were voiced by earlier, superior thinkers.

For far too long, we have had a principal/agent relationship in which the putative agents may pursue their own ends with impunity because the supposed principals have no control over their supposed agents. Vested with tremendous authority and answerable to no one, the federal judiciary can be described as America’s home-grown aristocracy. Eliminating life tenure would be a great step toward bringing the aristocracy to heel.

B. Why the Constitution Enshrined Life Tenure

If the above plea for judicial accountability resonates even a little, one might wonder why the Constitution grants life tenure to federal judges. After all, such a term of office goes against the obvious republican grain of the rest of the Constitution. As Tushnet points out, the founding generation was blessed with some “particularly intelligent people,” and so we might be puzzled as to why they infected our republic with a decidedly aristocratic virus.

In response to the anti-Federalist claim that life tenure created an American aristocracy, Alexander Hamilton laid out the most complete

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145. BRUTUS No. XV, supra note 131, at 438.
146. See Letter from Thomas Jefferson to William T. Barry, supra note 130, at 256.
148. Maybe these arguments sound overblown. Most might scoff at any suggestion that judges are the modern-day equivalent of tyrannical kings or holy priests. Yet the argument makes no claim about the moral character of federal judges. The argument merely points out the obvious tension with our republican pretensions that results from having judges who have some of the regal attributes of the English monarch and some of the traits of a high priest.
149. TUSHNET, supra note 1, at 52.
defense of this judicial perquisite in *The Federalist* Number 78. First, the founding generation wished to give the judiciary a measure of independence from the other two, supposedly stronger, branches. Without such independence, the judiciary would be “in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches.”  

Second, only life tenure would attract those “fit characters” who would bind themselves down by “strict rules and precedents which serve to define and point out their duty” and who had “sufficient skill,” “competent knowledge,” and the “requisite integrity.” In other words, those worthy of being judges were a select few and would need to be enticed with life tenure. Third, life tenure was meant to insulate judges from the temporary passions of the people themselves. Judges could heed the people’s more abiding commitment to the Constitution if they were insulated from the people’s “momentary inclination[s]” and “occasional ill humors.” Finally, and most importantly, life tenure was thought to be “essential to the faithful performance” of the judiciary’s duty to defend a limited Constitution. Life tenure would provide the judiciary the necessary backbone.

C. Taking On Hamilton’s Tenuous Arguments for Life Tenure

Although Hamilton gallantly defends life tenure for federal judges, his seemingly plausible arguments are not convincing. Some of his empirical claims or predictions no longer ring true. Judges no longer need be concerned with being awed or overpowered by the other branches. Instead, the other branches must guard against being dazzled and overwhelmed by

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150. *THE FEDERALIST NO. 78*, *supra* note 117, at 466 (Alexander Hamilton). Hamilton labels the judiciary the “least dangerous” branch because he views it as being relatively impotent. Indeed, he approvingly quotes Montesquieu’s claim that that the judiciary is “next to nothing.” *Id.* (quoting *MONTESQUIEU*, *supra* note 126, at 156).

151. *Id.* at 471.

152. See *id.* at 469.

153. *Id.* at 469-70.

154. *Id.* at 469.

155. *Id.* at 470-71. Hamilton also claims that life tenure is necessary to prevent the private rights of individuals from being injured by unjust or partial laws. See *id.* at 470. Because this concern seems to be a subset of his earlier assertion about the people’s temporary passions, I do not treat it separately.

156. By presenting only Hamilton’s defense of life tenure, I do not mean to suggest that these are the only reasons to prefer life tenure. I suggest only that these are the best reasons I know for life tenure. Hamilton could not press another significant reason for life tenure—that it produces agreeable results—because he had no way of proving that agreeable results would follow. I discuss this powerful reason *infra* Section III.F.
the courts. Other assertions never held water and contradicted the Constitution's first principles. There is no reason to believe that those with integrity will be more likely to shun a judgeship in a world without tenure. Likewise, there is no basis for preferring the liberated voices of judges to the clamor of the people. Finally, we need not regard life tenure as the guarantor of a limited Constitution; in fact, life-tenured judges could hasten the demise of a limited Constitution.

1. Life Tenure as an Inter-Branch Shield

Perhaps judges required an extra measure of independence from the political branches back in the late eighteenth century. With the English King's overweening influence on the judiciary still a not-too-distant memory, maybe the courts seemed the least capable of holding their own in inter-branch conflicts. After all, the Declaration of Independence had lamented that the English King had "made judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." Likewise, state legislatures had exerted influence over the judiciary through annual appointments and through salary appropriations.

In this day and age, however, few should believe that judges need protection from the other branches. Federal judges routinely slap down executive constructions of statutes and the Constitution. Nor do they seem to have any compunctions about striking down Congress's handiwork. In fact, the judiciary has had the audacity to declare "that the federal judiciary is supreme in the exposition of the law of the Constitution." The judiciary is hardly the most timid branch.

If anything, the other branches are overwhelmed and awed by the judiciary. By custom, the judiciary's opinions and judgments are taken as the "law," which the other branches are accustomed to following timidly. If someone has the temerity to criticize a judge's opinion, many condemn the criticism as a threat to judicial independence. If someone in government goes further and actually challenges judicial supremacy, he is buried in accusations of subverting our Constitution.

157. David Currie does a very nice job of discussing how English kings exerted influence over judges before the Act of Settlement and how the King influenced colonial judges even after the Act. See David P. Currie, Separating Judicial Power, LAW & CONTEMP. PROBS., Summer 1998, at 7, 8-9.
158. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).
159. See Currie, supra note 157, at 9-10.
In a world with short terms of office and a possible removal option, judges undoubtedly would be less independent of the other two branches than they are now. Presumably, judges would glance over their shoulders to gauge how the other branches reacted to their decisions. They might even decide to avoid decisions or interpretations that would anger the people’s elected representatives. Such reactions would be inevitable and welcome. As odd as this may sound to many, judges should be somewhat responsive to the representative branches because these branches represent the judiciary’s ultimate principals. The point of eliminating life tenure is to end judicial liberation. The representative branches and the people should hold judges accountable for their failures and faults by declining to reappoint or by removing them.163

In any event, the sturdy backbones of those who sit on the federal bench would not collapse with life tenure’s elimination. Paying heed to the concerns of other branches hardly means that the judiciary would lie supine before them. Indeed, though each of the other two branches must bear in mind the concerns of the other (and the courts), we feel free to speak of an independent executive branch and an independent legislature.164 Moreover, the judiciary would continue to have better salary protections than Congress and the President.165 Most fundamentally, no other branch could dictate the exercise of their Article III judicial power. Their judgments and opinions would still be theirs alone. In a world where the judiciary’s word is law, this power cannot be underestimated.166 An appropriate judicial independence

163. Allowing the executive or legislative branch to play a role in the removal of judges might raise some of the same concerns that were voiced in the Declaration by the colonists. See THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776). In reality, however, the contexts are quite different. Federal judges would retain their salary protections and thus would not be wholly dependent upon Congress and the President. Moreover, though the President could have a role in removal (if the proposed amendment permitted it), the President is not at all analogous to the English King. Though both are chief executives, the President has a populist base. Making judges indirectly accountable to the people by making them somewhat answerable to the people’s immediate agent (the President) hardly smacks of executive tyranny.

164. Sometimes, we even discuss the anomalous “independent” departments whose heads are appointed (and occasionally reappointed) by the President and confirmed (and periodically reconfirmed) by the Senate and whose jurisdictions and budgets are set by statute.

165. The Constitution allows the legislature to raise the salaries of sitting judges. See U.S. CONST. art. III, § 1. By contrast, Congress cannot raise (or lower) the President’s salary during the period in which the President holds office. See id. art. II, § 1, cl. 7. Congress has no constitutional salary protections. In fact, its ability to raise members’ salaries is procedurally limited. See id. amend. XXVII.

166. Those who subscribe to the orthodox view that the other branches must adhere to the Supreme Court’s construction of the Constitution and laws of the United States, see Cooper v. Aaron, 358 U.S. 1, 18 (1958), should quickly grasp that judges will still wield tremendous legal authority. After all, judges will decide what the Constitution and the laws mean. Someone who subscribes to a Paulsenian coordinacy approach, see Paulsen, supra note 68, at 221, may have less reason to support life tenure’s elimination. After all, a Paulsenian believes that other branches can already ignore judicial opinions and rationales that seem wrong. See id. at 221-22. Given the judiciary’s relative lack of power, eliminating life tenure for judges might not seem like such an
America's Aristocracy does not rest on a wholly liberated judiciary that is *primus inter pares* vis-à-vis its supposedly coordinate branches.

2. *Life Tenure as an Incentive To Attract the Learned and Virtuous*

One cannot deny that life tenure helps attract some of the best, the brightest, and the most virtuous to the federal bench. Of course, like any wonderful perquisite, it also attracts some of the worst, the dullest, and the most corrupt. By making an occupation more attractive, one attracts all types. There is no reason to believe that the most desirable candidates are more likely to be attracted to federal judgeships than those who are least desirable. In fact, the converse might be true. Precisely because they are slow or corrupt, the undesirables might find more value in a position in which they are guaranteed an irreducible salary and cannot be fired. In effect, they can shield their faults behind these protections.

Even if life tenure systematically attracted only those who were learned and scrupulous, we could presumably lure such folks with other incentives. We could ensure that federal judges were paid handsomely, even more so than now. We could ensure that they would receive a generous pension even after they leave the bench. We could even expand their jurisdiction if we approved of their job performance. All of these proposals would make the bench more attractive and would demonstrate that life tenure is just one carrot among many. We should not give away the store and thereby lose accountability when other perfectly acceptable incentives will do.  

Life tenure should certainly not be thought absolutely necessary to attract those who are both learned and honorable. Such individuals should be the least alarmed by a review of their judicial handiwork. After all, they are the most likely to produce results that can withstand searching scrutiny. Even if those most worthy received an unfair review, however, they once again need not be anxious. Just like public officials of wisdom and integrity that lose elections, judges with similar attributes will be in demand once they leave the federal bench. Judges have highly desired skills and experiences and will not want for opportunities.

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167. Of course, even the best incentives for becoming a judge will not ensure the most fit judges. We should not focus merely on supply-side factors and neglect the demand side. The President and the Senate must choose the most virtuous and worthy from among all those who might want to be judges.
3. Life Tenure as a Necessary Buffer from the People

Hamilton’s concerns about the potentially corrosive effect of public opinion also miss the mark. Admittedly, in a world without life tenure, the sheer force of public opinion can cause the courts to veer from their best interpretation of the Constitution. But public opinion also has the ability to steer the courts toward the Constitution. As discussed at greater length below, there is no reason to believe that the courts are more likely to be faithful to the Constitution than are the people. The comparison cannot be between some utopian judiciary ever dutiful and faithful to the Constitution and a judiciary cowed by the fickle, faithless people. The more appropriate comparison is between an unfettered judiciary and a judiciary restrained (and sometimes prodded) by the people. When posed in these terms, it is not clear whether we should fear or laud the people’s influence.

4. Life Tenure as Necessary for, or Merely Conducive to, the Constitution’s Defense

At first blush, this may seem the strongest justification for life tenure: If judges are free of potentially coercive and corrosive influences, they will be able to do right by the Constitution. Yet this justification seems powerful only because it is the reason most often given for life tenure. It seems right because we hear it so often and usually unthinkingly accept it. In fact, life tenure is neither a necessary nor a sufficient condition for constitutional fidelity. More importantly, life tenure does not even make constitutional fidelity more likely. Instead, the corrupting influence of life tenure might make constitutional infidelity more probable.

Notwithstanding Hamilton’s claim that life tenure is necessary for the defense of a limited Constitution, a judge surely could enforce limits on governmental authority without life tenure. Experience has taught us that state judges are perfectly capable of declaring legislative and executive actions unconstitutional, notwithstanding their lack of life tenure.6

168. Though members of the California Supreme Court must seek periodic approval from the voters, see CAL. CONST. art. VI, § 16(a), they have not shown an aversion to striking down the acts of either the California legislature or the governor. See, e.g., American Academy of Pediatrics v. Lungren, 940 P.2d 797 (Cal. 1997) (holding unconstitutional a California statute requiring minors to seek parental consent or judicial authorization prior to an abortion); Harbor v. Deukmejian, 742 P.2d 1290 (Cal. 1987) (holding Governor Deukmejian’s exercise of the veto power unconstitutional). Judges lacking life tenure even strike down popular initiatives enacted by voters. See, e.g., Hotel Employees Int'l Union v. Davis, 981 P.2d 990 (Cal. 1999) (declaring that Proposition 5, an Indian gaming initiative, violated the California Constitution).
Nor should life tenure be thought sufficient for or even conducive to a vigilant judicial defense of a constitution. Hamilton may have hoped that the life tenure would liberate judges from extraneous concerns and enable them to defend the Constitution resolutely. Notwithstanding his fond hopes, life tenure's mere existence provides no reason to believe that judges will choose Hamilton's preferred path. Life tenure means that judges need not worry about any personal consequences that might stem from a particular decision. It gives them the freedom that comes from unaccountability. What judges do with this unaccountable power is another thing altogether.

Viewed in this manner, life tenure is actually a double-edged sword. The same life tenure that enables judges to adhere steadfastly to the Constitution also enables them to transcend its text, structure, and history. In other words, life tenure makes both constitutional fidelity and infidelity possible. Liberated judges could adhere to the Bill of Rights and the notion of limited and enumerated federal power, or they could follow their own philosophy or social science. As this analysis suggests, fidelity to the Constitution and to the laws does not necessarily follow from judicial liberation. It is a choice that must be actively pursued in the teeth of the heady temptation to create one's own constitution and laws.

Human nature being what it is, most judges probably succumb to the temptation at one time or another. To be sure, there may be some who resist successfully throughout their time on the bench. Others may have success only some of the time. However, most people do not doubt their own capacity to do good. Couple that sometimes unjustified self-assurance with the corruptive influence of life tenure and you have a combustible combination. Like absolute power, unaccountable power tends to corrupt.

Our experience with life tenure bears this out. Puffed up with life tenure, the judiciary occasionally has snuffed out some of our liberties and stretched federal authority beyond what is appropriate. Likewise, judges occasionally attempt to impose their policy preferences in cases involving statutes or executive action. No one can deny that life tenure sometimes empowers (indeed emboldens) judges to transcend the supposedly Supreme Law of the Land.

169. We all know of judges that seem to embody precisely the virtues that we envision when we conceive of an ideal judge. Indeed, I have had the honor of serving two federal judges who performed their tasks with unimagined integrity and fidelity to the Constitution. In my mind, however, these two judges are exceptions that prove the rule that life tenure should be abolished. We cannot defend a system based only on such dreamy visions of perfection. We need to be more realistic about how men and women react when given guaranteed employment.

170. Though this part of the argument shades into substantive criticism of the courts, there need not be any consensus as to when the judiciary has transcended the Constitution or the laws. One need only acknowledge that life tenure enables the judiciary to get things wrong, very wrong. If one can envision some constitutional right or limitation that one believes the Court has gutted, the point merely becomes more concrete.
While others may find judicial liberation's ramifications surprising, law professors can hardly claim complete ignorance. As professors surely know, nothing can be as emancipating as knowing that no matter what outrageous statements you make, you cannot be removed from your job because of such statements. Judges have an even more ironclad protection. No one can remove them for any reason, save for the rather remote impeachment option, and they are guaranteed a salary that cannot decline. Why Hamilton and other members of the founding generation blithely assumed that fidelity to the Constitution rather than the self-indulgent pursuit of one's own preferences would follow from life tenure is a mystery.

D. Life Tenure as in Fundamental Tension with Constitutional First Principles

Despite Hamilton's valiant defense of life tenure, the institution always was in fundamental tension with the Constitution's foundations. The Constitution's justly celebrated system of checks and balances exists precisely because it was assumed that government officials regularly would act in venal, self-interested ways. Hamilton claimed that men were "ambitious, vindictive, and rapacious." James Madison more famously

171. Professors might be thought part of a conspiracy of silence regarding life tenure. We favor life tenure so much for ourselves that we are unwilling to confront its drawbacks for judges. Indeed, no one should doubt that the conventional wisdom regarding life tenure is quite strong. In rather bulky and recent law reviews dedicated to "Judicial Independence and Accountability," no academic seriously questioned whether life tenure serves any purpose. Instead, most assumed the value of life tenure and noted its tension with accountability. See Symposium, Judicial Independence and Accountability, 72 S. CAL. L. REV. 311 (1999); Symposium, Judicial Independence and Accountability, LAW & CONTEMP. PROBS., Summer 1998, at 1. But see Currie, supra note 157, at 7, 12, 14 (observing that there are few checks on removing judges but concluding that judges are both independent and accountable). For those interested in literature discussing such questions, the first symposium contains an excellent bibliography. See Judicial Independence and Judicial Accountability: A Selected Bibliography, 72 S. CAL. L. REV. 723 (1999).

172. But perhaps my rhetorical question is a bit too harsh. Hindsight has a way of making unforeseen matters seem rather obvious and inevitable. We must remember that the Federalists regarded the judiciary as the "least dangerous" of the branches. Indeed, Hamilton approvingly cited Montesquieu for the proposition that the judiciary was "next to nothing" as compared to the other branches. See THE FEDERALIST NO. 78, supra note 117, at 466 (Alexander Hamilton) (citing MONTESQUIEU, supra note 126, at 186). Not having experienced the problems of life tenure, perhaps supporters of life tenure should be excused for downplaying the problems that seem to arise inevitably from judicial liberation.

Of course, we might be giving Hamilton and others less credit than they are due. Judicial liberation actually might have appealed to some of the Constitution's supporters. An aristocratic, nationalist judiciary, many of whom might serve for decades, could be counted on to perpetuate a strong federal government. In other words, life tenure ensured that, whoever controlled Congress and the Presidency, the courts would be controlled by those who would press for a nationalist interpretation of the Constitution. In this way, a liberated judiciary held out the prospect of a generation of judicial capture.

173. THE FEDERALIST NO. 6, supra note 117, at 54 (Alexander Hamilton).
declared that government's structure must be such that "[a]mbition must be made to counteract ambition." 174 Indeed, government's very existence suggested that men could not be trusted: "If men were angels, no government would be necessary." 175 Because men are not angels, checks were necessary. In a government of "men over men," 176 the government must be able to control the governed, and the governed must also have a check on its agents. "A dependence on the people is, no doubt, the primary control on the government . . . ." 177

Life tenure, by completely insulating judges from accountability, ignores these fundamental truths of self-government. If people could be trusted with life tenure, we would not need government, let alone the courts. The very fact that we need government suggests that we cannot tolerate life tenure. In other words, because judges (like the rest of us) are not angelic, they should not be entrusted with such unchecked power. Life tenure is a long-lived constitutional aberration that we should belatedly repudiate. In its place we must establish some form of salutary "dependence on the people" so that we may check our agents.

E. Imagining a Brave New World Without Life Tenure

Eliminating life tenure would alter judges' approaches to their tasks. When they approached a court case, they would anticipate and take into account the views of the other branches and the people. Notwithstanding such accountability, judicial review would continue to yield the benefits discussed earlier: specialization and an independence from the other branches. While judges might tend to spend less time acquiring the specialized interpretative skills (because they would know that they might be removed), they would not entirely neglect such skills either. In part, they would be judged by the quality of their judgments and opinions and by their skill in the judicial craft. Hence, it would behoove them to hone their interpretive abilities. One does not need life tenure to be competent and faithful and to have pride in one's work. Millions of people prove this each day. 178

Moreover, a healthy judicial independence would still exist, as no one would be able to dictate results in particular cases. Making these judges accountable to the representative branches would not make them part of either the executive or the legislative branch. Judges would remain free to

174. THE FEDERALIST NO. 51, supra note 117, at 322 (James Madison).
175. Id.
176. Id.
177. Id.
178. In fact, one might suppose that eliminating life tenure would lead to an increased desire to hone judicial skills. In countless occupations, accountability often leads to excellence.
follow or reject the considered view of their coordinate branches. Such judicial independence would still be a valuable check on legislative and executive actions that might transgress the Constitution.

Armed with the knowledge that they could remove judges or refuse to reappoint them, the political branches might begin to pay more attention to the Constitution’s fate in the courts. Currently, because constitutional law is a spectator sport, there is little incentive to monitor the courts. Whatever the courts do, the political branches can do nothing but watch and perhaps complain. Under the new regime, however, the executive and legislature would have powerful reasons to watch the courts and the Constitution. They could expose poor judgments, remove judges, and receive the public’s approbation. Give the politicians an upside to monitoring federal judges, and they might seize the opportunity.

Of course, all of these predictions depend crucially on the precise details of the amendment. Will the term of office be relatively long or short? Will there be a removal option? If so, how difficult will removal be to carry out? The devil is in the details. Those who appreciated the need for greater judicial accountability but still wanted the judiciary to retain some judicial liberty might establish long terms and not provide a removal option. Others might wish to enact relatively short terms of office and also enact an easy method of removal to keep the judiciary on a short leash.179 As should be obvious, though we might achieve various levels of judicial independence and accountability, we cannot maximize both variables.180 Whatever the precise proposal, we should be willing to sacrifice some judicial independence and welcome the accompanying movement toward at least a modicum of accountability.

F. Why We Should Not Leave Well Enough Alone

Pragmatists satisfied with the current regime might brush aside all these arguments as speculative and beside the point. In their view, federal judges do a pretty commendable job. Even if pragmatists thought judges did a terrible job, however, eliminating life tenure would not guarantee better judging; indeed, things could deteriorate. Such individuals are unlikely to be moved by calls for some level of judicial accountability because they either are satisfied with the judiciary’s handiwork or do not see how eliminating life tenure would improve results.

Likewise, pragmatists might even agree with Tushnet that the courts do in fact follow the election returns. If we already have an operational

179. The Senate and the House are often thought of in these terms. With six year terms, Senators are freer to vote their “conscience” than are biannually elected Representatives.

180. Indeed, judicial independence is inversely related to judicial accountability. By definition, the more independent someone is, the less one can hold that person accountable.
populist constitutional law, maybe we should thank Providence and not rock the boat. Without a doubt, the temptation to preserve (or endure) the status quo is a powerful impulse. The Declaration of Independence notes mankind’s propensity “to suffer, while evils are sufferable, than to right themselves by abolishing the forms [of government] to which they are accustomed.”

It is hard to quibble with the pragmatist. Admittedly, a strong desire for judicial accountability is only one possible preference. I do not think that a powerful (and satisfied) preference for particular results is wrongheaded, silly, or evil. After all, aristocracy is not the worst thing in the world. Many might be willing to pay the price and compromise their republican principles.

Further, it is also difficult to disprove the pragmatist’s speculations about a world without tenure. Assuredly, ending life tenure would not end judicial liberation from the Constitution. No legal framework can ensure fidelity. People might view a short term of office as an opportunity to pursue their own vision of the good; the possibility of an early dismissal cannot completely rein in the ever-present impulse to be a philosopher-king. Other judges might find their constitutional analyses subtly corrupted by a venal desire to secure another term or a better appointment. Still worse, judges who are now generally regarded as beyond reproach might give up the good fight altogether and conclude that their altered job status actually required them to yield to every passing fancy. We could end up undermining those who now stand up for the Constitution. Finally, the other branches might abuse their power over federal judges and remove those who conscientiously carry out their duties.

Notwithstanding pragmatism’s powerful pull, my view is that we should not tolerate an aristocratic life tenure. Even some of those who think that eliminating tenure would impair the quality of judicial decisionmaking should support the elimination of tenure. At the very least, those who support life tenure should no longer assume the superiority of a liberating life tenure but should instead defend the aristocratic status quo.

Until such a case is made, we should oppose an imperial life tenure. Monarchy should not be endured merely because the king chooses to

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181. The Declaration of Independence para. 2 (U.S. 1776).
182. To some extent, judges currently face the temptation of higher office either in the judicial branch or elsewhere. Such lures probably do affect judgments and opinions.
183. Just as the proponent of abolishing life tenure must contend with the claim that judging might deteriorate, so too must the proponent of life tenure. Unless the happy pragmatist has good reason to believe that life tenure will systematically produce congenial results, the pragmatist runs the risk that the judiciary will stray from her preferences. The judiciary’s history offers no reason for optimism that today’s winners will continue their winning streak. More likely, today’s winners will be tomorrow’s losers.
184. Such individuals could support the elimination of life tenure because, notwithstanding their satisfaction with the judiciary’s output, they might also value judicial accountability.
consult polls from time to time. Nor should we welcome a theocracy merely because its clerics seem especially solicitous of the public. Regardless of Americans’ longstanding love affair with the courts, the principle that the people rule in America is too important to continue to compromise. A system of fixed terms and early removal would be far better than a scheme that sanctions and sometimes mindlessly celebrates judicial liberation.

IV. CONCLUSION

Tushnet’s thin constitutional project suffers from too many flaws. After Tushnet’s radical surgery, the Constitution is simultaneously too skeletal and too commodious. Even if Tushnet’s thin Constitution somehow energized political debate, the resulting discourse would be rather unedifying. Even more so than today, every political, personal, and even commercial dispute could be made into a federal constitutional case. When Tushnet asks that we trade away relatively concrete rights and limits on government in return for a few well-sounding phrases, he asks far too much. Better to have no Constitution than Tushnet’s thin one.

In contrast, Tushnet’s quest for a populist constitutional law has the correct impulses. There is something fundamentally amiss when we entrust our most solemn rules to a secretive and unaccountable cadre. Unfortunately, his actual prescription would eliminate not only the harms of elitist constitutional law; it also would sacrifice the benefits that judicial review confers, such as specialization and an independent check on governmental action.

In proposing to eliminate judicial review, Tushnet, like others before him, misidentifies the problem with the federal courts. Judicial review is not the primary difficulty. It is not inherently elitist or undemocratic. It does not necessarily clash with first principles of self-governance. By itself, it does not foster arrogance or a false sense of infallibility. Properly cabined, judicial review is merely an act of agents on behalf of their principals.

Life tenure is the problem. It liberates judges from their role as agents of the people. It makes judicial review potentially antimajoritarian. It fosters an unseemly judicial imperiousness. If legislators or presidents had life tenure, no one would assert that legislating and executing laws was undemocratic. Instead, one would identify life tenure as the culprit and take the appropriate steps to eliminate the House of Lords or the monarchy.

Given that judicial review is not inherently undemocratic, perhaps eliminating life tenure is the superior means of making legal interpretation populist. We can enjoy a populist public law that permits judicial specialization, benefits from an independent check on the other branches, and ensures that legal decisionmakers are ultimately responsible to the people.
That we have failed to identify life tenure as the principal difficulty with federal judicial review is somewhat surprising. Over 200 years ago, the anti-Federalist Brutus quickly perceived that aristocratic life tenure for federal judges would make them

independent, in the fullest sense of the word. There is no power above them, to control any of their decisions. There is no authority that can remove them, and they cannot be controlled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.\textsuperscript{185}

Brutus was remarkably prescient. Federal judges are independent of every power under heaven. If we eliminate the liberating life tenure, we can place judges under the indirect control of the people and complete the populist revolution that began more than 200 years ago.

\textsuperscript{185} Brutus No. XV, supra note 131, at 438.