The New Majoritarianism

Robert Justin Lipkin
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INTRODUCTION

American political culture is torn between two warring factions. One battle in this war is over the proper role of the Supreme Court in American democracy. Typically, so-called "conservatives" seek to limit the role of the Court in favor of the elected branches of government.¹ By contrast, so-called "progressives" try to explain and justify a more central role for the judiciary.² The problem is over the counter-majoritarian dimension of judicial review through which unelected, unaccountable judges may overturn the fruits of democratically elected officials, thereby stifling the will of the majority. How can democracy sanction such a counter-majoritarian institution?

Conservatives typically answer this question by appealing to judicial restraint, a form of majoritarianism, which seeks to give the elected branches of government a wider role in ascertaining constitutional meaning. Even some arguably activist conservative justices remain committed to majoritarianism in many areas of constitutional adjudication.³ In fact, the judicial wars between conservatives and progressives often center on the degree of majoritarianism tolerated. Historically,

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³ See SCALIA, supra note 1; McIntyre, 514 U.S. at 358-71 (Thomas, J. concurring).
conservatives give majoritarianism a wider scope than do progressives. Recently, some progressives have begun to take seriously the counter-majoritarian dimension of judicial review. These progressives typically argue for restricting judicial review significantly as a general constraint on judicial decision-making or by insisting on judicial restraint in certain areas of the law.

Now a leading constitutional progressive has weighed in on this controversy. Mark Tushnet argues that majoritarian constitutional interpretation should replace judicial review. Because Tushnet is an important constitutionalist and because his argument is forceful, the stakes here are high. If Tushnet is right, then much of constitutional theory is wrong. In this article, I critically examine Tushnet's new majoritarianism, and argue that he has not made the case for a new progressive majoritarianism, nor for any type of majoritarianism that fails to recognize constitutional review as a distinct form of law-making. In particular, I argue that Tushnet fails to distinguish between constitutional review and judicial review as well as between judicial review and judicial supremacy. Once we make these distinctions, I argue that Tushnet not only jettisons judicial review, but regrettably, he also abandons the deliberative, multi-institutional structure of American constitutional politics. A thorough examination of Tushnet's new majoritarianism helps to reveal certain central, but largely neglected, features of American democratic constitutionalism in which reflection, criticism, and self-correction define constitutional politics.

I. DEMOCRATIC CONSTITUTIONALISM

A. The Problem

The problem of reconciling constitutionalism and democracy has plagued American constitutional culture since the Republic’s creation.

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4. Three important exceptions are the First Amendment (ordinances against hate-speech and anti-pornography ordinances), the Equal Protection Clause (affirmative action), and the Tenth and Eleventh Amendments (federalism).


7. Both the Federalist and Antifederalist papers, as well as the ratifying convention itself, were attempts to harmonize constitutionalism and democracy. See THE FEDERALIST PAPERS (James Madison,
The Constitution's third century has dawned without its resolution. If democracy is to reign, the people must prevail. However, if the people are to prevail, no entrenched constitutional requirements can constrain the people's choice. Consequently, a polity can be democratic or constitutional; it cannot be both. Unless a rapprochement between democracy and constitutionalism is possible, democratic constitutionalism is illusory.

One traditional solution to the problem of democratic constitutionalism is the idea of a written constitution ratified by a majority or super-majority of citizens and which subsequently constrains further majoritarian decisions. However, a written constitution permits replacing the present majority's wishes with the present minority's. Indeed, the very sense of constitutionalism, written or otherwise, is predicated on constraining the present majority's wishes. More importantly, a written constitution needs to be interpreted and applied, and thus some institution must be designed to serve this purpose. In the American constitutional context, the courts have come to occupy that role through the doctrine of judicial supremacy.

By "entrenched constitutional requirements," I mean constitutional requirements that a present majority cannot alter without formally amending the Constitution. These requirements embody the decisions of a past (perhaps, transtemporal) majority. Thus, the problem of reconciling constitutionalism and democracy always seems to identify the present majority with democracy and past majorities with constitutionalism. For the purpose of evaluating the counter-majoritarian problem, it is crucial to identify the relevant majority. Suppose a present majority wrongly thinks that a statute is constitutional. Do majoritarian principles justify the statute's claim to constitutionality despite its inconsistency with past majorities or even with present super-majorities? If the Court strikes this statute down, is its behavior counter-majoritarian because it rejects the present majority, or rather is its decision majoritarian because it upholds the decisions of past majorities? The problem of identifying the relevant majority pervades the counter-majoritarian problem; yet, few theorists address this issue directly. But see generally, Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043 (1988).

Arguably, constitutional or higher law always concerns the real majority trumping errant decisions of the present majority (the real minority) through the Court's interpretation of the Constitution. A present majority can become a real majority through super-majoritarian decisions.

It could be argued that if the methods of change are majoritarian, their entrenchment is unproblematic. Then the majority is governing itself through constitutional requirements. This response is unsatisfactory, at least for majoritarians, because constitutional change formally requires a super-majority, and therefore, in constitutional systems such as ours, the methods of change are exclusively non-majoritarian; a significant minority can withstand the winds of change. And what if a majority seeks alternative methods of change? What should constrain this majority if the polity is truly democratic? How can the wishes of a past, dead, majority prevail? See id. If constitutionalism is inherently undemocratic, democratic constitutionalism must be considered illusory. Discussions of counter-majoritarianism need to identify the appropriate majority and minority involved. Sometimes this distinction indicates only the winners and the losers in some substantive debate. In other cases, the distinction is between a present majority and a past majority and even sometimes between a present majority and a future one.
B. Judicial Supremacy as the Solution

According to the doctrine of judicial supremacy, courts run roughshod over the elected branches of government to enforce majoritarian fidelity to the Constitution.\textsuperscript{10} Constitutional democracy requires fixed standards that are designed to constrain majority rule. The Constitution, through judicial supremacy, supplies these fixed standards that ground all democratic decisions and, therefore, explains the possibility of democratic constitutionalism. Since the legitimacy of democracy rests upon the consent and participation of the governed, and since the legitimacy of constitutionalism rests on striking the right balance between governmental powers and individual rights, constitutional democracy must have rules to guide the operation of the popular will.\textsuperscript{11} Some institution must assume the responsibility of determining whether the decisions of elected majorities are legitimate. In a regime committed to judicial supremacy, the courts carry out this necessary constitutional function. A constitutional democracy is a legitimate form of government, in this view, when the Court—through judicial supremacy—checks the majoritarian branches by determining whether their acts are consistent with the Constitution.\textsuperscript{12}

The foundation of our contemporary view of judicial supremacy was established in \textit{Marbury v. Madison},\textsuperscript{13} but a close reading of this case will show that Marshall’s arguments for judicial review were inconclusive.\textsuperscript{14} Even if a written constitution requires review, it does not necessarily require judicial review. Most importantly, judicial review does not entail \textit{Marbury}'s doctrine of judicial supremacy nor the contemporary enriched conception of judicial supremacy.\textsuperscript{15} Instead, Marshall’s argument can

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\textsuperscript{10} The critical question here is what fidelity means. For an important exploration of constitutional fidelity, see Symposium, \textit{Fidelity in Constitutional Theory}, 65 FORDHAM L. REV. 1247 (1997).

\textsuperscript{11} Another way to understand this is that the Constitution sets up a modified democracy. When the court invalidates a legislative act, therefore, it restrains improper forms of democracy and permits all other conceptions of democracy as constitutionally permissible.

\textsuperscript{12} The doctrine of judicial supremacy is designed as a salient feature of a system of divided powers, limited powers, dual sovereignty, and the protection of human rights. Moreover, judicial supremacy, like the veto, the veto override, and the Senate, is designed to be a necessary feature of those checks and balances that are designed to restrict too much power aggregating to one branch over the others. Constitutional theorists generally, whether restrained or activist, have been committed to judicial supremacy. The division in this camp centers on how broad the judicial role should be, not whether the judiciary should be supreme.

\textsuperscript{13} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{14} In \textit{Marbury}, Marshall gives several arguments, which attempt to show how judicial review is anchored in American constitutional law. \textit{Id.} at 177-78. But see ROBERT JUSTIN LIPKIN, \textit{CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM} (2000).

\textsuperscript{15} See Cooper v. Aaron, 358 U.S. 1, 28-29 (1958).
equally well support legislative or executive review as well as judicial review. In other words, in this view, each branch has the responsibility to constitutionally protect its domain against the other branches. Additionally, each member of the elected branches is personally responsible, as are citizens, to determine whether majoritarian statutes are constitutional.

Unfortunately, this means that the Constitution inconveniently establishes an interpretive equality between and among the branches of government. How is constitutional review to survive given this interpretive equality and the perennial existence of conflicts over constitutional meaning? Some final arbiter is necessary to cure the ills of interpretive equality. Marshall thought judicial supremacy was that cure. However, inferring judicial supremacy from judicial review (or from constitutional review generally) is a *non sequitur*. Though a *non sequitur*, Chief Justice Marshall bequeathed a pragmatically beneficial principle designed to resolve the problem of interpretive equality despite its invalidity as a piece of logic.

16. Further, the argument that putting the elected branches in charge of the Constitution is like putting the fox in charge of the henhouse rests on a cynical—albeit perhaps plausible—conception of politics in the Twentieth Century. At least it overlooks how various constitutional structures provide incentive-compatible or self-enforcing norms to constrain the conduct of legislators and executives. Madison believed that these self-enforcing norms were needed to constrain the conduct of legislators and executives. Indeed, Madison believed that constitutional structures (for example, federalism and separation of powers) were self-enforcing and designed to preclude factionalism, whose effects distort our vision of the common good. Madison, it should be remembered, believed that government’s first job was to control the people; its second and equally important task was to control itself. See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). Self-enforcing norms were a necessary feature of governmental self-control. However, it is not clear that Madison thought that self-enforcing norms were sufficient to constrain the elected branches of government. Instead, Madison allowed the judiciary’s role as a relatively external constraint to evaluate the conduct of the elected branches. Thus, a Madisonian democracy is compatible with—perhaps even requires—judicial supremacy.

17. Constitutional interpretation is not exclusively or even primarily a governmental function; the people as citizens have a responsibility to participate in the dialogic process of interpreting the Constitution.

18. Interpretive equality is not necessarily a coherent notion. It leaves open the question of which branch prevails when the Court and the elected branches disagree. For reasons of efficiency and competence, interpretive equality needs an additional mechanism to settle conflicts between and among the different branches of government. From a majoritarian perspective, it is not obvious why the electoral system or the people’s representatives should not furnish this additional mechanism. In other words, the electorate should prevail in deciding constitutional meaning. When the Court and the elected branches disagree, the people through their representatives will decide which branch should prevail by reelecting their representatives or throwing the bums out.

In *Marbury*, Chief Justice Marshall claimed to establish judicial supremacy over co-ordinate branches of the federal government. In this instance, Marshall held that the Constitution is “the fundamental law of the nation.” *Marbury*, 5 U.S. (1 Cranch) at 177. As for the role of the courts, “it is emphatically the province and duty of the judicial department to say what the law is.” Id. See also Cooper, 358 U.S. at 28-29, for a more recent statement of the concept of judicial supremacy as it derives from *Marbury*. The doctrine of judicial supremacy in these cases means that the Supreme Court’s interpretation of the Constitution trumps the interpretations of other federal and state actors.
The questions remain. How can a society be governed by judges and retain its claim to democracy and popular legitimacy? If judges can invalidate the majority’s instructions, the courts become the new dictators. Clearly, if kings, priests, and aristocrats quash democratic decisions, as do the courts, history would judge them unkindly as counter-majoritarians. But is judicial supremacy not just one more form of tyranny? This counter-majoritarian problem, therefore, suggests the impropriety of the courts serving as final arbiters of constitutional interpretation. Yet, if no other institution is available to effectively and fairly review the voice of the elected branches of government, then popular government cannot be constitutional. Is there any attractive way out of this dilemma?

What happens if the people side with the elected branches against a recalcitrant court? According to present practice, this might cause a constitutional crisis. However, similar situations arise even now and are the source of much majoritarian disdain for judicial supremacy. See, e.g., Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990). These cases suggest a role for judicial review in a regime of legislative supremacy. In Johnson, the Court invalidated a state statute criminalizing the desecration of an American flag. 491 U.S. at 399. In response to this unpopular decision, Congress passed a law designed to achieve virtually the same results as the Texas statute. 18 U.S.C. § 700 (1989). In Eichman, the Court struck down this federal statute despite overwhelming majoritarian support for judicial supremacy.

Similarly, in Employment Div., Dept of Human Resources v. Smith, 494 U.S. 872, 908-09 (1990), the Court altered over thirty years of free exercise jurisprudence by rejecting strict scrutiny (and the creation of exceptions) in free exercise cases when the law is designed for general applicability and does not target a particular religious sect. As in the flag burning case, Congress intervened by passing the Religious Freedom and Restoration Act of 1993. 42 U.S.C. § 2000bb (1993). However, the Court once again invalidated the federal statute in City of Boerne v. Flores, 521 U.S. 507, 536 (1997). Again, a more majoritarian system might permit judicial deference to Congress in such cases when Congress attempts to overrule a Court decision in such thoroughly deliberated controversies. Of course, there might be persuasive reasons why the Court was right on the merits in both cases. Nevertheless, majoritarians should endorse legislative supremacy even when the legislature is wrong. These examples are designed merely to show that it possible for judicial review to operate in a majoritarian regime.

19. The problem here is that federal judges defy complete accountability, which consists of accountability in and accountability out. Judges may be accountable through the input processes of appointment and confirmation. However, unlike legislators and executives, judges cannot be voted out of office. Thus, the people cannot formally disapprove of a judge’s decision as part of normal politics, short of impeachment. Therefore, once a judge is confirmed, he or she has little accountability (out) in our constitutional system.

Moreover, the United States legal culture makes it taboo to contact judges in attempts to influence their decisions, whereas contacting elected officials is regarded as a civic virtue. Indeed, one could argue that the reverence with which we treat judges, especially federal judges and justices, is a ritualized attitude that is inappropriate in a democracy. Judges are citizens, with perhaps a special role to play in American democracy. They are not super-citizens or priests, black robes notwithstanding.

20. Constitutional amendment, in the American context, is an impracticable solution to this problem, and requires a super-majority for change.

21. Two general approaches for resolving this dilemma are available: rejectionism and complex democracy. Rejectionism, including representative democracy and republicanism, attempts to dissolve the dilemma by insisting that the historical constitution was never intended as a purely majoritarian document. Complex democracy, by contrast, maintains that the most plausible normative account of democratic constitutionalism permits judicial review. Both the doctrines of rejectionism and complex democracy
II. THE EMERGENCE OF A NEW MAJORITARIANISM

A. The Reason for Majoritarianism

Constitutional majoritarianism states that no attractive resolution of the problem of democratic constitutionalism is possible without making the elected branches of government dominant in constitutional interpretation. In other terms, a majoritarian voice in constitutional interpretation is necessary if the counter-majoritarian problem is to be resolved. In this view, majoritarian constitutional interpretation is the only form of constitutionalism compatible with democracy. From the beginning of American constitutionalism, this majoritarian refrain has echoed through the centuries.

Progressive majoritarians now join the chorus by recommending a larger role for the elected branches in ascertaining constitutional meaning. These theorists believe that the people or their representatives should settle controversial cases of constitutional meaning. Any progressive democrat can appreciate, at least in ideal circumstances, the attractiveness of this majoritarian proposal. What democrat would balk at a forum of informed, intelligent, articulate, decent human beings settling questions of constitutional meaning? However, in contemporary Western democracies, the ideal is no more than quixotic. What, then, motivates the progressives in joining forces with conservatives in restricting the Supreme Court’s reach? Many of these new majoritarians are supporters of the Warren Court’s progressive egalitarian turn. Why would these progressives retreat from a court-centered constitutionalism? History and theory no doubt play some role with certain progressives. After all, New Deal progressives insisted that an activist Court was undemocratic and unprogressive. Perhaps, the anticipated conservatism of contemporary, and probably future, courts plays an important role also. Additionally, the Court’s restriction or abandonment of affirmative action programs and its general reluctance to narrow the scope of the First Amendment concerning hate-speech and pornography may be two central reasons behind this new phenomenon, namely, the revival of progressive constitutional majoritarianism.

22. Of course, in earlier eras, such as the New Deal, constitutional majoritarianism was conspicuously progressive.
23. This lead to President Franklin D. Roosevelt's failed Court packing plan.
These progressive majoritarians represent the flip side of their conservative counterparts restricting the courts to a peripheral role in American government. Both conservative and progressive majoritarians want to restrict the Court's role in various ways, although they differ on the kind of restrictions. Nevertheless, majoritarians insist upon a restricted role for the Court generally, and thus, a greater opportunity for the elected branches of government to determine constitutional meaning. Typically, majoritarians do not take their argument to its logical conclusion, namely, that the Constitution should be taken away from the courts. That is, not until now.24

B. Tushnet's Populist Constitutionalism

Mark Tushnet has filled this space by presenting an argument for abandoning judicial review entirely.25 Tushnet points out correctly "[w]hat the Constitution means is not necessarily what the Supreme Court says it means. If legislators think the Court misinterpreted the Constitution, their oath allows them—indeed, it may require them—to disregard [the Court]."26 In fact, according to this populist conception of constitutionalism,27 the people through their elected representatives, not judges, are the normative authority behind the Constitution's meaning. After all, what qualifies judges rather than legislators or citizens to be better interpreters of the abstract normative and aspirational contents of the Constitution?

24. Some commentators come close to this position. For example, Michael Klarman suggests that courts need to engage in anti-entrenchment judicial review, and if they cannot, then perhaps they should not engage in judicial review at all. See Michael J. Klarman, Majoritarian Judicial Review: The Entrenchment Problem, 85 GEO. L.J. 491, 537 (1997). Klarman admirably describes the anti-majoritarian entrenchment problems in the majoritarian branches of government.

25. See TUSHNET, supra note 6, at 154-76.

26. Id. at 6.

27. Tushnet does not give a rigorous definition of "populism." Is it different from democratic constitutionalism, liberal constitutionalism, or republican constitutionalism? As far as I can tell populism generally is the view that the people should decide important political and social issues, not powerful elites, and that the people's interests are conceptually tied to the common good in a way that the interests of powerful elites are not. Understood in this fashion, populist constitutionalism is a formal doctrine that does not depend upon the content of a contemporary majority's values. In short, populist constitutionalism has no content other than the view that a contemporary majority shorn of elites is the proper yardstick for determining which policies are desirable. Populism of this sort does not distinguish between conservative or progressive conceptions of the good. Instead, whatever a contemporary majority desires, such as abortion rights, physician-assisted suicide, private property, or tax cuts, should be implemented, and the people or their representatives should decide any constitutional questions associated with achieving the people's interests. Populism is committed to this proposition because as soon as we introduce a mechanism for determining whether the community's reflective wants are its real wants, we turn our backs on populism, or so the argument goes.
For Tushnet, American constitutionalism should be populist. Populist constitutional law is “oriented to realizing the principles of the Declaration of Independence and the Constitution’s Preamble.” Tushnet does not claim that this framework will automatically resolve every constitutional controversy. However, it will define the terms of the debate and encourage some resolutions. And even when resolution is unlikely, the various parties will disagree over how a common parlance in a shared framework should be understood, not over the framework itself.

In advancing this conception, Tushnet appeals to a familiar metaphor of the Constitution and Declaration represented by a picture of a golden apple with a silver frame. The silver frame represents the Constitution and the apple represents the Declaration. For Tushnet this metaphor represents the “thin” constitution in contradistinction to the “thick” constitution that contains all the provisions of the written constitution. This metaphor suggests the Declaration’s foundational normative role in American constitutionalism. The Constitution was designed to express the normative authority of the Declaration, and therefore, should be understood as only a vehicle of the latter. The normative authority is located in “principle[s] of universal human rights justifiable by reason in the service of self-government,” and this populist dimension of American constitutionalism, including its universal conception of human rights, requires the people’s active participation in law making. Populist constitutional law is a process of deliberative self-government structured through universal rights.

Tushnet can defend this conception of the priority of universal human rights philosophically or historically. A philosophical defense would be to isolate the relevant principles in the thin constitution and then show how these principles are normatively and politically attractive. Of
course, any philosophical justification of the thin constitution is likely to be controversial outside of the American context. Instead, Tushnet advocates an historical defense of the thin constitution. For Tushnet "[t]he idea of universal human rights resonates powerfully with the historical experience of the people of the United States. Our public policies have been guided by that idea, imperfectly to be sure, but consistently through our history."32 According to Tushnet, the thin constitution defines, constitutes, and re-constitutes our individual and national identity. American political society is defined by the thin constitution, an icon of the people's creation unfettered by antiquated structures of previous ages. The thin constitution is the basis of a new breed of people, or at least, a new breed of citizen committed to the value of free and equal citizenship for each member of the community. No pedigree for entering the American polity is permitted, except a commitment to free and equal citizenship. Race, gender, class, and ethnic origin are irrelevant.

Who should interpret the thin constitution? Tushnet believes that the Court is institutionally unsuited to interpret the thin Constitution. Instead, he believes that outside the Court, the Constitution leaves "a wide range open for resolution through principled political discussions—principled because they are oriented towards the Declaration's principles."33 Tushnet challenges Marbury's notion of judicial supremacy. If we believe in populist constitutionalism, we must permit the people's representatives to resolve constitutional controversies, not the court, which is after all, an unelected and virtually unaccountable institution.34 Here Tushnet's majoritarianism is similar to conservative majoritarianism.35 However, Tushnet's argument differs from those resting entirely on the counter-majoritarian problem by including questions of political science, not just political theory, in his analysis.36

32. Id.
33. Id. at 185.
34. The question of the Court's legitimacy in a democracy represents one of the central issues in contemporary constitutional theory. For a recent defense of judicial review as a political practice, see Terri Jennings Peretti, In Defense of a Political Court (1999).
35. See sources cited supra note 1.
36. Political science describes, explains, and assesses social consequences of various institutions such as judicial review. Political theory, by contrast, seeks non-empirical arguments concerning the meaning and normative importance of a particular concept, argument, or form of reasoning. The counter-majoritarian problem is essentially a problem of political theory, not political science because it asks whether judicial review is conceptually compatible with democracy, not whether this alleged counter-majoritarian element in judicial review increases or decreases democratic self-rule. The counter-majoritarian problem simply assumes that democracy means majoritarianism and therefore counter-majoritarian institutions must be inconsistent with democracy. Political (constitutional) theorists deploying the counter-majoritarian problem typically fail to explore the possibility of a deeper, more complex form of democracy, not reducible to majoritarianism, a form of democracy that permits or requires judicial review.
For Tushnet the question is what arrangement best expresses the people's choice. Tushnet's argument seeks empirical evidence verifying the majoritarian branches' superiority in interpreting the Constitution. He queries, "[w]hy would anyone think that judicial supremacy was the right way to understand our Constitution?" For Tushnet the question is which branch of government is more likely to produce results consistent with the thin Constitution. Why shouldn't elected officials, appointed officials, and voters make up their own minds concerning constitutional meaning?

For support, Tushnet adopts Lincoln's view that the Court's decision binds only the parties to a case and not other officials or branches of government. Judicial decisions, according to Lincoln, are not restrictions "binding on the voter . . . [or] binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision." Lincoln insisted that the people abdicate their position as the ultimate normative authority if they permit the Court to be the final arbiter of constitutional meaning. Tushnet admires Lincoln, describing him as "an incredibly subtle constitutionalist," whose "statements contain nearly everything we need to work out a theory" that would permit judicial decisions without being "inconsistent with populist constitutional law." Neither Lincoln nor Tushnet elaborate on just how this populism operates. If everyone has the same effective power in deciding upon the constitutionality of a piece of legislation, whose judgment controls when these decisions inevitably conflict? For Tushnet, populism is all there is to the extent of embracing a current majority's endorsement of judicial supremacy. Tushnet's position implicitly overlooks non-populist, republican, or

37. Of course, Tushnet needs to present an argument for this contention. Talking about "the people" as some undefined but homogeneous foundation determining constitutional structure is unlikely to work. For one thing, as Morgan and others point out, "the people" is not a determinate conception. Who counts as the people often depends on one's political and constitutional values, and so cannot be a basis of those values. See Edmund Morgan, Review of Ackerman, in NY REVIEW OF BOOKS 46 (1994).

38. TUSHNET, supra note 6, at 7.

39. Judicial supremacy is, on this view, counter-intuitive because its benefits are inconclusive. No empirical data supports the contention that the Supreme Court gets constitutional issues right more often than the legislative branches.

40. TUSHNET, supra note 6, at 9 (alteration in original).


42. It is unclear whether Lincoln rejected judicial supremacy only in cases like Dred Scott, or whether he rejected it generally. Tushnet argues against judicial supremacy (and judicial review) generally. In fact, rejecting judicial supremacy, whether in a particular case or generally, raises similar questions about the rule of law.

43. No doubt, Tushnet would reject the soundness of such a position while upholding the majority's right to embrace it. See Mark A. Graber, The Law Professor as Populist, 34 U. RICH. L. REV. 373, 412 (2000).
complex theoretical conceptions of democracy. More importantly, Tushnet does not explain the relationship between populism and progressivism.\(^4\)

**C. The Political Question Doctrine: A Majoritarian Paradigm**

The political question doctrine is the paradigm of Tushnet's majoritarian constitutionalism.\(^4\) According to this doctrine, the Constitution gives final authority to the elected branches in deciding upon the meaning of certain constitutional provisions. Therefore, judicial review is inappropriate in these cases. For example, the Court held in *Nixon v. United States*\(^4\) that questions concerning the impeachment process should not be subject to judicial review, because ultimate authority and responsibility for impeaching and removing the President from office rests with Congress.\(^4\) According to the Court, no constitutional basis for judicial review of Congress's conduct exists in this area.\(^4\) For Tushnet, the political question doctrine is a self-imposed chink in the armor of judicial supremacy, since it illustrates how, at least

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\(^4\) Basically, populism refers to the undiluted rule of the people. For Tushnet populism "means the enactment into public policy of the people's views, whatever they happen to be." Mark Tushnet, *Response, Politics, National Identity, and the Thin Constitution*, 34 U. RICH. L. REV. 545, 553 (2000). Of course, Tushnet must then be directly concerned with the institutional means of determining what the people's views are. In short, he must show how the present legislative and executive process genuinely reflects the people's views. And that requires a much more comprehensive argument than is presented in *TAKING THE CONSTITUTION AWAY FROM THE COURTS*. TUSHNET, supra note 6.

By contrast, progressivism is a certain view of justice, equality, and the liberty to live a meaningful life. Populism can be conservative, even fascistic; progressivism, at least in theory, cannot be. Populism, at best, is only one democratic value, while progressivism seeks the expression of eclectic democratic values. As Graber puts it,

> Participatory democrats celebrate democracy not simply for giving ordinary citizens a say in their governance, but as the political system most likely to improve human capacity. Rather than proclaim the supremacy of one democratic value, the best strain of progressivism strives to find means by which democracy will benefit from the wisdom of ordinary people and from the trained capacities of persons with particular expertise in governing.

Graber, supra note 43, at 412.

\(^4\) In present circumstances, the specter of judicial rejection distorts the democratic process. This "judicial overhang" causes legislators to avoid judicial interference by writing laws that reflect what the legislators think courts will accept. See TUSHNET, supra note 6, at 57-65. This influences the legislators' reasoning and as a result prevents current evaluations of the elected branches' fidelity to the Constitution. Democratic participation itself is diminished by the prospect of judicial review. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); see also Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?*, 88 NW. U. L. REV. 9, 11 (1993). Since the political question doctrine abandons judicial review (though perhaps not entirely), it provides a useful context for assessing whether the Constitution away from the Court is self-enforcing.


\(^4\) Id. at 237-38.

\(^4\) See id.
in one important area, that the Constitution can be taken away from the courts. Tushnet does not deny that constitutional issues arise from the political question doctrine, just that institutionally the Court should stay out. Obviously, if Congress removed a judge or President for high crimes and misdemeanors because he or she was physically unattractive, it would be acting unconstitutionally. However, populist constitution­alism leaves the remedy to the people and future elections, as well as to the motives of legislators, however submerged, to do the right thing.

Tushnet then generalizes the scope of this doctrine by suggesting that all constitutional issues can be treated in a similar fashion. In short, he contends that "if legislators are committed to some constitutional values in a way that justifies some aspects of the political questions doctrine, we have to consider the possibility that they might be committed to a wider range of such values than our traditional way of thinking about legislators assumes." Tushnet’s vision echoes Madison’s desire to construct a government in which crass or selfish motives cancel each other out and are then replaced with civically oriented motives. Tushnet believes that no constitutional framework exists that avoids crass motives in every case. However, he seeks a structure through which political motives may sometimes coincide with constitutional motives.

D. The Key to the New Majoritarianism: Self-Enforcing Norms

The central constitutional question for Tushnet is whether constitutional structure encourages governmental officials to enforce the requirements of the Constitution through their own legitimate motives for action. Tushnet rests his case on this important point: value- and structure-based incentives will motivate lawmakers to pass laws consistent with the Constitution. If Tushnet fails in this critical response, he fails period. Consider his words:

I have developed the view that a combination of value-based and structure-based incentives makes it sensible to think of the Constitution’s provisions dealing with federalism and separation of powers as self-enforcing. The constitutional values protected by those features of our Constitution would not be threatened by eliminating judicial review, particularly when we recognize that the courts might

49. TUSHNET, supra note 6, at 107-08.
50. See infra notes 50-54 and accompanying text.
themselves mistakenly bar our representative from adopting policies that are in fact consistent with the Constitution.\textsuperscript{51}

The key to Tushnet's argument is that constitutional principles such as separation of powers and federalism are incentive compatible or self-enforcing. Considerations of political self-interest combined with genuine, though minimal, respect for American constitutionalism will in most cases prompt legislators to make the right decision.

Tushnet is a savvy observer. He does not maintain that legislators at their worst are better at interpreting the Constitution than judges at their best. In this regard, Tushnet is fully aware that legislators make mistakes, but so do judges. From an historical perspective, neither legislators nor judges have a corner on the market of constitutional accuracy.\textsuperscript{52} Tushnet's majoritarianism, however, insists that on a "moderately bad day" legislators are probably as good or better than judges. If so, placing constitutional interpretation in the hands of the elected branches helps realize democracy's goals better than alternative arrangements.

To evaluate this thesis it is necessary to validate complex empirical judgments about the comparative constitutional accuracy of legislatures and courts. Tushnet does not pretend to adequately provide the empirical evidence validating the greater accuracy of the legislature. But neither do his critics demonstrate the superiority of the courts. And Tushnet does appear to be normatively committed to the view that legislative mistakes are more palatable than judicial ones because the people's mistakes are preferable to that of an elite judiciary.\textsuperscript{53} Distributing constitutional interpretation between the majoritarian branches and the courts fails to exorcize the role of the elites in interpreting the Constitution. For Tushnet, "[t]he question of whether the Constitution is self-enforcing, then, probably is an all-or-nothing proposition: Either we have a Constitution that the courts enforce entirely . . . or one that is entirely self-enforcing."\textsuperscript{54}

To illustrate this important feature of Tushnet's argument, consider the issue of whether the federal government can mandate minimum wages for state governmental employees through the Commerce Clause. In a five to four decision, the Court in \textit{National League of Cities v. Usery}\textsuperscript{55}

\footnotesize{\textsuperscript{51} TUSHNET, \textit{supra} note 6, at 123.}
\footnotesize{\textsuperscript{52} Tushnet's position seems to rely on some intuitive sense of when courts or legislators derive the right answer to a constitutional question. If so, he must explicate what the notion of a right answer means.
\textsuperscript{53} Here the counter-majoritarian problem does appear to influence Tushnet's views.
\textsuperscript{54} TUSHNET, \textit{supra} note 6, at 126.
invalidated such a law. Shortly thereafter, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court reversed itself, because Justice Blackmun writing the majority opinions in both cases changed his vote. For Tushnet, Blackmun's decision in *Garcia* vindicates the Madisonian position that "the principal means chosen by the Framers ensure the role of the States in the federal system" by giving Congress the authority of such decisions in the structure of the Federal government itself.

According to this structural feature of federalism, since members of Congress are state citizens elected by the people in individual states, the states have an effective role in protecting their interests through the federal government. Courts are not necessary to protect against federal intrusion into state affairs. In other cases, such as the Brady Handgun Violence Prevention Act and the Religious Freedom and Restoration Act (RFRA), the states raised the issue of federalism and lost both times. Tushnet rejects the view that "they lost because Congress was structured in a way that induced it to overlook state interests. They lost because Congress disagreed with the positions state officials were asserting . . ." over what constituted state interests.

Tushnet also offers a separation of powers example of a self-enforcing constitution. Consider the case of former President George Bush's flirtation with instituting the line item veto without congressional approval or amending the Constitution through Article Five. The

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57. TUSHNET, supra note 6, at 126.
59. TUSHNET, supra note 6, at 101. Of course, it is difficult to evaluate these victories and losses without some independent conception of what counts as the proper balance between the states and the federal government. Although, Tushnet might be right that Congress is not structured to overlook state interests generally, it might nevertheless be true that, at any given time, a majority of federal legislators might favor state interests in greater federal power over those state interests in greater state power. In both cases, state interests prevail, but not necessarily state interests in trumping federal regulation.

True, congressional representatives are also state citizens and will have the interests of the state at heart. However, federal legislators will be motivated to satisfy two sets of state interests. When state interests require a stronger federal government, members of Congress will draw the federalism balance in favor of the federal government. When state interests favor stronger federal powers, Congress will decide accordingly. In these circumstances, state interests always prevail. If so, it is impossible to understand, let alone test, how federalist legislation can be self-enforcing. Only if the correct balance is whatever Congress thinks it is, does the claim that federalism is self-enforcing become persuasive. And then only because by abandoning the idea of determinate constitutional meanings, the idea of a right answer to the question of federalism is trivialized.

If the notion of federalism is conceptually determinate, it means that in principle some definite conception of federalism is true, even if it is not epistemically determinate, that is, even if we do not know which conception is true. See generally Robert Justus Lipkin, *Beyond Skepticism, Foundationism, and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811 (1990).
60. U.S. CONST. art. V.
traditional interpretation of presidential power permits the President to veto or to sign an entire bill. He cannot sign the bill while simultaneously vetoing its objectionable provisions. Originally, before omnibus or packaged legislation, bills addressed a particular issue and could be voted on up and down, and then vetoed or signed into law. However, bills now are multi-issued. Therefore, since the Framers contemplated only single issue bills and not multi-issue ones, this expectation permits a contemporary president to delete single issues from omnibus bills.

President Bush was tempted by this argument, but refrained from implementing it on his advisors' warning of the political flack he would suffer by inventing the line item veto \textit{ex cathedra}. Bush took their advice and declined to risk political disapproval. Tushnet concludes, "[t]he Constitution was self-enforcing in this instance."\footnote{TUSHNET, \textit{supra} note 6, at 115.} For Tushnet, other examples exist of self-enforcing norms that are structural features of American constitutionalism.\footnote{TUSHNET, \textit{supra} note 6, at 115.}

What generally explains these features of politics American style? Tushnet believes that a combination of value and structural incentives encourage, albeit imperfectly, legislators to act in a constitutionally responsible manner. Value incentives are based on a preferred or privileged conception of constitutional meaning, or to put it in Tushnet's terms, they favor a particular interpretation of the Constitution. Value incentives are those determinate features of the Constitution to which legislators are committed out of respect for the Constitution. Provisions yielding value incentives ideally explain why the Constitution is self-enforcing with regard to those provisions. Structural incentives, by contrast, are the political motives that derive from the operations of government. Are these two types of motives sufficient to explain majoritarian fidelity to the Constitution? Tushnet takes seriously the proposition that they are. But isn't there an unfair advantage to those legislators motivated solely by structural features? Not always. Surprisingly, sometimes "\textit{[p]olitical considerations demand that the legislator take a position that rules our direct consideration of politics.}"\footnote{TUSHNET, \textit{supra} note 6, at 115.} In these cases, a legislator's self-interest counsels acting on a value

\begin{footnotesize}
\begin{enumerate}
\item TUSHNET, \textit{supra} note 6, at 115.
\item It is unclear that Tushnet could marshal sufficient evidence for his thesis concerning self-enforcing government. Consider the executive war powers controversy over whether the President has the constitutional prerogative to initiate war. The plain meaning of Articles I and II of the Constitution clearly give this power to Congress, while making the President commander-in-chief once war is declared. Yet, presidents since Truman, if not before, have assumed the power to make war. It is not clear that the War Powers Act remedies this situation because it is the functional equivalence of granting the President the power to declare war, and Congress lacks the authority to do so.
\item TUSHNET, \textit{supra} note 6, at 115.
\end{enumerate}
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incentive. Tushnet concludes tentatively that the combination of these motives over the course of America's political development might make the entire Constitution self-enforcing. His central point is that "[t]he Constitution outside the courts should be a thin Constitution if it is to be self-enforcing through a political process that combines structure-based and value-based incentives."64

What about individual rights? Tushnet believes that individual rights are also ultimately self-enforcing, though the argument here is somewhat different. In this context, his argument essentially relies on alleged empirical data suggesting that the courts have been far from unsullied guarantors of individual rights.65 According to this position, both liberals and conservatives misconceive the implications of judicial decisions. Liberals place too great a faith in the Court's inclination and ability to protect individual rights, while conservatives are unjustifiably anxious over activist courts. Courts are not nearly as amenable to rights activism as liberals expect or as conservatives fear. Moreover, the great accomplishments in guaranteeing civil rights, for instance, has been driven by legislative, not judicial intervention.66

Tushnet's view is committed to the proposition that since no one's rights are significantly greater under a regime of judicial supremacy than under a regime of legislative supremacy, and that since the courts are not obviously better in protecting rights than the legislature, the proper forum is the legislature. According to this conception of populist constitutionalism, principled discussion of constitutional rights can and should be carried on by the legislature, public officials, and voters. No guarantee of constitutional fidelity or perfection is offered.67 Rather, the rejection of judicial supremacy is the most normatively appropriate and empirically efficient proposal available in a democracy.

Tushnet's argument is self-consciously tentative. It can be stated as follows:

If we accepted the controversial empirical judgments about how the political system actually operated, and if we thought that a stable constitutional system could be founded on such judgments, and if we were able to free ourselves from our obsession with the courts, and if we paid attention to the thin Constitution of the Declaration's

64. Id. at 113.
67. Conceptually, it is not obvious what "rights granted by the majority" might be. Are they still rights or entitlements? Typically, rights are conceived as constraints on the majority. If we ground rights in majoritarian decisions such constraints seem illusory.
principles, then we would find that the idea of a self-enforcing Constitution describes an attractive way of distributing constitutional responsibility throughout the government.  

This argument is at best self-fulfilling.  Even if Tushnet is correct, attractiveness is not equivalent to the best theory, or even to the most plausible theory. More importantly, certain conceptual objections to his argument may be fatal even to its attractiveness or plausibility.

III. OBJECTIONS TO TUSHNET’S NEW MAJORITARIANISM

A. The Importance of Tushnet’s Populist Constitutionalism

The new majoritarianism is important in at least two respects. First, in contemporary constitutional jurisprudence, majoritarianism had been associated with conservative constitutional judges and theorists. These individuals typically embrace the status quo as the appropriate baseline for evaluating proposals for social change, rejecting judicial activism as illegitimate because it is undemocratic. Generally, the conservative vision counsels only incremental change; whenever change does occur, it should be driven by legislative decisions not judicial ones. Conservative jurisprudences typically resist sweeping judicial decisions as insufficiently tested in experience, but reluctantly accept such decisions when they are based on majority rule. Sweeping judicial solutions are therefore doubly inappropriate. First, they are sweeping decisions that conservatives reject. Second, they are sweeping judicial decisions. Thus, they lack both wisdom and legitimacy. According to this type of conservatism, when the Court engages in social engineering, it is acting as a superlegislature, and a bad one too. Tushnet’s new majoritarianism, in contrast, is predicated upon the hope of more progressive majoritarian decisions. Nevertheless, it is puzzling why Tushnet would join forces with this traditionally conservative form of constitutionalism absent clear evidence of a progressive majority.
The second reason the new majoritarianism is important is that Tushnet himself is an important figure in the history of American constitutional theory, one who was schooled and trained in the heyday of the Warren Court's judicial activism, and one who has substantive progressive views. It is therefore intriguing that such a progressive legal theorist would construct the most comprehensive rejection of judicial supremacy yet. Moreover, to my knowledge, Tushnet is the only prominent majoritarian, conservative or progressive, advocating the abolition of judicial review. Both sympathizers and detractors alike must take this work seriously. In the next section, I discuss some critically important problems that must be resolved before Tushnet's new majoritarianism can be seen in its proper light.

B. Why Take the Thin Constitution Away from the Courts?

Tushnet’s theory seems to conflate two contrasts. The first contrast distinguishes between the thin and the thick constitutions, while the second contrast is between the courts and the legislature. Two different questions exist here: (1) which constitution, the thin or the thick one, should govern constitutional law? and (2) which branch of government should interpret the constitution in (1)? Tushnet does not adequately distinguish between these interpretive and institutional questions.

Abandoning the written Constitution is a question of politically interpreting the periods of independence and founding. What best explains the underlying normative reasons for the beginnings of the fledgling republic? Taking the Constitution away from the courts is a question of institutional role and does not imply that the relevant constitution is either thin or thick. This institutional question essentially refers to interpretive competence and legitimacy in explicating the meaning of the Constitution; it says nothing about which constitution is the appropriate one. And Tushnet gives us little reason for deciding in favor of the thin Constitution.

74. Erin Daly has pointed out in conversation that one might accept the distinction between the thin and thick constitutions, yet dispute which texts qualify as one or the other. Moreover, ratification and consent are critical reasons for preferring the Constitution to the Declaration concerning political legitimacy.

75. Tushnet boldly advocates re-defining the American Constitution. Rather than keep the original, written Constitution as the central constitutional and legal text, Tushnet proposes that we construct a new and hybrid document, namely, the Declaration of Independence and the Constitution's Preamble. However, he fails to explain what justifies or legitimizes this move. What in constitutional or democratic theory justifies Tushnet's selective identification of America's Founding document? Tushnet needs to argue for the connection between the thin constitution and majoritarianism. That the constitution is thin does not entail that the elected branches of government should be responsible for interpreting it.
For Tushnet, the normative and aspirational content of the thin constitution shows the Declaration to be the basis of American constitutionalism and politics. The Declaration precedes the Constitution, and its insistence on equal rights is the basis of populist constitutionalism. The problem with Tushnet’s argument that is that it confuses questions of separation or independence with questions of founding. On the one hand, the question of separation concerns the factors relevant to rebelling against tyranny. Which factors explain the legitimacy of declaring independence from an oppressor? In this context, the meaning and rhetoric of such cataclysmic events are very much tied to the trauma, perhaps desperation, in attempting to separate in the first place. Questions of independence are almost by their very nature temporary and immediate. Rebelling from tyrannical rule comes about when oppressive circumstances overwhelm the founding generation. The separation question is immediate, more acute, and directly designed to rectify the oppressive consequences of an unpalatable alliance with a considerably stronger power.

In contrast, questions of founding ask how we should go on together once the separation is achieved. What sort of society should we now construct? The question of founding is more circumspect, more long-term, and more reflective about what the society’s basic values are and how they should best be expressed in constitutional law. For example, even if the notion of equality in the Declaration is populist or progressive, it is not obvious that equality must serve the same function in the Constitution. The different purposes behind the Declaration and the Constitution suggest that neither must be seen as a reflection of the other.

If the Declaration is, or is seen to be, a progressive document, then progressives may see it as the basis of the Constitution. However,

76. However, the aspirational or idealized meaning of the Constitution is indeterminate. We simply do not know how to interpret and recombine texts according to their aspirational meaning. Without such knowledge, it is simply a non sequitur to infer from this constitutional ideal that the Declaration is part of our founding document. Further, in actually using the thin constitution to govern, Tushnet needs to explain how legislators whose role is created through the auspices of the thick constitution could possibly abandon it and instead appeal to the ideals in the Declaration and the Preamble.

77. But see SCALIA, supra note 1, at 134 (arguing that the Declaration is aspirational and philosophical while the Constitution is pragmatic).

78. It is not clear whether Tushnet’s majoritarianism is populist or progressive or both. Populism, typically, refers to people deciding whatever it is that they want. By contrast, progressivism refers to a process by which people want freedom, equality, and community, and the opportunity to define these values for themselves. A populist constitutionalism need not be progressive. However, progressive constitutionalism at some level needs to be populist.

79. Given the (perhaps understandable) inequality at the time of the Declaration, it is a stretch to call the document a progressive one.

80. See SCALIA, supra note 1, at 134.
progressives, like anyone else, must provide an argument demonstrating the Declaration’s saliency. It may be easy for certain progressives to link a progressive interpretation of the Declaration with the Constitution. I myself am attracted to such linkage. But progressive advocates of the thin Constitution must realize that their enterprise is implausible in two important respects. First, even if the Declaration is progressive, it is necessary to show why the Constitution should be viewed as an articulation of the Declaration. Second, progressives must show that the Declaration is progressive not merely concerning independence, but also concerning the founding. While equality might be a supreme value regarding the interrelations between different peoples, it might be less important, or alternatively more dangerous, when constructing a society anew. Neither Tushnet nor anyone else has satisfactorily demonstrated that there exists a conceptual and normative connection between the Declaration’s conception of equality and the Constitution’s.

Most importantly, Tushnet overlooks the jurisprudential problems underlying the construction of the thin constitution. First, by what authority does one begin to select texts and parts of texts and then integrate them into a new constitutional document? And, assuming the authority, which jurisprudential framework is required for creating Tushnet’s “thin constitution”?

Naturalism might integrate the various parts of the thin constitution. In this view, if true general principles exist which explain linking the Declaration and the Preamble, then a naturalist might argue that the two documents are linked. However, in this case, we can drop the thin constitution and resort directly to the relevant naturalist principles. Moreover, it is highly unlikely that a real consensus exists over the content and implications of these principles. Even if such principles were not contested, it is difficult to see how democracy arises out of naturalist principles never acted upon by the citizens of the polity.

Similarly, coherentism might explain the integration of the various documents in the thin constitution. On this view, we can link the Constitution to the Declaration by showing how the former is an articulation of the latter. Nevertheless, even if we are successful in

81. But see Balkin, supra note 29, at 180 n.5.
82. Naturalism contends that true moral principles exist in nature independently of human convention. See generally JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).
84. Coherentism maintains that judges construct coherent principles arising from the legal system. The best coherentist theory is Ronald Dworkin’s law as integrity. See DWORKIN, FREEDOM’S LAW, supra note 2.
providing a generally acceptable argument that the Constitution articulates the principles in the Declaration,\textsuperscript{85} it does not follow that the Declaration should take precedence over the Constitution in law, or that we are permitted to abandon the thick constitution in favor of the Declaration. Without some democratic authority for this integration, it is difficult to see how Tushnet's conception of the thin constitution is plausible.

Finally, if Tushnet's theory is positivist, it requires an articulated rule of recognition for validating the thin constitution.\textsuperscript{86} Tushnet fails to provide such a rule.\textsuperscript{87} After all, the Founders never ratified the thin constitution as the law of the realm.\textsuperscript{88}

Constitutional pragmatism is the most likely prospect for integrating the founding documents. Pragmatist theories answer the question of whether and how to integrate the various documents in the thin constitution by determining whether the broad consequences of doing so are desirable. According to this view, the Declaration may be integrated with the Preamble of the Constitution because doing so provides a unified account of the purposes and goals underlying American constitutionalism. Pragmatists can simply say it would be good to consider the Declaration and the Preamble as the foundation of American constitutionalism. Nevertheless, constitutional pragmatism must have some parameters if it is to be plausible. Even if conceivable,
it is hardly likely that pragmatism has the resources necessary for formally explaining the link between the Declaration and the Preamble. The analytic structure for determining the connection between texts is more elaborate than most pragmatist theories allow. Pragmatism as a general device connecting various legal documents might be possible but only in a heuristic or suggestive sense, when its use, for instance, provides a greater understanding of the thick constitution. However, it is difficult to see how it can justify the abandonment of the thick constitution. Thus, it is unlikely that pragmatism could justify the Declaration as constitutionally binding on the citizenry.\footnote{Of course, a suitably capacious conception of pragmatism might work here.}

However, even if pragmatism could work, it cannot work for Tushnet, since he seems to be committed to positivism. Hence, it is incumbent on him to explain the positivist basis for this integration. Positivism might be able to establish the link between the various provisions of the thin Constitution, but only if some relatively well defined rule of recognition is first devised. The positivist basis of American constitutionalism is consent broadly construed. Consequently, a positivist conception of the thin constitution must show how its various parts were consented to individually, but even more importantly, consented to as the thin constitution. I do not see any chance of this argument succeeding.\footnote{It might have been different. If the Founders deliberated about the question of linkage and if the ratification of the Constitution depended upon the acceptance of the idea of a thin constitution, then history might support Tushnet’s position. However, it is unlikely that we can explain the constitutional convention and the subsequent period of the ratification debates by positing a thin constitution as the document to be created.}

Nowhere in the relevant founding documents can one glean that this rule was used to decide upon the creation of the thin Constitution. Thus, Tushnet’s positivism appears to be inadequate as the jurisprudential basis of the thin Constitution.\footnote{Tushnet could argue that consent to adopt the thin constitution can come about informally through constitutional culture if the relevant institutions and actors regard it as authoritative.}

C. Why Take the Thin Constitution Away from the Courts?

For the sake of argument, let us assume that the thin constitution should legitimately replace the thick constitution. Tushnet must explain why the political branches of government and not the courts should institutionally interpret this replacement. Tushnet appears to equate the thick constitution with arcane and obfuscatory legal reasoning, the sort of approach favored in law schools, including such terms of art as standards of review, content and viewpoint neutrality, \textit{de jure} and \textit{de facto} discrimination, and so forth.
This discourse and its attendant reasoning enable judges to decide cases in a competent manner. Yet, these devices also preclude genuine democratic deliberation over constitutional controversies. Tushnet's point calls for normalizing constitutional jargon, if that is possible and desirable. However, even if normalization is a worthwhile goal, it does not entail giving up either judicial review or even judicial supremacy.\textsuperscript{92} It just means that the institution responsible for constitutional interpretation should deploy a jargon-free discourse. In principle, there is no reason to believe that the legislature is better at using a jargon-free constitutional discourse than the courts. And given the assumption that the thin constitution is preferable to the thick constitution, there is little reason to insist that the courts cannot use the thin constitution better than they use the thick constitution. Thus, adopting a jargon-free discourse for constitutional interpretation does not automatically show that the document should be taken away from the courts.\textsuperscript{93}

Tushnet might reply that if we embrace the thin Constitution, there is nothing the courts do any better than the legislature. In this view, the Court's claim to legitimacy, in part, is due to its special competence in constitutional interpretation. If general principles of the thin Constitution constitute the appropriate constitution, then any educated citizen can engage in constitutional interpretation.\textsuperscript{94} While this is true, some institutions may carry on a particular discourse better than others.

\begin{itemize}
\item \textsuperscript{92} Without the thick constitution, Tushnet fails to explain the principles of separation of powers, federalism, or any of the principles for organizing government.
\item \textsuperscript{93} Nothing stops a populist constitutionalist from insisting on jargon-free discourse as well as on appointing non-lawyers to the Court as a means of further democratizing the Court without accepting majoritarianism. In other words, a populist theorist can adhere to judicial supremacy while making the Constitution more populist and user friendly. In short, it does not follow that legislators are better users of jargon-free constitutional discourse than are judges. After all, judges spend their professional lives engaging in the appropriate discourse. That others without legal education or training can, if they were inclined, learn to engage in this discourse does not suggest that they will, especially if like legislators, they have other pressures in executing their responsibilities. Even if constitutional law and theorizing is just a form of political theorizing, it doesn't follow that the political branches are likely to carry out this reasoning better than intelligent, informed people, lawyers or not, who are asked to engage in constitutional interpretation.
\item \textsuperscript{94} This proves too much and too little. It proves too much because if true it contradicts the familiar assumption that judges need to be lawyers. On this assumption, legal discourse and reasoning require a certain expertise. Perhaps, this assumption ought to be reconceived, especially in light of the possibility of considering non-lawyers as judicial candidates. Why not appoint knowledgeable or street-wise, non-lawyer citizens to the Court? It is an idea worth considering independently of the present issue before us. Postmodern turns in legal theory suggest that neither law generally nor constitutional law in particular are autonomous domains of human inquiry. Constitutional theorizing is a form of political theory more limited than abstract political theory to the particular historical conditions of the society involved. Thus, let us evaluate candidates for the Court according to the quality of their understanding of American culture and politics. The assumption proves too little because conceding the need to extirpate jargon from constitutional law does not entail taking the Constitution away from the courts.
\end{itemize}
We can spell out this point by distinguishing between two kinds of political judgments or norms. The first kind, or first-order judgment, concerns the political and social desirability of certain governmental programs, such as social security or tax reduction. Second-order judgments derive from a discourse for perpetuating constitutional traditions, broadly construed. In other words, they seek to determine which present decision will legitimately and authentically extend the relevant tradition into the future. Second-order judgments determine the pedigree of first-order judgments. Constitutional law represents an integration of first- and second-order judgments, the latter determining the permissibility of the former.95

Certainly, these second-order norms ought to be as jargon-free as possible. Second-order constitutional norms ought to be reconceived as a form of politics, but not necessarily interest-group politics. Instead, constitutional discourse involving these second-order norms ought to comprise a mid-level political theory of the particular polity in question. As such, the branch of government responsible for constitutional reasoning should deal in a discourse that articulates these second-order norms, norms that though inevitably contestable, define historically and normatively the political identity of its citizens. Thus, if the thin constitution rejects second-order norms, it simultaneously rejects constitutionalism.96

Tushnet appears not to recognize the idea of constitutional reasoning as involving a discourse of second-order constitutional norms.97 If he did, he would see that both legislators and judges could in principle perform second-order reasoning.98 Further if we take the Constitution away from the courts, we should be mindful to find a home for it in an institution that can effectively engage in second-order reasoning.99 This

95. Cf. HART, supra note 87, at 71-78.
96. In this article, I do not argue for this conception of constitutionalism as the interaction of first- and second-order norms and judgments. See LIPKIN, supra note 14, at ch. 5. However, without some such distinction it is difficult to figure what “constitutional reasoning” means.
97. In embracing the thin constitution, Tushnet need not abandon second-order reasoning. However, he must explain the nature of the thin constitution’s second-order discourse.
98. It is far from obvious why an independent governmental branch, dedicated to analyzing and interpreting second-order norms, is undesirable in a deliberative democracy. In fact, it is more likely that independent attention to these second-order norms is necessary for any genuine collective deliberative decision-making. If we take the entire government structure to constitute the American deliberative system, it is not obvious why a non-majoritarian branch cannot effectively perform this process of integrating first- and second-order norms in a process of self-government. Rejectionists generally take this position. They question the force of the counter-majoritarian problem because for them what must be democratic is the entire government, not necessarily each particular branch. See, e.g., STEVEN H. SHIFFLIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 84 (1990).
99. Sometimes this distinction between first- and second-order norms is expressed by the distinction between policy and principle. However, both first-order and second-order norms affect policy and both
new home, which for Tushnet is the majoritarian branches, should not collapse second-order and first-order norms. Taking the Constitution away from the courts should mean that legislators must now develop greater acumen in using second-order reasoning, not that they should give up its importance. Similarly, leaving the Constitution in the courts does not mean a return to jargon-filled legal mumbo-jumbo. Rather, it means whoever legitimately interprets the thin constitution should be capable of conducting second-order reasoning through a discourse that is accessible to informed citizens.

Without some account of the distinctive content and structure of constitutional reasoning, Tushnet’s approach repudiates constitutionalism. A constitutional republic requires a distinction between first-order norms and second-order norms. When Tushnet collapses the thick constitution into its thinner cousin, and when he contends that the thin constitution abhors the judiciary, he tacitly rejects the view that there exist second-order constitutional norms that some branch or combination of branches of government must administer. In Tushnet’s constitutional universe, it seems that evaluating a bill’s constitutionality is indistinguishable from evaluating its political expediency or desirability. Does constitutionalism disappear in the process of transforming the thick constitution into the thin one? If the thinness of the thin constitution is attributable to an absence of constraint or indeterminacy, doesn’t Tushnet’s project mean abandoning constitutionalism? Given the thinness of Tushnet’s constitutionalism, it would seem especially important to explicate the thin constitution’s critical terms in a manner coherent with both an attractive abstract political theory and an accurate historical understanding of American Constitutionalism.

types of norms can be principled.

100. While Tushnet does agree that constitutional reasoning requires a process of monitoring, he does not appear to recognize that this monitoring process must imply a form of discourse and reasoning different from ordinary majoritarian decisions. See Tushnet, supra note 44, at 555-56. By failing to specify the substantive nature of the reasoning involved, Tushnet appears to be jettisoning constitutional review along with judicial review.

101. This raises a problem of educational and intellectual elites in a democracy. Should a commitment to democracy also reject intellectual jargon?

102. Not necessarily. If Tushnet agrees that constitutionalism involves second-order norms, then taking the Constitution away from the courts and placing it as the thin constitution in the legislature what remains is second-order discourse (although one different from the second-order discourse of the thick constitution) with which legislators must now learn to use. What Tushnet overlooks is that constitutional discourse can survive (changed or not) if it provides legislators with a form of description and interpretation that permits them to evaluate legislation for its second-order authenticity. What kind of legislative reasoning would count as constitutional review once we take the Constitution away from the courts? What theories of legislative interpretation are available to provide legislators with insight into interpreting the thin constitution?
Tushnet fails to explain the legitimacy of the thin constitution. Is it merely an effective heuristic device or is it grounded in a jurisprudentially respectable account of the individuation and identity of constitutional texts? Is Tushnet, after all, creating a new constitution? No doubt, the thin constitution inspires, but is it the real constitution? What counts as the real constitution? Tushnet needs to answer these questions. Also, Tushnet assumes unjustifiably that if the thin constitution is the appropriate constitution, it must be taken from the Court. On the contrary, the questions of which is the appropriate constitution and which branch of government should be responsible for constitutional interpretation are separate questions. Even if we embrace the thin constitution as the real one, it does not follow that the elected branches are best able to interpret and apply its provision to constitutional controversies.

D. The Interpretive Question in Tushnet’s Majoritarianism

How should the elected branches interpret the thin constitution? Which methods and procedures of review should they adopt? Even if Tushnet rejects the idea of second-order norms, he must give an account of legislative constitutional interpretation and review. Such an account might mirror court-centered, constitutional interpretive theory, distinguishing textualism, originalism or intentionalism, structuralism, and normativism, or it might provide a novel taxonomy of interpretive methodologies, or some combination of both. For legislators to interpret the thin constitution in order to validate statutes, they must then take a stand as to which methodology is appropriate, and the familiar arguments between and among judges, the academy, and concerned citizens will resurrect themselves. That might not be such a bad development.

However, Tushnet’s populist majoritarianism seems to be a detour around such interpretive quandaries. In other words, adopting the thin constitution in the legislature, though not producing hard and fast determinative result in every case, is designed to create a framework of freedom and equality that dispenses with the need to form theories of interpretive methodology. This is a curious result because the thin constitution’s text is briefer and more abstract than the thick constitution’s, and therefore interpretation is even more critical.

103. For an explication of these terms, see generally Lipkin, supra note 14.
104. Tushnet’s majoritarianism yields the positive result of focusing on majoritarianism as a method of constitutional interpretation and review. Conceivably, it permits us to see the possibility of a new majoritarian-centered discourse of constitutional review.
Tushnet needs to articulate how members of the elected branches are to interpret the thin constitution, and why courts could not do a better job of interpretation. This question of interpretation must be answered before we can evaluate whether majoritarian review is better suited to constitutional democracy than judicial review.\(^{105}\)

Tushnet's majoritarianism may answer the institutional question of which branch of government decides the constitutional legitimacy of first-order legislative judgments. However, like other majoritarians, Tushnet fails to answer a pressing interpretive question of which interpretive methodologies are required for legislators to understand and apply the thin constitution accurately.\(^{106}\) Moreover, he fails to recognize that even if we should take the Constitution away from the courts, it is not obvious that it should reside in the legislature. Indeed, it is not clear that an altogether different institutional design—combining features of two or more of the three branches of government—ought not to be developed.\(^{107}\)

Constitutionalism requires some independence from ordinary legislative deliberations. Maybe an independent branch of government should determine a bill's constitutionality. Or, perhaps, a special (blue-ribbon) committee or joint committee of House and Senate ought to do the job. Irrespective of which alternative is chosen, Tushnet needs to address the question of whether giving the Constitution to the legislature requires the legislature to make anything other than first-order legislative policy decisions. We are still governed by a constitution. But is the constitution merely what the present Congress says it is?\(^{108}\) Without a context or a set of procedures, including a viable discourse

\(^{105}\) Tushnet must also demonstrate an intelligible connection between the thin constitution and the elected branches. If the thin constitution is our guide, what authorizes the elected branches created pursuant to Articles I and II of the thick constitution?

\(^{106}\) Tushnet seems to assume that the constitutional discourse developed over the years by the Supreme Court will have no place in the legislative and executive branches. But this is not obvious. See Neal Devins, Reanimator: Mark Tushnet and the Second Coming of the Imperial Presidency, 34 U. RICH. L. REV. 359, 366 (2000).

\(^{107}\) Tushnet fails to explain how individual legislators should perform constitutional (in his regime, majoritarian) review. Remember the thin constitution contains few, if any, particularistic provisions, such as the emoluments clause or the nativity requirement for Presidents. Nonetheless, the thin constitution must express principles that are subject to interpretation as are the thick constitution's principles. The Constitution's eternal quest for the appropriate interpretive method remains as important as ever, perhaps even more so. This eternal question seeks a principled approach to the problem of reconciling a provision's earlier, dated meaning with its current meaning. Even if Tushnet could resolve this last problem, he must also explain how these methodologies produce legislative constitution review. Do constitutional and political controversies arise in a single debate? Does the legislative decision embracing or rejecting a bill on political grounds also decide its constitutionality? If so, constitutionalism appears to be nothing more than an epiphenomenon.

\(^{108}\) This is a paraphrase of Chief Justice Hughes' famous quip that the Constitution is what the court says it. See CHIEF JUSTICE CHARLES E. HUGHES, ADDRESSES AND PAPERS 139 (1908).
and system of reasoning, constitutional analysis is an empty vehicle riding piggyback on politics; nothing distinctive (or even identifiable) remains.

In concluding this section, let us keep in mind that the unfortunate problem with Tushnet's majoritarianism is that it collapses the thick constitution into the thin constitution and then merges it with ordinary legislative decisions. Thus, he obscures the question of whether a distinctive form of constitutional discourse (that the legislature could adopt) is possible. Without this possibility, constitutional discourse is indistinguishable from ordinary legislative politics. Tushnet's conclusion begs the important question of whether constitutional review remains necessary or desirable if we decide against the courts as the institutional bastion of this discourse. Finally, Tushnet fails to distinguish between judicial review and judicial supremacy. On grounds of competence, efficiency, and expertise, we might continue a role for the courts in constitutional review without granting it the final word. So, Tushnet should say more about constitutional review. He needs to explain the process of how the elected branches are to engage in constitutional interpretation. He must articulate a process—legislative hearings, methods of voting, and final determinations—of constitutional interpretation that legislators must employ if the thin constitution is to govern American politics.

E. The Moral Poverty of the Thin Constitution

Tushnet also needs to articulate whether the thin constitution is morally adequate as the foundation of American constitutionalism. To achieve this task, Tushnet must interpret the principles contained in the thin constitution. Interpretation may not end with the intent of the Framers, but it certainly includes such intent, perhaps even as a primary interpretive factor. Consequently, interpretation relies, in part, on how the ratifying generation understood the scope and limits of the

109. This does not prejudge the issue of whether law in general, or in particular constitutional law, is politics. Although, I believe that law is politics; nevertheless, different forms of political reasoning exist which might be more appropriate to some governmental institutions than others.

110. It is essential to remember that "[j]udicial supremacy and judicial review are related but nonetheless distinct constitutional concepts, and they must ultimately be judged on their own independent merits and receive separate hearings." Keith E. Whittington, Herbert Wechsler’s Complaint and the Revival of Grand Constitutional Theory, 34 U. RICH. L. REV. 509, 522 (2000).

111. A deliberative democracy requires constitutional review regardless of which branch, or combination of branches, carries it out.

112. See DWORKIN, FREEDOM'S LAW, supra note 2, at 1-20, for a discussion about different kinds of interpretive intention.
provision in question. Understood in this fashion, the normatively attractive principles that Tushnet identifies in the thin constitution, such as equality and inalienable rights, do not accurately reflect the intentions of the ratifying generation in constructing and ratifying the constitution. Remember that the generation responsible for the Declaration permitted slavery, mistreatment of Native Americans, gender inequality, slavery, classism, and other wholesale oppression. Thus, if the thin constitution is supposed to reveal the intentions of this founding generation, it fails as a moral paradigm since for all its talk of equality, in reality, it is the equality of only a privileged few. In contrast, if one insists that the Declaration contains the normative force Tushnet claims for it, then we must regard the founding generation as hypocritical since it failed to live up to its own charter.

Tushnet might reply that the Declaration is aspirational in the sense that it posits an ideal its authors knew could not be realized during and immediately after the period of separation. Nevertheless, they believed sincerely that it should one day guide the development of American constitutional law and politics. Tushnet is right in pointing out the aspirational or idealized meaning of the Declaration. However, the hypocrisy or moral poverty associated with the founding generation is devastating for Tushnet's historical defense of the American commitment to universal human rights. An historical interpretation must be faithful to actual societal norms, not the aspirational values discovered by a later generation. If the commitment to universal human rights is aspirational, it means it is only barely, if at all, historically accurate. Thus, Tushnet should turn to a philosophical justification of this commitment by constructing principles that provide the best interpretive account of the commitment to universal human rights. But then neither the Declaration nor the Constitution is instrumental in grounding this commitment.

F. The Lincoln-Tushnet Connection

Tushnet portrays Lincoln as a great American constitutionalist since the latter was dedicated to the Declaration of Independence as the normative foundation of American politics and constitutional law.  

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113. In one sense, Lincoln is, of course, correct. Had the Court in *Dred Scott* upheld the Missouri Compromise, this decision would not in itself emancipate other slaves. Each slave would have been required to litigate his or her case in order to determine whether the critical facts in *Dred Scott* of transporting a slave to a free state were present in their cases also. Nevertheless, it is misleading to insist that only the parties are bound by a decision. Embracing such a view distorts the authority, finality, and effectiveness of law to embrace such thesis. *See Larry Alexander & Frederick Schauer, On Extrajudicial*
Lincoln's conception of constitutional law precluded judicial supremacy; indeed, one could say Lincoln thought that judicial supremacy violated the separation of powers safeguard. According to Lincoln, since the federal government consists of three equal branches of government, no branch can corner the market on constitutional interpretation. In Lincoln's view, the Constitution created an interpretive equality among the three branches of government; no branch's interpretation of the Constitution is superior to any other branch. Hence, if the judiciary resolves a constitutional controversy according to its conception of constitutionality, it cannot bind other branches or American citizens generally. Using *Dred Scott* as an example, the Lincoln-Tushnet connection insists that only the parties to the controversy in court are bound by the Court decision. *Dred Scott* does not bind the other branches of government or individual officials, voters or citizens.

Like other theorists, for Tushnet *Dred Scott* best illustrates the bankruptcy of judicial supremacy. The rap against this case is that it required a civil war to overturn. To be sure, Taney decided this case in terms of an antiquated and immoral conception of racial justice. However, it was a conception of justice that the framers permitted and which many actively endorsed. To argue against Taney's decision, on originalist or historicist grounds, is tendentious, because from an originalist perspective, his decision seems clearly plausible. To sign a document that permits slavery is to tacitly acquiesce to the practice. The Founding culture should be blamed, not an individual justice.

*Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1382-83 (1997).*


115. In this case, the function of the Constitution as a guiding constraint is lost. Whatever the people desire politically just is what is constitutional. Without some separate process and language for determining constitutionality, constitutionalism dies.

116. See BORK, supra note 1.

117. This is not to say that we should absolve Taney of all blame. He was, of course, perpetuating a morally vile practice. But in doing so, he was not engaging in substantive due process as Bork contends. Rather Taney was attempting to be faithful to the original document and the historical era in which it was ratified. See Cass Sunstein, *Dred Scott v. Sanford and Its Legacy*, in *GREAT CASES IN CONSTITUTIONAL LAW*, supra note 41, at 64. Bork's characterization of *Dred Scott* as a substantive due process decision obscures the fact that it is self-consciously originalist. See id. This shows that an originalist justice can be just as activist as a non-originalist justice. Although, Sunstein agrees that the decision in this case is originalist, he also believes it is an example of substantive due process. It is difficult, however, to see how this is possible. If Taney used originalism, then from his perspective, at least, the original Constitution precluded former African slaves from becoming citizens. If so, then substantive due process (inventing a right to own slaves) played no part. Perhaps, Sunstein means that despite Taney's purported use of originalism, he was a bad originalist because the history of the founding cannot support the existence of this right. Consequently, Taney used substantive due process through the guise of originalism.

The reason Sunstein believes the Constitution does not support the right in *Dred Scott* is that he
Of course, an individual judge also can be blamed for committing himself to a rigid form of originalism. Originalism is appealing when it insists on considering historical evidence as a factor in a judicial decision, even the first factor. It does not follow that contemporary factors can never override an originalist conclusion, especially when the failure to do so has morally egregious consequences.\(^{118}\) Taney was wrong not because he created a constitutional right to property in human beings; such a right was arguably implied by the original constitutional compromise. Rather, Taney was wrong because he failed to recognize that the right to property in people was at his time, and perhaps at the time of the founding, one of the greatest moral outrages in human history. Thus, \textit{Dred Scott} is inconclusive in demonstrating the failure of judicial supremacy. Rather, it demonstrates, by contrast, that when one starts with an inherently flawed concept perpetuated by the original constitutional culture, judicial decisions will be similarly flawed. Of course, to flesh this example out more we would need to know the consequences of upholding the Missouri Compromise.\(^{119}\) Would that have prevented the Civil War? And could a society persist that was half slave and half free? Slavery might have died out through the industrialization of work. Or, perhaps new generations of slaves would have suffered slavery's inhumanity. These questions are ones that we will never be able to answer conclusively.\(^{120}\)

believes that the original Constitution did not endorse slavery, but rather barely tolerated it. However, this is highly implausible. When a document is designed to stand in part for the fundamental political values of the new American republic, the complete absence of any provisions referring to slavery itself should be seen as at least authorizing or permitting slavery. (Although the word "slavery" is not contained in the original Constitution, two references to the practice exist throughout the document, and one in the Fourteenth Amendment). Slavery was either a grave moral wrong or a fundamental right of slave owners. One would think that a document containing higher law would address this. If it does not, or if it grudgingly provides some protection for slave owners, the only plausible moral response is that in acquiescing to this practice, the Constitution grudgingly endorsed it. Imagine saying that a Nazi constitution that failed to mention the final solution of European Jewry did not endorse the holocaust because it made no mention of the final solution. Given the circumstances and the plight of Jews, such silence is acquiescence and yes, endorsement.

Like Bork and Sunstein, Justice Scalia believes that \textit{Dred Scott} is the first example of substantive due process. \textit{See Scalia, supra} note 1, at 24. However, it is not obvious how a decision can be both originalist, yet also the result of substantive due process.

\(^{118}\) Even jurists committed to judicial restraint embrace this principle at least pragmatically, with the interesting, apparent exception of Judge Learned Hand. \textit{See Dworkin, Freedom's Law, supra} note 2, at 340.

\(^{119}\) This statute concerned the admission of new states to the Union. It required that an equal number of these states be free and slave. The decision in \textit{Dred Scott} could have invalidated this statute for being beyond Congress' authority without recognizing a right to own slaves.

\(^{120}\) Tushnet also joins others who, on empirical grounds, deny the efficacy of cases such as Brown v. Board of Education, 347 U.S. 483 (1954), or Roe v. Wade, 410 U.S. 113 (1973). One such criticism, Gerald N. Rosenberg, The Hollow Hope 70-71 (1991), maintains that the great judicial decisions protecting rights fail to do the trick. Only majoritarian enforcement following such court decisions works.
The Lincoln-Tushnet connection reinforces the view that each American, whether private or public citizen, has a responsibility to engage in the process of constitutional interpretation. Similarly, the Presidency and the Congress as institutions have the power and responsibility to decide constitutional propriety for themselves. Indeed, both officials and citizens should take constitutional review more seriously. Everyone should carefully formulate his or her opinion on the constitutionality of laws that govern the people.

What the Lincoln-Tushnet connection fails to resolve is how conflicts or deadlocks over constitutionality are to be decided. What effective device exists to resolve conflicts between and among the different branches of government? The doctrine of judicial supremacy attempts to answer the institutional question of which institution or person gets to make the final decision. In times of conflict, society needs relative closure concerning a conflict over the constitutional permissibility of a bill or governmental policy. If the government is to operate effectively and fairly, it is necessary to have an institutional means of achieving this closure. Institutional mechanisms of closure beyond judicial supremacy are possible, but some mechanism is required if constitutionalism is to remain distinguishable from ordinary legislative reasoning.

If I understand the Lincoln-Tushnet connection correctly, two problems cast doubt on its plausibility: the problem of judicial implications and the problem of general implications. Jurisprudentially, the rule of law reminds us that similar cases must be treated the same. If the judicial decision in *Dred Scott* is warranted, a similar decision applies to every relevantly similar case. Thus, it is impossible to restrict the application of a judicial decision only to the parties of the case in question. The logic of judicial decisions implies analogical or general principles connecting the particular case to cases of a certain kind.

In reply, however, one might wonder whether the 1964 Civil Rights Act would have even occurred were it not for a capacious judicial reading of the Commerce Clause. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Additionally, *Roe*’s reaffirmation of *Roe* might be an unexpected judicial defense of the fundamental, though inexplicit, right of personal autonomy. See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

121. Alternatives, of course, exist. For example, why not give the entire representative government the responsibility for determining constitutionality. Each branch is responsible for its own determination of constitutionality, and when a majority of the branches support a particular interpretation, that interpretation prevails.

122. Tushnet’s position regarding interpretive equality conflates the interpretive and the institutional questions. The former says what the Constitution means and must be answered in terms of a theory or conception of constitutional interpretation. The latter question assumes an interpretive answer of one sort or another to the first question, and then asks which institution or combination of institutions should conduct the interpretive process. Finally, there exists the still further question of which institution has the final say in cases where the branches conflict.
Logically and jurisprudentially, *Dred Scott* cannot be restricted to the parties only but must apply to all similarly situated individuals.\(^{123}\)

The problem of general implications is more complex. The Lincoln-Tushnet connection contends that an interpretive equality exists between the three branches of government, thus precluding judicial supremacy. In this view, each branch of the government has equal authority to interpret the Constitution, at least regarding the constitutional provisions pertaining to its domain. The problem here is whether interpretive equality can work. How can each branch of government have an equal voice in interpreting the Constitution? How are cases of interpretive conflict between and among the different branches of government resolved? What if the President, Congress, or both interpreted the Equal Protection Clause to embrace the “separate but equal” principle in *Plessy*?\(^{124}\) Whose interpretation should prevail?

In 1954, when *Brown* was decided, should the political branches have simply rejected the decision as applying only to the parties in the case? Nothing in the Lincoln-Tushnet view resolves this problem.\(^{125}\) Some mechanism is required to settle conflicting interpretations.\(^{126}\)

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\(^{123}\) Of course, future cases may be distinguishable. Hence, it does not necessarily follow that the next *"Dred Scott"* must be disposed of in the same manner as the original. However, absent reasons for distinguishing between cases, the rule of law dictates treating them the same. The problem of judicial implications appears to falsify ab initio this aspect of Lincoln’s constitutionalism. A judicial decision cannot be restricted to its own circumstances or to its own parties only; it must logically apply to relevantly similar circumstances and relevantly situated parties.

\(^{124}\) See TUSHNET, *supra* note 6, at 113.

\(^{125}\) See sources cited supra note 112.

\(^{126}\) Certainly judicial review is not the only solution, but it does have one obvious merit of relative independence from the political branches. And even majoritarians embrace an independent judiciary. Maybe this independence is too great, thereby creating the counter-majoritarian problem. But independence and accountability are two factors, which cannot be perfectly balanced so that an institution is perfectly independent and perfectly accountable. Both factors weigh against one another in a zero sum manner. Increasing independence reduces accountability, and vice versa.

\(^{127}\) The standard explanation of why the political branches should defer to the Court’s decision is that judicial reasoning is different from policy considerations. Just as judges have no claim to expertise on pure policy matters, legislators have little expertise on constitutional matters. Judges, therefore, are better trained for and more inclined to satisfy the ideals of judicial reasoning than are legislators. Underlying this argument is the conviction that law and politics are two different areas of human inquiry. Judges should do law, while legislators should do politics.

In contemporary jurisprudence, the problem with the standard explanation is that it no longer commands the allegiance it once had. Granted, everyone believes that *some* differences exist between law and politics. However, many contemporary theorists reject the idea that there exists a dichotomy separating law and politics. Indeed, this traditional view is behind most philosophical conundrums in constitutional jurisprudence. The better view is that law is politics, though not necessarily interest-group politics or the politics of wheeling and dealing. Instead, constitutional law is politics in the sense of political theory providing the best articulation of the political system in question. Some rejection of the law and politics dichotomy is probably required if majoritarianism is ever to get off the ground. If the distinction stands, the political branches simply cannot do constitutional law because their job is politics, while the courts only job is law.
The problem of interpretive equality calls for some structural device devoted to constitutional review, even if this review should not be entirely judicial or even if it should not be judicial at all. This device must be located in some branch of government, or in some inter-branch entity, or some new practice, including leaving it entirely to the people through referenda or ordinary elections. Tushnet advocates the latter and there is much to be said in its favor.\textsuperscript{128} It is important to realize that even if we decide that the people should be the final arbiter of constitutional meaning, we must nevertheless articulate a form of reasoning, of civic discourse, that the electorate can use to state the issue, frame the question, conduct the analysis, and tie the discussion to constitutional structure and history. Hence, even if the people are the final arbiters of constitutional meaning, we must describe the language of constitutional review from their perspective, if we want to avoid rendering constitutional meaning merely epiphenomenal. Before indicating the language of constitutional review, however, Tushnet must convince his critics that the Constitution contains self-enforcing norms or is incentive-compatible. If not, the elected branches alone are clearly inappropriate institutional settings for constitutional review.

\textit{G. Federalism and Separation of Powers as Constitutionally Self-enforcing Norms}

The heart of Tushnet’s project is the idea that the Constitution, through the principles of federalism and separation of powers, is incentive-compatible or self-enforcing.\textsuperscript{129} For Tushnet’s project to be plausible, he must show that American constitutionalism is sufficiently self-enforcing to guard against aberrant uses of constitutionalism at least in a wide range of ordinary cases. However, Tushnet’s view faces deep conceptual and epistemic problems in this context. If Tushnet’s argument fails here, it fails period.

In order to show that the Constitution is self-enforcing, it is necessary to know or to assume that, independent of political deliberation, a certain answer is the correct answer to a constitutional controversy. For Tushnet’s interesting examples to work he must assume an answer to the question “Is this conduct consonant with the Constitution?” Only when

\textsuperscript{128} Under the appropriate circumstances where citizens are sufficiently informed and committed to the resolution of a constitutional controversy for civic, not selfish, reasons, the prospect of a collective, deliberative resolution of the conflict is an attractive possibility. However, as a general form of constitutional review, I doubt its efficiency. If the Court decides one hundred cases per term, will the next election contain one hundred constitutional provisions for the people to decide upon, or will the people review only a fraction of these cases? Some constitutional system of review must be constructed to deal with these eventualities.

\textsuperscript{129} See TUSHNET, supra note 6, at 107-08.
an answer is assumed can we test whether the relevant constitutional norms are self-enforcing, that is, whether they will be self-enforcing in producing the right results.

The problem with this approach, of course, is that usually we cannot assume the right answer. Rather, we can only talk in conditional or relative terms. If passing a particular bill is the correct answer, then the Constitution is self-enforcing when the political branches have the appropriate incentive to pass the bill. If refraining from passing it is the correct answer, then the political branches should be motivated not to pass it. However, if the right answer is to pass the bill, and no such motivation exists, then the Constitution is not self-enforcing. If refraining from passing the bill is the correct answer, again the Constitution is not self-enforcing unless the appropriate motivation exists not to pass it. From Tushnet's perspective, in constitutional crises the winning side will tend to see the Constitution as self-enforcing, and the losing side will not. Yet, no independent or neutral conception of self-enforcing norms or incentive-compatibility is likely. Consequently, Tushnet's methodology for testing legislative decisions for their incentive-compatibility is suspect; the methodology cannot provide the intended test.

This problem pervades Tushnet's argument. Whenever he concludes that the Constitution is self-enforcing, he assumes without argument that a certain answer is correct and that the political branches will choose this answer. However, every time Tushnet demonstrates that a particular constitutional principle is self-enforcing because the majoritarian branches acted accordingly, he simultaneously shows that it is also not self-enforcing, relative to the view that they should have refrained from acting. Each example depends upon and is relative to a particular interpretation of the constitutional principle under examination. If the Constitution is self-enforcing with regard to a certain answer, then it is not self-enforcing with regard to the negation of that answer. Without independent evidence of correctness, we are unable to tell whether the Constitution is self-enforcing generally, or even in a particular case.

Hence, Tushnet's test for determining incentive-compatibility is a non-starter. Only by knowing the correct answer to the constitutional question can we begin to test Tushnet's thesis. This is merely a logical point about the inability of determining whether norms are self-enforcing without independently knowing that a particular controversy should be resolved in a certain way. All Tushnet's model can do is to give a relative conception of self-enforcing norms. If one believes X is the correct interpretation of federalism, say, then the Constitution is self-enforcing or not, depending upon how Congress behaves, and this of
course can be observed. But a relativized conception of constitutional accuracy is too weak to help us evaluate whether the Constitution should be taken away from the courts. Since without a non-relativized answer, the Constitution is always both self-enforcing regarding some outcomes and not self-enforcing concerning the negations of these outcomes.

To appreciate the force of this objection, assume that the purpose of federalism was the creation and maintenance of a system of dual sovereignties. Assume further that the correct balance between state and federal power precludes the post-1937 Commerce Clause and economic due process decisions. In this case, the New Deal would not be self-enforcing; instead, it would be revolutionary. By contrast, assume that the post-1937 decisions were valid. In that case, the elected branches enforced the Constitution through conventional motivation. However, since no non-controversial, non-relative answer is available in this context, whether the Constitution is self-enforcing remains indeterminate. Whether a constitutional principle is self-enforcing depends on the correct interpretation of its meaning. Without relying on an assumed correct answer, we simply cannot know whether the principle of federalism or separation of powers is self-enforcing. But relying on an assumed answer depends ultimately on an interpretive theory that warrants the assumption. Without such a theory all decisions are both self-enforcing and not self-enforcing.

Recall Tushnet's useful example of a self-enforcing decision concerning the line item veto. Tushnet assumes that the presidential decision to initiate the line item veto without congressional approval or constitutional amendment would be constitutionally impermissible, and then proceeds to describe the political pressures or incentives that prompted President Bush to relent. Since the President gave up the quest, Tushnet concludes that the doctrine of separation of powers is self-enforcing at least with regard to forbidding presidential intrusion.

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130. In NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the Court reversed its opposition to the New Deal by adopting a majoritarian interpretation of the Commerce Clause. In West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), the Court again reversed itself over the propriety of economic due process legislation. Id. at 399-400.

131. See LIPKIN, supra note 14, at 49-50.

132. A general problem arises of who determines this? And how do we know who determines this without first knowing the right answer? If Tushnet's theory decides an answer to the first question in terms of the elected branches, then whatever the elected branches decide is self-enforcing.

133. Moreover, it rests on a questionable doctrine that constitutional questions have uniquely right answers. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). But see, LIPKIN, supra note 14, at ch. 2.

134. If the principles of federalism and separation of powers are conceptually determinate, but epistemically indeterminate, then testing whether they are self-enforcing is problematic.
into congressional prerogatives. What, however, if the original purpose of the presidential veto was to reject single bills? If so, one could argue that the present practice of passing omnibus bills unjustifiably forces the president to veto groups of single issues bills in one fell swoop. Compelling the president to veto groups of single issue bills and not the single issue bills themselves is itself unconstitutional. Consequently, if one assumes that a line-item veto is constitutional, the same factors convincing President Bush not to exercise the line-item veto on his own now shows that the President did not do the right thing. It shows that the separation of powers principle is not self-enforcing because, according to a different assumption, the President should have exercised the line-item veto.

In short, any example Tushnet uses is subject to the same objection. The Constitution is self-enforcing only when the actual behavior of the political branches validates an assumedly correct answer to the relevant constitutional controversy. But the correct answer is usually contestable. Whether the Constitution is self-enforcing will depend upon one’s particular partisan commitment to answers in particular cases. In every case demonstrating the existence of self-enforcing norms, the same argument shows that (relative to an alternative answer) the norms are non-self-enforcing. 135 Given that alternative answers are always contestable, no non-controversial answer can be given to the question of incentive-compatibility. 136

The problem of the assumed answer is also illustrated in the recent impeachment and trial of President William Jefferson Clinton. This is an especially interesting case because the Court was not involved and the political branches, therefore, did not need to look over their shoulders to anticipate how the courts would react to their legislative decision. Does this recent experience confirm or disconfirm Tushnet’s notion of the Constitution as self-enforcing?

Again we must begin our examination by assuming a correct answer and then alternatively by assuming its negation. If we assume that President Clinton should have been removed from office, we must conclude that the system of self-enforcing norms failed. Political loyalty prevailed over the public good and this could not have been the

135. Perhaps, if two individuals agree on the correct result in a constitutional controversy then they can decide whether the Constitution is self-enforcing. However, this victory is limited to those who already agree on constitutional meaning. When disputants disagree, there is no way to ascertain whether constitutional norms are self-enforcing.

136. In every case of demonstrating the existence of self-enforcing constitutional norms, the result will be that some norms are self-enforcing relative to one answer and not self-enforcing relative to its negation. Thus, every example proves that the Constitution is simultaneously self-enforcing and not self-enforcing.
intention behind the impeachment and removal clause. In any event, if the right answer to the question of whether President Clinton ought to have been removed is yes, then the impeachment and removal provision is not self-enforcing. If, on the one hand, one assumes that President Clinton ought not to have been removed from office, one must still face the fact that both sides to this controversy distorted constitutional principles in order to win the battle. Without fear of judicial scrutiny, constitutional norms did not sufficiently discipline the political branches.

Let us explore this further. Democrats distorted constitutional meaning in seeking a censure resolution when it is clear that the principle of separation of powers, not to mention the Constitution's text and its history, does not permit such a process. The Republicans also distorted constitutional meaning by revising the meaning of "high crimes and misdemeanors." From the perspective of those opposed to impeachment, the Republicans in the House violated constitutional norms, and to that extent, their behavior disconfirms Tushnet's thesis. However, if the House Republicans were justified in impeaching President Clinton because he should have been removed from office, then his acquittal in the Senate was not a product of self-enforcing norms, and therefore, the Senate's conduct also disconfirms Tushnet's notion. Indeed, too little constitutional data concerning impeachment prevented the operation of self-enforcing norms in this case. This is a good example of how the Constitution works away from the courts. When the legislative branch does not fear the courts and when there is no other form of constitutional review except the legislature (and the people), it is difficult to believe that constitutional norms will be self-enforcing. Consequently, these examples do not bode well for majoritarian constitutionalism.

137. Of course, this assumes that perjury and obstruction of justice per se constitute "high crimes and misdemeanors." Robert Justin Lipkin, Impeachment and the War Over the Democratization of American Culture, 5 WIDENER L. SYMP. J. 213, 219-20 (2000).


139. One could argue that since impeachment is worse than censure, if the Constitution permits impeachment, it must include lesser sanctions also.

140. The Republicans in the Senate also distorted constitutional meaning by not conducting a trial.

141. See Klarman, supra note 138, at 655.

142. Tushnet might reply that these test cases do not refute his thesis because the thin constitution does not presently bind the legislators. Nevertheless, if one believes that, in this case, the political branches overreached, it does not bode well for majoritarian constitutionalism.

143. One example of legislative insensitivity to both the thick and thin Constitution can be revealed in the following news story. Pennsylvania State Representative Thaddeus Kirkland introduced a bill permitting prayer in the schools in an effort to deter juvenile violence. When confronted with the likelihood of the Supreme Court declaring the law unconstitutional, Representative Kirkland replied: "it's
In cases of suing a sitting President, Tushnet hypothesizes a requirement that "[t]he president is not entitled to a complete suspension of lawsuits until he or she leaves office, but the president has an absolute right to refuse to attend any particular court session for any reason whatever." Tushnet contends that such a rule would be self-enforcing. Consider his argument in full:

The president would have to calculate whether the political costs associated with objecting were worth the gains he gets from delaying the lawsuit. He would also have to worry about crying wolf: If he objects too often, he may lose so much political esteem in the public’s eyes that he might be unable to get away with objecting when there really was a crisis demanding his full attention. Giving the president this sort of absolute privilege might simultaneously protect the presidency and the rule of law, not because judges figure out the correct balance themselves but because the president’s political incentives are likely to lead to a decent solution.

The problem with this example (and others) is that it assumes that suing the President is a perfectly ordinary issue affecting the nation. However, a President is likely to be sued only when it is perceived that his presidency is weak or when his enemies believe that political attack will weaken his presidency. If he wants to remain President, at least throughout his term, he would be inclined to use the absolute privilege concerning particular requests as a de facto absolute privilege to avoid a lawsuit. And without the possibility of review, Tushnet’s absolute privilege to delay would have no effect in restraining the President. Had President Clinton the opportunity to use Tushnet’s absolute privilege to delay, many conscientious advisers might (should?) have counseled him to do so. Consequently, Tushnet’s examples of self-enforcing behavior in separation of powers cases are unpersuasive.

Tushnet’s new majoritarianism concerning federalism and separation of powers is not empirically testable. Therefore, the only framework within which to evaluate is political. Part Four takes up the central political question concerning the new majoritarianism.

very unconstitutional for young people and older folks to basically be killing one another . . . The bottom line is we have tried everything that is constitutional but it [sic] hasn’t worked.” Thaddeus Kirkland: Bring Prayer Back to Classroom, DELAWARE COUNTY DAILY TIMES, May 5, 1999, at 5. Second, using examples to prove the incentive-compatibility of majoritarianism again assumes a particular baseline or correct constitutional answer. Only then can we know whether the dynamics of constitutional majoritarianism will produce these answers, or at least not stray too far afield.

144. TUSHNET, supra note 6, at 114. If self-enforcing norms provide the motivation to act prudently according to the received notion of constitutional requirements, the Clinton scandal might have been shorter and less tedious.

145. Id.
IV. THE POLITICAL BASIS OF CONSTITUTIONAL REVIEW

A. What is Constitutional Meaning?

Interpreting the Constitution, whether in the courts or in the majoritarian branches, should be conducted according to the best methods of political interpretation.\(^{146}\) Constitutional meaning is what the best interpretive theory of constitutional practice says it is. Thus, although Tushnet’s view might rid us of the courts, it cannot rid us of the problems of interpretation. Legislators and executives as well as citizens still must interpret the Constitution; thus, textualist, originalist, structuralist, and normativist theories still need to be evaluated. Tushnet seems to suggest that taking the Constitution away from the Courts magically answers the interpretive question of constitutional meaning; it does not. Tushnet advocates a form of majoritarianism that limits or abolishes the judicial role in determining constitutional meaning. What, then, in Tushnet’s regime is left for the court to do?\(^{147}\)

The question of constitutional meaning is conceptually distinct from the issue of who is the final arbiter of this meaning. Some institutional process is required to finally decide constitutional meaning in any given case or series of cases. In American constitutional law, the judiciary plays that role; it need not. Instead, a constitutional court can be comprised of the Senate, the House, the President, or some new combination of these or other entities and may be given the job of reviewing the constitutionality of statutes. To win the victory for judicial supremacy one must show that judicial reasoning significantly differs from legislative reasoning.\(^{148}\) Even if this cannot be demonstrated, judicial supremacy survives if one can show that the institution of

\(^{146}\) Political interpretation follows pragmatic methods for evaluating normative attractiveness and historical consistency. See Lipkin, supra note 14, at chs. 2-3.

\(^{147}\) One answer is that the courts still function as interpreters of statutory law, though the final arbiter of statutory meaning is Congress itself. Another possibility is that the Tushnet’s partial account of how we approach the interpretive question of constitutional meaning in terms of the Declaration and Preamble apply to the courts. Here the courts should drop the “formulaic” constitution, where possible, and develop a constitutional discourse that resonates with the people.

\(^{148}\) Philosophical realist accounts of legal reasoning typically regard law as a reflection of the way the world is, and, therefore, we can get the right law and the appropriate institutional arrangement too if we can devise a form of reasoning—of discovery and justification—that adequately captures reality. Until the advent of legal realism, law was conceived as a system of sentences or propositions that adequately portrayed the way the law is. Now many have grown skeptical that philosophical realism is plausible. Instead, legal realism prevails.
judicial supremacy has better consequences for a democracy than alternative institutional arrangements.\textsuperscript{149}

\textbf{B. What is the Conceptual Basis of Judicial Review in A Democracy?}

Tushnet fails to explore the conceptual basis of judicial review in a democracy. Democratic rule can turn tyrannical if constraints on legislative and executive decisionmaking are absent. Of course, we can ask which constraints are better suited to bring about a particular kind of democracy. Judicial supremacy will be part of some conceptions and not part of others. However, the conceptual function of judicial review is designed to provide a check on majoritarian branches of government. More importantly, judicial (or constitutional) review is designed to provide a check on all branches of government, including the judiciary itself.

I put this point generally as the corrective role of constitutional review in a deliberative democracy. That is, some mechanism in a democracy should provide the deliberative system with a second-thought or secondlook, sometimes concerning different goals than the original majoritarian decision.\textsuperscript{150} This follows the structure of practical reasoning generally.\textsuperscript{151} Practical reasoning is conducted on primary and secondary levels. Depending upon the context, primary reasoning typically is directed to form particular substantive judgments about what to do and secondary reasoning is designed to review the results of first-order reasoning.\textsuperscript{152}

Typically, majoritarians believe either that constitutional review is itself counter-majoritarian, and therefore constitutionally impermissible, or that it can be sanitized only when performed by the political branches. The first approach might be right concerning a simple or majoritarian democracy, though this conclusion is not obvious. However, the fundamental point is that American constitutionalism

\begin{itemize}
  \item \textsuperscript{149} See Devins, \textit{supra} note 106, at 371.
  \item \textsuperscript{150} See Lipkin, \textit{supra} note 14, at ch. 4.
  \item \textsuperscript{151} See generally David P. Gauthier, \textit{Practical Reasoning; The Structure and Foundations of Prudential and Moral Arguments and Their Exemplification in Discourse} (1963).
  \item \textsuperscript{152} The American republic was never designed to be simply a pure democracy, or simply an institution of primary reasoning. Instead, the political and constitutional checks on primary reasoning, including judicial review, constitute a system of secondary-reasoning forming constraints over the majoritarian process. As Gary McDowell puts it, referring to Madison, "While never faltering in his belief that the people were 'the fountain and original of all power,' neither did he confuse simple democracy with good government. The very doctrine of popular sovereignty demanded that the structures of government be sturdy enough to withstand human weaknesses." Gary L. McDowell, Liberty's Vestal Flame, TIMES LITERARY SUPPLEMENT, Apr. 30, 1999, at 12.
\end{itemize}
cannot be accurately regarded as a simple democracy, or one that sanctions legislative supremacy. For example, American democracy was never intended to be a parliamentary system such as Great Britain's. The various mechanisms for filtering majority rule such as federalism, separation of powers, and individual rights all provide checks and balances on the majoritarian principle. Consequently, these checks make it clear that American government is not a simple democracy, but rather a complex democracy.

The second approach, that review should be in the hands of the people or their representatives, denies the legitimacy of the judicial supremacy, but does not deny and may even require an alternative practice of constitutional review. My argument here is that there is an important difference between doing and reviewing; and these distinct activities should not be confused. If the correct answer to the

153. Too often theorists invoke the concept of democracy without specifying its content. Even as astute and important a theorist as John Hart Ely never specifies exactly what he means by democracy. See JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). At least two general forms of democracy exist: simple democracy and complex democracy. Simple democracy appeals to the principle of majority rule with a minimum of side constraints such as those precluding a present majority from calling off the next elections. According to majoritarian democracy, judicial review is counter-majoritarian and therefore invalid, except perhaps when the court is needed to police the majoritarian processes for distortion or outright evasions of the principle of majority rule.

Often such simple conceptions of democracy derive from skepticism about social or political theory. Since no one can prove the truth of one's conception of the good society, the best solution is to let the majority's decision prevail. Moreover, since no one has a privileged conception of morality in general or the moral conditions underlying a richer conception of democracy in particular, each person's view is equally as plausible as anyone else's. And, since no method guarantees convincing every member of a collectivity as to the true democratic way, let the collective will be decided through the majority.

However, if the assumptions underlying moral skepticism are true, why should we care about the equality of democratic individuals or that majority rule is a legitimate method for determining the collective will? If moral skepticism is true, no moral principles exist for organizing society or if they exist, their content is contestable. Skepticism, therefore, is not a good ground of democracy. Some non-skeptical argument is required explaining the moral desirability of simple democracy.

Complex democracy seeks to understand the conditions underlying the principle of majority rule. The simple democrat seems to insist that this principle is inherently good. The complex democrat believes that democracy is good but only when it fosters the moral conditions rendering democracy desirable. See DWORON, FREEDOM'S LAW, supra note 2, at 70-72.

154. The need for an argument demonstrating the desirability of majoritarian rule quickly transforms simple democracy into complex democracy. Such values as equality, freedom, and community underlie the need for and desirability of democracy, and therefore these values constrain the proper form of democracy. Once beginning to defend a simple democracy, there is no turning back. A defensible conception of democracy explains how the underlying political and moral values explain and justify morality rule. The best form of democracy is the one most conducive and hospitable to achieving these underlying moral and political values. The moral imperative underlying democracy, if there is one, are those moral and political values that are both the cause and effect of democracy. It is only because democracy promotes a certain kind of life, a life where individuals flourish individually and collectively that complex democracy achieves its salient purpose.

155. Recall the old saw: "Those who can, do. Those who can't, teach." On a lighter side, a variant on this old saw is: "Those who can, do. Those who can't, review."
the institutional question is that the people or their representatives should engage in both these practices, and no difference is perceived in their process or language, then constitutionalism drops out of the process entirely. In this event, everything is doing and nothing counts as reviewing. Tushnet's examples illustrate the poverty of conflating these two activities. Though perhaps difficult to distinguish, these different activities are essential to constitutionalism generally. The question is not whether constitutional review is important; in a constitutional democracy, it must be. Rather the question is which institution should engage in review. And, as we have seen, Tushnet fails to explain the nature of constitutional review (or interpretation) when conducted by the political branches.

Any adequate theory of American constitutionalism must explicate the difference between doing and reviewing or legislating and judging. Although these two activities are not mutually exclusive, they are different, if only in degree. This distinction rests on the difference between certain fundamental features of human ratiocination. The activity of doing refers to those first-order judgments a person makes in resolving practical problems such as what to wear, whether to see a movie, and so forth. Collectively, we decide whether to cut taxes, whether to wage war, or whether to institute a national health plan. In the latter case, the people's representatives attempt to resolve political, economic, and social problems. These are judgments of action and occupy a great and important area of human reasoning.

In addition to judgments of action, there are judgments of reflection. These judgments attempt to resolve problems about the legitimacy, authenticity, integration, coherence, and truth of our judgments of action. Judgments of action and judgments of reflection interact with one another to form new judgments of both types and to abandon old ones. This distinction between first-order and second-order judgments or reasoning is a general feature of practical reasoning and applies to a variety of different contexts. In constitutional law, the distinction is between what legislators do in resolving problems of society, and what judges do in attempting to answer the question of the legitimacy or authenticity of the solutions. For example, a desirable proposal for national health care (a first-order judgment) should be evaluated for its legitimacy according to constitutional standards (a second-order judgment). Empirical considerations such as efficiency and cost are also relevant to the question of whether the first-order judgment to create a national health care is a good thing. The question of whether the government can legitimately pass such legislation is a different type of question. Here empirical facts are relevant, but not dispositive. In American constitutional law, this second-order question attempts to
determine whether a particular judgment of action is compatible with the Constitution or with constitutional practices, or in countries not possessing a written constitution, whether it is consistent with the normatively attractive generalized practices of the society. The process of review helps achieve the goal of permitting the government and the people to rethink its decision within accepted parameters of the polity’s fundamental values. Judgments of reflection help distinguish between the efficacy of a proposal and its authenticity or legitimacy.

In general, these two forms of judgment, or two levels of inquiry, ask what sorts of considerations should modify judgments about the common good. Thus, in a constitutional system, the range of possible first-order solutions is necessarily restricted by institutional and republican factors. The notion of a discursive limit is essential for constitutionalism to be a factor in social policy and government. American constitutionalism simultaneously allocates power to different institutional arrangements and restricts these arrangements when inconsistent with individual rights. These arrangements and restrictions encourage the creation and maintenance of a just and good complex democracy. For the most part questions of action occur on different levels of generality and scope within the appropriate first-order inquiries. Efficiency and fairness are typically the hallmark of this endeavor. However, a constitutional democracy requires an additional stage of inquiry, or a different kind of reasoning for reviewing legislation. Without this additional device, it is impossible to distinguish between the legislative legitimacy of a statute and its constitutional authenticity. Every bill that passes would be constitutional. The necessity of review can be seen when a proposed bill is likely to resolve a pressing problem in a way that conflicts with the underlying purposes of the society’s constitution. For example, suppose a desirable solution of an economic problem includes restricting freedom of expression. Here, free speech restricts the permissible solutions to economic problems. Consequently, we should always distinguish two questions: (1) will the proposal work fairly? And (2) is the bill legitimate or authentic? Constitutional rule cannot occur without answering both these questions affirmatively.

As we have seen, the problem with majoritarian theories such as Tushnet’s is the failure to clearly identify these two different types of

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156. Theorists committed to both judicial activism and judicial restraint must accept this conviction.
157. For example, the British system can be viewed as one in which constitutional judgments do not play an important role. Of course, Britain has an unwritten constitution that permits legislators and citizens to engage in constitutional review. Some have argued that the United States also has an unwritten constitution. See Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703 (1975).
158. Although constitutionalism does not require a written constitution, constitutional text does promote keeping judgments of action apart from judgments of reflection.
reasoning: first-order and second-order reasoning. Constitutional review insists that someone or some institution engage in the process of reviewing the authenticity of a particular law. Constitutional review is unintelligible unless one specifies who is to perform this function and how. The question of the intelligibility of constitutional review is independent of the question of judicial review. A constitutional democracy can (and must) embrace constitutional review, though it need not embrace judicial supremacy, or even judicial review (or it can embrace judicial review, but not judicial supremacy). One can argue that judicial review should be retained but not as the final word in constitutional interpretation. In so doing, we retain the benefits of the judiciary’s expertise with second-order reasoning while taking away only its role in having the final word.

Conceptually, constitutional review entails re-examining majoritarian decisions to determine whether upon reflection they cohere with the legitimacy conditions of that polity. It does not entail the additional institutional arrangement that the judiciary should engage in this process, nor that if the judiciary has a role that it must trump the constitutional interpretations of the people or their representatives. I have suggested an effective process of constitutional review that may or may not include the courts. But even if one believes that judicial review must be part of constitutional review, it does not follow that the judiciary should be the final arbiter of constitutional meaning. However, it does entail that there exist a final arbiter whose job is to conduct second-order reasoning evaluating first-order political decisions. In this regard, the elected branches of government might use constitutional discourse effectively. Consider Chief Justice Marshall’s eloquent statement of constitutionalism: “[A constitution’s] nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. . . . [W]e must never forget that it is a constitution we are expounding.” McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). Given the will, the elected branches could effectively use Marshall’s or any other conception of constitutionalism. But that will work only when the elected branches use a sufficiently constitutional (second-order) language.

C. Two Proposals for A New Constitutionalism

In this section, I contrast Tushnet’s proposal for a new majoritarianism with my own alternative. Tushnet believes that American constitutionalism should abandon judicial review. Toward this end, Tushnet imagines the Supreme Court issuing the following decision:

159. In this regard, the elected branches of government might use constitutional discourse effectively. Consider Chief Justice Marshall's eloquent statement of constitutionalism: "[A constitution’s] nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. . . . [W]e must never forget that it is a constitution we are expounding." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). Given the will, the elected branches could effectively use Marshall's or any other conception of constitutionalism. But that will work only when the elected branches use a sufficiently constitutional (second-order) language.
In 1803 we launched a great experiment—judicial review. We believe the nation benefited from judicial review over the past two centuries. Today, however, the gains from further exercises of judicial review no longer exceed the losses. We have therefore decided to end the experiment in 2003. We will no longer invalidate statutes, state or federal, on the ground that they violate the Constitution.\textsuperscript{160}

For Tushnet, implementing this proposal would not “make much difference one way or the other” to the power of government or “the liberties of the American people.”\textsuperscript{161} However, “[d]oing away with judicial review would have one clear effect: It would return all constitutional decision-making to the people acting politically. It would make populist constitutional law the only constitutional law there is.”\textsuperscript{162} This is the heart of the majoritarian dilemma. Tushnet inveighs against judicial review and carves the landscape into two mutually exclusive categories: judicial review and political decision-making.\textsuperscript{163} When he abandons judicial review, what drops out of the picture is the special second-order form of reasoning that depicts constitutional reasoning and review. Constitutional reasoning can and should be used to review legislative decisions. If the above argument is correct, Tushnet’s account banishes constitutional reasoning from the discourse of legislators, executives, and most importantly, from civic discourse. We ought not to be sanguine about this prospect. Instead, it would be better to specify the language of constitutional reasoning and then to ask which institution is a better candidate for using that language. Conceptually, judicial review may be an important step in constitutional review without giving the courts the final say in the process.\textsuperscript{164}

Majoritarians, sincerely concerned with constitutional review, need not follow Tushnet’s proposal to end judicial review. Consider a possible congressional alternative: As in Tushnet’s hypothetical, the Court speaks:

\begin{footnotes}
\begin{itemize}
\item[160.] TUSHNET, supra note 6, at 154.
\item[161.] Id.
\item[162.] Id.
\item[163.] Without ways of resolving the counter-majoritarian entrenchment problems associated with the elected branches mentioned by Klarman, it is difficult to prevent these problems from multiplying. Nevertheless, Klarman seems to be arguing a thesis sympathetic to Tushnet’s. For Klarman, legitimate judicial review would scrutinize legislation for entrenchment problems however difficult this will be. By contrast, Tushnet implies that such anti-entrenchment judicial review is better abandoned along with other conceptions of judicial review.
\item[164.] Indeed, even in present circumstances, judicial supremacy is not “supreme,” since there are methods for overturning judicial decisions. However, overturning these decisions is difficult and therefore unlikely. I am suggesting a new institutional device that would make these processes easier and more effective.
\end{itemize}
\end{footnotes}
Whenever Congress decides that the Court's decision in a particular case is unconstitutional, Congress shall designate that the people or their representatives should ratify or overrule the Court's decision. In most circumstances, after one Presidential election, Congress by a majority (or supermajority?) may overturn the Court's interpretation of the Constitution, giving the people the ultimate authority in determining constitutionality.\footnote{165}

Little depends upon the details of this proposal. I leave the issue of when the ratification designation should be made. It might occur when any Supreme Court decision is constitutionally suspect, no matter how the Court is split, or only when the Court is split, or it can be limited to those decisions that are split five to four or six to three. I also omit discussion of whether the congressional override should be majoritarian or supermajoritarian, and if majoritarian, just what form. What is left is a simple process through which the constitutional process benefits from retaining an institution that engages in second-order reasoning about our political judgments. No doubt, Congress could create a joint committee for re-evaluating the constitutionality of proposed legislation, and there might then be no need for constitutional review performed by the judiciary. But, at least for now, that is not the case, and so this proposal guarantees institutional responsibility for carrying on constitutional review.\footnote{166}

Once the ratification designation occurs, the people, especially through the ensuing presidential election, will deliberate and debate the constitutionality of the relevant Supreme Court decision.\footnote{167} When the election results are determined, Congress shall have the prerogative to ratify or overturn the judicial mandate.\footnote{168} This proposal attempts to

\footnote{165. Of course, given present constitutional baselines, this act of Congress is likely to be unconstitutional. However, that remark assesses constitutionality in the narrow terms of a conservative jurisprudence, and if so then, this proposal is a non-starter. But if our goal is to devise a better conception of constitutionality and a better conception of who best decides what is better, the proposal should be taken seriously. This proposal can, I believe, begin informally just as judicial review originally began. However, if push comes to shove, and if both majoritarianism and constitutionalism are sufficiently important, those concerned with the counter-majoritarian problem should advocate amending the Constitution through Article V.}

\footnote{166. For Congress to take over constitutional review some process is necessary, if constitutional review is to be taken seriously. Included in this process must be a mechanism for challenging and evaluating a bill's constitutionality. In other words, there must be a process for initiating the challenge, conducting a public hearing before the appropriate committee on constitutionality, deliberating the constitutional pros and cons of the bill, and finally a process for deciding the bill's constitutionality.}

\footnote{167. I ignore questions of divided government when the President represents one political party and Congress the other. Tactical problems can be resolved, if we adopt these majoritarian solutions to the problems of judicial supremacy.}

\footnote{168. This proposal may include a provision for including the Court in the final decision. Once Congress overrides the errant Supreme Court decision, the ball is back in the Court. After reflecting on
marry two central features of democratic constitutionalism. First, constitutional review is preserved through the judiciary, though the final word rests with the people. Again, the emphasis is on the importance of constitutional review, not its expression as judicial review. Second, since constitutional review itself cannot definitively settle the institutional question, give the people and their representatives the final say concerning the constitutionality of a proposed statute. This idea of constitutional review is majoritarian insofar as it permits people and their representatives the opportunity to overrule an errant court. On the other hand, this view is congenial to complex democracy because it gives the Court the special responsibility of engaging in second-order reasoning. Once this second-order reasoning is developed, its use will not be restricted to the Court. Indeed, during a presidential campaign, the Court's decision would be debated. With any luck, the discourse used in this debate will be for the most part second-order. However, even in cases where public discourse is impoverished, at least one institution, namely the judiciary, will be setting an example of the kinds of considerations and reasoning that go into constitutional interpretation without necessarily being the final arbiter of constitutional meaning.

Tushnet's proposal throws the baby out with the bath water. If judicial review is defective, let us get rid of it. But let us keep constitutional review, which requires some institutional authority for engaging in constitutional discourse consisting of second-order judgments about first-order statutes. Without constitutional review politics and constitutional law are precisely the same, each lacking the appropriate concepts, arguments, and justification for constitutional review. Constitutional review consists of a unique discourse, one that historically has been conducted by the courts. But it just as easily finds its home in the political branches, just so long as the political branches the results of the election, the Court may now reverse (or reaffirm?) its earlier holding. Including the Court in this process may be desirable, but not essential.

169. Let me make this point clear. I am not advocating abandoning judicial review. My point is simply that majoritarians should realize the need for some form of constitutional review, that is, they should acknowledge the need for engaging in second-order reasoning. Thus, if judicial review is unsatisfactory, but constitutional review is essential, majoritarians need to indicate the best institutional arrangement for constitutional review and the appropriate kind of discourse and reasoning required for its expression.

170. Basically, first-order reasoning results in ordinary lawmaking and second-order reasoning results in the laws of lawmaking. The distinction between first- and second-order norms and judgments is useful, not perfect. As Michelman puts it:

Disputes about the higher legality of particular instances of ordinary lawmaking are nothing other than disputes about how to apply the laws of lawmaking and questions about how to apply the laws of lawmaking are not cleanly separable from questions about what the laws of lawmaking are. Acts of legal application contain acts of legal manufacture.

FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 21 (1999).
acknowledge that policy decisions and constitutional review represent two related, but distinct, forms of discourse.

How can we implement this proposal of integrating judicial review with the political branches' final authority? One possibility follows Tushnet's hypothetical. Just as *Marbury* amended the Constitution without adopting the formal amendment process, so too can political leaders if they will informally change the current process of constitutional review.171 Recall the above alternative proposal for integrating judicial review and political decisions. In this case, the relevant branches of government cooperate with one another in order to create a new institutional design for judicial review. Just as the practice of judicial review, as well as other constitutional structures, has emerged over the course of American constitutional history (such as the centrality of the executive branch, the creation of an administrative "branch" of government, and so forth), so too can a new conception of the Court's role in constitutional interpretation. If judicial supremacy diminishes the efficacy or legitimacy of constitutional review, we can abandon judicial supremacy without abandoning judicial review. We can have the best of both worlds.

If the counter-majoritarian problem is really a problem, it can be overcome by embracing legislative or executive supremacy as the final arbiter of constitutional meaning, but only after the court decides the case. In this way, judicial review can be informally relegated to a middle-stage process in constitutional review. This integrated system preserves the distinction between doing and reviewing, between first- and second-order discourses. This distinction is at the heart of constitutionalism generally. Any majoritarian who fails to recognize this and considers constitutional review as merely epiphenomenal is not just taking the Constitution away from the Court, rather she is taking the Constitution, whether thick or thin, away from government and the people. To avoid this, constitutional review should remain an integration of first-order and second-order norms devoted to fairly and capaciously interpreting the scope and limits of American constitutionalism.172

**CONCLUSION**

What are the implications of the failures of the new majoritarianism? Must we be resigned to the position that constitutionalism is anathema

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171. See Lipkin, supra note 14, at ch. 4.
172. If informally this proposal threatens a constitutional crisis, it can be implemented through Article V's amendment procedure.
to populist democracy? Must we concede that American constitutional government is as populist or democratic as it is going to get? Before we can evaluate a majoritarian proposal, it is necessary to answer two questions: the normative question and the institutional question. Normatively, we must determine whether review of majoritarian decisions is desirable in a populist democracy, or any other type of democracy. Second, if it is desirable, which institution or combination of institutions should exercise this review power?

This Article raises serious objections to constitutional majoritarianism, specifically, Mark Tushnet’s conception of the thin Constitution and its implementation. This Article further concludes that Tushnet has not adequately defended his claim that the Constitution should be taken away from the courts and given to the elected branches of government. Finally, it concludes that constitutional review, whether judicial or not, is part of any complete system of constitutionalism. If constitutional review is not carried out by the courts, several different possibilities exist for institutionalizing the process through which government acts may be reconsidered and re-evaluated. It is this process of review that ensures the nation’s constitutional identity and enables American citizens to be faithful to the deliberative framework of democracy.