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THE LAW PROFESSOR AS POPULIST

Mark A. Graber *

A new populism is taking root in the strangest soil, American law schools. Tocqueville regarded “the profession of law” as an “aristocratic element,” “a sort of privileged body in the scale of intellect.”¹ Lawyers, he observed, belonged to “the highest political class,” and routinely developed “some of the tastes and habits of aristocracy.”² During the 1990s, however, bold challenges to elite rule in the name of popular majoritarianism were issued by distinguished professors and chairholders at the most prestigious law schools in the United States. Such leading jurists as Richard Parker, Jack Balkin, Akhil Reed Amar, Sanford Levinson, and Mark Tushnet proudly declared their populist identity, and urged fellow law professors to join the people’s crusade.³ Deploring the “chronic fetishism of the Constitution, constitutional law, and the Supreme Court,” these scholars are presently calling for constitutional theory that acknowledges “that ‘common’ people, ordinary people—not their ‘betters,’ not somebody else’s conception of their supposed ‘better selves’ are the ones who are entitled to govern our country.”⁴ This “vision of ‘populist constitutionalism,’” Levinson notes, “seems to permeate the Yale

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1. ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 276, 273 (Henry Reeve et al. trans., 1980).

2. *Id.* at 278, 273.

3. See AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS at xi (1998); RICHARD PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO *passim* (1994); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS at x, 178-94 (1999); J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1945-54, 1989-90 (1995).

4. PARKER, *supra* note 3, at 79, 97.

Law School,⁵ and is a presence on the legal faculties at Harvard,⁶ Michigan,⁷ Texas,⁸ and Georgetown.⁹

Taking the Constitution Away from the Courts expresses the populist spirit from the very beginning. Professor Tushnet introduces his themes by reflecting on his experience “hear[ing] Joan Osborne perform Patti Smith’s song at a concert to benefit the political group Voters for Choice on the anniversary of *Roe v. Wade*.”¹⁰ The words, which appear as the first text in the book, are the following:

The people have the power
To redeem the work of fools
Upon the meek the graces shower
It’s decreed
The people rule.¹¹

The popular singer singing hymns to the people at a popular gathering evokes a long populist tradition. Fifty years ago the folk singer might have been Woody Guthrie singing the populist standard, *This Land is Your Land*, at a union rally. Professor Tushnet then recognizes an incongruity in populist tributes to *Roe*, Mr. Justice Blackmun’s opus. A “tension” exists, the first paragraph of *Taking the Constitution Away from the Courts* concludes, “between celebrating a Supreme Court decision finding abortion laws unconstitutional and extolling popular political power.”¹²

Professor Tushnet’s treatment of this tension should become a classic in American political thought. *Taking the Constitution Away from the Courts* advances two powerful theses that will occupy American constitutional thinking for years to come. Opposing clause-bound interpretivism, Professor Tushnet insists that Americans are constitutionally obligated to respect a thin Constitu-

5. Sanford Levinson, *Constitutional Populism: Is It Time for “We the People” to Demand an Article Five Convention?*, 4 WIDENER L. SYMP. J. 211, 214 (1999).

6. See PARKER, *supra* note 3 (describing the view of a Harvard faculty member).

7. See Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 482 (1998) (describing a Michigan professor’s viewpoint).

8. See Levinson, *supra* note 5, at 218 n.1 (describing the perspective of a Texas law professor).

9. See TUSHNET, *supra* note 3, at xii (describing the view of a Georgetown faculty member).

10. *Id.* at ix. The *Roe* decision is reported at 410 U.S. 113 (1973).

11. TUSHNET, *supra* note 3, at ix. My antipopulist sensibility may best be revealed by the fact that I had not heard of Joan Osborne, Patti Smith, or the song in question, until I read *Taking the Constitution Away from the Courts*.

12. *Id.*

tion committed only to realizing the principles of the Declaration of Independence, broadly understood.¹³ In sharp contrast to the court-centeredness of virtually all constitutional discourse in the legal academy, *Taking the Constitution Away from the Courts* insists that the goals of a populist constitutional law can be achieved only if federal (and presumably state) courts abandon their practice of declaring laws unconstitutional.¹⁴ Most contemporary critics of judicial power insist only that justices should not be the exclusive or final interpreters of constitutional meaning,¹⁵ that justices should have the power to declare only a limited class of laws unconstitutional,¹⁶ that justices should declare unconstitutional only those laws that no reasonable person would think constitutional,¹⁷ or, as Robert Bork has argued, that legislative majorities should have the power to overrule judicial decisions declaring laws unconstitutional.¹⁸ Professor Tushnet goes the whole hog. He would eliminate judicial review entirely.¹⁹ *Taking the Constitution Away from the Courts* maintains that judges should be authorized to interpret

13. See *id.* at 11-13, 31, 51, 185.

14. See *id.* at ix, 7, 107, 128, 174, 186, 194.

15. See, e.g., JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 19-55, 77-138 (1984); SUSAN R. BURGESS, *CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES* 1-27 (1992); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 44-84, 231-79 (1988); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 122-54 (1988).

16. See generally JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 60-70 (1980) (explaining that courts should declare unconstitutional only laws inconsistent with the individual rights provisions of the Constitution); ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 207-11, 223-33 (1989) (stating that courts should declare unconstitutional only laws of a judiciary nature); MATTHEW J. FRANCK, *AGAINST THE IMPERIAL JUDICIARY: THE SUPREME COURT VS. THE SOVEREIGNTY OF THE PEOPLE* 65-91 (1996) (explaining that some constitutional scholars support narrowing the range of issues in which judicial finality should prevail).

17. See SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 9-12, 212-22 (1990); CHRISTOPHER WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW* 323-56 (1986)

18. See ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 116-17 (1996). Several scholars have asserted that Supreme Court justices should serve fixed, rather than life, terms. See L.A. POWE, JR., "OLD PEOPLE AND GOOD BEHAVIOR," *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* (William N. Eskridge, Jr. & Sanford Levinson eds., 1998). Such claims do not directly challenge either judicial review or judicial supremacy, but are means of making the exercise of those powers more consistent with public opinion. Interestingly, no populist law professor has proposed a preferred populist procedure, the election of federal justices.

19. See TUSHNET, *supra* note 3, at ix, 7, 107, 128, 174, 186, 194. Some progressives and populists at the turn of the twentieth century similarly called for the abolition of judicial review. For those and other proposals to limit judicial review made during that era, see WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 313-24 (1994).

statutes consistently with their best understanding of the thin Constitution.²⁰ Nevertheless, when legislatures express a clear wish to ban flag burning, adopt affirmative action programs, allow prayer in school, restrict campaign finance, or adopt any other constitutionally controversial measure, populist constitutional law requires justices to respect the right of the people to interpret the thin Constitution as they think best.

Taking the Constitution Away from the Courts consistently raises the sort of issues that American constitutionalists should consider, but rarely do. Professor Tushnet is particularly successful in demonstrating how arguments for (and against) judicial review routinely rely on complex empirical and historical matters on which legal academics have little expertise.²¹ This is a particularly welcomed assertion for those as concerned with the present law-school monopoly on constitutional theory as the present judicial monopoly on constitutional exposition.²² As more scholars understand that constitutional theory is an interdisciplinary project, the likelihood increases that more egalitarian exchanges will be promoted between academic lawyers, philosophical philosophers, and more empirically oriented students of political institutions and behavior. Every serious constitutional theorist must confront the arguments that Professor Tushnet lays out, especially if they wish, as I do, to defend judicial review.

This potential classic of American political thought is not, however, a classic of American populist thought. Some tensions, inherent in the elite law professor as a populist, are visible on the book jacket and title page, before the text even begins. In sharp contrast to Robert Bork, who has been publishing polemics against judicial review in trade presses, Professor Tushnet chose to submit a serious, scholarly critique of that practice to a distinguished university press.²³ Princeton University Press is hardly the publisher of choice for populist broadsides. Works on that list are written by and for elite professors or persons who aspire to be elite professors. *Taking the Constitution Away from the Courts*, like most

20. See TUSHNET, *supra* note 3, at 164-65.

21. See, e.g., *id.* at 99, 123, 128.

22. See Mark A. Graber, *Delegalizing Constitutional Law*, 6 GOOD SOCIETY: A PEGS J. 47 (Fall 1996).

23. One can tell some books by their cover. The blurbs on the back cover of Bork's books are mostly from popular political commentators or leading newspapers. The blurbs for *Taking the Constitution Away from the Courts* are from two academics.

distinguished university press books, is far more likely to facilitate interesting and important conversations in faculty seminars than make the author a media celebrity.²⁴

The first paragraph of *Taking the Constitution Away from the Courts* reveals other tensions inherent in the elite law professor as populist. The rally Professor Tushnet attended was for legal abortion. This policy is strongly supported by America's elite. The ordinary, working class Americans that populism celebrates are more ambivalent about, if not generally opposed to, abortion on demand.²⁵ The rally is a benefit, rather than a demonstration, march, or gathering. Professor Tushnet and other attendees are exercising political power in the manner of the political elite, by making monetary donations to a cause they favor.²⁶ Populist movements historically ask participants to contribute time and energy, not a check. Tushnet never acknowledges the tension between making a cash contribution promoting elite social values while simultaneously declaring a populist sensibility better embodied in the membership, rhetoric, and political style of those political associations committed to more conservative social values.²⁷ Much of the tension in *Taking the Constitution Away from the Courts* between simultaneously celebrating *Roe* and popular political

24. Professor Tushnet most clearly demonstrates his elite academic commitments when declaring that his book is "not an argument that the populist interpretation is the only, or even the best, interpretation of the Constitution," but that the work is designed only to "open[] up issues that thoughtful voters and elected officials should think about." TUSHNET, *supra* note 3, at xi. One imagines William Jennings Bryan concluding his speech to the 1896 Democratic Party National Convention, see *The Cross of Gold, Speech before the Democratic Convention (July 9, 1896)*, in SELECTED AMERICAN SPEECHES ON BASIC ISSUES (1890-1950), at 182, 185-87 (Carl G. Brandt & Edward M. Shafter, Jr. eds. 1960), with the following similarly stirring words:

The last paragraph's conclusion, "you shall not crucify mankind on a cross of gold," is not an argument that the gold standard is an unjust, or even inferior, monetary policy. By that catchy phrase I mean only to open up issues that thoughtful voters and elected officials should think about.

Having had some fun at Professor Tushnet's expense, I should emphasize that the above sentence is the key to the book. *Taking the Constitution Away from the Courts* does not work when read as providing definitive answers to important constitutional questions. The book works fabulously, however, when read as detailing the sort of questions scholars must raise when thinking about constitutional matters. Many disciplines would be better off fostering intelligent speculation about important matters than definitive answers to less-salient concerns.

25. See MARKA. GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 144-45, 205 n.103 (1996) (citing numerous public opinion polls).

26. Many contributions made at that benefit, no doubt, were beyond the means of most ordinary, working-class Americans.

27. For the populist credentials of the pro-life movement, see MICHAEL KAZIN, THE POPULIST PERSUASION: AN AMERICAN HISTORY 255-60 (1995).

action is dissolved by analysis suggesting that abandoning judicial review will not adversely affect most causes favored by those elites who attend pro-choice benefits.²⁸

This essay explores some of the problems that arise when elite law professors pose as populists. One problem, articulately raised by Professor Jack Balkin, is that “the academic who advocates populism is still a member of an intellectual elite” who “writes in academic journals and speaks in the language of academic theory.”²⁹ The other problem is that elite law professors tend to be “scavengers,”³⁰ who “ransack’ the past to find arguments for whatever vision of the social order they wish[] to promote.”³¹ Liberal proponents of the republican revival in constitutional theory emphasized classical republicanism’s commitment to political participation, ignoring the classical republican claim that such participation could take place only in a homogenous society.³² A similar risk of appropriation exists when liberal law professors wander from republican to populist paths when “roaming through history looking for [their] friends.”³³ Elite jurists may extract material from populism that suits their purposes, paying no attention to those elements of more concern to working-class or religious populists.

The elite populism in *Taking the Constitution Away from the Courts* is weaker and thinner than the populism advanced by working-class political movements. The populism is weak because populist participation matters only when different institutional forms are likely to yield similar results. Professor Tushnet favors populist processes for making constitutional decisions only because he concludes that less-populist processes are no more likely than more-populist processes to yield the mix of policies that liberal elites favor.³⁴ The populism is thin because (1) political participation is the only populist value considered; (2) Professor Tushnet does not clearly advance a populist understanding of political participation; and (3) abandoning judicial review is the only populist measure

28. See *infra* notes 36-44, 54-55 and accompanying text.

29. Balkin, *supra* note 3, at 1951.

30. Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591, 1591 (1988).

31. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 175 (1996).

32. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT & JUDICIAL REVIEW* 25-27 (1999).

33. MORTON HORWITZ, *Republican Origins of Constitutionalism*, in *TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS* 148 (Paul Finkelman & Stephen Gottlieb eds., 1991).

34. See TUSHNET, *supra* note 3, at 154.

advocated. *Taking the Constitution Away from the Courts* rarely takes notice of other elite influences on the legal system and in the broader political system. This latter omission threatens to undermine the entire project. If elites exercise similar influence in nonjudicial fora, then taking the Constitution away from courts will at most empower one set of elites at the expense of another set of elites.

These comments refer more to the packaging than the substance of *Taking the Constitution Away from the Courts*. My political sympathies lie with grass-roots progressivism rather than working-class populism.³⁵ Thus, my claim that Tushnet's political commitments seem closer to the latter primarily provides a more accurate historical pedigree for views I think sound. The sections below that question the merits of abandoning judicial review primarily point to areas where additional research and philosophical clarifications are necessary for a populist (or grass-roots progressive) constitutional law. Nothing in the following pages provides the knock-down refutation of any claim in *Taking the Constitution Away from the Courts*. Professor Tushnet is extraordinarily successful raising questions about received wisdom on the necessity for judicial review in the United States. More generally, the self-identified populists who teach at elite law schools have been producing a fascinating, impressive, and important body of scholarship for the past decade. The following pages contend only that Professor Tushnet and others have not produced an impressive and important body of populist scholarship. Many of their best arguments are not particularly populist, while other arguments do not take a clear stand on issues that distinguish populism from other participatory theories of democracy. Taking the Constitution away from the courts is not sufficient to achieve populist constitutional law, and such an institutional reform may even limit popular participation in constitutional debates unless other populist/grass-roots progressive reforms are enacted.

35. See MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 227-34 (1991); Mark A. Graber, *Conflicting Representations: Lani Guinier and James Madison on Electoral Systems*, 13 CONST. COMMENTARY 291 (1996).

I. WEAK POPULISM

Taking the Constitution Away from the Courts offers the weakest possible populist attack on judicial review. Strong populist attacks on judicial review judge political processes exclusively or at least primarily by their capacity to improve the political participation and influence of working-class Americans. If the abandonment of judicial review were to increase popular participation in abortion policy-making and increase the probability that abortion would be recriminalized, the strong populist believes judicial review must be abandoned. Such a populist would insist either that the sole virtue of political institutions is their capacity to increase political participation or that the increased political participation associated with abandoning judicial review is of far more value than keeping abortion legal. No such argument appears in *Taking the Constitution Away from the Courts*. Professor Tushnet dissolves the tension between his elite support for legal abortion and his populist commitment to popular political power by claiming that legal abortion and other liberal causes are as likely to be served by legislative supremacy as by judicial supremacy.³⁶ Populist values do not trump other values. They are relevant only when judicial review has no impact on the overall direction of public policy.

Professor Tushnet offers an impressive array of arguments for taking the Constitution away from the courts: (1) vigorous debate on constitutionalism already takes place outside of courts,³⁷ and judicial review may be responsible for many weaknesses in that debate;³⁸ (2) elected officials have numerous incentives to respect constitutional limits;³⁹ (3) judicial policymaking may oscillate as much as legislative policymaking;⁴⁰ (4) courts are no more likely to respect limits on judicial power than legislatures are to respect limits on legislative power;⁴¹ and (5) justices have historically demonstrated no greater solicitude for human rights than other governing officials.⁴² The gist of all these arguments is that proper constitutional limits and values are as likely, if not more likely, to

36. See TUSHNET, *supra* note 3, at 186-87.

37. See *id.* at 65.

38. See *id.* at 57-66.

39. See *id.* at 96-108.

40. See *id.* at 28.

41. See *id.* at 26.

42. See *id.* at 129-63.

be honored when courts refuse to declare laws unconstitutional. “[J]udicial review,” *Taking the Constitution Away from the Courts* concludes, “basically amounts to noise around zero: It offers essentially random changes, sometimes good and sometimes bad, to what the political system produces.”⁴³ Because judicial review in practice is “a marginal institution,” Professor Tushnet acknowledges that abandonment “would not increase our power of self-government that much.”⁴⁴ Still, he asserts, abolishing judicial review “may contribute to serious thinking about the Constitution outside the courts” and foster “[p]opulist constitutional law,” which “seeks to distribute constitutional responsibility throughout the population.”⁴⁵

These arguments demolish traditional justifications for judicial review. Conventional defenses of judicial review proclaim that judicial review is legitimate when the Justices exercise the power properly, as properly is defined by a particular theory of the judicial function in constitutional cases.⁴⁶ Some constitutional commentators find judicial review in a democracy defensible when the Justices strike down only those laws inconsistent with the original understanding of constitutional provisions.⁴⁷ Others find it appropriate when the Justices strike down only those laws inconsistent with a particular understanding of democracy.⁴⁸ Still others think judicial review is proper when the Justices strike down only those laws inconsistent with a particular understanding of the Constitution’s

43. *Id.* at 153. Professor Tushnet may have been more accurate when he previously noted that because “[t]he Justices are members of the cultural elite,” judicial outputs are likely to reflect the opinions of that class. *Id.* at 150. Judicial decisions have also historically tended to reflect the views of the presidential coalition that appointed the judicial majority than the legislative coalition that confirmed the appointments of the judicial majority. See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. AM. POL. DEV.* 35, 65-66 (1993) (noting that judicial review “has consistently favored the interests of the presidential wing of the dominant national coalition of the elite wings of both major parties”) [hereinafter *Graber, The Nonmajoritarian Difficulty*]. Still, traditional justifications of judicial review do not defend that practice as a means for augmenting presidential power or increasing elite influence on public policy. I have hinted at such an elite justification of judicial review. See Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 *OHIO ST. L.J.* 731, 807-13 (1997) [hereinafter *Graber, The Clintonification of American Law*]; see also *infra* notes 188-89 and accompanying text.

44. TUSHNET, *supra* note 3, at 174.

45. *Id.*

46. See *infra* notes 47-50.

47. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); WHITTINGTON, *supra* note 32, at 218.

48. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

aspirations.⁴⁹ Both as a matter of history and constitutional structure, however, the Justices are unlikely to adopt any particular theory of the judicial function for long periods of time when that theory consistently produces results that are an anathema to the dominant national coalition. The Justices do not simply follow the election returns.⁵⁰ Still, historical and empirical studies of judicial review indicate that Justices rarely oppose strong majorities and almost never do so for any length of time.⁵¹ Judicial review is least likely to occur, Professor Tushnet properly concludes, when various theories of the judicial function maintain that judicial review is most needed.⁵² Professor Tushnet is also right to think that nattering at the Justices in law reviews, op-eds, or Princeton University Press books is unlikely to change matters.⁵³ “[W]e are entitled to be skeptical,” he writes, “when a hundred years of constitutional theory has not yet persuaded judges to follow where principle—as defined by the theory class—leads.”⁵⁴ If judicial review is justifiable, then the American practice of judicial review must be justifiable, not some idealized system of judicial review. No extent theory of judicial review has shown that courts have historically performed better than legislators on constitutional matters and are likely to continue better performance for the foreseeable future. More often than not, constitutional theorists begin by cataloguing a 200-year reign of error, alleviated only by one particular judicial regime or by a few sage Justices who got the law right.⁵⁵

This strong attack on traditional justifications for judicial review is not, however, a powerful populist attack on judicial review. At no point does *Taking the Constitution Away from the Courts* maintain that the Constitution should be taken away from the courts even if the likely long-term impact of legislative supremacy will be to diminish protection of those constitutional limitations Professor Tushnet believes government should respect. Every attack on

49. See SOTIRIOS A. BARBER, *THE CONSTITUTION OF JUDICIAL POWER* (1993); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

50. See RONALD KAHN, *THE SUPREME COURT & CONSTITUTIONAL THEORY, 1953-1993* (1994).

51. See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. OF PUB. LAW 279 (1957); Graber, *The Nonmajoritarian Difficulty*, *supra* note 43, at 35.

52. See TUSHNET, *supra* note 3, at 162-63.

53. See *id.* at 155-57.

54. *Id.* at 157.

55. See BORK, *supra* note 47, at 19-132; Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 20-35 (1959).

judicial review is based on the claim that liberal, typically elitist, values are as likely to be served by legislative supremacy as by judicial supremacy.⁵⁶ Professor Tushnet indicates that abandoning the practice of judicial review might result in some policies he dislikes.⁵⁷ Those policies are counterbalanced, not by more participation, but by the probability that legislative supremacy would also result in other policies that Professor Tushnet and liberal law professors favor.⁵⁸ “[W]ithout judicial review,” he observes, “liberals would have to give up the prospect of further constitutional gains for gay rights and run the risk that they would be unable to defend abortion rights in the political arena.”⁵⁹ “Conservatives,” however, “would have to give up the prospect of further erosion of affirmative action programs and would have to fight campaign finance reform in the political arena.”⁶⁰ The last chapter recognizes that “[p]opulist constitutional law offers no guarantees that we will end up with progressive political results.”⁶¹ Instead of then making the populist claim that more equal political processes are worth some sacrifice of other progressive values, *Taking the Constitution Away from the Courts* merely declares “neither does elitist constitutional law.”⁶²

Should populist values clash with other values Professor Tushnet cherishes, *Taking the Constitution Away from the Courts* suggests that the populist commitment to political participation might be abandoned.⁶³ Professor Tushnet declares that “if democracy regularly produced disagreeable results, I would rethink my commitment to democracy.”⁶⁴ He would support judicial review if he was confident that the judicial majority would agree with him on all issues.⁶⁵ Professor Tushnet does not claim that he would sacrifice

56. See TUSHNET, *supra* note 3, at 154.

57. See *id.*

58. See *id.*

59. *Id.*

60. *Id.*

61. *Id.* at 186.

62. *Id.* The argument against judicial review in *Taking the Constitution Away from the Courts* presently works with the substitution of any value that persons would consider good, all things being equal. Let us assume that abandoning judicial review would make my daughter, Rebecca, happy, and that all persons agree that making Rebecca happy is, all other things being equal, a good thing. Let us further postulate, as Professor Tushnet does, that judicial review is essentially “noise about zero” with respect to any other value that one would think relevant to that practice. *Id.* at 153. It would then follow that judicial review should be abandoned because that would make Rebecca happy. The role of populist participation seems no stronger in the actual argument made in *Taking the Constitution Away from the Courts*.

63. See *id.* at 31.

64. *Id.*

65. See *id.* at 155.

populist values to achieve even a slight increase in his preferred policymaking. Still, the argument in *Taking the Constitution Away from the Courts* does not clarify what force political participation has when populist-process values conflict with substantive progressive values.

The attack on judicial review would have more populist bite if serious disagreement existed over whether political participation was desirable. Professor Tushnet and other legal populists maintain that elites oppose political participation by ordinary people.⁶⁶ Few elitists, however, oppose the weak populist understanding of political participation, that all things being equal, more political participation is better than less. Elites, Professor Tushnet properly notes, fear mass participation when they believe misguided or evil policies will result from giving ordinary people too much power.⁶⁷ Were they convinced that the people in the streets would demand absolute monarchy, Louis XVII and Marie Antoinette might have been populists.

II. THIN POPULISM

Professor Tushnet's attack on judicial review illustrates how elite appropriation of populist identity risks denuded populism of vital impulses. An argument that superficially calls on the people to take the Constitution back from elites is, in fact, more structured to persuade elites that little they value is at risk in institutional fights for constitutional supremacy. By minimizing the stakes, *Taking the Constitution Away from the Courts* tames populism, stripping that persuasion of those elements that might inspire working-class citizens. Ordinary people, who typically work longer and at more physically demanding jobs than academics,⁶⁸ are not likely to mobilize against judicial review when little of substantive value is at stake. While populists historically regarded judicial review as

66. See, e.g., PARKER, *supra* note 3, at 56, 60-61; TUSHNET, *supra* note 3, at 124.

67. See TUSHNET, *supra* note 3, at 124, 127. Professor Tushnet and other legal populists are more confident than elite democratic theorists that ordinary people can be trusted to protect fundamental values. Still, the argument in *Taking the Constitution Away from the Courts* proves only that liberal elites should place as much trust in legislative processes as in judicial processes, and not that liberal elites should place more trust in ordinary people. Judicial review may amount to "noise about zero" because the elites who control legislative decision-making are the same or similar to the elites who control judicial decision-making. See *infra* notes 188-89 and accompanying text.

68. See Balkin, *supra* note 3, at 1936.

undemocratic, their primary reason for reducing judicial power was to protect populist legislation.⁶⁹

Similar appropriation is already taking place in the popular culture that some populist law professors celebrate.⁷⁰ “Populism,” in the mass media, Michael Kazin observes, has become “something of a fashion statement,” used “to describe anything or anybody not associated with the glamorous or the wealthy.”⁷¹ He notes that the populist label has been attached to “talk-show hosts, cable networks, rock musicians, film directors, low-priced bookstores, even sports fans who boo[] when rich athletes play poorly.”⁷² Some upscale corporations presently advertise their products as “[p]opulist.”⁷³

Populism among law professors seems somewhere between a serious political identity and a fashion statement. Some claims are better understood as political slogans than as political commitments. The bare assertion that “[a] populist constitutional law rests on a commitment to democracy”⁷⁴ hardly distinguishes populism from any other strand of American political thought. All participants in American public debates profess to agree on democracy. Similarly, virtually all political movements in the United States understand themselves as committed “to realizing the principles of the Declaration of Independence and the Constitution’s Preamble [and to] . . . the principle of universal human rights justifiable by reason in the service of self-government.”⁷⁵ Legal populists better express political commitments when they use “populism” to describe policies and political programs that promise to increase political participation. “The populist constitutionalist,” Tushnet writes, “believes that the public generally should participate in shaping constitutional law more directly and openly.”⁷⁶ This understanding of populism is compared to “elite” beliefs “that the people could not possibly care enough about individual rights to protect them

69. See ROSS, *supra* note 19, at 10.

70. See, e.g., Balkin, *supra* note 3.

71. KAZIN, *supra* note 27, at 271.

72. *Id.*

73. *Id.*

74. TUSHNET, *supra* note 3, at 31.

75. *Id.* at 181. Given Professor Tushnet’s general philosophical orientation, I do not read this claim as inconsistent with the anti-foundationalism of much American political thought.

76. *Id.* at 194; see also *id.* at x (“It is *populist* because it distributes responsibility for constitutional law broadly.”); *id.* at 106 (“[T]he point of populist constitutional law . . . is to enhance the public’s consideration of fundamental issues.”); *id.* at 174 (“Populist constitutional law seeks to distribute constitutional responsibility throughout the population.”).

through politics.”⁷⁷ Such a populism, understood largely as a synonym for participatory democracy, does have some bite. Still, the contemporary legal version of populism is a pale version of historical populism, and is probably better classified as an offshoot of grass-roots progressivism.

A populism committed only to increasing political participation is a remarkably thin populism. Populists did champion political participation. Elite law professors who write as populists, however, mute the antielitist, producerist, and religious strains of populist thought. Moreover, the political participation championed in *Taking the Constitution Away from the Courts* is not distinctively populist. Professor Tushnet advocates more political participation, but does not take a stand on the more-populist concern with the participatory opportunities sufficient to afford all interested citizens an equal share in government.⁷⁸ Finally, the only populist proposal Professor Tushnet endorses is that judicial review should be abandoned.⁷⁹ *Taking the Constitution Away from the Courts* does not consider other elite influences on the production of constitutional meaning, influences that may suggest that populists should have priorities other than abandoning judicial review, and that abandoning judicial review at present may not serve populist interests.

A. Populist Values

The legal populist claim that “American populism . . . is simply about democracy”⁸⁰ seems false to the populist experience. The best expressions of Populist Party sentiments, the Ocala Platform of 1890 and the Omaha Platform of 1892, are primarily devoted to substantive policy demands. Of the seven demands made in the Ocala Platform, only the seventh, calling “for the election of United States Senators by direct vote of the people of each state,” directly concerns democratic processes.⁸¹ The Omaha Platform of the Populist Party was devoted entirely to substantive policy concerns,

77. *Id.* at 124; see also *id.* at 177 (claiming that “[l]iberals today seem to have a deep-rooted fear of voting . . . because they are afraid of what the people will do”).

78. See *id.* at 154, 194.

79. See *id.* at 154.

80. Richard D. Parker, Book Review, 15 LAW & HIST. REV. 394, 394 (1997) (reviewing MICHAEL KAZIN, THE POPULIST PERSUASION: AN AMERICAN HISTORY (1995), and ROBERT H. WIEBE, SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY (1995)).

81. *Report of the Committee on Demands, in A POPULIST READER: SELECTIONS FROM THE WORKS OF AMERICAN POPULIST LEADERS 88-89* (George Brown Tindall ed., 1976).

although the “expression of sentiments” at the end, clearly designated “not as a part of the Platform of the People’s Party,” called for a “secret ballot system,” “the initiative and referendum,” “the election of Senators of the United States by a direct vote,” and “limiting the office of President and Vice-President to one term.”⁸² Late nineteenth-century populists and their progeny did insist that various democratic failings explained why the federal government refused to adopt their preferred policies. The National People’s Party Platform began by declaring: “[c]orruption dominates the ballot-box, the Legislatures, the Congress, and touches even the ermine of the bench.”⁸³ Nevertheless, American populists have not historically been concerned with increasing democratic participation solely or primarily because increased political participation has intrinsic virtue. The value of political participation for its influence on human development is far more associated with such progressives as John Dewey, Jane Addams, and Louis Brandeis than populist leaders.⁸⁴ Populists were for a more participatory democracy because, unlike Professor Tushnet, they believed that participation by ordinary persons would considerably alter the course of American policymaking. Populist attacks on judicial review were intended to secure populist legislation, and not to alter the balance of institutional power for pure process reasons.⁸⁵

Three distinct strands of populist rhetoric that cannot be reduced to political participation have endured over time: producerism, religiosity, and antielitism. Most populists celebrate labor as the creator of all value, condemning both the idle poor and the unproductive rich who live off the labor of others. Populist “producerism,” Michael Kazin’s history of that persuasion points out, was “an ethic” holding “that only those who created wealth in tangible, material ways (on and under the land, in workshops, on the sea) could be trusted to guard the nation’s piety and liberties.”⁸⁶ The populist world-view has also been religious rather than secular. As Kazin notes, “[t]he notion that a democratic politics must concern itself with the enforcement of [Christian] ethical standards, both public

82. *National People’s Party Platform*, in *A POPULIST READER: SELECTIONS FROM THE WORKS OF AMERICAN POPULIST LEADERS*, *supra* note 81, at 90, 94-95.

83. *Id.* at 90.

84. For a discussion of participatory values in grass-roots progressive thought, see GRABER, *supra* note 35, at 87-95.

85. See ROSS, *supra* note 19, at 10-11.

86. KAZIN, *supra* note 27, at 13; see also *id.* at 14, 17, 53-54, 162-63 (discussing the ethic of populist procedurism).

and private, was integral to the appeal of Populism.”⁸⁷ Finally, populism has historically been strongly antielitist, on the ground that elites lack the proper values of the common folk. Elites, in populist discourse, were “everything that devout producers . . . were not: condescending, profligate, artificial, effete, manipulative, given to intellectual instead of practical thinking, and dependent on the labor of others.”⁸⁸ Twentieth-century populist movements have not championed all these values, but most have advanced at least one. Contemporary legal populists ignore all.

Taking the Constitution Away from the Courts does not express any populist antielitism. Professor Tushnet notes that “justices are members of the cultural elite,”⁸⁹ but does not claim that the values of that elite are in any way inferior to those of ordinary people. On many issues, most notably abortion, Professor Tushnet is quite sympathetic to elite values.⁹⁰ The closest he comes to elite-bashing is when he declares that “[e]litists tend to think that the people could not possibly care enough about individual rights to protect them through politics.”⁹¹ This claim, Professor Tushnet then declares, “may . . . accurately reflect current circumstances.”⁹²

Other legal populists are similarly restrained in their criticism of elites. “[P]opulist constitutionalism,” according to Balkin, merely “demands that academics become more self-conscious about their status as members of a subculture whose elite values tend to shape and occasionally distort their perspectives.”⁹³ Parker indicts elites only for “biased exaggerations” of the prejudices of ordinary people.⁹⁴ No legal populist asserts at any length that the values of ordinary people are by and large superior to the values held by most law professors. Nineteenth-century antielitist populism had a strong machismo strain, exemplified by the conduct of President Andrew Jackson.⁹⁵ Contemporary legal populists would probably regard the

87. *Id.* at 6; *see also id.* at 2, 10, 17, 33, 54, 133 (discussing populist religious ideals).

88. *Id.* at 15; *see also id.* at 1-2, 10-11, 15-16, 32-33, 65, 106 (discussing populist views of the elite).

89. TUSHNET, *supra* note 3, at 150.

90. *See id.* at 64-65, 124, 135, 136-37, 138-39, 147, 145-50, 186 (discussing abortion issues).

91. *Id.* at 124.

92. *Id.* at 124, 127. Tushnet does seem less sympathetic with “country-club Republicans” for favoring legal abortion while disfavoring federal funding for abortion. *See id.* at 149.

93. Balkin, *supra* note 3, at 1990.

94. PARKER, *supra* note 3, at 92-93.

95. *See* KAZIN, *supra* note 27, at 19-24.

seventh President's attacks on the masculinity of his opponents as a form of sexual harassment.

The religious dimension of populism is also missing from the contemporary legal populist persuasion. Professor Tushnet devotes an entire chapter to the law of religion outside of the courts,⁹⁶ but at no point does he indicate that religious values are particularly important. Religion in *Taking the Constitution Away from the Courts* is neither vital to regime maintenance nor a source of valuable inspiration. Professor Tushnet merely suggests that liberals ought to tolerate religious arguments when good secular arguments exist for the same policy.⁹⁷ He does not call on liberals to make religious arguments. The populist perspective is limited to determining whether posting the Ten Commandments in classrooms serves a sufficient secular purpose,⁹⁸ that secular purpose *may* not be that religious values are necessary to maintain the polity. More generally, Professor Tushnet reduces religion in public life to questions of political tactics. "[L]iberals," he writes, "often may have good prudential reasons for putting up with religious arguments, and . . . religious people often may have good prudential reasons for refraining from making religious arguments in public."⁹⁹ The arguments for these propositions strike me as interesting, important, and largely correct.¹⁰⁰ Secular "[l]iberals[,] confident that they will prevail in the long run[,] can afford to be generous."¹⁰¹ This, however, is hardly a populist battle cry.

No contemporary legal populist expresses the Jeffersonian sentiment that "those who labour in the earth are the chosen people of God."¹⁰² In keeping with his egalitarian interpretation of the Declaration of Independence, Professor Tushnet believes all occupations are created equal. Nowhere does he suggest that working-class persons are better able to govern than elites.¹⁰³ Indeed, Professor Tushnet believes that "[j]udicial interpretations

96. See TUSHNET, *supra* note 3, at 72-94 (chapter entitled "The Constitutional Law of Religion Outside the Courts").

97. See *id.* at 75-77.

98. See *id.* at 77.

99. *Id.* at 84.

100. I do think Professor Tushnet should explore at some length the problems presented in small communities where one religious sect is dominant.

101. TUSHNET, *supra* note 3, at 86.

102. THOMAS JEFFERSON, *THE PORTABLE THOMAS JEFFERSON* 217 (Merrill D. Peterson ed., 1975).

103. See TUSHNET, *supra* note 3, at 181-82.

may have added weight because they come from experts."¹⁰⁴ His point is that "the normative weight comes from the expertise . . . , not from the office."¹⁰⁵ Progressives agree completely. Following good progressive practice, *Taking the Constitution Away from the Courts* refers to the powers and rights of an undifferentiated people, rather than the conflict between ordinary people and elites.¹⁰⁶ Parker insists that elites are, at heart, ordinary, a claim that both historical populists and elites would find insulting.¹⁰⁷

Professor Tushnet's refusal to appeal to any populist value other than political participation has potential political ramifications. The logic of *Taking the Constitution Away from the Courts* does not require any appeal to producerist, religious, or antielitist values. The political appeal may. Populist arguments are supposed to appeal to ordinary, working-class citizens. Contemporary legal populists who extract from populism the participatory values cherished by some liberal elites, while ignoring populist sentiments more inspiring to the masses, are likely to produce works that are critically acclaimed in the law reviews and ignored in the popular press.

B. *Political Participation*

Taking the Constitution Away from the Courts advances a weaker and thinner understanding of political participation than more producerist-oriented populisms. The understanding is weak because Professor Tushnet does not claim that increasing political participation is more important than other political goods. His argument is merely that more participatory processes are, all other things being equal, better than less participatory processes.¹⁰⁸ The populist commitment to political participation is thin because Professor Tushnet does not explain why participation is valuable. The understanding of political participation in *Taking the Constitution Away from the Courts* is neither yoked to a populist theory of

104. *Id.* at x.

105. *Id.*

106. See KAZIN, *supra* note 27, at 51 (noting that "[t]he progressives' favorite synonym for 'the people' was 'citizens' or 'the public' rather than 'producers'").

107. See PARKER, *supra* note 3, at 109-10.

108. See *supra* note 78 and accompanying text.

political equality nor a progressive theory of human development and informed decision-making.

Strong populist Democrats believe that "every citizen has the right to equal legislative influence."¹⁰⁹ Political participation, in this view, is not simply one democratic good among many. A polity is democratic only to the extent that participatory opportunities enable any interested citizen to have the same influence on policymaking as any other interested citizen.¹¹⁰ Debate exists over what government institutions best reduce inequalities in actual power. Still, the pure populist maintains that actual political equality is the virtue of democratic political orders. Participation is valued primarily as a means of securing equal political influence.

Populists have historically not understood political participation as a vehicle for improving human capacity or enabling governing officials to make more informed decisions. The leaders of working-class movements generally regard preferences as prepolitical. Ordinary Americans learn their sound political values when working to produce material wealth and when attending church. They do not discover their true interests when listening to elites, although elites may articulate those interests more persuasively.¹¹¹ Populism also has no historical sensitivity to the free-speech rights of those who would challenge the basic values of ordinary Americans.¹¹² Political participation, in a producerist world-view, is more a means for protecting working-class interests developed in nonpolitical settings than a means for developing better, more fully human, interests.

Populist democracy stands in sharp contrast to more formal understandings of democracy. Many democratic theorists maintain that democracy (or polyarchy) exists whenever governing processes

109. LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 124 (1994).

110. See Balkin, *supra* note 3, at 1988 (noting that populists do not tend to believe persons have communal obligations to take an interest in politics). Political quiescence, however, cannot be a consequence of coercion or limited political agendas. See generally JOHN GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* (1980).

111. See KAZIN, *supra* note 27, at 24-25 (stating "[t]hus, an enduring irony of populism: this language that praises connections between anonymous people and mistrusts the palaver of elites has often been communicated most effectively by eloquent men who stand above the crowd").

112. The uncontroversial point is simply that populists have never assumed leadership roles fighting for the free speech rights of nonpopulists. The extent to which populists assumed leadership roles fighting *against* free speech rights is controversial. See MICHAEL PAUL ROGIN, *THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER* 1-7 (1967).

incorporate a relatively universal suffrage, relatively free speech, and certain other procedures for making public policy.¹¹³ Joseph Schumpeter advanced one influential version of this theoretical approach when he declared, "the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."¹¹⁴ Those governing systems that satisfy these minimum requirements are all democratic.

More formal democrats do not believe all democracies are created equal. Some democratic forms are better than others because they are better able to realize a plurality of human goods. Equal distribution of political power is usually considered one democratic good, but not the only democratic good. Nonpopulist democrats are also concerned with the form of government most likely to yield good policy, best develop certain human capacities, and maintain national strength. Very limited deviations from democratic form may even be justified when necessary to achieve these ends.

The participatory strain in democratic theory shares the populist concern with political participation, but participatory democrats are far more likely than populists to emphasize the intrinsic virtues of participation. Classical democrats, Jack Walker wrote, "were *not* primarily concerned with the *policies* which might be produced in a democracy; above all else they were concerned with *human development*."¹¹⁵ Lane Davis similarly understands participation "as a vital means of intellectual, emotional, and moral education leading toward the full development of the capacities of individual human beings."¹¹⁶ Walker and Davis reject the elitist view that ordinary people have no capacity to participate in politics.¹¹⁷ They also, however, reject the populist view that persons may fully develop all their human capacities in private settings. "The road to intellectual and moral growth," Davis declares, "must lead to participation in the practical problems of public affairs."¹¹⁸ Grass-roots progressives similarly claimed that "the final end of the state was to make men

113. See, e.g., ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 63-84 (1956).

114. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269 (Harper & Row 1962) (1942).

115. Jack L. Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285, 288 (1966); see also Lane Davis, *The Cost of Realism: Contemporary Restatements of Democracy*, 17 W. POL. Q. 37, 40 (1964).

116. Davis, *supra* note 115, at 40.

117. See Walker, *supra* note 115, at 291-95.

118. Davis, *supra* note 115, at 41.

free to develop their faculties," and placed special emphasis on the freedom of speech, both as a means for achieving that goal and because free speech was "indispensable to the discovery and spread of political truth."¹¹⁹

This cursory exercise in democratic theory suggests that legal populism must be more carefully formulated at present if elite law professors truly wish to identify more with Tom Watson than John Dewey. Claims that legal populists value participation do not distinguish self-identified populists from the numerous democratic theorists who think participation is one of many democratic goods. More significantly, legal populists who stress general participatory values do not distinguish themselves from many self-identified progressives. John Dewey, Louis Brandeis, and Jane Addams were among the many grass-roots progressives who placed political participation at the center of their democratic theories.¹²⁰ Dewey regarded a democratic society as one that made "provision for participation in its good of all of its members on equal terms."¹²¹ Addams regarded democracy as "an attempt at self-expression for each man."¹²² Their emphasis on participatory values sharply distinguished them from the strand of progressivism associated with Herbert Cooley and Walter Lippman.¹²³ Dewey progressives differed from populist democrats because progressives did not believe political equality was the only democratic good, placed considerably more emphasis on participation as a means for human development, and celebrated free speech for all citizens as a means for realizing a more informed public.¹²⁴

The strong populist who thinks political equality the only democratic good is probably as much a straw person as the pure elite democratic who thinks that persons without an Ivy League education should have the decency not to speak or vote on matters of public importance. All professed democrats think greater and more equal political participation to be *a* democratic good, but not *the* democratic good. Differences among democratic theorists are differences of degree. Populist democrats are more committed to achieving political equality and are less willing to trade the

119. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). See generally GRABER, *supra* note 35, at 98-100.

120. See GRABER, *supra* note 35, at 87-95.

121. JOHN DEWEY, *DEMOCRACY AND EDUCATION* 115 (1916).

122. JANE ADDAMS, *THE SECOND TWENTY YEARS AT HULL-HOUSE* 383 (1930).

123. See GRABER, *supra* note 35, at 78-83.

124. See *id.* at 95-100 (discussing grass-roots progressivism and free speech).

participatory opportunities necessary to achieve that equality for other possible democratic goods. Populists believe that ordinary persons already possess adequate political capacities. Progressives believe that participation in politics will improve human capacity and foster more informed decision-making.

Taking the Constitution Away from the Courts does not take a clear stand on those issues that divide democratic theorists. Professor Tushnet does take the nonpopulist view that other human goods may sometimes trump the human goods associated with political participation, and he seems to have a more progressive than populist understanding of free speech.¹²⁵ He does not, however, clarify what human goods are associated with participatory democracy. His book speaks of “distribut[ing] responsibility for constitutional law broadly” and “return[ing] constitutional law to the people.”¹²⁶ Readers never learn why “disagreements over the thin Constitution’s meaning are best conducted *by the people*.”¹²⁷ We might want to distribute responsibility for constitutional law more broadly to equalize political influence, foster informed decision-making, improve human capacity, or maximize all three of these ends. Similarly, Professor Tushnet does not make clear whether his claim that “the public should generally participate in shaping constitutional law more directly and openly”¹²⁸ means that all interested citizens should have an equal influence, or merely more influence, on how constitutional questions are resolved.

These questions have important ramifications for the status of judicial review in populist constitutional law. Many political practices foster some participatory values while inhibiting others. Giving all persons named Smith the power to veto minimum wage laws may increase both political participation and political inequality. More Smiths participate in politics than Joneses who drop out, but power is distributed more unequally among the Smiths and the Joneses. Judicial review may have a similarly complex impact on political participation. Should judicial review bring neglected issues to public attention, that practice will “enhance the public’s consideration of fundamental issues,” but will not enable the public to

125. See *supra* notes 109-24 and accompanying text; see also TUSHNET, *supra* note 3, at 129-33, 162-63.

126. TUSHNET, *supra* note 3, at x, 186; see also *id.* at 174.

127. *Id.* at 14.

128. *Id.* at 194.

“shap[e] constitutional law more directly and openly.”¹²⁹ If this and other suggestions made in the next section have any empirical weight, opponents of judicial review need to more clearly specify why they value political participation.

C. *Realizing Populist Constitutional Law*

Taking the Constitution Away from the Courts frequently maintains that populist constitutional law will be realized solely by taking the Constitution away from the courts. Doing away with judicial review, that work proclaims, “would return all constitutional decision-making to the people acting politically. It would make populist constitutional law the only constitutional law there is.”¹³⁰ This claim is modified, however, both explicitly and implicitly in the text. Professor Tushnet recognizes that certain procedural and substantive failings in contemporary legislative and electoral politics will not vanish the moment courts stop declaring laws unconstitutional.¹³¹ *Taking the Constitution Away from the Courts* is best read as suggesting that legislative supremacy is the most populist process for making constitutional decisions, and that no other constitutional decision-making process is likely to yield more populist/liberal decisions.

Populist constitutional law will not be achieved in the absence of judicial review if persons are not able to vote, criticize government, and develop individual opinions.¹³² “Judicial review confined to securing these prerequisites to populist constitutional law,” Professor Tushnet admits, “would surely be a good thing.”¹³³ No good historical or institutional reason exists, however, for thinking that judicial review in practice can be so cabined. As Professor Tushnet correctly writes, “[o]nce we tell justices that they ought to . . . secure the preconditions of populist constitutional law, . . . they will be doing much more [and less] than that.”¹³⁴ For every judicial decision enabling more people to vote, another judicial decision will prevent the people from regulating campaign finance. This judicial inability

129. *Id.* at 106, 194.

130. *Id.* at 154. Tushnet identifies “the project of taking the Constitution away from the courts” with “developing a populist constitutional law.” *Id.* at 7.

131. *See id.* at 154.

132. *See id.* at 157-58.

133. *Id.* at 158.

134. *Id.*

to police the political process explains why Professor Tushnet thinks populists are better off permitting politically accountable elected officials to have the final say on what the Constitution means at any particular time. The processes by which contemporary elected officials presently make constitutional decisions hardly satisfy populist standards, but courts have historically demonstrated no tendency to make less-populist processes more populist.

Taking the Constitution away from the courts will also not guarantee the substance of populist constitutional law. Professor Tushnet sometimes writes as if his concerns are purely procedural, but other passages indicate that populist constitutional law has particular commitments. "[P]opulist constitutional law seeks to distribute constitutional responsibility through the population,"¹³⁵ *Taking the Constitution Away from the Courts* declares, but populist constitutional law is also "law oriented to realizing the principles of the Declaration of Independence and the Constitution's Preamble."¹³⁶ Doing away with judicial review cannot guarantee that the resulting constitutional law will meet this standard. All governing institutions are capable of making decisions inconsistent with any reasonable interpretation of the Declaration of Independence. Orville Faubus violated the thin Constitution when he defied court orders desegregating the school system in Little Rock, Arkansas.¹³⁷ Professor Tushnet similarly claims that proposals to constitutionalize birthright citizenship "reject the Declaration's principles."¹³⁸ Still, *Dred Scott v. Sandford*,¹³⁹ *Plessy v. Ferguson*,¹⁴⁰ *Debs v. United States*,¹⁴¹ *McCleskey v. Kemp*,¹⁴² and other judicial

135. *Id.* at 174.

136. *Id.* at 181.

137. *See id.* at 14. Professor Tushnet claims that "Governor Faubus could not plausibly have claimed that his actions advanced the Declaration's project." *Id.* Chief Justice Taney, however, argued at length that denying citizenship to former slaves was mandated by the Declaration of Independence. *See Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407-12 (1856). At no point in *Taking the Constitution Away from the Courts* is Professor Tushnet able to point to a policy that at the time the policy was politically controversial was nevertheless understood by all parties to the debate as inconsistent with the Declaration of Independence. *See infra* notes 138-43.

138. TUSHNET, *supra* note 3, at 191. *But see* PETER H. SHUCK & ROGERS M. SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985) (defending the constitutionality, though not the desirability, of proposals to limit citizenship to persons born in the United States).

139. 60 U.S. (19 How.) 393 (1856).

140. 163 U.S. 537 (1896).

141. 249 U.S. 211 (1919).

142. 481 U.S. 279 (1987).

decisions¹⁴³ demonstrate that Justices are as prone as other officials to reach decisions inconsistent with any reasonable interpretation of the Declaration of Independence. If legislative supremacy is the most populist process for making constitutional decisions, then populists should prefer the risks of legislatures making constitutional mistakes to the approximately equal risk of justices making constitutional mistakes.

Doing away with judicial review may not “return[] constitutional law to the people, acting through politics,”¹⁴⁴ even when the above qualifications are taken into account. A judiciary without the power to declare laws unconstitutional, Professor Tushnet asserts, would still exercise considerable influence on how the thin Constitution is interpreted.¹⁴⁵ If judicial review is problematic from a populist perspective, then lesser judicial powers may also be problematic. Moreover, when constitutional meaning is produced outside of the courts, elite influences on legislative and electoral processes inhibit populist constitutional law. Given the expense of political campaigns and the relative ease of access to the courts, judicial decision-making at present may actually increase popular participation and influence on constitutional decision-making. At least these empirical concerns warrant more investigation than they are given in *Taking the Constitution Away from the Courts*.

Taking the Constitution Away from the Courts is remarkably blind to disturbing political conditions that Professor Tushnet eloquently describes elsewhere. Professor Tushnet is aware that contemporary electoral and legislative processes have numerous democratic flaws, most notably the influence of money in political campaigns.¹⁴⁶ His claim that judicial review is as likely to exacerbate as mitigate those flaws is reasonable. Nevertheless, until those flaws are corrected, taking the Constitution away from the courts will not result in a populist constitutional decision-making process. At most, abandoning judicial review will result in a more populist constitutional decision-making process. If, however, the actual democratic flaws in present legislative and electoral processes are as bad or worse than

143. Readers, particularly readers who do not share my constitutional proclivities, should feel free to add or substitute their favorite judicial ogres at this point.

144. TUSHNET, *supra* note 3, at 186.

145. *See id.* at 163-64.

146. *See* Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29 (1999) (describing numerous democratic deficiencies in the contemporary policymaking process).

the actual democratic flaws in the contemporary system for making constitutional decisions, then taking the Constitution away from the courts will result in a less-populist constitutional decision-making process. The only way to determine the populist/democratic consequences of abandoning judicial review is to examine, more carefully than Professor Tushnet does, the populist vices and virtues of the different processes by which constitutional decisions might be made.

1. The Thin Constitution in the Courts

Professor Tushnet does not propose to take the Constitution away from the courts entirely. Justices, he declares, should rely on the thin Constitution when interpreting statutes.¹⁴⁷ “The greater the tension between the statute and the thin Constitution’s values,” he asserts, “the more reason a court would have for interpreting the statute in a way that reduces the tension.”¹⁴⁸ A Tushnetian Justice who believed that racial quotas or bans on abortion violated the principles set out in the Declaration of Independence would not interpret a statute as authorizing such policies unless the authorization was unequivocally stated on the statute’s face.¹⁴⁹ *Taking the Constitution Away from the Courts* also suggests that Justices could rely on the thin Constitution when scrutinizing the behavior of police, prosecutors, and other unelected officials.¹⁵⁰ “Decisions by elected legislators,” Professor Tushnet comments, “have greater democratic justification than decisions by even the most conscientious police officer[s].”¹⁵¹ When confronted with malenforced bans on abortion or homosexuality, a Tushnetian Justice might insist that the legislature take steps to ensure egalitarian enforcement, revise the statute to be consistent with existing enforcement practices, or leave the conduct in question unregulated.¹⁵² In other writings,¹⁵³ Professor Tushnet has expressed some sympathy with Judge Guido

147. See TUSHNET, *supra* note 3, at 163-64.

148. *Id.* at 164.

149. See *id.* at 165.

150. See *id.* at 164.

151. *Id.* at 47.

152. See, e.g., GRABER, *supra* note 25, at 76-117.

153. See Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter-majoritarian Difficulty*, 94 MICH. L. REV. 245, 267 n.85 (1995).

Calabresi's view that "constitutional courts may assist in purging the statute books of laws that have lost majority support."¹⁵⁴

This judicial freedom to construe the thin Constitution subject to legislative revision vests courts with substantial power to influence constitutional meaning. At the very least, judicial interpretations of the thin Constitution will remain good constitutional law until the legislature provides a more authoritative construction. The delay may be considerable when Congress is occupied with other matters. Justices will frustrate a law-making majority committed to capital punishment when all members of that governing majority agree that balancing the federal budget is more important than passing a bill that more clearly mandates the death penalty for certain crimes. More importantly, simple majorities do not govern in the United States. Multiple majorities are necessary to change the status quo. A judicial decision "interpreting" a federal statute as not mandating capital punishment can be overruled only if the President, Senate majority, and majority in the House of Representatives are for capital punishment, or if a supermajority in both chambers of the national legislature are for capital punishment.¹⁵⁵ The potential populist problems with this judicial power to impose constitutional limits on simple majorities may be exacerbated if, as Professor Tushnet reasonably thinks, courts are more likely to protect constitutional rights when judicial decisions are subject to legislative revision.¹⁵⁶ Justices, in Tushnetian constitutionalism, may not hand down any decisions that can be overturned only by a supermajority. They will be encouraged, however, to hand down far more decisions than at present that can be overturned only by a multiple majority.

This nonmajoritarian judicial power to construe statutes consistently with the thin Constitution seems inconsistent with the populist commitment to "return[ing] constitutional decision-making to the people."¹⁵⁷ A populist constitutional system might not give any special status to laws enacted by past majorities or vague laws enacted by present majorities. Still, if populism is committed to

154. *Id.* (citing GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 16-30 (1982)).

155. This analysis ignores such nonmajoritarian practices as the committee system and filibuster rule on the ground that a simple legislative majority could abandon those rules by so voting when the House of Representatives and Senate first organize.

156. See TUSHNET, *supra* note 3, at 165.

157. *Id.* at 154.

“reinvigorated majority rule,”¹⁵⁸ then proponents of populist constitutional law must abolish all institutions, not just judicial review, that privilege the status quo in any way. Constitutional law will be returned to the people in this populist sense only if Americans make far more extensive use of the referenda and adopt a more parliamentary form of government.¹⁵⁹ Unless these reforms are adopted, taking the power of judicial review from the courts will neither take the Constitution entirely away from the courts nor ensure that democratic majorities control constitutional decision-making.

The judicial power to “interpret” statutes consistently with the thin Constitution is problematic even if the present constitutional procedures for making laws satisfy populist standards. Any populism that rejects simple majority rule will find that on some issues some of the time, no lawmaking majority exists for any position.¹⁶⁰ Some rule or process must be in place to resolve potential legislative deadlocks. A populist process of constitutional decision-making would not rely on institutions resembling federal courts to determine law when no majority for any position existed in those governing institutions vested with the ultimate authority for making public policy and interpreting the thin Constitution. Members of a populist institution authorized to make decisions in the absence of lawmaking majorities would be elected, serve fixed terms, and probably be ineligible for reelection after holding office for a certain period of years. Populist democracy frowns on life terms for any public official, not just those officials entrusted with the power to declare laws unconstitutional.

The populist institution responsible for breaking deadlocks would be less subject to elite penetration than the present federal judiciary. The thin Constitution in the courts is not likely to receive a working-class interpretation. Those persons who have access to elite legal resources have more success litigating than those who do

158. PARKER, *supra* note 3, at 104. Professor Tushnet does not make clear the relationship between populist democracy, majoritarian democracy, and consensual democracy. For possible implications for judicial power, see *infra* notes 207-12 and accompanying text.

159. Professor Tushnet has elsewhere expressed some sympathy for these reforms. See MARK TUSHNET, *The Whole Thing*, in CONSTITUTIONAL STUPIDITIES/CONSTITUTIONAL TRAGEDIES 104 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

160. This problem may also occur with simple majority rule when more than two alternatives exist. See generally KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963) (discussing economic theory).

not.¹⁶¹ Judicial decision-makers almost exclusively represent the upper class.¹⁶² Elite educational institutions perpetuate this inequality by educating and credentialing the vast majority of persons who will become elite attorneys and the vast majority of persons who will become elite justices.¹⁶³ These elites are likely to determine how the thin Constitution in the courts is interpreted, even if courts renounce the power to declare laws unconstitutional.¹⁶⁴

These arguments hardly constitute a definitive populist case against granting courts any constitutional power. Litigation may better foster political participation than populists have historically recognized.¹⁶⁵ The liberal or populist benefits from Justices interpreting statutes consistently with the thin Constitution may outweigh the slight populist costs of a less-participatory form of constitutional decision-making. These arguments, however, cannot easily be cabined to statutory interpretation. If courts are prone to make liberal/populist rulings when given the power to interpret statutes in light of the thin Constitution, then courts should be prone to make liberal/populist rules when given the power to declare statutes unconstitutional in light of the thin Constitution. Judicial review, in these circumstances, favors the political Left and is not, as Professor Tushnet proclaims, "noise around zero."¹⁶⁶ Similarly, if granting Justices the power to interpret statutes in light of the thin Constitution increases popular participation in constitutional decision-making, then granting Justices the power to declare laws unconstitutional in light of the thin Constitution may further increase political participation. These questions cannot be resolved by definitional fiat. Just as actual practice is the best guide for determining whether judicial powers are likely to be used in ways that benefit the Left, so actual practice is the best guide for

161. See SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING* 151-59 (1990); see also GRABER, *supra* note 25, at 121-22. See generally Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC. REV.* 95 (1974).

162. See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 44-45 (new rev. ed. 1999).

163. See *id.* at 45.

164. One may wonder whether a working-class populist in a treatise on populist constitutional law would have focused exclusively on judicial reform, leaving untouched such institutions as Cravath, Swaine & Moore and the Yale Law School.

165. See *infra* notes 178-85 and accompanying text.

166. TUSHNET, *supra* note 3, at 153.

determining whether different judicial powers increase popular participation in the making of constitutional law.

2. Judicial Review and Participation Reconsidered

Many proponents of judicial power tend to compare courts at their best to legislatures at their worst.¹⁶⁷ Judicial review looks pretty good to liberals when the choice is between Earl Warren and Joe McCarthy. That practice seems less attractive when the alternatives are Clarence Thomas and Barbara Jordan.¹⁶⁸ *Taking the Constitution Away from the Courts* properly calls on scholars to kick this bad habit. Professor Tushnet recognizes that judicial review “cannot be defended except by seeing how it operates—whether in fact the government is better with it than without it.”¹⁶⁹ This assessment requires careful examination of how the Justices have generally performed in routine cases and their historical willingness to intervene in clear cases of legislative tyranny. On the basis of such a review, Professor Tushnet argues with much plausibility that judicial review may not be the best means for protecting constitutional liberties.¹⁷⁰

Professor Tushnet abandons this critical realism when he considers what decision-making process will best enable “the public [to] . . . participate in shaping constitutional law more directly and openly.”¹⁷¹ *Taking the Constitution Away from the Courts* never examines actual legislative or judicial processes to determine the extent to which each presently promotes the participation valued by populists. The argument seems to be simply that legislative processes are more populist than judicial processes because legislators are elected and federal judges are not. That many adults do not vote, that most vote only in presidential elections, that the candidates in those elections spend more time appealing for large donations than votes, and that political scientists speak of the “declining significance of elections”¹⁷² has no role in this analysis.

167. *See id.* at 56.

168. Conservatives should reverse the order of these names or substitute new, more appropriate names.

169. TUSHNET, *supra* note 3, at 152.

170. *See id.* at 129-53 (chapter entitled “Assessing Judicial Review”).

171. *Id.* at 194.

172. BENJAMIN GINSBERG & MARTIN SHEFTER, *POLITICS BY OTHER MEANS: THE DECLINING IMPORTANCE OF ELECTIONS IN AMERICA* 9 (1990). Ginsberg and Shefter identify “judicial proceedings” as one cause of the declining significance of elections, but they are as concerned

This failure to compare present legislative and judicial processes may be rooted in Professor Tushnet's misleading claim that "[p]opulist constitutional law returns constitutional law to the people, acting through politics."¹⁷³ This assertion implies a limited conception of politics that Professor Tushnet then recognizes mistakenly separates law from politics. Immediately after implying that law is not politics, *Taking the Constitution Away from the Courts* criticizes the conventional claim that "we have a principled Constitution, where courts rule, and unprincipled politics, where the mere preferences of democratic majorities rule."¹⁷⁴ Professor Tushnet further acknowledges that "courts everywhere are parts of the national political system."¹⁷⁵ Citizens, such observations should have led him to state explicitly, engage in politics when they support litigation campaigns aimed at persuading Justices to declare laws unconstitutional or vote for a President they believe will appoint Justices committed to overruling *Roe v. Wade*.¹⁷⁶ A constitutional regime committed to judicial supremacy determines constitutional meanings through politics, even if those politics are different from the constitutional politics in a regime committed to a different constitutional decision-making process.

Constitutional meanings are always determined by political processes, even in an absolute monarchy where the political process consists entirely of efforts to convince the king that some policy is desirable. Asking whether constitutional meaning shall be determined by a political process, therefore, does not advance constitutional theory. The populist question is what political processes are most likely to enable the people to "participate in shaping constitutional law more directly and openly."¹⁷⁷ Many reasons exist for thinking that a judicial process would be part of the broader political process that at present best promotes participatory values.

Judicial review may "enhance the public's consideration of fundamental issues"¹⁷⁸ by increasing public awareness of certain fundamental issues. Judicial decisions have publicized and nationalized political controversies. The Supreme Court's opinions declaring

with criminal prosecutions against government officials as the judicial power to declare laws unconstitutional. *See id.* at x, 19.

173. TUSHNET, *supra* note 3, at 186.

174. *Id.* at 187.

175. *Id.* at 134.

176. 410 U.S. 113 (1973).

177. TUSHNET, *supra* note 3, at 194.

178. *Id.* at 106.

flag-burning unconstitutional stimulated a movement to make that practice illegal. Likewise, *Roe v. Wade* dramatically increased popular interest in the abortion issue.¹⁷⁹ Little evidence supports claims that federal judges serve as republican schoolmasters, educating people about fundamental constitutional values.¹⁸⁰ Judicial decisions on abortion tended to harden existing opinions, rather than refine them.¹⁸¹ Still, many activists on both sides of the abortion issue probably would not have participated in politics had reproductive policy not been nationalized by judicial decision.¹⁸²

Judicial review may facilitate public participation in constitutional decision-making because litigation is a form of political participation. “[P]articipation in the legal process,” Professor Susan Lawrence notes, “can fulfill the functions given to participation in classical democratic theory: develop responsible, individual, social and political action; increase feelings among individuals that they belong to the community; and ensure that all are equally makers and subjects of law.”¹⁸³ Moreover, litigation is a particularly cheap form of political participation. Groups that cannot afford increasingly expensive lobbying and electoral campaigns are nevertheless guaranteed their day in court if members claim that their constitutional rights have been violated. “A few volunteer lawyers, several wealthy benefactors, and support from relatively small organizations provided the resources necessary for placing abortion in the agenda of the federal judiciary.”¹⁸⁴ Terri Peretti has similarly concluded that constitutional litigation serves to expand political participation in the United States. “[T]he opportunities for groups to gain access to and [have] an effective voice in government policymaking are greatly expanded,” she writes, when courts have the power to declare laws unconstitutional.¹⁸⁵

Judicial review may “distribut[e] responsibility for constitutional law [more] broadly” than legislative processes when flaws in electoral processes inhibit greater and equal political participa-

179. See KRISTIN LUKER, *ABORTION & THE POLITICS OF MOTHERHOOD* 137-44 (1984) (discussing the immediate effects of *Roe v. Wade*).

180. See *id.*

181. See Charles H. Franklin & Liane C. Kosaki, *The Republican Schoolmaster: The Supreme Court, Public Opinion and Abortion*, 83 AM. POL. SCI. REV. 751, 768 (1989).

182. See *id.*

183. LAWRENCE, *supra* note 161, at 154.

184. GRABER, *supra* note 25, at 122.

185. TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* 219 (1999).

tion.¹⁸⁶ Contemporary populists are particularly incensed by the influence of money in American politics. "Who can look at the system by which national elections are financed," Sandy Levinson declares,

and describe it as anything other than corrupt, and increasingly threatening the basic integrity of the American political system? And who can take seriously the capacity of Trent Lott, Tom DeLay, or President Clinton, each of them mired in this corrupt process, to offer genuinely disinterested advice on what we as citizens might do to reclaim our political system from the tentacles of big money?¹⁸⁷

In this political regime, the average citizen may have more opportunity to make an argument that will influence a federal judge than to make a cash contribution that will influence an elected official.

Judicial review may increase popular influence in democratic decision-making to the extent that "political decision making is in reality almost always more a matter of elite bargaining than popular deliberation."¹⁸⁸ Prominent political sociologists maintain that people "cannot have large institutions such as nation states, trade unions, political parties, or churches, without turning over effective power to the few who are at the summit of these institutions."¹⁸⁹ If these theories of democracy are descriptively accurate, taking the Constitution away from the courts will merely change the balance of power among those elites who determine constitutional meaning. Populist interests may not be served by taking power from judicial elites. Working-class concerns may best be promoted when conflict among elites is maximized. The more homogenous the elite in power, the fewer the conflicts that will require elites to seek popular support. The intellectual and cultural elites who exercise judicial power may also be more sympathetic to populist concerns than the business elites more likely to influence legislatures. At the very least, the progressive elites who tend to occupy appointed positions may provide some counterbalance to the market forces that have historically undermined populist institutions.

186. TUSHNET, *supra* note 3, at x.

187. Levinson, *supra* note 5, at 216.

188. ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 36 (1997).

189. Seymour Martin Lipset, *Introduction* to ROBERT MICHELS, *POLITICAL PARTIES: A SOCIOLOGICAL STUDY OF THE OLIGARCHICAL TENDENCIES OF MODERN DEMOCRACY* 15 (Eden Paul & Cedar Paul trans., 1962).

Judicial review may increase public control over constitutional meanings when elected officials have not and will not resolve those controversies presently resolved by courts. Many commentators think "delegation by majoritarian institutions" is the most important cause of judicial review.¹⁹⁰ "Political leaders," Professor Tushnet agrees, "often find judicial review a convenient way to hand off hard decisions to someone else."¹⁹¹ Legislative deference to the judiciary is not, however, always best understood as a practice that "may serve politicians' interests, not their constituents'."¹⁹² Promoting judicial review on some issues is one way politicians are able to take clear stands on issues of more importance to more people. Political struggles are not simply fought over particular issues, but over what issues will be fought about. As E.E. Schattschneider recognized, "[s]ome issues are organized into politics while others are organized out."¹⁹³ Jacksonian politicians during the 1840s and 1850s took very clear stands on the national bank and sought to depoliticize slavery. The coalition that arose to fight slavery deliberately avoided taking stands on the issues associated with the national bank.¹⁹⁴ The Populist Party similarly refused to take a stand on temperance in order to be able to take a more clear stand on currency issues.¹⁹⁵ Unless there is a radical change in the political system's capacity to absorb numerous cross-cutting issues, taking the Constitution away from the courts will not force elected officials to make more policy decisions. The more likely consequence is that elected officials will continue ignoring issues previously decided by courts, foist those issues off on some other institution whose members are not directly accountable to voters, or pay much less attention to other issues that had previously been on the legislative agenda.

Judicial review may be part of populist democracy at present because any campaign to abolish that practice would detract from more important populist priorities. Were Professor Tushnet to run for office on an anti-judicial review platform, he would have to

190. C. Neal Tate, *Why the Expansion of Judicial Power? in THE GLOBAL EXPANSION OF JUDICIAL POWER* 27, 32 (C. Neal Tate & Torbjorn Vallinder eds., 1995). See generally Graber, *The Nonmajoritarian Problem*, *supra* note 43, at 35.

191. TUSHNET, *supra* note 3, at 173.

192. *Id.*

193. E.E. SCHATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 69 (1975):

194. See Graber, *The Nonmajoritarian Problem*, *supra* note 43, at 39-40, 46-47.

195. See KAZIN, *supra* note 27, at 37-38.

disavow his previous commitment to democratic socialism.¹⁹⁶ Otherwise he would lose support from liberals committed to judicial review and anti-court conservatives opposed to the welfare state. Populists have historically been unwilling to mute economic concerns to achieve such institutional reforms. William Jennings Bryan consciously decided not to push for an elective judiciary when doing so might reduce support for other populist concerns.¹⁹⁷

Judicial review may promote populist lawmaking by enabling lawmaking majorities to pass important legislation. American legislators have frequently secured the passage of needed reforms by including a provision in the final bill facilitating a second, judicial look at particularly controversial proposals. The Federal Election Campaign Act of 1974¹⁹⁸ and the Gramm-Rudman-Hollings Act¹⁹⁹ were enacted only when legislators opposed to several provisions in each bill were induced to vote for passage by the addition of clauses ensuring that federal courts would immediately have the opportunity to delete offending sections of both measures.²⁰⁰ American politics for this reason do not support Professor Tushnet's assertion that "[t]he Court's campaign finance decisions" effectively "block us from taking steps to reduce the influence of economics on politics."²⁰¹ Judicial review facilitated campaign finance reform during the 1970s by permitting legislators to support what they believed was a less-than-perfect bill in the hope that the Court might perfect the measure. Without judicial review, Congress might not have passed those campaign finance reforms held constitutional in *Buckley v. Valeo*.²⁰²

Judicial review may be an element of populist democracy if that practice is inextricably connected to other institutions that populists value. Studies of the United States and other countries indicate that judicial review flourishes under certain conditions.²⁰³ Scholars have

196. See Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981).

197. See ROSS, *supra* note 19, at 36.

198. Pub. L. No. 93-443, 88 Stat. 201 (codified in scattered sections of 2 U.S.C.).

199. 2 U.S.C. §§ 901-909, 921-922 (1994).

200. See FISHER, *supra* note 15, at 36; see also BARBARA HINKSON CRAIG, *CHADHA: THE STORY OF AN EPIC CONSTITUTIONAL STRUGGLE* 70 (1988).

201. TUSHNET, *supra* note 3, at 131.

202. 424 U.S. 1, 143 (1976). Tushnet is right to point to "the judicial overhang [that] distorts what legislators say about the Constitution." TUSHNET, *supra* note 3, at 57. Still, the example of laws passed only after proponents agree to expedite judicial review is an example of how judicial review may foster some participatory virtues while inhibiting others.

203. See Tate, *supra* note 190.

identified several factors, including the separation of powers, a politics of rights, interest group politics, weak parties, and federalism, as facilitating, though not necessarily compelling, the judicialization of politics in liberal democracies.²⁰⁴ This association is practical, not logical. Professor Tushnet properly notes that a polity can have a politics of rights without judicial review,²⁰⁵ constitutional rights claims may be even more effective when directed at elected officials than at unelected justices.²⁰⁶ Still, history suggests that certain institutional forms and practices reinforce each other. A populist unwilling to challenge federalism, the separation of powers, weak parties, and a politics of rights is not likely to mount a successful challenge to judicial review.

Judicial review may be a populist practice if populists are more committed to consensual rather than majoritarian democracy. Consensual democracies, Arend Lijphart notes, are not "satisfied with narrow decision-making majorities."²⁰⁷ That democratic practice "seeks to maximize the size of those majorities" by designing "rules and institutions [that] aim at broad participation in government and broad agreement on the policies that the government should pursue."²⁰⁸ Granting judicial power to interpret a hard-to-amend constitution is one of the important practices adopted by virtually all consensus democracies. "In the pure consensus model," Lijphart writes, "the Constitution is rigid and protected by judicial review."²⁰⁹ The American experience may support this view of courts as a more consensual institution, or at least an institution that makes the political system more consensual as a whole. Terri Peretti believes that as a result of judicial review, "the political system" in the United States "possess[es] a greater capacity to discover, with more certainty and reliability, the stable and enduring bases of political consensus."²¹⁰ Significantly, Lijphart's study found that consensual institutions may perform better than

204. See AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES 3-4 (1999); Tate, *supra* note 190, at 28-33. Liberal democracy is another practice precondition for judicial review. See *id.* at 28. Justices in dictatorships do not declare laws unconstitutional. No opponent of judicial review, however, maintains the absence of judicial review to be a virtue of Stalinist Russia or present day Iraq.

205. See TUSHNET, *supra* note 3, at 163-64.

206. See *id.* at 166.

207. LIJPHART, *supra* note 204, at 2.

208. *Id.*

209. *Id.* at 216.

210. PERETTI, *supra* note 185, at 219.

majoritarian institutions on a variety of dimensions.²¹¹ If “citizens in consensus democracies are significantly more satisfied with democratic performance in their countries than citizens of majoritarian democracies,”²¹² and if populist democrats ought to prefer institutions that increase popular satisfaction with democratic performance, then populist democrats might support judicial review as one element of consensual democracy.

Judicial review may be a populist practice if judicial decisions declaring laws unconstitutional are at least as consistent with public opinion as the political decisions made by other governing officials. Some Supreme Court decisions, most notably the decisions declaring unconstitutional state-sponsored prayer in public schools,²¹³ clearly lacked popular support. The electoral branches of government, however, are equally capable of acting in this countermajoritarian fashion. Witness the congressional decision to impeach President Clinton²¹⁴ and President Clinton’s decision to veto a bill banning partial-birth abortions.²¹⁵ The comparative performance of the executive, legislative, and judicial branches of the national government has led scholars to conclude that “the modern Court appears neither markedly more nor less consistent with the polls than are other policy makers.”²¹⁶ The mechanisms by which public opinion influences judicial decisions may be different than the mechanisms by which public opinion influences other officials. Still, whether because of factors identified in the above paragraphs or for some other reason, the people may presently exercise the same control over the Constitution in the courts as they do outside of the courts.

These claims hardly refute populist or other attacks on judicial review. Much of the empirical evidence is controversial or represents at most preliminary findings. Gregory Caldeira’s comment that “we do not yet have sufficient evidence on which we can place much confidence” concerning whether “the Supreme Court represent[s]

211. See LIJPHART, *supra* note 204, at 7-8.

212. *Id.* at 286.

213. See, e.g., *Engle v. Vitale*, 370 U.S. 421, 436 (1962).

214. H.R. Res. 611, 105th Cong. (1998).

215. See President’s Message to the House of Representatives Returning without Approval Partial Birth Abortion Legislation, PUB. PAPERS OF WILLIAM J. CLINTON 1340 (1997).

216. THOMAS MARSHALL, PUBLIC OPINION AND THE SUPREME COURT 80 (1989). For a good summary of existing studies on public support for particular judicial decisions, see GREGORY A. CALDEIRA, *Courts and Public Opinion*, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 303, 313-16 (John B. Gates and Charles A. Johnson eds., 1991).

public opinion” could be said of the judicial role promoting consensus and participation.²¹⁷ Moreover, the weight of this evidence depends on populist commitments. A populism committed to increasing public participation and consensus democracy might find that judicial review facilitates that goal. A populism committed to more equal political influence and majoritarian democracy might prefer legislative supremacy. These opinions would also depend on estimates concerning elite influences on legislative politics, and whether those elites who exercise judicial power may have more populist sympathies than those elites who exercise legislative power. For all these reasons, the claims in this section are presented in the Tushnetian spirit, as designed only to “open[] up issues that thoughtful voters and elected officials should think about, and that are obscured by the elitist constitutional law that dominates contemporary legal thought.”²¹⁸

The claims above do demonstrate, however, why a populism that focuses exclusively on taking the Constitution away from the courts is a thin populism, even when that populism is limited to populist constitutional law. *Taking the Constitution Away from the Courts* properly highlights nonjudicial institutions as appropriate fora for constitutional decision-making. Entrusting legislatures with final or shared authority for making constitutional decisions means that the populist flaws in those electoral institutions must be cured in order to realize populist constitutional law. Should these flaws not be corrected, giving the judiciary shared or final authority may be the most populist alternative. Expanding the current legal services program may be a more populist reform than abandoning judicial review.²¹⁹

III. FROM POPULISM TO PROGRESSIVISM

Liberal legal elites face particular difficulties articulating populist values. Liberal economists who wear the populist label recognize that working-class citizens are more likely to favor loose money policies than those elites who hold prestigious chairs in business schools and economic departments, run major banks, or sit on the

217. Caldeira, *supra* note 216, at 316.

218. TUSHNET, *supra* note 3, at x.

219. Judicial review would also meet more populist standards if Justices were elected to fixed terms. The possibility of that reform seems even less likely than serious campaign finance reform.

Federal Reserve Board.²²⁰ Conservative legal elites who speak as populists better articulate the values of ordinary people on many cultural issues than their peers in the academy, at the bar, or on the bench.²²¹ Liberal legal elites who profess populism, however, are rarely able to excoriate fellow elites for being out of touch with the mainstream on those issues presently being considered by the Supreme Court. On the constitutional questions that have most excited the general public, questions ranging from abortion to the role of religion in public life, the academic legal left is far more likely to find allies among secular elites of all political persuasions than among the more religious working-class.²²²

Recasting populism is one solution to this liberal dilemma. *Taking the Constitution Away from the Courts* redefines as populist only those participatory values that have historically animated mass movements. Populist constitutional law, in legal populist writing, is indifferent to the religious, economic, and cultural values on which liberal law professors and working-class citizens are likely to disagree. This rhetorical strategy is legitimate. No obligation exists for any movement seeking the populist mantle to adopt some fixed percentage of the demands made in the Omaha Platform or to bear a very close relationship to some other political movement generally recognized as populist. That populism has historically combined producerism and participatory rhetoric hardly means that a coherent constitutional theory cannot be fashioned exclusively from participatory strands of populism. Moreover, populism has evolved throughout American history. The label is neither trademarked nor copyrighted. The legal populist's call for participation by all people, not just white, male Christian people, does have affinities with labor populism of the 1930s and communitarian populism of the 1980s.²²³ Whether Professor Tushnet and others are eventually seen to be the

220. See, e.g., James K. Galbraith, *How the Economists Got It Wrong*, AM. PROSPECT, Feb. 14, 2000, at 18.

221. See, e.g., William Bradford Reynolds, *Renewing the American Constitutional Heritage*, 8 HARV. J.L. & PUB. POL'Y 225, 234 (1985) (describing the political liberalism of lawyers, judges, and law professors as "the liberalism of a verbal elite . . . out of touch with the mass of Americans").

222. Liberal law professors are more likely than other elites to prefer the redistributive policies favored by most working-class citizens. Most liberal law professors, however, think that the judiciary should not declare unconstitutional unjust economic policies. See Graber, *The Clintonification of American Law*, *supra* note 43, at 738-44. Professor Tushnet, to his credit, does maintain that redistribution ought to be a goal of populist constitutional law. See TUSHNET, *supra* note 3, at 183-86.

223. See KAZIN, *supra* note 27, at 135-63.

intellectual descendants of those populists will depend more on who rallies to their causes than on how intellectual historians classify their ideas.

Liberal academics may nevertheless be better advised to discard a populist label that no more describes their political vision than the classical republicanism label describes the legal republicanism of the past two decades. *Taking the Constitution Away from the Courts* and allied commentary are far more similar in substance and spirit to the writings of John Dewey and other left-wing progressives than the works of Ignatius Donnelly and the populists of any generation. Dewey, Brandeis, and others believed that public participation in politics is a vital democratic good, but that more educated participation is better than less uneducated participation.²²⁴ 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.²²⁵ 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.

Liberal law professors who identify with this grass-roots progressivism make sense of their lives, occupations, and ambitions. Professors of political science and law seek to improve the capacity of their students and the general public. The best professors may enable their students to obtain more rewarding jobs and live more satisfactory lives, but the primary function of progressive public education is to produce better citizens. The primary function of elite education, in this vein, is to produce better political leaders. No progressive thinks amending the Constitution to require a certain SAT score for public office is a good idea. Elite education is better understood as a privilege that entails a responsibility to serve the public, service that requires respect rather than obeisance to public opinion. Professor Tushnet implicitly endorses the progressive conception of leadership when, recognizing that most people favor judicial review, he hopes for a statesmanship that will convince the

224. See, e.g., JOHN DEWEY, *DEMOCRACY AND EDUCATION* (1916).

225. See, e.g., Davis, *supra* note 115, at 37 (arguing that contemporary "realist" democratic theory fails to provide moral guidance for future action).

populace otherwise.²²⁶ The more traditional populist leader merely articulates more eloquently what the people already believe.²²⁷

Scholars who acknowledge that governance by more educated persons is likely to be better than governance by less-educated persons need not forget that progressive movements succeed only when political leaders are able to appeal to the beliefs and aspirations of the great majority that did not go to Ivy League colleges or elite law schools. "No major problem can be seriously addressed," Michael Kazin properly concludes, "unless what an antebellum populist called the 'productive and burden-bearing classes'—Americans of all races who work hard for a living, knit neighborhoods together, and cherish what the nation is supposed to stand for—participate in the task."²²⁸ The assertion, "I should govern because I am well educated," may contain philosophical truth, but is a sure political loser. Fashioning a broadly persuasive liberal rhetoric is a vital job. That responsibility, however, primarily falls on politicians. Professors are responsible for educating persons of all political persuasions. Our fundamental role as scholars is to increase the number of ideas available to our fellow citizens.²²⁹ Judged by this standard, *Taking the Constitution Away from the Courts* is a work of philosophical genius.

226. See TUSHNET, *supra* note 3, at 173-74.

227. See KAZIN, *supra* note 27, at 44.

228. KAZIN, *supra* note 27, at 289.

229. See T.H. WHITE, *THE BOOK OF MERLYN* 11 (1977).

