

2000

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Recommended Citation

Frank I. Michelman, *Populist Natural Law (Reflections on Tushnet's "Thin Constitution")*, 34 U. Rich. L. Rev. 461 (2000).
Available at: <http://scholarship.richmond.edu/lawreview/vol34/iss2/6>

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POPULIST NATURAL LAW (REFLECTIONS ON TUSHNET'S "THIN CONSTITUTION")

Frank I. Michelman *

I. INTRODUCTIONS

A. *Tushnet's Contention*

Constitutional review is the activity of measuring action choices of governments against a pre-existing set of publicly known or ascertainable, "higher" norms for the conduct of government.¹ Anyone can do it: chief executives pondering vetoes or preparing state messages; legislators contemplating legal change; police chiefs reviewing department manuals; school board members debating curriculum guides; city planners routing highway expansions; citizens lobbying and pundits castigating any or all of the above; dinner partners talking politics; candidates running for office; voters turning out rascals. "American-style judicial review," let us say, is constitutional review conducted by a nonpopular, unelected, life-tenured body, whose decisions, considered legally binding on other officials, are not reversible by any other set of political actors, except in extraordinary political mobilizations under rules deliberately designed to keep them few and far between.² "Popular government," by contrast, is lawmaking and administration by officials replaceable in popular-majoritarian elections over relatively short spans of two, four, or six years. Mark Tushnet's *Taking the Constitution Away from the Courts*³ enters a longstanding American debate over whether American-style judicial review of the lawmaking and other acts of popular government (hereafter just "judicial review") is a desirable feature in our political arrangements.

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1. I write "action choices" rather than actions in order to allow for constitutional norms that require (not just prohibit) government action of certain kinds, in certain circumstances.

2. See, e.g., Kathleen Sullivan, *Constitutional Amendmentitis*, AM. PROSPECT, Fall 1995, at 20, 20.

3. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

One can easily imagine a culture and practice of constitutional review by chief executives, legislators, police chiefs, school boards, city planners, candidates, pundits, and citizens, from which judicial review is entirely missing. Such a culture and practice is what Tushnet calls “populist constitutional law.”⁴ Over the course of his carefully plotted book, Tushnet develops a multipronged argument—I suspect the completest that has ever been produced—that we would probably be better off with populist constitutional law disencumbered of judicial review and its “overhang.”⁵ The argument is rich, complex, qualified, and detailed. In its broadest outline, though, it is simple and easy to grasp. It’s the standard form of practical argument in which a background normative preference grounds a default position—one that might, in principle, be overcome by other concededly relevant considerations but, as matters turn out and as the argument is designed to show, is not. In Tushnet’s book, the background preference is for democracy,⁶ the immediately implied default position is against judicial review, and the ultimately unsuccessful counter-considerations are “constitutional values.”⁷

B. *The Thin Constitution*

Suppose you readily accept the most general premises of Tushnet’s argument: A due concern for constitutional values might save judicial review from condemnation by a default preference for democracy, but nothing else can. Suppose, further, that the two of you agree perfectly in your practical predictions of what would happen without judicial review. You and he could still disagree on the argument’s outcome, if you and he meant quite different things by “constitutional values.” For example, you could both agree that *his* “constitutional values” would be as safe without judicial review as with it, whereas *your* “constitutional values” would not be. In

4. *See id.* at 9.

5. “Judicial overhang” is Tushnet’s term for the distortive effects of judicial review on populist constitutional law, as currently practiced or imagined, and the fact that it currently occurs “in the court’s shadow.” *Id.* at 55. If, for example, congressional leaders were to offer “the Supreme Court won’t allow it” as a reason for opposing the McCain-Feingold campaign reform bill, that would be an instance of the judicial overhang at work (regardless of whether it was a sincere explanation). *See id.* at 57-65.

6. *See, e.g., id.* at 31 (“A populist constitutional law rests on a commitment to democracy . . .”).

7. *See id.* at 96 (arguing that if we have in place “self-enforcing institutional arrangements” that can be relied on to advance “constitutional values,” then “we can [safely, prudently] take the Constitution away from the courts”).

that case, you might want to keep judicial review in force, whereas he would certainly want to junk it. In sum: in order properly to gauge the appeal of Tushnet's argument, we have to know exactly what *he* means by "constitutional values." For that purpose, we need before us Tushnet's idea of "the thin Constitution."⁸

The thin Constitution, as Tushnet defines it, consists not of canonical or technical rules and standards that lawyers peculiarly know as positive law, but rather of moral principles that everyone American knows as incontestable.⁹ Here are five sorts of things the thin Constitution, accordingly, does not include: first, the provisions of the documentary Constitution dealing with the structures and mechanics of government;¹⁰ second, the canonical, formulaic texts of the Bill of Rights;¹¹ third, judge-made legal doctrine designed, prudentially, to "implement" the thin Constitution;¹² fourth, judge-made legal doctrine reporting the Court's views about the Constitution's substantive intentions, such as its strong bias against "viewpoint-specific" restrictions of "expressive conduct" such as flag-burning;¹³ and, last but by no means least, any other resolutions, reached from time to time by lawmakers or judges, of sincere and reasonable disagreements about what is and is not permitted or required by the abstract and general norms of the thin Constitution.¹⁴

"What, then, *is* the thin Constitution?"¹⁵ It consists, as we said, of moral principles. The principles are those of the Declaration of Independence: "that all people [are] created equal, [and] that all [have] inalienable rights;" alternatively, they are the Constitution's "fundamental guarantees of equality, freedom of expression, and liberty."¹⁶ Note that, while Tushnet connects these principles and guarantees historically to the Declaration and the Constitution, they are, to all intents and purposes of lawyers, unwritten. As for the Declaration, it is not positive law and never pretended to be. As for

8. See, e.g., *id.* at 9.

9. See *id.* at 11.

10. See *id.* at 9 (assigning these provisions to the "thick" Constitution).

11. See *id.* at 11 (stating that the thin Constitution is "[n]ot 'the First Amendment' or 'the equal protection clause'").

12. See *id.* at 10.

13. See *id.* at 11 (excluding from the thin Constitution "what the [Supreme] Court has said about" the canonical clauses); *infra* text following note 85.

14. We'll have little to say about the last item until the end. See *infra* pp. 485-87.

15. TUSHNET, *supra* note 3, at 11 (emphasis added).

16. *Id.* at 11.

the Constitution, it has no self-announced theory of what in it is and is not fundamental; and, anyway, Tushnet's thin Constitution is drawn mainly from the part of *it* that is not (or is least) positive law, namely the Preamble. To speak more carefully, the thin Constitution draws from that in the Preamble which "resonate[s] with the Declaration," that which commits the nation to the pursuit of domestic Tranquility, the common defense, and the general Welfare, all for the sake of Justice and the Blessings of Liberty.¹⁷ Surely we meet here the so-called "higher law" constitutionalism for which, among American political leaders, Abraham Lincoln most luminously speaks, seconded from the trenches by such able scholars as Edward Corwin and Thomas Grey.¹⁸

Perhaps a little unexpectedly to some, Mark Tushnet appears in his latest book as an unabashed natural-law constitutionalist. (Hugo Black, who also flew populist colors, would have had him for lunch.¹⁹ Or tried to.) Why ought citizens carry on "the Declaration's project" as represented by the thin Constitution? Because, Tushnet says, "the Declaration's principles state unassailable moral truths," as well as because "the Declaration's project is what constitutes us as a people."²⁰ Ronald Dworkin might have said it.²¹ But there is a further point, one about thinness, and one that you won't find in Dworkin. In Tushnet's view, it is, very specifically, the *thinness* of the thin Constitution that gives Americans striving to follow it the opportunity to "construct an attractive narrative of American aspiration;"²² a point to which we shall return, but not until the very end.

17. *Id.* at 12.

18. For Tushnet's eloquent evocations of Lincoln, with an assist from Gary Jacobsohn, see *id.* at 11-13. See also Edward Corwin, *The "Higher Law" Background of American Constitutionalism*, 42 HARV. L. REV. 149 (1928-29); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978).

19. See, e.g., *Adamson v. California*, 332 U.S. 46, 90 (1947) (Black, J., dissenting) (speaking, not flatteringly, of the Court's "natural-law-due-process formula").

20. TUSHNET, *supra* note 3, at 31; see also *id.* at 50-51. Tushnet states that "populist constitutional law . . . is a law committed to the principle of universal human rights justifiable by reason in the service of self-government." *Id.* at 181. "We ought to take as our project realizing the Declaration's principles because . . . those principles are good ones." *Id.* at 193.

21. See RONALD DWORKIN, *LAW'S EMPIRE* 187-90, 211-15 (1996). I cannot resist the recollection of my own one-time coupling of Dworkin with critical legal studies. See Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1513-15 (1988).

22. TUSHNET, *supra* note 3, at 12.

II. NATURAL LAW AND JUDICIAL REVIEW

In countries where the practice of constitutional law obtains, opinions differ about the point of the practice. Here is a very crude classification.²³ “Positivist constitutionalism” is the view that the point of the practice of constitutional law is, simply, compliance with duly enacted law—the Constitution—that deserves, as such, our fidelity.²⁴ “Natural-law constitutionalism” is the view that the point of the practice is the realization in our public life of moral values, accessible to reason but transcending any legal text or *corpus juris*.²⁵ Of course, the opposition is not really so stark and clean as that. Thoughtful positivists stand ready with moral reasons to support their claim of an obligation of fidelity to the Constitution.²⁶ Thoughtful natural lawyers concede their project is doomed if the positive law is insufficiently receptive.²⁷ Still, the two stances clearly differ over the sources of those “publicly known or ascertainable . . . norms for the conduct of government,” as I have called them, that the practice of constitutional review is supposed to make effective in the actual conduct of political life.²⁸ To speak again crudely: for positivist constitutionalists, the norm-sources are all and only written; for natural-law constitutionalists, at least some of the basic

23. Lawrence Sager distinguishes, along very similar lines, a “positive” and a “pragmatic-justice” account of “the nature of the Constitution.” Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 415 (1993). According to the latter, “the aim of the constitutional enterprise as a whole is justice, and constitutional discourse is political theory in plain clothes.” *Id.*

24. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

25. See, e.g., RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1-38 (1996) (describing, and advocating, the “moral reading” approach to constitutional adjudication); 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 10-16 (1991) (describing, but not embracing, “rights foundationalism”). The text-transcending reason of which I speak need not be conceived as free-floating from any and all local cultural determinants, in order for the resulting view be a “natural law” view in the interesting sense. See TUSHNET, *supra* note 3, at 53 (commending the conclusion that “the people of the United States are constituted by our commitment to the realization of universal human rights”) (emphasis added); see also *id.* at 191 (urging that “the people of the United States continue to constitute ourselves by a commitment to universal human rights”); Ronald Dworkin, *Natural Law Revisited*, 34 U. FLA. L. REV. 165 (1982); cf. Frank I. Michelman, *Morality, Identity and “Constitutional Patriotism,”* 76 DENV. U. L. REV. 1009 (1999).

26. See, e.g., Bruce Ackerman, *Rooted Cosmopolitanism*, 104 ETHICS 516, 517 (1994); Frank I. Michelman & Margaret Jane Radin, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1024-26 (1991) (describing normative motivations and orientations of brands of legal positivism).

27. See, e.g., DWORKIN, *supra* note 25, at 36.

28. *Supra* p. 461.

ones are, in the last analysis, unwritten (as, for example, in Mark Tushnet's thin Constitution).

When, in American political life, positivist and natural-law constitutionalists square off, what is it that they're sparring over? Almost always, the bone of contention is the manner in which the Supreme Court ought to exercise its power of review of the constitutional propriety of government action choices. Positivists gravitate to textualist and "originalist" approaches to the work of constitutional adjudication. Natural lawyers, by contrast, insist on the responsibility of judges to bring with them to the bench their powers of moral reason and discernment, whether or not leavened with local cultural knowledge.

For both sides, typically, judicial review itself is a forgone conclusion. Still, we might ask which of the two parties is the more directly and unhesitatingly committed to judicial review. Most of us, I think, would instinctively say the natural lawyers are. In the contemporary United States, positivism is almost always *democratic* positivism, tied to an unshakeable sense that the people of a country have a right to be their own rulers. It seems that must include the right to decide the content of their own constitutional laws—not only the relatively abstract and general, canonical-textual formulations of those laws (for example, "[n]o state shall . . . deny to any person . . . the equal protection of the laws"),²⁹ but also the applied meanings of those formulas when major contests over those meanings arise (for example, regarding affirmative action). That makes judicial review perennially problematic for democratic positivists, because it is hard to maintain the position that, as between the Supreme Court deciding *Adarand Constructors, Inc. v. Pena*³⁰ and Presidents and Congresses issuing the executive orders and enacting the statutes there cast under a constitutional cloud,³¹ the Supreme Court speaks more authentically for the people. Doing so is not impossible, but it requires some pretty strenuous work, along the lines of Bruce Ackerman's going-on-seventeen-year-old campaign on behalf of "dualist democracy."³²

29. U.S. CONST. amend XIV, § 1.

30. 515 U.S. 200 (1995).

31. By its de facto overruling of *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), the Court in *Adarand* cast grave doubt on the constitutionality of an Act of Congress. See *Adarand*, 515 U.S. at 227.

32. See Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

By contrast, the idea of requiring governmental action choices to pass muster before an independent judiciary recommends itself straightforwardly—or so it has seemed to do—to those who believe that moral reason, as opposed to sheer political will, is what ought finally to decide many constitutional-legal controversies. Again, an opposite view is not impossible to conceive. Granting that constitutional questions ought to be decided as matters of fresh moral judgment, not as matters of present political preference or of the translation of frozen, past expressions of judgment or preference, one can still maintain that the exercise of the pertinent moral reason belongs by right to the people and not to any bevy of Platonic guardians.³³ But, still, confession to a natural-law, as opposed to a democratic-positivist, view of the point of constitutional review looks like an admission against interest for an advocate of dethronement of the independent judiciary from its present place of dominance over American constitutional law.

It would be, then, at least mildly interesting to find an argument for dethronement that affirmatively and specifically relied on a natural-law, *as opposed to* a democratic-positivist, stance regarding the ultimate sources of constitutional law—or, let us say, of constitutional values. More stunning would be an argument for judicial dethronement that *necessitates* the natural-law attitude—necessitates it because, as the author is at pains to show, the opposite, democratic-positivist assumptions would defeat the argument. We're talking now about an argument that runs *from* democracy-based opposition to judicial review *to* a conclusion that constitutional values, therefore, must be seen to have their roots in trans-political (I do not say trans-temporal) reason, not in identifiable events of democratic political decision-making. *That* is something that none of us, I'll bet, had ever expected to meet in our lifetimes. And *that* is what Mark Tushnet has given us. It is one feature of his book—not the only one—that makes it so adventurous, and so interesting.

Tushnet's notion of "constitutional values"—or, to speak more carefully, of the constitutional values whose vindication or advancement ought to concern us when we weigh the merits and demerits of judicial review—is, we have seen, distinctly a natural-law notion.

33. See TUSHNET, *supra* note 3, at 181-82 (offering this as the historic and traditional American self-understanding); see also JEREMY WALDRON, LAW AND DISAGREEMENT (1999). For the "Guardians," see LEARNED HAND, THE BILL OF RIGHTS 56-77 (1958).

His constitutional values are the values spoken for by the “thin” Constitution.³⁴ The thin Constitution keeps thin by being natural-law. If it weren’t the latter, it couldn’t be the former; an American-positivist constitution necessarily would be, in Tushnet’s terms, “thick.” And, as Tushnet is the first to say, “the thinness of the populist Constitution” is most definitely “essential” to the credibility of his case against judicial review.³⁵

Thus endeth the lesson. The rest is commentary.

III. A SKETCH OF TUSHNET’S ARGUMENT AGAINST JUDICIAL REVIEW

A. *The Democratic Default*³⁶

In Tushnet’s case against judicial review, the background normative preference is for democracy, meaning popular self-government or what Lincoln called “government . . . by the people.”³⁷ Tushnet does not argue for this preference; he takes it to be something already shared between him and his audience. If you do not share it, his argument can have no force for you. Conversely, if you do share it, then maybe Tushnet already has you on the run—because then, it would seem, “no thanks” must be the resulting default position regarding judicial review. Other relevant considerations being equal or indecisive, it would seem, we would have to reject judicial review because it is obviously and directly at odds with the background preference for democracy.

B. *A Wide Conception of Democracy*

The full truth is not so simple. You can’t infer “no judicial review,” even as a rebuttable default, from a background commitment to democracy, unless and until you have first made sure that the

34. See TUSHNET, *supra* note 3, at 11-12, 181-82 (identifying the “thin” and “populist” constitutions).

35. *Id.* at 13; see also *id.* at 113 (“The Constitution outside the courts should be a thin Constitution if it is to be self-enforcing through a political process that combines structure-based and value-based incentives.”).

36. Cf. DWORKIN, *supra* note 25, at 15-16 (describing a “majoritarian premise” whereby the community ought generally to abide by the decisions of the majority of its citizens).

37. 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler ed., 1953).

question of democracy's existence in your country is, in practice, cleanly separable from the question of judicial review's existence there. If you, as an American, think democracy's existence in the United States in any degree depends, as a practical matter, on judicial review's existence here, then you can't, without tripping over yourself, move from a preference for democracy even to a provisional, rebuttable rejection of judicial review. I keep saying "in practice" and "as a practical matter," because democracy's existence in a country surely does depend *conceptually* on the effective honoring in that country of certain kinds of constitutional rights that courts make it their business to enforce, most obviously rights of political expression and association and of equality of political franchise.³⁸ Tushnet, himself, affirms the conceptual tie between democracy and rights of this kind.³⁹ How, then, can he step from a prodemocratic premise to an anti-judicial review default stance?

The answer lies in the realm of fact, not of theory. (Tushnet, admirably, writes in this book as much as a political scientist as he does as a legal and political theorist.) In theory, there are outer limits of what constitutes a democratic form and practice of government, and some of those limits doubtless consist of rights of the people that "legislative majorities are to respect."⁴⁰ In fact, in the United States, those outer limits are as safe against transgression without judicial review as with it, or so Tushnet contends.⁴¹ Thanks to a political culture that gives "powerful" support to the basic rights of democratic citizens, there are few "real" problems in America today respecting disfranchisement, thought control, and censorship of antigovernment expression,⁴² and no realistically imaginable *American* political resolution of a constitutional question will cross the outer bounds of democracy.

Notice how this claim's plausibility depends on pushing those outer bounds pretty far out. To take the obvious contemporary examples, the claim means that democracy will be in force in America no matter how American legislatures, out from under the judicial overhang, might realistically be imagined to treat the matters of term limits and campaign-expenditure caps. If the

38. See generally DWORKIN, *supra* note 25, at 1-38; JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

39. See TUSHNET, *supra* note 3, at 157-58.

40. JOHN RAWLS, *POLITICAL LIBERALISM* 227 (2d ed. 1996).

41. See TUSHNET, *supra* note 3, at 30-32.

42. See *id.* at 158.

legislature in State A decides that the Constitution allows a fairly strict limit or cap and then proceeds to enact it, democracy is nonetheless in force in State A. If, at the same time, the legislature in State B decides that the Constitution prohibits any limit or cap at all, and for that reason refrains from enacting any, democracy is also nonetheless in force in State B. The same is true if legislatures in the United States simultaneously divide, as doubtless they would if freed of the judicial overhang, over whether the Constitution permits criminalization of flag-burning,⁴³ numerical over-representation in the state legislature of sparsely populated rural districts,⁴⁴ legislative districting designed to guarantee the return of a representative number of African-Americans,⁴⁵ punishment of racist hate speech,⁴⁶ prohibition of unsigned political leaflets,⁴⁷ liability for negligent and damaging falsehoods about public figures,⁴⁸ ballot-access restrictions designed to protect "political stability,"⁴⁹ or exclusion of paid signature gatherers from initiative and referendum activities⁵⁰—all of those being constitutional questions that the Supreme Court has resolved on grounds at least tinged with a concern for the requirements of true democracy. In Tushnet's view, any concatenation of answers to questions like these (and the list could go on and on) leaves democracy standing intact. In other words, Tushnet's democracy is a big tent. It just about *has* to be more spacious than that of any judge, scholar, or party to constitutional litigation who has ever argued or defended a constitutional-legal position in terms of what democracy means or requires.

Inevitably, someone will ask: Suppose some legislature enacts a \$50-per-candidacy cap on campaign expenditures, and does so precisely because its members believe the measure will guarantee lifetime reelection to incumbents. Would democracy then still be in force? Tushnet's answer would be twofold: First, democracy would still be in force, because the enactors' incumbency-protection belief would be false. Campaign cap or no, word of what the legislators had done would easily get around, and American voters would take

43. See *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

44. See *Reynolds v. Sims*, 377 U.S. 533 (1964).

45. See *Miller v. Johnson*, 515 U.S. 900 (1995); *Shaw v. Reno*, 509 U.S. 630 (1993).

46. See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); cf. *Hudnut v. American Booksellers*, 475 U.S. 1001 (1986).

47. See *Talley v. California*, 362 U.S. 60 (1960).

48. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1969).

49. See *Storer v. Brown*, 415 U.S. 724 (1974).

50. See *Meyer v. Grant*, 486 U.S. 414 (1988).

the first opportunity to throw the traitors out and elect a new government pledged to undo the dirty work.⁵¹ Alternatively, if that is not so, then nothing can save us anyway, certainly not judicial review.⁵² But now we are speeding too fast ahead of our story.

C. *Overcoming the Democratic Default: Advancement of Constitutional Values*

Tushnet does not believe that democracy is the only consideration bearing on our appraisals of judicial review. Supposing democracy to be practically secure in the United States, with or without judicial review in force, there are still other “constitutional values” to worry about.⁵³ Because there are, it remains possible, in theory, to defend judicial review by showing that its positive contribution to the “advancement” of the other constitutional values outweighs or otherwise overrides its cost to democracy. Obviously, that case rides on the strength of our belief in the contribution judicial review makes to constitutional-values advancement. If we can’t conclude with some confidence that constitutional values are measurably better served in the presence than in the absence of judicial review—if the one and only “clear” effect of abolition would be to return constitutional decision-making from the judges to the people—should not the democratic default lead us to reject judicial review?⁵⁴

Maybe not. Suppose the effects wouldn’t be *completely* clear. Suppose we couldn’t be *absolutely* certain that judicial review doesn’t do at least a *little* better for the other constitutional values than populist constitutional law would do. And suppose we *were* absolutely certain that we can’t do *worse* for the other values with judicial review in force. That combination of estimates strikes many people as highly sensible, even logically compelled. It seems to them

51. See, e.g., TUSHNET, *supra* note 3, at 66 (“Candidates for office . . . would want to take constitutional rights seriously when the people themselves care deeply about constitutional rights.”).

52. See *id.* at 71 (“[I]t seems wildly unlikely that the courts can save us from ourselves.”); cf. Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY 155, 164 (Irving Dillard ed., 1977) (“[A] society so riven that the spirit of moderation is gone, no court can save; a society where that spirit flourishes, no court need save”); ELY, *supra* note 38, at 182-83 (strongly discounting the threat of anti-cholecystotomy laws).

53. See *supra* note 7.

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

that adding a judicial review filter can only increase, and cannot decrease, effective protection against violations of the other constitutional values. That is because they think the other values all concern fears about what the government might do to us. If so, an extra barrier against government action can only advance the other values and cannot possibly set them back. A perception of that kind, set against a background preference for democracy, makes the choice for or against judicial review depend, always imponderably, on how we weigh the absolute certainty of some loss of democracy against the virtual certainty of some net loss of the other values.

In Tushnet's view, the choice is not so fathomlessly uncertain as that. He is relentless on the point that judicial review carries its own risk of mistakes, offsetting the risk of mistakes we surely run without it. The idea that adding constitutional-review filters can't possibly increase, but can only decrease, the net total of constitutional-value losses, is patently false. "Keep the government out of here, there, and everywhere," Tushnet truly says—I wish he had mentioned the Preamble right there—is an idea that "[l]iberals cannot like."⁵⁵ Advancement of liberal constitutional values often requires government action. Equal citizenship regardless of race is a constitutional value for Tushnet—as for us all?—and its realization, in today's United States, almost certainly requires the enactment and enforcement of civil rights laws.⁵⁶ Yet it is not all that difficult to see such laws as prohibited infringements on constitutionally protected privacy and property rights.⁵⁷ When and as the Supreme Court should have happened to do so, mistakenly, the judicial filter would have lessened, not increased, satisfaction of constitutional values.⁵⁸ As Tushnet says, "We buy judicial review wholesale."⁵⁹ The

55. *Id.* at 133.

56. *Cf.* S. AFR. CONST. (Constitution Act, 1996) ch. 2 (Bill of Rights), §§ 9(1) ("Everyone is equal before the law and has the right to equal protection and benefit of the law."), 9(2) ("Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.").

57. *See, e.g.*, *United States Jaycees v. McClure*, 709 F.2d 1560, 1561 (8th Cir. 1983) (Richard Arnold, J.) (holding unconstitutional, as applied to the Jaycees' males-only membership rules, Minnesota's law prohibiting sex discrimination in "places of public accommodation"), *rev'd sub nom.* *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

58. *See, e.g.*, TUSHNET, *supra* note 3, at 96 ("Judges are not perfect. . . . They can find a constitutional right where the Constitution does not create one."); *cf. id.* at 126 (discussing instances in which courts, by "overenforc[ing]" certain values, "depriv[e] the people of our power to govern ourselves without promoting any value the Constitution actually seeks to

price of *Brown v. Board of Education*⁶⁰ may be “Supreme Court decisions restricting affirmative action and campaign finance reform.”⁶¹

For present purposes, we need not rehearse and appraise in detail Tushnet’s case against judicial review. It’s enough to observe that, using lines of argument of the kinds I have been sketching, Tushnet does arrive at the conclusion that we can’t conclude with any confidence that constitutional values are measurably better served in the presence than in the absence of judicial review and that the democratic default, therefore, should lead us to reject judicial review.

D. “Incentive-Compatibility”⁶² and Citizens’ Values

The case proceeds with an eye on both pans of the balance. On the one side, Tushnet argues that courts make mistakes about constitutional values, as one indeed would have to expect.⁶³ On the other side, he argues that constitutional values are safer with popular politics than Americans have taught themselves to believe.⁶⁴ Let us focus, now, on the latter line of argument. At its core is the claim that constitutional values, by and large, are parts of an incentive-compatible arrangement of political institutions and practices. An incentive-compatible arrangement is one that is self-enforcing without external policing, given the motivations that can be expected to operate on participants in the arrangement. Tushnet’s homely example is an automobile dealership’s contractual arrangement with members of the sales force for payment of a large bonus to the one who sells the most volume over a period of time.⁶⁵ The boss devises this scheme to take the place of inevitably vain attempts by herself to oversee directly the sales efforts exerted by each member. True, the scheme won’t work unless the salespeople can be reasonably sure the bonus really will be paid to the one who earns it under the rule, and we can ask what would give them the

promote”).

59. *Id.* at 141.

60. 344 U.S. 1 (1952).

61. TUSHNET, *supra* note 3, at 141.

62. *Id.* at 95.

63. *See id.* at 96.

64. *See id.* at 121.

65. *See id.* at 95-96.

needed assurance if there were no courts and police around to “enforce” the contract. Tushnet’s answer is that the arrangement is self-enforcing because of everyone’s knowledge that the employment market (not to mention the auto sales market) will punish the boss severely if she reneges on her deals with the sales force.⁶⁶

Similarly, Tushnet argues, public officeholders who flout, say, Bill-of-Rights values can count on being punished in the vote-market by an electorate displeased by the flouting.⁶⁷ True, again, that won’t work unless a basic respect for the rules about voting—more broadly, for the structural provisions of the Constitution—is itself guaranteed, and don’t we need the courts to guarantee at least that much? Tushnet’s answer is that we don’t, because there are lines clearly defining the outer limits of tolerance of the American social contract for democratic government, and officeholders will be stopped from crossing those lines by some combination of shame, fear of popular reprisal that will find some way to effect itself, and their own, internalized, cognitive commitments to democratic values.⁶⁸ (As we have already noticed, Tushnet combines this with a familiar theme in the American historical lexicon of anti-judicial review polemics, that if we ever reach the point where the mentioned combination of deterrents will not work, there’s nothing left of the Great Republic that’s worth a judiciary’s saving, anyway.⁶⁹)

The Constitution’s incentive-compatibility arises from complex layerings of what Tushnet calls “structure-based” and “value-based” incentives.⁷⁰ The voters’ readiness to rally to the defense of Bill-of-Rights substance is a value-based incentive. The officeholder’s fear of crossing the voters is a structure-based incentive. The officeholder’s refusal to transgress the outer bounds of a democratic-republican system of government reflects a mix of both kinds of incentive. The structure-based component of the mix in turn

66. *See id.* at 96. We can keep asking, of course—this time, whether judicial enforcement of the most basic rules of property and contract isn’t required to keep these markets up and running. Tushnet’s response would be: Maybe, but we don’t need anything like constitutional law, taking precedence over common law and statute law, to assure ourselves of *that*. *Vide* the case of Britain, from the memory of humankind runneth not to the contrary to the present day.

67. *See id.* at 66.

68. *See, e.g., id.* at 106-07 (observing that what reliably stops Senators from “deny[ing] fundamental fairness in impeachment trials” isn’t the Constitution’s mandate to the Senate to “try” impeachments, but rather is the “[S]enators’ commitments to constitutional values *in themselves*”).

69. *See supra* note 52 and accompanying text.

70. TUSHNET, *supra* note 3, at 108.

responds to a value-based incentive, the voters' presumed devotion to the ideal of democratic-republican government.⁷¹ Plainly, the value-based incentives of the voters (to whom—as to the judiciary—no structure-based incentives apply) are foundational in this model; without them, the model collapses. In sum—glossing over much of what is of enormous interest in Tushnet's book—Tushnet's argument that we do not need judicial review to guarantee the advancement of constitutional values rests crucially on the claim that the value-based incentives of the citizenry support a no less reliable, incentive-compatible structure of assurances.

IV. THICK AND THIN: SORTING CONSTITUTIONAL VALUES

A. *Too Many Values*⁷²

Obviously, the plausibility of that claim is going to vary with exactly what we include in the set of constitutional values to be concerned about. Suppose we take those values to include the effectuation of the Constitution's dictates regarding such housekeeping matters as the legislative veto, or even such arguably hotter, structural issues as the suability of states for violations of congressional regulations of commerce. In both those fields, Congress got away with repeated violations over extended periods⁷³—habits of infraction that, for all anyone knows, would have lasted forever had the judiciary not at length stepped in to “enforce” what it now tells us are the pertinent, contrary commands of the Constitution.⁷⁴

The problem is not avoided, it is only sharpened, if we focus the idea of “constitutional values” on substantive concerns about human needs and interests that we think ought to shape and direct the powers of government as a whole. In American constitutional law, those concerns about human needs and interests find expression at

71. *See id.* at 66 (“[R]epresentatives once elected, would want to take constitutional rights seriously when the people themselves care deeply about constitutional rights.”).

72. I was thinking of Joseph II's wondrous critique of Mozart's music. *See* PETER SHAFFER, *AMADEUS* 29 (1981).

73. *Cf.* TUSHNET, *supra* note 3, at 101 (remarking that *United States v. Lopez*, 514 U.S. 549 (1995), “certainly supports skepticism about the self-enforceability of federalism”).

74. *See, e.g.*, *Alden v. Maine*, 119 S. Ct. 2240, 2269 (1999) (holding that states enjoy sovereign immunity from suits for violations of the Fair Labor Standards Act); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (holding that section of Immigration and Nationality Act that authorized one House of Congress, by resolution, to invalidate a decision of the Executive Branch was unconstitutional).

various levels of generality and abstraction. There is, for example, the level of the text, where constitutional values would seem to include “the free exercise [of religion],”⁷⁵ “the freedom . . . of the press,”⁷⁶ and the absence from our lives of “unreasonable searches”⁷⁷ and “cruel and unusual punishments.”⁷⁸ Do locutions of that kind compose any part of the catalogue of the “constitutional values” we’re supposed to be concerned about advancing? If so, why stop there? How about the more concrete and contextualized set of aims and ideals for the conduct of government that we find laid down by judge-made constitutional law, the teachings of the *United States Reports* regarding such matters as laws restricting free expression, allegedly for wholly commendable reasons unrelated to message content—public nudity laws, for example, as applied to paid entertainment?⁷⁹ If those judge-identified aims and ideals count as “constitutional values,” then Tushnet’s incentive-compatibility claim is in serious difficulty, because, obviously, we can’t rely on value-based incentives of the citizenry to keep lawmakers faithful to constitutional values conceived at that level of refinement. To take a fairly extreme and striking example, we can’t depend on the electorate to punish the first post-hangover legislature to enact a flag-desecration law like the ones held unconstitutional in *Texas v. Johnson*,⁸⁰ and *United States v. Eichman*.⁸¹

It is true, as Tushnet points out, that large parts of the judge-made *corpus juris constitutionale* consist of something rather different from the judiciary’s determinations of what the Constitution, in the service of basic human interest, finally requires of American government.⁸² When, for example, the Supreme Court tells lower courts to invalidate restrictions on expressive conduct (burning a draft card or a flag, for example), when and only when the restrictions exceed what those courts find “essential to the furtherance of” some “important or substantial governmental interest,”⁸³ the high court is not exactly and undilutedly reporting its findings about the human interests and related constitutional values implicated in the case-types under consideration. (“Not

75. U.S. CONST. amend. I.

76. *Id.*

77. U.S. CONST. amend. IV.

78. U.S. CONST. amend. VIII.

79. See *Barnes v. Glen Theatre*, 501 U.S. 560 (1991).

80. 491 U.S. 397, 399 (1989).

81. 496 U.S. 310, 318 (1990).

82. See TUSHNET, *supra* note 3, at 42-44.

83. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

overburdening expression any more than the judge will consider necessary to vindicate a substantial state interest” is not plausibly the name of a basic political value, for the defense of which Americans “would march [their] sons and daughters off to war.”⁸⁴) The Court then, almost certainly, is prescribing a set of prudential rules for lower courts to follow (as well as for itself to follow in future proceedings), in the belief that having courts follow those rules is the best way to “implement” what it takes to be the pertinent constitutional values.⁸⁵

But to say that not all of judicially produced, constitutional-legal doctrine is a specification of constitutional values is not to say that none of it is. In fact, a sizable fraction of it appears to be just that—a report of the Court’s relatively concrete and detailed views about what the Constitution, in the service of human interest, really “wants” in various sorts of contexts and situations. Thus, the Court in the draft-card and flag cases very clearly purports to find out something about what the Constitution wants that the parchment itself does not spell out—that is, the Constitution wants the government *not* to regulate expressive conduct at all, insofar as its motivation to do so lies in dislike of the political or ideological stance or message believed to be conveyed by the conduct in question. Suppose we spoke of “the special obnoxiousness to liberty of governmental restrictions on expression, when the latter are prompted by political or ideological antipathy.” Surely, we’d just have spoken the name of a value, and one that we would ordinarily think of as constitutional. Yet a fair reading of Tushnet’s treatment of these matters is that he does not regard a judicial determination of constitutional meaning, at that level of concreteness or detail, to be one that touches “constitutional values,” at least not the kind that should mainly concern us in our grand calculus of the costs and benefits of judicial review.

B. *Value-Trashing: A Road Not Taken*

Tushnet could neatly have avoided all trouble of this sort, had he been willing both to embrace a value-free notion of law and to make

84. TUSHNET, *supra* note 3, at 11 (quoting *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (Stevens, J.)).

85. See TUSHNET, *supra* note 3, at 43-44, 61, 161; Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997).

constitutional “law,” as opposed to “values,” the object of concern. He could have joined with those who say that the Constitution, as a law, is fully in force as long as there are no violations of any command demonstrably contained in its text. The strongest form of this view would be that there is no such thing as the truth of the matter about what any text says, or means, so as soon as we reach the point where the slightest disagreement sets in, it’s *chacun à son goût*—from which it may be held to follow that, if there is an honestly reported difference of *goûts* concerning whether “the freedom of speech” encompasses the torching of an American flag, national constitutional law can have nothing to say about the permissibility of statutes abridging activities falling under that description. A weaker version, giving the same result, would be that, even if there is a true answer to a question such as whether the First Amendment prevents Congress or a state legislature from enacting a law prohibiting flag-desecration, the truth of one or another proposed answer is not the sort of thing that anyone can demonstrate to anyone else by a cogent, logical argument drawing on nothing but the text for its premises. That being so, it may be maintained, obedience to the true answer ought not to be a part of anyone’s legal obligation, to be “enforced” by the courts and the police.⁸⁶

Adoption of either of those views would have allowed Tushnet to say, for example, that his argument is not hurt by the fact that the electorate probably wouldn’t punish Congress or a state legislature for enacting a flag-desecration statute. That’s no problem, he could then say, because such a statute, being not demonstrably prohibited by the words of the Constitution, is not against the law of the Constitution, and the Supreme Court’s pretense of laying down that it is, is an act of usurpation.

C. *Tushnet’s Constitutional-Legal Moralism*

Happily, Tushnet wants nothing to do with arguments of that kind. Tushnet is a constitutional-legal moralist. He thinks questions of right and wrong in politics have answers that go beyond differences of opinion, that getting them right is something very much worth caring about, and that this aim has a bearing on how rightly to measure the constitutional permissibility of, for example, flag-

86. See Larry Alexander, “*With Me, It’s All er Nuthin’*”: *Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 544-46, 549-51 (1999).

desecration laws.⁸⁷ He plainly thinks the Supreme Court has measured right, in that instance.⁸⁸ He nowhere asks us to assume that populist constitutional law would do the same. “Of course,” he writes, “it is a fact that the people are not committed to the Constitution’s principles *as the courts have understood them.*”⁸⁹

Generalizing—and I am reading between the lines, here—we may doubt that Tushnet believes, and I do not read him as maintaining, that judicial review gives us *no* better overall chance of getting constitutional choices right, at this level of refinement, than we would have without it.⁹⁰ Flag-desecration laws, offensive to political morality as they truly are, are still not in the class of events we have mainly to be concerned about, namely, transgressions of the thin Constitution.⁹¹ The world is not lost if people have to put up with *this* degree of deviance from true, basic, political morality. “[A] nation that enforces anti-flag-burning statutes” is not, on that account, “Stalinist Russia.”⁹² Tushnet’s position is that any gain to the overall cause of political-moral rightness by getting issues of this relatively refined kind right rather than wrong, discounted by the marginal increase in the probability of getting them right that judicial review might credibly be thought to bring with it (and you

87. References abound in Tushnet’s book to good and correct constitutional decisions, and conversely to bad and mistaken ones. While such remarks crop up in sundry contexts, they are all, obviously, meant sincerely, not ironically. I will give just a few citations here. *See, e.g., TUSHNET, supra* note 3, at 44 (explaining how use of formalist doctrines can increase the net total of “correct decisions”); *id.* at 91 (“The legislator would act wrongly in following the [religiously based, racist views of constituents] not because those views were religious but because they were wrong.”); *id.* at 96 (speaking of judges who find constitutional rights where “the Constitution does not create one” or deny rights that “the Constitution actually protects”); *id.* at 105 (“The Constitution is not indifferent as to the outcome of controversies over what its words mean.”).

88. *See id.* at 59 (“The federal Flag Protection Act was a bad law . . . because [among other defects] it was inconsistent with free speech principles”); *id.* at 106 (opining that a ban on flag burning is not “even a close case”).

89. *Id.* at 70.

90. My reading has to be set beside Tushnet’s own summation:

Sometimes the courts deviate a bit [from what the dominant national political coalition wants], occasionally leading to better political outcomes and occasionally leading to worse ones. . . . On balance, judicial review may have some effect in offsetting legislators’ inattention to constitutional values. The effect is not obviously good, which makes us lucky that it is probably small anyway.

Id. at 153.

91. *See id.* at 57 (“The real question is whether in general legislatures or courts make more, and more important, constitutional mistakes.”(emphasis added)).

92. *Id.* at 106; *cf. id.* at 78 (“[A] liberal society guided by a thin Constitution can probably put up with whatever sorts of political actions religious believers take. The thin Constitution’s nonestablishment provision is thin indeed.”).

are allowed to assume it greater than nil), is not worth the cost to popular government that judicial review surely involves.

Stated thus, Tushnet's case sounds a good deal less algorithmic—in that sense, less compelling—than it does in the form I gave it earlier: that, since we can't conclude with any confidence that constitutional values are *any* better served in the presence than in the absence of judicial review, the democratic default should lead us to reject judicial review. Perhaps, though, the two forms of statement are not at odds. Tushnet may believe—I've been saying that I gather he does believe—that judicial review, at least arguably, has a better overall chance than has populist constitutional law of getting the right answers to issues such as the permissibility of flag-desecration laws, but that doesn't have to mean he thinks judicial review has any better chance of getting *constitutional values* right, because flag-desecration laws don't have to raise any question of "constitutional values" in the limit sense—the "thin" sense—in which Tushnet would have us understand that term.

D. *The Calculus of Thinness*

"[T]he thinness of the populist Constitution," Tushnet writes, "is essential if the position I am developing is to be at all defensible."⁹³ We are in a position, now, not only to see why he is right to say so, but also to add that he means not just the thinness of the populist constitution but its natural-law basis. The two aspects are tightly linked in Tushnet's argument. If you are going to tout a country's constitution as self-enforcing through a structure of incentives resting finally on the value-based incentives of the country's citizenry, then, true, it had better be a thin constitution you are talking about, but equally it had better be a naturalistic one.

A naturalistically thin constitution plausibly has two properties, crucial to incentive-compatibility, that positivistically thick constitutions seem bound to lack: First, violations are relatively clearly observable, as constitutionally sensitive events, by ordinary, nonlawyer citizens.⁹⁴ Second, clear violations are strongly unwel-

93. *Id.* at 13.

94. *See id.* at 127 (suggesting that it's when constitutional values are "easy to grasp" that people most dependably will punish their representatives for violations); *id.* at 168 ("We might find that we did not need the courts' help . . . if . . . the Constitution outside the courts is relatively simple and understandable. . . . [T]he Declaration's principles . . . provide the

come to most ordinary citizens, who can accordingly be expected to use their electoral franchise to resist them.⁹⁵ Taken together, these two properties make it quite persuasively arguable that judicial review can do nothing much to reduce the incidence of thin-constitutional violations. And then, even leaving open the possibility that judicial review actually does do something more to curb thick-constitutional violations, the stage may be well-set for the democratic default to tilt the overall balance against judicial review. It will be, as long as one agrees with Tushnet's further assessment that thin-constitutional violations are, as a class, much likelier than thick-constitutional violations to involve serious setbacks for human rights.⁹⁶ As Tushnet, at one point, sums up the case:

Preserving judicial review to deal with extreme cases . . . means allowing it in ordinary cases. And that has costs In the end we have to decide whether on balance the risk [that the people themselves would tolerate] extreme cases and the possibility of successful resistance [by judges] is great enough to justify routine judicial review. I doubt that it is.⁹⁷

V. REFLECTIONS

We might compare Tushnet's position with the one staked out in what may be the most recent writing prior to Tushnet's to speak of constitutional-legal "thinness," Lawrence Sager's fine and important 1993 essay, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*.⁹⁸ Sager began with the thought that the demands imposed on government by what he called "constitutional case law,"⁹⁹ or "constitutional adjudication,"¹⁰⁰ stop well short of the

model.").

95. See *id.* at 12 ("Politicians believe, probably correctly, that their constituents care about the thin Constitution [P]oliticians become cautious when they worry that enough constituents care enough."); *id.* at 70-71 (affirming that "the people are not committed to the Constitution's principles as the courts have understood them," while denying that "the people . . . have become so degenerate that the principles of the Declaration of Independence no longer mean anything to us").

96. See *id.* at 13 ("The Declaration and the Preamble provide the substantive criteria for identifying the people's vital interests."); *id.* at 127 (questioning whether there is really any reason for anyone to be "deeply committed to the details of the thick Constitution we actually have").

97. *Id.* at 163.

98. Lawrence Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. REV. 410 (1993).

99. *Id.* at 410.

100. *Id.* at 419.

demands imposed by what he called "political justice."¹⁰¹ Sager's main examples were: (1) the post-*Lochner*¹⁰² withdrawal of adjudication from the sphere of social and economic rights, which means that not only freedom of contract but rights to subsistence, health care, and education are left to the tender mercies of legislative majorities;¹⁰³ (2) the "state action" doctrine, which means that constitutional duties to refrain from racial and other class-based discrimination are only very exceptionally imposed on nongovernmental agents;¹⁰⁴ and (3) the general declination of courts to require even government actors affirmatively to correct and compensate for current gross inequities owing to a long history of viciously unjust discrimination by both government and (dominant) society at large.¹⁰⁵

Sager is very sure these doctrines systematically write a great deal of actual injustice off the adjudicative calendar. His purpose, however, in pointing this out isn't to raise a hue and cry about it. His interest in the facts he reports is a normative one, to be sure, but only in a somewhat removed sense. His article poses a choice between two possible ways, conceptually, of meting out the gap between the reach of constitutional adjudication and the concerns of political justice. It then asks which of the two ways is the more normatively satisfying.¹⁰⁶

Somewhere between constitutional case law and political justice, Sager points out—following up on an earlier article on which Tushnet relies¹⁰⁷—there stands the Constitution and the norms it contains.¹⁰⁸ It could be that the courts, more or less deliberately, and with the more or less conscious backing of the country, are declining to tell the government what to do about certain demands on government conduct that no one ought to doubt the Constitution really means to impose. If so, then the gap between adjudication and justice is partible into two fractions: a sub-gap between adjudication and

101. *Id.* at 410.

102. *Lochner v. New York*, 198 U.S. 45 (1905).

103. See Sager, *supra* note 98, at 410; see also *Harris v. McCrae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1972).

104. See Sager, *supra* note 98, at 411; see also *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

105. See Sager, *supra* note 98, at 411; see also *Milliken v. Bradley*, 433 U.S. 267 (1977).

106. See Sager, *supra* note 98, at 414-15.

107. See Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); see also TUSHNET, *supra* note 3, at 170.

108. See Sager, *supra* note 98, at 435.

constitutional norms, and an adjacent, complementary sub-gap between constitutional norms and justice. Taking both the case law and the minimum demands of justice to be fixed points, Sager's question is how we ought to regard the Constitution's relative proximity to the one and the other. He asks whether we get a normatively more attractive picture by placing the Constitution close to justice, thus assigning the lion's share of the total case law/justice gap to judicial under-enforcement of the Constitution, or, conversely, by placing the Constitution close to the case law, thus attributing the case law/justice gap mainly to the Constitution's own understatement of the demands of justice.

Sager's answer is: better to chalk up the total gap mainly to judicial under-enforcement of the Constitution's justice-seeking norms.¹⁰⁹ The most normatively attractive explanation for the case law/justice gap, he says, lies in the value we rightly assign to "popular participation in the definition and implementation of justice."¹¹⁰ But when we look to see why we value such popular participation, the reasons we find simply are not reasons for wishing or understanding our political charter to have set its sights short of the full realization of political justice. Of course, we have important disagreements about what the realization of justice means in practice, but those shouldn't keep us from agreeing that our Constitution ought to commit us to trying the best we can to figure it out and then do it. Awareness of such disagreements does, however, combine with a care for popular participation to yield a strong reason for "restraining the reach of constitutional *adjudication*," that is, in order to allow due room for "robust participation by popular institutions in the constitutional project of identifying and implementing the elements of political justice."¹¹¹

That sounds a lot like Tushnet. And it is. And it isn't. To put the difference as plainly, if over-simplistically, as I can: Whereas Sager's contraction of the province of constitutional adjudication is meant to shore up a background conviction that judicial review is a highly desirable component in a governance system geared to "the project of identifying and implementing the elements of justice over

109. *See id.* at 414-19.

110. *Id.* at 418.

111. *Id.* at 419 (emphasis added).

time,”¹¹² Tushnet’s thin constitutionalism is meant to shore up an argument that it is not.

The view Sager takes of the presumptive merits of judicial supremacy is just the one Tushnet spends a book trying to unseat. Sager *starts with* the view, and never deserts it, that an independent judiciary has clear advantages over popularly elected assemblies in the “judgment-driven” (as opposed to “preference-driven”) work of finding justice-serving answers to questions of constitutional interpretation and application.¹¹³ He notices, however, that certain “elements of political justice” cannot be pursued without deciding lots of closely connected questions, not themselves matters of justice, that are nevertheless of great and legitimate concern to a country’s people—matters of strategy, responsibility, and institutional arrangement.¹¹⁴ The elements of justice most saliently displaying this property of coming tightly bundled with important non-justice considerations are just the ones, Sager says, where the extant case law/justice gap is most noticeable: positive social and economic rights, affirmative correction of current social conditions resulting from past injustice, and extensions of corrective obligations to various nongovernmental actors.¹¹⁵

The general idea is that whoever undertakes to deal responsibly with the “justice” elements in these bundles will have to deal with the rest of the bundles, too. These are whole balls of wax, best dealt with in their entirety either by the courts or by the political branches. If we have some very good reason not to want the courts messing with the non-justice parts of these balls of wax, that would explain why we, exceptionally, exclude them from dealing with the justice elements the balls of wax contain. That gives Sager—unmistakably a committed defender, in general, of American-style judicial review—an opening through which to make his peace with the party of popular self-government. Although one could certainly, and without great difficulty, *imagine* an appointive, independent judiciary commissioned to decide whatever non-justice questions may come bundled with justice questions, Sager is prepared, out of a due regard for the values of popular self-government, to assign the ball-of-wax cases, in their entirety, to the

112. *Id.*

113. *See id.* at 414-16 & n.6.

114. *Id.* at 418-19.

115. *See id.* at 420-21, 427-28.

political branches.¹¹⁶ If you want to see graphically how this differs from Tushnet, consider that there is no ball of wax around the question of the constitutional permissibility of flag-burning.

But of course the difference between Sager's and Tushnet's positions is profounder than that. Sager, committed in general to judicial supremacy in the pursuit of justice wrapped as constitutionalism, "justice in plain clothes,"¹¹⁷ nevertheless approves a certain thinning out—a certain reining in—of constitutional case law so as to open a space for claims of rights of popular self-government. Tushnet, working to undermine Sager-ish convictions of the pragmatic advantages of American-style judicial review in the pursuit of justice *alias* constitutional law, finds himself pressed by the needs of that work to thin out *the notion of justice itself*, or at least that part of it to be pursued as constitutional law.

To end there, with Tushnet thinning down justice *only* in order to make it fit his incentive-compabilist argument against the pragmatic advantages of judicial review, would be to do a serious injustice to Tushnet. He has, as well, an affirmative argument for a thin conception of constitutional values, one that flows directly from his background commitment to self-government, quite without regard to any argument against the utility of judicial review.

It is one thing to say that ordinary, acculturated Americans *can* discern abnegations from the value-commitments of the Declaration and the Preamble. It does not follow that we always have discerned or always do discern what we are capable of discerning, or that we always act politically according to what we discern. In fact, never to this day have we nearly always done so, nor are we ever likely to finish the job. The thin Constitution is, in Tushnet's words, "a *project*, that is, a self-creating activity in which the people of the United States daily decide whether to continue to pursue the course we have been pursuing."¹¹⁸ And—here is the point—the space thus opened for self-creation through self-government is itself a part of the beauty of the thin Constitution. Political participation and self-government are, in Tushnet's view, ranking human values in themselves (in some way weightier, it would seem, for him than they are for Sager), and the values reach their highest pitch when

116. *See id.* at 435.

117. Sager, *supra* note 98.

118. TUSHNET, *supra* note 3, at 183.

the issues on the table are those of “national self-definition.”¹¹⁹ Issues of national self-definition are not identifiable by whether they do or do not come surrounded by a ball of wax. Such issues include the permissibility of a flag-desecration law,¹²⁰ but Tushnet would surely agree that they include, as well, such questions as those of what we do about satisfying everyone’s basic material needs,¹²¹ and what we do about affirmative action.¹²² These questions of justice that are also questions of national self-definition are precisely the questions that arise in that space of reasonable disagreement over concrete applications of the thin Constitution’s abstractions, from which judicial review and its overhang are constant threats to crowd out popular government.

In sum, the distance between Tushnet and Sager lies partly, but only partly, in their differing beliefs about the relative trustworthiness of judicial review and populist constitutional law in getting to the true resolutions of the matters in reasonable disagreement. The rest lies in their differing assignments of value to direct popular involvement in the process of conscientious, judgment-driven decision (higher for Tushnet) and to getting the resolutions right (higher for Sager). In Tushnet’s view, justice is not done, but neither do the heavens fall, if populist constitutional law mistakenly allows punishment of flag-burners, and the loss is more than made up for by the moral gain of letting every American into the process of “all-things-considered judgment”¹²³ guided by a sincere and not unreasonable vision of the principles of the thin Constitution.¹²⁴

There remains one more thing, and not a minor one, that Tushnet must be asking us to believe. Tushnet maintains that if only we envision constitutional values as sufficiently, naturalistically thin, Americans can be counted on to stand up for them at crunch time.

119. See *id.* at 190-93.

120. See *Texas v. Johnson*, 491 U.S. 397 (1988). In *Johnson*, the Court explained that its decision against the constitutionality of the Texas flag-desecration statute reaffirms the principles of freedom and inclusiveness that the flag best reflects, and . . . the conviction that our tolera[nce] . . . is a sign and source of our strength. . . . [The image] immortalized in our . . . national anthem, is of the bombardment [the flag] survived at Fort McHenry. It is the Nation’s resilience, not its rigidity, that Texas sees reflected in the flag – and it is that resilience that we reassert today.

Id. at 419.

121. See TUSHNET, *supra* note 3, at 183.

122. See *id.* at 185.

123. *Id.* at 51-53, 91.

124. See *id.* at 51.

But it turns out, to the kind of hard look we have taken, that by standing up for constitutional values, Tushnet does not mean getting them right any particular fraction of the time. He means *trying*, in the right spirit, to get them right, approaching them in the idealized, liberal-humanist spirit of the Declaration. What “matters” about the political treatment of flag-burning, or of California’s nativist Proposition 187, “is not primarily how controversy . . . is resolved, but the terms in which it is discussed.”¹²⁵ No matter that Tushnet himself does not think these cases are “even . . . close.”¹²⁶ As long as fair-minded people, honestly committed to the abstract values of the Declaration, “at least as aspirations,” could conclude otherwise, then outcomes of otherwise are no sign of a distempered world.¹²⁷

That may be more than some of Tushnet’s liberal-minded readers will find they can swallow. For myself, I think he asks of us about what John Rawls does in his most recent explanations of the idea of public reason.¹²⁸ But that is matter for another essay.¹²⁹

125. *Id.* at 193.

126. *Id.* at 106.

127. *Id.* at 106, 127.

128. See JOHN RAWLS, *The Idea of Public Reason Revisited*, in COLLECTED PAPERS 573 (Samuel Freeman ed., 1999).

129. I plan to pursue the comparison in my forthcoming Storrs Lectures on “The Essential Constitution.”

