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LOSING FAITH: AMERICA WITHOUT JUDICIAL REVIEW?

*Erwin Chemerinsky**

TAKING THE CONSTITUTION AWAY FROM THE COURTS. By *Mark Tushnet*. Princeton: Princeton University Press. 1999. Pp. xii, 242. \$29.95.

In the last decade, it has become increasingly trendy to question whether the Supreme Court and constitutional judicial review really can make a difference. Gerald Rosenberg, for example, in *The Hollow Hope*, expressly questions whether judicial review achieves effective social change.¹ Similarly, Michael Klarman explores whether the Supreme Court's desegregation decisions were effective, except insofar as they produced a right-wing backlash that induced action to desegregate.²

In *Taking the Constitution Away from the Courts*, Mark Tushnet³ approvingly invokes these arguments (pp. 137, 145), but he goes much further. Professor Tushnet contends that, on balance, constitutional judicial review is harmful. He maintains that it produces relatively few benefits that could not be gained through the political process and that it actually has serious costs. He contends that without judicial review, a populist constitutional movement, with a vibrant public rhetoric of constitutionalism, would emerge (p. 154). Without constitutional judicial review, he posits, there will be more development of statutory rights and perhaps even a growth in welfare rights (p. 165).

Professor Tushnet thus argues, as his title suggests, that the Constitution should be taken away from the courts. Although he never precisely defines what this means, it is clear that he is calling for the end of constitutional judicial review. For example, at one point he suggests that the Supreme Court do this via a decision proclaiming that *Marbury v. Madison*⁴ was a failed experiment and that judicial

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1. GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

2. Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7 (1994).

3. Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center.

4. 5 U.S. (1 Cranch) 137 (1803).

review end in 2003 (p. 154). Toward the end of the book, he describes Robert Bork's proposal to amend the Constitution by including a provision that permits Congress to overrule a Supreme Court decision by majority vote.⁵ Springing from Bork's proposal, Tushnet argues that it would be preferable to go further and end judicial review altogether.

Tushnet's book is the logical culmination of two trends in liberal scholarship: the view that judicial review makes little positive difference and the strong disagreement with many decisions of the last quarter-century by the Burger and Rehnquist Courts. Tushnet invokes numerous examples of what he regards as undesirable rulings, including such outcomes of Supreme Court decisions invalidating affirmative action programs (pp. 139-40), advancing protection of states' rights and federalism (pp. 99-101), and limiting campaign finance reform and protecting corporate speech (p. 180).⁶ If the Court does little good with its judicial review, but imposes significant harms, the conclusion becomes to eliminate judicial review. Ironically, the political left, as embodied in Tushnet, and the political right, as reflected in Bork, come together in an effort to end constitutional judicial review.

Although I have the greatest respect for Professor Tushnet and his enormous contributions to constitutional scholarship,⁷ I strongly disagree with virtually every aspect of this book. In short, I believe that Tushnet underestimates the benefits of judicial review by selectively choosing examples where the political process might work in protecting rights and overestimates the gains from eliminating judicial review by hypothesizing an idealized populist constitutionalism. Put another way, Tushnet greatly minimizes the costs of ending judicial review, especially for those who have nowhere else to turn but to the courts for protection. He greatly exaggerates the benefits of eliminating judicial review by imagining a populist approach to the Constitution that he never develops or explains.

In Part I, I describe Tushnet's argument in some detail. Professor Tushnet's argument for ending judicial review is carefully developed and nuanced. Critiquing it first requires a detailed description.

In Part II, I respond to each step of Tushnet's argument. My focus is to identify the unsupported assumptions in his argument and to

5. See p. 175; see also ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117 (1996).

6. Tushnet, for example, is objecting to decisions such as *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating campaign finance reform); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (invalidating affirmative action programs); and *Alder v. Maine*, 119 S. Ct. 2240 (1999) (protecting states from suit in state court).

7. Professor Tushnet has produced an extremely large body of scholarship. Some of his most notable contributions include *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988) and a two-volume biography of Thurgood Marshall. He also has written dozens and dozens of influential law review articles.

highlight the extent to which he generalizes from a few examples to reach broad conclusions about the lack of benefits and the harms of judicial review.

In Part III, I suggest that ultimately it is not possible to prove that Tushnet is wrong and that the country would be worse off without judicial review. Nor is it possible for him to prove the contrary. The idea of “better off” or “worse off” would require a calculus for determining the social good that is surely impossible to devise. Also, there is no way of calculating, over the past and future of American history, whether judicial review has produced and will produce more on the good or on the bad side of this ledger. Tushnet and his critics would agree that there have been some good decisions and some bad decisions, however good and bad are defined, and there is simply no way to know how to measure the good against the bad. There is also no way to know, or calculate, the harms and benefits that would result if judicial review was completely eliminated.

In the end, each side can make its arguments for and against judicial review, but neither side will ever be able to prove its case or persuade the other. Ultimately, it is a matter of intuition and faith as to whether the benefits of judicial review outweigh its costs. My intuition is completely different from Tushnet’s and I greatly fear that *Taking the Constitution Away from the Courts*, and other scholarship like it, will have an effect that will lead to less active judicial review, resulting in real long-term harms for society and severe barriers for those who most desperately need protection from the courts.

I. TUSHNET’S ARGUMENT

Tushnet’s book lays out a well-developed argument in support of his conclusion that the Constitution should be taken away from the courts. There is an obvious danger in trying to summarize in a few pages a nuanced position developed over 200 pages, therefore, critiquing Tushnet’s thesis requires setting it forth as carefully and neutrally as possible.

I see five major steps to Tushnet’s argument:

1. *There are two versions of the United States Constitution — termed the “thick” Constitution and the “thin” Constitution.*

Tushnet introduces the distinction between the “thick” and “thin” Constitutions early in his book, and relies on it throughout (pp. 9-14). Indeed, Tushnet at the outset says: “Developing the argument against judicial supremacy and for a populist constitutional law requires me to introduce a distinction that will pervade this book — between the *thick* Constitution and the *thin* Constitution” (p. 9).

The thick Constitution seems to be the detailed provisions that particularly concern the structure of government. Tushnet writes,

“[t]he thick Constitution contains a lot of detailed provisions describing how the government is to be organized” (p. 9). He identifies four characteristics of the provisions that constitute the thick Constitution: 1) as a whole they are important in constituting the government; 2) they are rarely the subject of judicial attention; 3) they often are interpreted by the Supreme Court in an undesirable manner; and 4) the public is generally indifferent to them.⁸

In contrast, the thin Constitution contains the provisions that Tushnet regards as important. He writes: “We can think of the thin Constitution as its fundamental guarantees of equality, freedom of expression, and liberty” (p. 11). Professor Tushnet says that the thin Constitution is the collection of those ideals expressed in the Declaration of Independence and the Preamble to the Constitution (pp. 12-13). He argues that “the thin Constitution is indeed admirable in ways the thick Constitution is not. The thin Constitution protects rights that it has taken centuries of struggle for people to appreciate as truly fundamental” (p. 12).

2. Judicial review to enforce the thick Constitution is unnecessary and undesirable.

The distinction between the thick and the thin Constitution is useful for Tushnet because it allows him to dismiss the need for judicial review of much of the Constitution and then focus his argument on whether judicial review of the thin Constitution is desirable.

This specific attention to the thin Constitution is possible because Tushnet argues that the provisions of the Constitution concerning the structure of government, such as federalism and separation of powers, are most likely to be followed because incentives for compliance exist.⁹ He says, moreover, that courts often may err in interpreting these provisions, concluding that “[t]he constitutional values protected by those features of our Constitution would not be threatened by eliminating judicial review, particularly when we recognize that the courts might themselves mistakenly bar our representatives from adopting policies that are in fact consistent with the Constitution” (p. 123).

3. Even as to the thin Constitution, judicial review often is unnecessary in providing protections that would not exist without it.

Tushnet quotes extensively from James Madison that the structure of the Constitution itself is a significant protector of rights and preventer of tyranny (pp. 96-99). Tushnet also argues, at some length, that political pressures ensure that the government will not engage in sig-

8. Pp. 9-11. It should be noted that Professor Tushnet describes each of these characteristics in a brief paragraph.

9. Pp. 95-128. Tushnet especially develops this argument in Chapter Five.

nificant violations of rights and disregard for the Constitution.¹⁰ The core of the argument here is that the system is replete with incentives that encourage the government to act in a manner compatible with the Constitution.

Tushnet thus concludes his chapter on “Assessing Judicial Review”:

Looking at judicial review over the course of U.S. history, we see the courts regularly being more or less in line with what the dominant national political coalition wants. Sometimes the courts deviate a bit, occasionally leading to better political outcomes and occasionally leading to worse ones. Adapting a metaphor from electrical engineering, we can say that judicial review basically amounts to noise around zero: It offers essentially random changes, sometimes good and sometimes bad, to what the political system produces. 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. [p. 153]

4. *Judicial review inevitably results in significant errors by the courts.*

Tushnet constantly emphasizes the errors made by the Supreme Court in interpreting the Constitution. In describing the thick Constitution, Professor Tushnet writes: “*Judicial errors*. The courts have not done an obviously admirable job when they *have* dealt with these provisions” (p. 10). As to the thin Constitution, he responds to those who defend judicial review by stating: “The conventional assumption is that of course we get a higher rate of compliance with constitutional values if the courts enforce the Constitution. That assumption often rests on the unstated, and largely indefensible, belief that the courts never make mistakes. But they do” (p. 126).

Tushnet indicates many of the decisions that he regards as mistakes, such as those invalidating affirmative action programs (p. 120), protecting corporate speech (pp. 130-31), and invalidating campaign finance reforms (p. 129). These, of course, are decisions frequently attacked by progressives and have produced a large body of critical scholarship. Throughout the book, Tushnet makes it clear that his politics are liberal and that he regards many of the Rehnquist Court’s decisions as mistakes. Indeed, my sense, as a reader, is that much of what animates this book is Tushnet’s great frustration with the current and recent conservative Supreme Courts.

10. Pp. 95-128. This argument is developed in detail by Professor Tushnet in Chapter Five.

5. *Without judicial review, a populist constitutionalism will develop with benefits that outweigh any costs associated with the loss of judicial review.*

Having argued that the benefits of judicial review do not outweigh the costs of its mistakes, Tushnet then goes further and argues that the very institution of judicial review inherently contains undesirable effects. Most importantly, he repeatedly states that judicial review prevents the development of a populist constitutionalism (pp. 171, 174, 181-85). The book, however, does not offer a clear definition of "populist constitutional law." At only one point in the book does Tushnet offer an insight into the term's definition:

What is populist constitutional law? Throughout this book I have described it as a law oriented to realizing the principles of the Declaration of Independence and the Constitution's Preamble. More specifically, it is a law committed to the principle of universal human rights justifiable by reason in the service of self-government. [p. 181]

Tushnet intimates that without Supreme Court decisions regarding specific constitutional provisions, a popular rhetoric of constitutional law will develop (p. 194). He says that "[p]opulist constitutional law rests on the idea that we all ought to participate in creating constitutional law through our action in politics" (p. 157).

Moving from the populist notion to discuss lawmakers, Tushnet argues that legislators and executives will be more attentive to the Constitution if there is no judicial review to correct their violations. Without judicial review defining rights in constitutional terms, he contends, a richer development of individual liberties will be possible. For example, Tushnet suggests that without judicial review, more statutory rights might be developed and that "[f]reed of concerns about judicial review, we might also be able to develop a more robust understanding of constitutional social welfare rights, which are recognized in many constitutions around the world" (p. 169).

Thus, Tushnet argues that the gains from judicial review are minimal, while its costs in terms of mistakes and preventing a populist constitutional law from developing are high. He, therefore, concludes that the Constitution should be taken away from the courts and the practice of constitutional judicial review should be abolished.

II. A CRITIQUE OF TUSHNET'S ARGUMENT

I believe that Tushnet's conclusion rests on his systematic minimization of the benefits of judicial review and exaggeration of its costs, particularly by hypothesizing an idealized populist constitutional law that he never describes in any detail. In this Part, I discuss the assumptions and gaps in Tushnet's argument. My goal here is not to

make the counter case in favor of judicial review; that would require a separate book. Rather, I seek to show why Tushnet has failed to establish his case for abolishing judicial review.

A. *The Distinction Between the Thick and the Thin Constitutions*

Tushnet's analysis begins with the distinction between the thick and the thin Constitutions, a comparison he invokes throughout the book. Yet, the distinction and its basis are never made clear. He indicates only that the thick Constitution comprises the provisions that concern the structure of government, while the thin Constitution is composed of the provisions that safeguard basic human freedoms (pp. 9-10).

The problem with this argument, however, is that the constitutional provisions concerning the structure of government frequently are defended on the grounds that they are key protectors of individual freedoms.¹¹ In fact, Tushnet himself quotes James Madison at some length as supporting the view that the structure of government provides safeguards of liberties (pp. 96-99). If all of the Constitution serves to advance individual liberty in some way, then the distinction between the thick and the thin Constitutions seems unwarranted.

Tushnet's answer is that the people of the United States are committed to the thin Constitution, not the thick one. His "argument is that we are constituted as a people by the thin Constitution, not the thick one" (p. 50). But he offers no support for this conclusion. Indeed, observation suggests that people are just as committed to the concept of separation of powers and to the idea of having both national and state governments as they are to individual freedoms.

Tushnet might respond that the concepts of separation of powers and federalism are part of the thin Constitution, but the detailed provisions about them are part of the thick Constitution. The problem, though, is deciding what is the core and the thick Constitution, as opposed to the details and the thin Constitution. Consider a simple example: Is the process of adopting a law, as outlined in Article I, Section 7 of the Constitution, part of the thick Constitution or part of the thin Constitution? The idea that lawmaking requires action by both houses of Congress and signature by the President, or an override of a veto, seems basic to American government. I would suggest that popular commitment to this procedure is as great as the commitment to any provision of the Bill of Rights. Yet, if this is so, then Supreme Court decisions regarding the legislative veto and the line item veto

11. See, e.g., *New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself: 'Rather federalism secures to citizens the liberties that derive from the diffusion of sovereign power.'") (citations omitted); see also *Gregory v. Ashcroft*, 511 U.S. 452, 458 (1991).

concern the thin Constitution.¹² The distinction between the thick and the thin Constitutions becomes ever more ephemeral and difficult to draw.

Tushnet also seems to refer to the thick Constitution as the large body of law developed by the Supreme Court interpreting the document. Throughout the book, Tushnet is very critical of the various complex tests developed by the Court for particular constitutional provisions (pp. 111-12, 194). In other words, the thin Constitution is the statement of basic human rights, and all of the Supreme Court's interpretations are part of the thick Constitution.

This distinction, also, is undefended and seems unhelpful. Tushnet uses this as a way of dismissing as relatively unimportant, if not actually undesirable, the Supreme Court's elaboration of constitutional rights. But constitutional tests such as "one person-one vote,"¹³ heightened scrutiny for race and gender discrimination,¹⁴ and the requirement for strict scrutiny of content-based restrictions of speech,¹⁵ all advance Tushnet's thin Constitution. Because the Constitution is written in such broad, open-textured language, the body of case law that makes it thick in this sense is key to advancing the rights that Tushnet says that he cares about.

B. *Tushnet Greatly Minimizes the Benefits of Judicial Review*

As explained in Part I, a crucial aspect of Tushnet's argument is his claim that constitutional judicial review has minimal benefits. There are many reasons why Tushnet tremendously underestimates the benefits of judicial review.

1. *Tushnet focuses exclusively on the Supreme Court.*

Almost without exception, Tushnet's analysis of the benefits and costs of judicial review focuses entirely on Supreme Court decisions.¹⁶ There is virtually no discussion in the entire book about the effects of judicial review by the lower federal courts and the state courts. Yet,

12. *See, e.g., Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating the line item veto); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating the legislative veto).

13. *See, e.g., Reynolds v. Sims*, 377 U.S. 533 (1965) (articulating the standard of one-person one-vote for elections).

14. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996) (requiring intermediate scrutiny and an extremely persuasive justification for gender classifications).

15. *See, e.g., Carey v. Brown*, 447 U.S. 455 (1980) (articulating the requirement for strict scrutiny of content-based regulations of speech).

16. The only real exception is his discussion of California's Proposition 187, which denied government benefits to undocumented immigrants. The proposition was declared unconstitutional by a federal district court and then settled at the appellate court level after the election of a Democratic governor who had opposed the initiative. *See* pp. 6-7, n.3.

the vast majority of constitutional litigation never reaches the Supreme Court. Last term, the Supreme Court decided only seventy-three cases. Focusing exclusively on the high Court ignores the huge quantity of lower-court decisions enforcing the Constitution. All of the easy cases where lower courts strike down clearly unconstitutional government actions based on well-established law — cases that never would warrant Supreme Court review — are ignored by Tushnet's analysis.

Tushnet possibly could make a couple of responses to this argument. He might suggest that lower court enforcement of the Constitution is no more likely to have benefits than Supreme Court decisionmaking; yet, the evidence in the book would not support such a conclusion. Tushnet argues that the Supreme Court generally is in accord with the popular will so its rulings make relatively little difference (pp. 134-35). He offers no such evidence, however, as to the lower courts. Nor does he account for the benefits of the instances where the courts are willing to overrule the popular will.

Also, Tushnet could say that, qualitatively, the Supreme Court's decisions are far more important than those of the lower federal courts. In many ways, of course, this is true. For instance, the rhetorical impact of the Supreme Court is so great because its pronouncements have national effects and receive national coverage that far exceed those of the lower courts. Moreover, errors by the Supreme Court obviously have greater impact because of their national scope and the lack of any realistic mechanism for correcting them (except for the Court later changing its mind). Yet, none of this speaks to the benefits of lower court enforcement and the thousands of lower court rulings that Tushnet, too, would regard as desirable.

2. *Tushnet overestimates voluntary compliance with the Constitution by the political branches of government.*

The classic, and I believe the most powerful, argument for judicial review is the need for it to enforce the limits of the Constitution. In *Marbury*, this is the primary argument advanced in favor of constitutional judicial review.¹⁷ Chief Justice John Marshall declared:

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what

17. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

is expressly forbidden [sic], such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.¹⁸

Tushnet argues that the benefits of judicial review in enforcing the limits of the Constitution are minimal because there are incentives for the political branches to comply with the Constitution and existing political checks on the judiciary make it unlikely to depart far from the popular will (pp. 95-128). Even accepting Tushnet's argument entirely, it ignores the instances in which the political process lacks the incentives he describes and in which the courts have acted to uphold the Constitution.

Most dramatically, those without political power have nowhere to turn for protection except the judiciary. In a telling passage, Tushnet admits "[m]y wife is Director of the National Prison Project of the American Civil Liberties Union. She disagrees with almost everything I have written in this chapter."¹⁹ The reality is that the political process has no incentive to be responsive to the constitutional rights of prisoners. Admittedly, the Rehnquist Court has a dismal record of protecting prisoners' rights,²⁰ but overall, no one could deny that judicial review has dramatically improved prison conditions for countless inmates who would be abandoned by the political process.

Another example where political incentives fail is in situations where state and local governments choose to discriminate against out-of-staters. Illustrations include right-to-travel cases involving the denial of benefits to out-of-staters,²¹ Dormant Commerce Clause cases involving discrimination against out-of-state businesses,²² and decisions under the Privileges and Immunities Clause of Article IV involving discrimination against out-of-state citizens.²³ In all of these situations, there is no incentive for a state or local government to be protective of out-of-staters who lack the ability to vote within the dis-

18. *Marbury*, 5 U.S. at 178.

19. P. 174. The title of this chapter is "Against Judicial Review."

20. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343 (1996) (limiting prisoners' access to law libraries); *Sandin v. Connor*, 515 U.S. 472 (1995) (limiting procedural due process rights of prisoners).

21. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489 (1999) (declaring unconstitutional a state law that limited welfare benefits for new residents to the amount of the state that they moved from for their first year of residence); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (declaring unconstitutional a state law that created a one-year residency requirement for eligibility for welfare benefits from the state).

22. *See, e.g.*, *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (invalidating a state law that prohibited out-of-staters from burying garbage in New Jersey landfills).

23. *See, e.g.*, *Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985) (declaring unconstitutional a state law limiting admission to the state bar to residents of the state).

criminating state. Indeed, all of the political incentives favor the state or local government engaging in such discrimination. Similarly, the political process has no incentive to protect aliens from discrimination, but it has great incentive to impose burdens on aliens who cannot vote and thereby to benefit the citizens who do.²⁴

More generally, there is little incentive for the political process to protect unpopular minorities, such as racial or political minorities. How long would it have been before southern state legislatures declared segregation of public facilities unconstitutional if not for *Brown v. Board of Education*?²⁵ How long would it have taken Congress, dominated by Southerners in key committee chairs, to have acted in this regard? The point is that, overall, the political process has little incentive to protect those who have minimal likelihood of influencing the outcome of elections.

Sometimes the political process will even fail the majority. Reapportionment is the classic example here. In the 1960s, malapportioned state legislatures were not about to reapportion themselves so as to decrease the political power of those in office. Every incentive led those who benefited from malapportionment to retain the existing system. Only judicial review could institute one-person, one-vote.²⁶

These, of course, are just some of the examples where the political process cannot be relied on to comply voluntarily with the Constitution. In all of these areas, there are significant examples of judicial protections. These are benefits that Tushnet unduly minimizes.

3. *Tushnet underestimates the benefits of judicial review in securing state and local compliance with the Constitution.*

The nature of the federalist structure of American government is that there are fifty states and tens of thousands of local governments that can violate the Constitution. These include not only every town, city, and county, but every school board and zoning commission. Tushnet focuses especially on Congress and the President in discussing the incentives for voluntary compliance with the Constitution (pp. 108-20). This focus ignores, however, the likelihood of constitutional infringements by all of the other levels of government and the corresponding benefit of judicial review.

A few examples illustrate this point. Without judicial review, the Bill of Rights would not be incorporated and applied to the states.²⁷

24. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1981); *Graham v. Richardson*, 403 U.S. 365 (1971).

25. 349 U.S. 294 (1954).

26. See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

27. Incorporation is discussed in ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 372 (1997).

Although most states might voluntarily comply with most of the Bill of Rights, some states certainly would not follow every one of its provisions. For instance, states did not provide free attorneys in felony cases until *Gideon v. Wainwright*.²⁸ In this respect, Tushnet ignores the benefits of judicial review in securing state and local compliance with the Constitution. In fact, Tushnet's discussion of incentives at the federal level focuses solely on Madison's arguments about separation of powers and how conflicts among factions protect rights (pp. 96-99). Many local governments, however, do not have separation of powers, and often there is clear domination by one group without the protection of competing factions.

Another illustration of how Tushnet minimizes the benefits of judicial review of state and local governments concerns abortion rights. Tushnet argues that without judicial review, political pressures would have resulted in legalizing abortion and that, in fact, the Supreme Court's rulings were undesirable in diminishing the incentives for political action to protect abortion rights (pp. 124-25, 138-39). Tushnet offers no evidence for this proposition. Even assuming political protection for abortion rights existed in most states, it certainly did not exist in every state. Numerous states today surely would have laws prohibiting abortion without judicial protection of the right. Consider the fact that as soon as the Supreme Court signaled that it might reconsider the abortion issue, states and territories such as Idaho, Utah, and Guam immediately acted to restrict abortions.

The point is that Tushnet ignores the benefits of judicial review of state and local governments that, for whatever reason and for whatever period of time, do not comply with the Constitution. In a federalist system, especially one in which most states have judges who face electoral accountability, the assumption of voluntary compliance by all state and local governments is highly dubious.

4. *Tushnet uncritically accepts the scholarship of those who minimize the benefits of judicial review.*

Tushnet relies on scholars such as Gerald Rosenberg and Michael Klarman to support his argument that judicial review has minimal benefits (pp. 143-52). This scholarship, however, has been subject to enormous criticism, both as to its methodology and its conclusions.²⁹ Tushnet does not acknowledge these critiques, nor attempt to answer them.

28. 372 U.S. 335 (1963).

29. See, e.g., LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE (David A. Schultz ed., 1998); David Schultz & Stephen Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's The Hollow Hope: Can Courts Bring About Social Change?*, 12 J.L. & POL. 63 (1996); Neal Devins, *Judicial Matters*, 80 CAL. L. REV. 1027 (1992).

Tushnet approvingly cites to Rosenberg's book, which in its subtitle asks: "Can courts bring about social change?" Several things about the question, which Tushnet implicitly accepts in minimizing the benefits of judicial review, need to be noted. First, it focuses solely on courts. The question could be phrased even more broadly to ask whether laws can bring about social change. For example, Tushnet laments that despite all of the court decisions concerning equal protection, economic conditions for African Americans are relatively unchanged (p. 151). Over the past thirty-five years, major civil rights statutes have been adopted. The failure to improve economic circumstances for African Americans obviously reflects inadequacies not just of the courts, but also, and perhaps even more significantly, of legislatures.

The point is to ask whether it makes sense to evaluate the ability of courts to make a difference apart from the general ability of the law to make a difference. Scholars such as Rosenberg assert that it is better to direct efforts at social reform to legislatures rather than courts. These scholars assume, however, that legislatures would be successful where they perceive court failure.

Second, the question assumes that it is possible to measure causation. Rosenberg, for example, asks if courts can "bring about" social change; Tushnet implicitly asks the same question throughout his book. Causation, obviously, is often enormously complex. Change is often a long-term process. The more profound the social change, the longer it is likely to take and the more variables that will likely be involved. Great care needs to be taken in articulating how causation and change will be observed and measured. If changes are noted, can we evaluate whether they result from court decisions, from other legal changes, or from other social phenomena?

Third, the question assumes that litigation and decisions are to be evaluated in terms of their resulting social change. At the very least, this requires deciding what social changes are relevant as a measure of success; but who is to decide what is relevant? Also, for many reasons, focusing on whether court decisions cause social change is an incomplete inquiry. Even if court decisions brought about no social change, they still might serve enormously important ends. Perhaps most importantly, court decisions can provide redress to injured individuals. Even if laws forbidding employment discrimination are shown to have had little net impact in eradicating workplace inequalities, the statutes still serve a crucial purpose if they provide compensation to the victims of discrimination. Similarly, even if tort law does not succeed in deterring dangerous products and practices, it can be successful in compensating innocent victims.

Moreover, redress might be noneconomic. Litigation can provide vindication to those who have suffered from unconstitutional or illegal practices. *Brown* was an enormously important statement of equality

even if little school desegregation resulted. Tushnet stresses the value of a populist rhetoric of judicial review (pp. 112-13, 187), but minimizes the value of judicial rhetoric. Richard Kluger powerfully expresses this vindication with regard to *Brown*:

Every colored American knew that *Brown* did not mean that he would be invited to lunch with the Rotary the following week. It meant something more basic and more important. It meant that black rights had suddenly been redefined; black bodies had suddenly been reborn under a new law. Blacks' value as human beings had been changed overnight by the declaration of the nation's highest court. At a stroke, the Justices had severed the remaining cords of *de facto* slavery. The Negro could no longer be fastened with the status of official pariah. No longer could the white man look right through him as if he were, in the title words of Ralph Ellison's stunning 1952 novel, *Invisible Man*. No more would he be a grinning supplicant for the benefactions and discards of the master class; no more would he be a party to his own degradation. He was both thrilled that the signal for the demise of his caste status had come from on high and angry that it had taken so long and first exacted so steep a price in suffering.³⁰

Finally, and most importantly, court decisions upholding the Constitution can protect key values even if no social change can be linked to the rulings. For instance, court decisions safeguarding freedom of speech protect the rights of individuals to express themselves and lead to a better informed citizenry, even if no better policies can be linked to the decisions. Allowing the Pentagon Papers to be published did not bring about social change, but it was a crucial vindication for an important constitutional value.³¹ Stopping government aid to parochial schools does not change society, but it enforces the Establishment Clause and the traditional value of separation of church and state.³²

My point is that without even presenting the critiques of Rosenberg's work, it is possible to identify many benefits of judicial review that Tushnet minimizes or ignores.

30. RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN v. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR JUSTICE* 749 (1975).

31. *See* *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

32. *See, e.g.,* *Wolman v. Walter*, 433 U.S. 229 (1977); *Lemon v. Kurtzman* 403 U.S. 602 (1971) (imposing limits on public aid to parochial schools).

5. *Tushnet selectively chooses examples to minimize the benefits of judicial review and to ignore the benefits of the “overhang” of judicial review.*

Tushnet selects a few examples to show the minimal benefits of judicial review. For example, he describes the political safeguards of federalism that exist to protect state and local governments without federal judicial action (pp. 99-101). He also discusses the constitutional provisions concerning impeachment and the President’s duties to enforce the law (pp. 104-08, 113-18).

This argument generalizes from only a few areas and reaches broad conclusions about the role of courts. It is a logical fallacy to say that because judicial review is unnecessary in some areas, it is generally unneeded. Likewise, it is a fallacy to say that because *some* decisions have limited impact, *most* decisions have limited impact.

Moreover, Tushnet ignores the benefits of judicial review in deterring unconstitutional acts by legislative and executive officials at all levels of government. He speaks of the “overhang” of judicial review and tells how knowledge of its existence causes other government officials to have less need to follow the Constitution. This may be true, but the overhang also has a positive effect: it discourages government officials from taking actions that they know will be declared unconstitutional by the courts. I have had countless experiences, formally in legislative hearings and informally in working with legislators and their staffs, where constitutional objections and the likelihood of invalidation caused them to abandon a proposed course of action.

This benefit of judicial review cannot be quantified. Never will it be possible to measure the laws that did not come into existence and what their impact would have been. But no one familiar with the legislative process would deny the benefit of this “overhang” of judicial review.

My description of how Tushnet minimizes the benefits of judicial review is not exhaustive. But it, at least, indicates a serious flaw in the argument for the elimination of constitutional judicial review.

C. *Tushnet Overestimates the Costs of Judicial Review*

Tushnet makes two basic arguments as to the costs of judicial review: one emphasizes the costs of judicial errors; the other stresses how judicial review prevents a populist constitutional law and the benefits associated with it. As to the former, as indicated in Part I, Tushnet repeatedly discusses judicial mistakes in constitutional cases as a key cost of judicial review.³³

33. See *supra* Part I.

The problem is that Tushnet offers no definition of what is a judicial error. As best I can tell, a judicial error is a decision that Tushnet does not like. No other criteria are suggested. This subjectivity makes the case for eliminating judicial review inherently unpersuasive because there is no way to balance the benefits against the costs of judicial review without some criteria for measuring the good and the bad. Tushnet offers none.

As to the latter argument—that judicial review prevents a populist constitutional law—Tushnet never develops or explains this argument, and that is one of the book's greatest frustrations. The idea of a "populist constitutional law" has great rhetorical appeal. But what exactly this means, and how eliminating judicial review will bring it about, are left unclear.

Tushnet says that a populist constitutional law will advance the "principle of universal human rights justifiable by reason in the service of self-government" (p. 181). He says that "[p]opulist constitutional law rests on the idea that we all ought to participate in creating constitutional law through our actions in politics" (p. 157). But what does this idea actually mean in practice? Who will be participating and what will they be doing?

Also, Tushnet never clarifies why judicial review prevents a populist constitutional law from developing. Tushnet implies that the complex body of judicially created law prevents the populist constitutional law (p. 194). But the reality is that people often speak in terms of their basic rights (which is his focus in a populist constitutional law) even with judicial review and complicated court decisions.

In fact, it is quite possible that without judicial review there would be less of a populist constitutional law. Without judicial review to enforce the Constitution, and to reinforce it in the public's consciousness, it is conceivable that the Constitution would become ever less important in society. The linkage between eliminating judicial review and developing a populist constitutional law is not explained or defended. Nor does Professor Tushnet do more than simply assert that eliminating judicial review might cause more development of statutory rights and welfare rights (pp. 168-69). The fact that another country without judicial review has more welfare rights does not provide enough reason to believe that this country, without judicial review, would embrace such rights.

Indeed, there is an implicit contradiction in Tushnet's analysis. He contends that the Supreme Court generally is in accord with the popular will, but he also contends that a populist constitutional law would advance human freedom. There is a tension here: Why believe that the populist constitutional law would be better in advancing past popular sentiments than judicial review? The contrary seems almost certainly the case. A populist constitutional law, almost by definition, would reflect popular attitudes. The judiciary, in contrast, at times can

be a moral leader and protect our core values — Tushnet's thin Constitution — from hostile public pressure.

As a simple example, popular attitudes in many parts of the country strongly support school prayer and religious infusion of government actions. The courts have been far more willing to resist this pressure and enforce the Establishment Clause than any conceivable populist constitutional law. The Texas town that wanted student prayers at high school football games surely never would have embraced a popular constitutional law prohibiting them.³⁴

D. *Taking the Constitution Away from the Courts?*

Tushnet argues for taking the Constitution away from the courts, but it never becomes clear what this means. Tushnet, apparently, would create a bright-line rule that all constitutional challenges are dismissed by courts. In other words, the government always would prevail against a constitutional claim. Tushnet's approach would thus be the functional equivalent of the state action doctrine in suits against private parties. The state action doctrine means that subject to very narrow exceptions, there is no cause of action against private violations of the Constitution.³⁵ Tushnet's rule would mean that there would be no cause of action or constitutional claim of any sort against the government.

What would this mean in criminal cases? Would courts simply ignore the Constitution in evaluating whether to issue a warrant or to provide a jury trial or in determining what evidence to admit? Much of the Bill of Rights is concerned with criminal procedure. These cases cannot be taken out of the courts without a radical change in American government. Is Tushnet suggesting that the courts should do whatever the government (i.e., the prosecutors) want in criminal cases? The undesirability of this is obvious and enormous. Similarly, in criminal prosecutions it appears that Tushnet's approach would force courts to apply criminal statutes even when they are patently unconstitutional.

Simply put, it makes no sense to take the Constitution out of the courts for cases that already are in the courts. For instance, in *United States v. Nixon*,³⁶ there was a criminal prosecution by the Watergate Special Prosecutor and an attempt to enforce a subpoena for evidence for the forthcoming trials. President Nixon invoked executive privilege as a defense to the subpoena. Even though this issue involves

34. *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000) (invalidating student-delivered prayers at football games).

35. For a discussion of the state action doctrine, see CHEMERINSKY, *supra* note 27, at 385-414.

36. 418 U.S. 683 (1974).

Tushnet's "thick" Constitution because it concerns separation of powers, it is unclear how the Court could have avoided the constitutional issue; either it would have ruled for or against the President.

More importantly, Tushnet does not advocate taking the Constitution *completely* away from the courts. Toward the end of the book, Tushnet says that courts still could invalidate legislative acts by developing other doctrines, such as by finding government actions are "ultra vires" and beyond the legislature's powers (pp. 163-65).

This approach allows Professor Tushnet to keep judicial review but just give it a different label. What, for example, would make a government action ultra vires? Obviously, if the government action exceeds the powers of the government under the Constitution, it is then ultra vires. Constitutional judicial review still would exist, but would be called something different. Tushnet's examples of how ultra vires is used in countries without judicial review undermine his argument that judicial review is unnecessary. It shows that even countries without written constitutions and without judicial review want courts to be a check on executive and legislative actions. This, in itself, is powerful evidence against taking the Constitution away from the courts.

III. CAN JUDICIAL REVIEW BE ASSESSED?

In reading Tushnet's book, I realized that there was no way for him to prove that the benefits of judicial review are outweighed by its costs, but no way for a critic to prove the converse either. First, there would have to be a way of measuring what would be considered good and bad effects of Supreme Court decisions. The idea of decisions making society "better off" or "worse off" would require a calculus for determining the social good that is surely impossible to devise. Even if somehow it could be defined, the causation problems would be immense; often it would be highly disputed as to what benefits or harms result from the courts' decisions.

Second, even assuming that good and bad could be defined, there would need to be a way of adding up the effects of all of the good decisions and the effects of all of the bad decisions to compare them. This task, however, would be impossible because, to a large extent, the impacts are qualitative. How could enforcing separation of powers, or enhancing human dignity, or preventing cruel and unusual punishment, or any other effects, be quantified, let alone added together?

Third, there would need to be a way of assessing events that did not occur. How many unconstitutional laws were not adopted, with what harms, because government officials knew that they were likely to be declared unconstitutional? Conversely, how many unconstitutional laws were enacted because, according to Tushnet's argument, government officials knew that there was judicial review as a back-stop? There is obviously no way to answer these questions. Even

more unknowable are the future effects, positive and negative, of eliminating judicial review.

These are just some of the problems with Tushnet proving his case, as he has set it out, for eliminating judicial review. The same problems would exist in trying to prove the opposite: that the benefits of judicial review have outweighed its costs.

Indeed, the types of criticisms that Tushnet offers of judicial review could be made of any institutional structure. A critic of democracy might argue for a benevolent dictator by making the same claims as Tushnet. The critic could point to all of the mistakes American democracy has made and even the horrible laws that have been enacted. The advocate of dictatorship could identify all of the incentives that exist for a dictator to remain benevolent and all of the good things that a dictator might do that are precluded in a democracy. A few countries where dictatorship has worked could be invoked, just as Tushnet occasionally mentions Great Britain and the Netherlands as illustrations of countries without judicial review that have not experienced significant harms (p. 163). The argument would be that most of the benefits of democracy would be gained anyway, that there are examples of serious errors by democracy, and that a benevolent dictatorship could produce numerous benefits.

This argument could not be proven true or false by adding up all of the benefits of democracy and comparing them to all of the harms. Certainly, historical experience with dictatorships in other countries might be considered. But more importantly, process arguments would be made as to why democracy is preferable to dictatorship. The same seems a much preferable way of analyzing judicial review rather than speaking of its errors and trying to compare it to its benefits.

Over a decade ago, as the conclusion to a book about judicial review, I wrote:

Yet I have no way of proving [that the long-term benefits of judicial review outweigh its costs]. It is difficult to know how to add up the benefits of all past "good" decisions and weigh them against the costs of all past "bad" decisions. Therefore, I suggest that the best way to determine the proper method of constitutional decision making is not to add up the examples but rather to structure an inquiry about government that will focus discussion on the purposes of the Constitution and the best way to accomplish them. The focus should be on basic normative questions: Should society be governed by a constitution? Should the Constitution evolve or remain static? Should evolution be by interpretation or by amendment only? Who should be the authoritative interpreter of the Constitution? and What limits should exist in the interpretive process?³⁷

In the end, it is a matter of faith. I continue to have faith that, in the long term, society is better off with a judiciary to enforce the limits

37. ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* 141 (1987).

contained in the Constitution, to give concrete meaning to its broad provisions, and to apply it to contemporary problems. It is frightening to me that respected scholars like Professor Tushnet have lost this faith. I worry that the erosion of faith in judicial review may cause courts to be less willing to enforce the Constitution and that serious harms could result — especially for those who have nowhere else to turn for protection except to the courts. As I read *Taking the Constitution Away from the Courts*, I kept wondering whether he really could be serious in calling for the end to all constitutional judicial review.

CONCLUSION

Sometimes I begin a federal courts class or a constitutional law class by having my students read the United States Constitution and a copy of the Stalin-era Soviet constitution. My students always are surprised to see that the latter has a far more detailed and elaborate statement of individual rights. I also have them read a description of the enormous human rights violations that occurred in the Stalin-era.

The point, of course, is that words on paper are not enough to make a constitution meaningful. The difference between America and the former Soviet Union, in part, was that no court in the Soviet Union could have invalidated the government's actions. Judicial review is crucial to enforcing the Constitution and making the Constitution more than just words on parchment in the National Archives. It is hard for me to believe that anyone could seriously want to take the Constitution away from the courts.