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## JUDICIAL SUPREMACY: PALLADIUM OF LIBERTY OR ACADEMIC PARADOX?

**JUDICIAL INDEPENDENCE AND THE AMERICAN CONSTITUTION: A DEMOCRATIC PARADOX.** By Martin H. Redish.<sup>1</sup> Stanford, CA: Stanford University Press. 2017. Pp. 260. \$ 55.00 (hardcover).

*Nelson Lund*<sup>2</sup>

In 1992, the people of Arkansas voted to require that their U.S. Representatives and Senators run as write-in candidates if they wished to serve more than three terms or two terms, respectively. This new provision of the Arkansas Constitution was challenged under the U.S. Constitution's Qualifications Clauses. The first of these clauses provides that no one may serve as a Representative "who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."<sup>3</sup> The provision for Senators is identical except that the age requirement is thirty years, and the citizenship requirement is nine years.<sup>4</sup>

The U.S. Supreme Court invalidated the people's choice by a five-four vote.<sup>5</sup> The authors of the majority and dissenting opinions, Justices John Paul Stevens and Clarence Thomas respectively, engaged in an exceptionally elaborate debate. Both opinions seemed to recognize, at least implicitly, that a clear and definitive resolution of the case could not be derived directly from the language of the Qualifications Clauses, or from their

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1. Louis and Harriet Ancel Professor of Law and Public Policy, Northwestern University Pritzker School of Law.

2. University Professor, Antonin Scalia Law School, George Mason University. For helpful comments, I am grateful to Stephen G. Gilles.

3. U.S. CONST. art. I, § 2, cl. 2.

4. U.S. CONST. art. I, § 3, cl. 3.

5. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

legislative history, or from the Court's own precedents. For Justice Stevens, the deciding consideration was a political theory:

[T]he text and structure of the Constitution, the relevant historical materials, and, *most importantly*, the “basic principles of our democratic system” all demonstrate that the Qualifications Clauses were intended to preclude the States from exercising any [control over congressional qualifications] and to fix as exclusive the qualifications in the Constitution.<sup>6</sup>

The “basic principles” to which Stevens refers here are taken from a quotation, to which he recurs over and over again, that has been attributed to Alexander Hamilton at the New York ratifying convention: “the people should choose whom they please to govern them.”<sup>7</sup>

Justice Thomas raised two major objections to this use of democratic theory. First, the people of Arkansas in fact *did* choose whom they pleased to govern them, namely individuals elected from among those who met the qualifications set out in the Arkansas Constitution.<sup>8</sup> Second, there is no “basic principle” of our democratic system that requires the people to express their choices only in elections and never in their constitutions, and we have unchallengeable proof that no such principle exists. The provisions of the Constitution that Stevens thinks the people of Arkansas violated *are themselves in violation* of the very same rule that Stevens claims is a fundamental principle of our democratic system.<sup>9</sup> Those Clauses forbid the people to choose to be governed by a twenty-four-year-old, or by a recently naturalized citizen, or by someone who does not inhabit the state, even if that's who pleases them.

Rather than respond to Stevens with an alternative theory of democracy, Thomas relies on a legal principle that he thinks is implied by the Constitution's enumeration of powers.<sup>10</sup> This principle is that the federal government has *only* the powers granted by the Constitution and that the States have *all* the

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6. *Id.* at 806 (emphasis added).

7. Stevens repeats this quotation, or parts of it, at least six times. 514 U.S. at 783, 793, 795 (twice), 796 n.12 (without quotation marks), 819.

8. *Id.* at 878–79 (Thomas, J., dissenting).

9. *Id.*

10. For a critique of the Stevens opinion that focuses on democratic theory rather than on the law, see Nelson Lund, *Rousseau and Direct Democracy (with a Note on the Supreme Court's Term Limits Decision)*, 13 J. CONTEMP. LEGAL ISSUES 459, 501–09 (2004).

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powers that the Constitution has not taken from them, expressly or by clear implication.<sup>11</sup> The Qualifications Clauses unambiguously establish minimum standards, and the Constitution gives Congress no power to supplement those qualifications with additional criteria. The States, however, are not forbidden to add new qualifications, and the Arkansas constitutional provision therefore does not violate the Clauses.

If you are attracted by Justice Stevens's opinion, you may like the approach taken in Martin Redish's book about judicial independence. Like Stevens, Redish resolves important questions on the basis of a political theory that he believes is implicit in the U.S. Constitution. If you are more impressed with Justice Thomas's arguments, as I am, you will be skeptical about many of the claims Redish makes. In this review, I will briefly summarize the principal arguments in the book, and explain why I think its major conclusions are mistaken.

#### I. JUDICIAL INDEPENDENCE AND JUDICIAL SUPREMACY

It is neither novel nor controversial to say, as this book does, that an important feature of our political system is the independence that the Constitution gives to the federal judiciary. The exact nature and extent of that independence, however, is in some respects debatable, and Redish makes some innovative arguments about the judiciary's proper role.

Notwithstanding his novel suggestions, Redish regards himself as a kind of constitutional conservative. Until recently, he believes, it was widely and properly assumed that the Constitution is a written document that was adopted in order "to enshrine a constitutional democracy that would effectively balance our competing interests in celebrating majority interests with the need to protect minority rights" (p. 15). The underlying assumption that the Constitution is that document and nothing else has, unfortunately, been disturbed by academic commentators whom he calls "modernists": constitutional realists, popular constitutionalists, and departmentalists.<sup>12</sup> Redish sets out to refute these theorists in a way that will reestablish what he calls

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11. 514 U.S. at 847-48 (Thomas, J., dissenting).

12. Redish takes the term "modernist" from a school of architectural design that he dislikes.

“traditionalism” or the “formalist traditional model” on a new basis that he calls “premodern theory.” He then uses his new/old theory to discover implications in the Constitution that have gone unrecognized until now.

It is true that the contemporary legal academy has produced a cacophony of competing theories unlike anything that existed in the past. What does *not* seem true is Redish’s picture of a settled traditionalism that was largely unchallenged until the arrival of academic wildlings like Bruce Ackerman, Larry Kramer, and Michael Stokes Paulsen.<sup>13</sup> The real break with the past, it seems to me, came with the doctrinal adventurism of the Warren and Burger Courts, which is captured in the notion of the “living Constitution.” That development prompted attempts at reviving and refining the traditional theory of originalism, which in turn provoked a storm of “noninterpretivist” counter-theorizing in defense of the living Constitution.<sup>14</sup>

By “constitutional realists,” Redish means academics who “challenge the premise that the complete American constitutional regime is set forth in the singular written document we identify as the Constitution” (p. 16). These writers argue that our supreme law is only what is actually treated as such, which is both more and less than what we find in the written document. Karl Llewellyn and other legal realists of the early twentieth century fall into this group, but Redish reserves most of his fire for some of our contemporaries: Ackerman, Todd Pettys, and Ernest Young. In his view, their scholarship “amounts to self and public deception” because they “challenge the fundamental import of the Constitution’s writtenness” (p. 31).

I agree with Redish that the Constitution is the written document, and I do not believe any vague and changeable set of principles has taken its place as a legal matter. Such principles, however, undoubtedly do have effects that are sometimes almost equivalent to constitutional amendments, and I would stress something that Redish never acknowledges: these virtual

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13. Redish is pretty tough on some of these theorists. What constitutional realists do, for example, “is downright deceptive,” and Professors Ackerman and Ernest Young could use some lessons from “a recent graduate of an eighth grade civics course” (pp. 32, 36).

14. The term “noninterpretivism” has gone out of fashion, perhaps because opponents of originalism have decided it is more politic to claim that they, too, are just interpreting the Constitution, not making it up to serve their political agendas. For an elaboration of this point, see Nelson Lund, *Living Originalism: The Magical Mystery Tour*, 3 TEX. A&M L. REV. 31 (2015).

amendments are almost always caused or ratified by the Supreme Court's misinterpretations of the Constitution.

Whereas the realists generally purport to be descriptive, Redish says that "popular constitutionalists" such as Kramer advance a normative case for taking final authority to interpret the Constitution away from the courts and reposing it in the people themselves. Redish rejects this proposal on the grounds that its real effect would be to give dangerously unchecked power to "majority impulses," and that it is inconsistent with the manifestly countermajoritarian nature of the Constitution (pp. 47-48).<sup>15</sup>

"Departmentalists," exemplified for Redish by Paulsen, argue that each branch of the federal government has independent authority to interpret the Constitution.<sup>16</sup> Unless such thinkers as James Madison, Andrew Jackson, and Abraham Lincoln can be considered "modernists," perhaps it is advocates of departmentalism who should be considered traditionalists.<sup>17</sup> In

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15. Although Kramer does think that popular constitutionalism is normatively desirable, he also advances a detailed historical case, which Redish ignores, for treating it as a once-dominant American tradition going back to the founding era. Whether Kramer's evidence and arguments are ultimately persuasive or not, he does not deserve to be dismissed with the flip comment that "[t]he very notion of a countermajoritarian Constitution refutes Kramer's normative claim" (p. 47). One might just as easily dismiss Redish by saying that "the very notion of the sovereignty of the people refutes his claims about judicial supremacy." (Tellingly, perhaps, Redish cites only a relatively short symposium piece by Kramer, and never mentions the substantial book he published in 2004.)

16. Redish characterizes Paulsen as "[d]epartmentalism's most vocal and extreme proponent" (p. 38). I agree that some of Paulsen's views are atypical, and it is therefore unfortunate that Redish chose to focus entirely on one of his articles. A few of the endnotes make glancing allusions to other theorists, but there is no attempt to grapple seriously with their arguments.

17. See, e.g., *Federalist No. 49* ("The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers . . ."); James Madison, Veto Message on the National Bank (Jan. 30, 1815) (treating his own objections to the constitutionality of the bank as "precluded in my judgment by repeated recognitions under varied circumstances of the validity of such an institution in acts of the legislative, executive, and judicial branches of the Government, accompanied by indications, in different modes, of a concurrence of the general will of the nation"); Andrew Jackson, Bank Veto (July 10, 1832) ("It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I can not assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled. . . . If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this

any event, Redish's attack on this view culminates in the claim that "judicial review requires judicial supremacy" (p. 41). His main argument is that if the Supreme Court's interpretation of the Constitution were not treated as the supreme law, the legislature and executive would be able to undermine, or even completely destroy, the countermajoritarianism that is a fundamental feature of our political system (p. 41).

The simplest rebuttal is that judicial supremacy would enable the courts to undermine, or even completely destroy, the popular nature of our government. Redish does not think much of this rebuttal. He believes that supreme authority over the interpretation of the Constitution has to be lodged somewhere, and that courts are rightly regarded as the least dangerous branch (pp. 43-44). But even granting the obvious truth that courts are in some respects less dangerous than elected officials, Redish is wrong to think that judicial review requires judicial supremacy.

Let's begin with *Marbury v. Madison*,<sup>18</sup> which endorsed and defended judicial review. The most logically powerful argument in the Court's opinion is this: faced with a conflict between the Constitution and a statute, courts have no choice except to give effect to the more authoritative of the two laws, namely the Constitution.<sup>19</sup> That logic applies to the President every bit as much as it does to the Supreme Court, even if the President's interpretation of the Constitution differs from the Court's.

Significantly, nobody on the Supreme Court has ever accepted all the implications of *Marbury*'s logic. Any Justice who did so would have to conclude that conflicts between the

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Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution."); Abraham Lincoln, First Inaugural Address (Mar. 4, 1861) ("[I]f the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal.").

18. 5 U.S. 137 (1803).

19. *Id.* at 176-78. Chief Justice Marshall does not say that the writtleness of the Constitution logically implies judicial authority to invalidate any law that a court believes is unconstitutional. He does maintain that it "would subvert the very foundation of all written constitutions" to declare that "if the legislature shall do what is *expressly* forbidden, such act, notwithstanding the *express* prohibition, is in reality effectual." *Id.* at 178 (emphasis added). *Marbury* advances other arguments for judicial review, but they are not arguments based on the logic of all written constitutions. It would be perfectly logical, if perhaps inadvisable, for a written constitution to place final authority for interpreting the document in a legislature or some other non-judicial institution.

Constitution and judicial precedent must always be resolved by giving effect to the Constitution, not the precedent. After all, if statutes enacted by the people's representatives are always trumped by the Constitution, it would seem to follow that mere judicial opinions must also be trumped by the Constitution. According to the Constitution itself, the "supreme Law of the Land" includes the Constitution, statutes enacted pursuant to the Constitution, and treaties. Conspicuously absent from this list is any mention of judicial opinions.

Not surprisingly, Chief Justice Marshall nowhere claimed that the Court is or should be supreme in the interpretation of the Constitution. Such an assertion did not appear until *Cooper v. Aaron* in 1958.<sup>20</sup> In practice, the Supreme Court has developed a complex and flexible approach to the exercise of judicial review. There is almost nobody who would seriously maintain today that courts are obliged by the Constitution to enforce unconstitutional statutes. But it is also true that very few would seriously maintain that courts are *always* obliged to strike down statutes they think are unconstitutional, even in the face of thoroughly settled judicial precedent.

Presidents take the same general approach that the Supreme Court has taken. In principle, Presidents always have the option of refusing to enforce or comply with statutes they consider unconstitutional, whether or not the Supreme Court agrees with them. But they are not obliged to ignore or defy *every* such statute. Similarly, the Constitution nowhere imposes on the legislature an obligation to relentlessly impose its own constitutional views by impeaching every executive and judicial officer who acts in a manner that Members of Congress consider unconstitutional.

One might think, with Redish, that leaving the President, the Supreme Court, and the Congress with concurrent authority to decide on the meaning of the Constitution is an invitation to constitutional crises and ultimately to chaos or tyranny.<sup>21</sup> History demonstrates that this is not so. The simple fact is that each

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20. 358 U.S. 1, 17–18 (1958). In context, even that statement could be interpreted to mean only that *state courts* are required to treat the holdings in Supreme Court decisions as the supreme law of the land.

21. Redish puts the thought this way: "[W]ithout judicial supremacy, coordinacy would be impossible" (p. 40).

branch of government sometimes gets the last word and sometimes does not.

The Supreme Court, for example, has lots of devices by which it avoids trying to become the last word on all constitutional questions. These include doctrines under which the Justices sometimes decline to exercise judicial review, as well as countless rulings that leave the other branches with broad discretion to interpret their own constitutional powers.<sup>22</sup>

Like the courts, Presidents have sought to minimize conflicts with the other branches. Over the years, for example, the President's legal advisors in the Justice Department have developed an elaborate internal jurisprudence that largely adheres to Supreme Court precedents. That jurisprudence displays some independence from the views of the judiciary, especially with respect to matters directly touching on the President's institutional interests, such as the scope of executive authority. But the jurisprudence is memorialized in written legal opinions that take judicial decisions very seriously and treat them as dispositive on many issues.<sup>23</sup>

Presidents, moreover, have not felt compelled to exercise every right they believe they have or that the Justice Department tells them they have. There is a fundamentally important distinction between claiming the authority to do something and actually doing it.<sup>24</sup> History shows that the people who have occupied seats of power in all three branches have managed to avoid the kind of war that might actually establish one branch as the supreme and definitive interpreter of the Constitution.

## II. JUDICIAL SUPREMACY UNBOUND

### A. IMPEACHMENT

If such a war were ever conducted, the Constitution's text seems to indicate pretty clearly who should win. Congress has the

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22. Well known examples include the political-question doctrine and the interpretation of the Necessary and Proper Clause in *McCulloch v. Maryland*, 17 U.S. 316 (1819).

23. These Justice Department legal opinions are purely advisory so far as the President is concerned. The President is free to ignore or overrule them, and Presidents sometimes do just that.

24. For a case study, see Nelson Lund, *Presidential Signing Statements in Perspective*, 16 WM. & MARY BILL RTS. J. 95 (2007)

authority to remove any officer, executive or judicial, for “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>25</sup> Why would one doubt that acting unconstitutionally could properly be considered a high crime or misdemeanor? Or that Congress has the authority to remove an officer who behaves in a way that a sufficient number of its members believe is unconstitutional?

Redish denies that this authority exists, and his explanation reveals a lot about his theory of constitutionalism. He does not deny that a President might lawfully be removed merely for acting unconstitutionally. But he maintains that judges may be removed *only* for “criminal behavior that threatens the integrity of the judicial role,” and *never* for a decision reached in the course of adjudication (p. 80). He justifies this double standard (which has no basis in the Constitution’s text) on the ground that judicial independence is so important that the impeachment power may not be used in any way that could possibly threaten judicial supremacy over the interpretation of the Constitution. The Constitution’s supermajority requirement for conviction is not nearly enough to satisfy Redish’s demand for countermajoritarianism (p. 95).<sup>26</sup>

It’s worth pausing at this point to consider some implications of Redish’s position. Suppose that five Justices voted to create a constitutional right for a mother to have her child put to death during the first week of its life in order to protect her physical or mental health. As a matter of doctrine, this hypothetical is a very short step beyond the Court’s current position on late-term abortions,<sup>27</sup> so it is not far-fetched in that respect. If the House of Representatives impeached these Justices, Redish would have the Supreme Court declare the indictment unconstitutional.<sup>28</sup> It’s unlikely, of course, that the Court would create a right to infanticide until after some significant political demand for such a

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25. U.S. CONST. art. II, § 4.

26. Redish describes the supermajoritarian impeachment process as “a majoritarian check” (p. 100). Going even farther, he sometimes rejects the right of “society” to remove judges from office for non-criminal misbehavior (pp. 78, 102). This seems to challenge what I always thought was the truly fundamental principle of the sovereignty of the people.

27. See *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Gonzales v. Carhart*, 550 U.S. 124 (2007).

28. See p. 80 (political-question doctrine should be inapplicable to congressional impeachment decisions).

right arose.<sup>29</sup> But that suggests that Redish's absolute rule against impeachment for adjudicatory decisions is not needed. Ironically, moreover, one reason that the Justices never issue decisions that lead to their impeachment is probably that even they recognize the flaws in Redish's theory of absolute judicial immunity.<sup>30</sup>

If Redish has correctly interpreted the Constitution, of course, it should be irrelevant whether the absolute immunity he advocates is either necessary or salutary. How, then, does he go about the task of interpretation? Redish insists on the importance of the Constitution's writtenness in his critiques of realists and popular constitutionalists, and he expressly characterizes himself as a "textualist" (e.g., p. 83). He also believes that the judiciary lacks moral or legal authority to overturn legitimate political choices by elected officials (pp. 3, 41). One therefore might expect him to adopt the interpretive theory of originalism. This he emphatically does not do. On the contrary, he says, "rigid originalism should play *no role* in modern constitutional interpretation," apparently because it requires "archaeological excavation" that is unnecessary and sometimes misleading (pp. 10, 18 & nn.19, 92 (emphasis added)).<sup>31</sup>

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29. Redish could hardly object that this hypothetical is unrealistic. He maintains both that his narrow definition of impeachable offenses is consistent with congressional practice (p. 101) and that "one must shape constitutional interpretation to deal with problems that theoretically may arise" (p. 228 n.94). Note, as well, that Redish has a very narrow view of what kinds of non-adjudicatory behavior can justify impeachment: "criminal behavior that threatens the integrity of the judicial role" (p. 80). Suppose that a Supreme Court Justice had a late-term abortion that inadvertently resulted in a live birth. If she immediately injected the baby with a lethal drug that she obtained from her physician, she could not be impeached without proof that the homicide threatened the integrity of the judicial role. That might be very hard to do, especially if the state prosecutor declined to indict her. If she were impeached without such proof, Redish's theory would require the Supreme Court to declare the indictment unconstitutional, no matter how heinous the Justice's behavior seemed to most of the nation.

30. *Cf., e.g.,* (Walter) *Nixon v. United States*, 506 U.S. 224, 235 (1993) ("Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers . . . [by] plac[ing] final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate." (citation to *Federalist No. 81* omitted)).

31. I say "apparently" because Redish is quite cryptic about the reasons for his rejection of originalism. Buried in one endnote are references to "a usually fruitless effort to ascertain the narrow understanding of a group of drafters some 200 years ago" and to a "largely futile attempt to constrain words by some narrow and unchanging historical perspective" (p. 224 n.27). Whether these characterizations of originalism are accurate or not, they seem to suggest why he would regard originalism as a source of misleading archaeological excavations. It's worth noting that Redish goes far beyond anything that

In order to flesh out Redish's interpretive approach, let's return to judicial review, which he thinks requires judicial supremacy. It is easy to make a strong case for judicial review on originalist grounds. Judicial review was practiced in Great Britain for hundreds of years, its legitimacy was widely accepted in the United States when the Constitution was adopted, and it was therefore an aspect of the "judicial Power" conferred on the Supreme Court by the Vesting Clause of Article III.<sup>32</sup> Redish himself alludes briefly to such "archaeological" evidence before summarizing a "conceivable" argument based on the Due Process Clauses and a "question begging" argument based on the Supremacy Clause (pp. 24-25). Dissatisfied with all these arguments, he concludes: "In truth, the most logical explanation of judicial review is common sense, logic, and reverse engineering from the structural Constitution itself" (p. 25). This explanation turns out to be very simple. The Constitution gives unelected judges salary and tenure protections in order to create a formal barrier against tyranny, and that barrier would be ineffective unless the judges have final and binding interpretive authority (e.g., pp. 26, 40).<sup>33</sup>

His treatment of judicial review exemplifies Redish's approach to constitutional interpretation. American constitutionalism consists, he believes, of a core principle that he calls "skeptical optimism," along with the political apparatus that the structural Constitution uses to effectuate that principle (p. 21).<sup>34</sup> Skeptical optimism strikes me as a perfectly serviceable shorthand for the spirit of what we call the Enlightenment, and maybe even the spirit of the Christianity that dominated America during the founding era. It is a lot harder to see how this general outlook constitutes a principle that could help us discern the meaning of constitutional language that is vague or ambiguous. And if originalism seldom leads to unimpeachable answers, as

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Justice Stevens said or implied in the *Term Limits* case, where Stevens engaged in extensive archaeological excavation.

32. See, e.g., Nelson Lund, *Judicial Review and Judicial Duty: The Original Understanding*, 26 CONST. COMMENT. 169, 173 (2009).

33. At one point, Redish says that judges "would only be removable on impeachment or for bad behavior" (p. 26). In light of his later rejection of claims that judges might be removed by some means other than impeachment (pp. 81-88), I take this to be an editing error.

34. As his terminology suggests, Redish thinks the founders optimistically believed that a strong majoritarian government was needed to empower the people, but worried at the same time about a tyranny of the majority (p. 21).

Redish maintains, filling one's soul with the spirit or attitude of "skeptical optimism" will generate whatever answer one likes to just about every constitutional question. With respect to the proper scope of judicial independence, for example, should we be optimistic about judges and skeptical about voters and elected officials, or vice versa? Or, if one takes the sensible position that we should be skeptical and optimistic about both, what degrees and forms of skepticism and optimism are appropriate toward each?

More promising is Redish's suggestion that an appropriate guide for the interpreter can be found through reverse engineering the structural Constitution. He is right to identify several ways in which our Constitution is deliberately and manifestly different from Great Britain's: it is written; it proclaims its supremacy as positive law; it is formally alterable only through a complex supermajoritarian process; and it creates a politically insulated judiciary that interprets the Constitution (pp. 22-23). This is a plausible basis from which to infer the legitimacy of judicial review. But it is not an adequate basis from which to infer judicial supremacy.

In order to see why, it's helpful to focus on a difference between the British and American constitutions whose importance is easy to overlook. Judicial review is often and mistakenly thought to be an American invention. British courts refused to implement unconstitutional acts of the Crown, which is one form of judicial review. Because Parliament served both as the legislature and as the highest court in the land, ordinary courts did not declare Acts of Parliament unconstitutional. It would have been as improper for a mere court to declare a statute unconstitutional as it would be for one of our inferior federal courts to overrule a decision of our Supreme Court. When American constitutions separated the highest judicial court from the legislature, they created a potential for interbranch conflicts between those who make statutory law and those who enforce constitutional law. As it turned out, no serious conflicts arose for a long time. *Marbury's* exercise of judicial review was noncontroversial, and it was not until *Dred Scott* that the Court provoked political opposition by declaring a federal statute unconstitutional.

Politically contentious exercises of judicial review obviously became much more common after the ensuing civil war, and they

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are now routine. Strikingly, Redish never tries to show that even the most intense of these controversies has actually threatened the independence of the judiciary. And I don't see how he could. We have developed an informal norm against political interference with judicial independence so strong that even Franklin Roosevelt could not overcome it. Though his plan to pack the Court was perfectly constitutional on its face, an overwhelmingly Democratic Congress refused even to consider it.<sup>35</sup> This makes me wonder why Redish so aggressively argues that “[t]he prophylactically insulated judiciary is the beating heart of the structural brilliance that defines American constitutionalism” (p. 17). It would make more sense to say that the Constitution's structural brilliance lies in the system that has produced a political and legal culture in which no one branch has obtained absolute sovereignty over the interpretation of the Constitution. The “reverse engineering” that Redish favors leads more easily to the departmentalism that he denounces than to the judicial supremacy that he advocates.

Although Redish calls himself a textualist and a traditionalist, it would be more accurate to call him a living constitutionalist.<sup>36</sup> He believes he has discovered in judicial supremacy the spirit or beating heart of the Constitution, and that a commitment to seeking the original meaning of the Constitution's text could only impede the task of working out the implications of that discovery. Some of those implications turn out to be so remarkable that one is almost tempted to think that an *idée fixe* may be at work.

## B. LIFE TENURE

The arguments Redish marshals in favor of judicial supremacy are extremely weak, but they do have a starting point in the Constitution's salary and tenure protections for federal judges. Even if he goes too far in drawing inferences from the constitutional text, these judges were certainly meant to enjoy a very high degree of adjudicatory independence. As Redish repeatedly and rightly emphasizes, this countermajoritarian

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35. Even Redish does not seem prepared to say that it was unconstitutional for a President to *propose* adding new seats to the Court.

36. Although he never uses this term to describe his approach to interpretation, he does at one point explicate his textualism in a way that sounds very much like living constitutionalism (pp. 97-99).

element in the structural Constitution was meant to help protect individuals from politically motivated invasions of their rights.

All of our nation's state constitutions establish an independent judiciary, but many of them make their judges more politically accountable than federal judges are. Redish thinks this is a really bad idea, and he focuses especially on retention procedures that allow the voters to decide at intervals whether a judge should remain on the bench. Although Redish barely seems to recognize it, the designers of all American constitutions faced a tradeoff in responding to two opposite dangers. Too much political insulation allows judges to get away with defying the law, up to and including the illegal adoption of virtual constitutional amendments. Too little political insulation incentivizes judges to shrink from faithfully enforcing laws to which large numbers of voters may strongly object.

Redish may be right that the federal life-tenure arrangement is better than the retention systems adopted by many states. But he does not provide anything like the kind of empirical evidence that would be needed to make a strong case for his position. Nor does he try. Instead, he asserts that state retention systems violate the Due Process Clause of the Fourteenth Amendment. Not surprisingly, he makes no effort to conduct the kind of "archaeological excavation" that an originalist would think is necessary. Rather, he assumes that due process requires a neutral decisionmaker, argues that state judges subject to retention procedures are inherently less neutral than judges who enjoy life tenure, and concludes that such procedures are therefore unconstitutional (pp. 114-116).

Redish recognizes that it is impossible to guarantee that judges will be perfectly unbiased. He notes, for example, that all judges have to be appointed by somebody, and that they will naturally feel gratitude toward those to whom they owe their appointment. In focusing as heavily as he does on the danger that a judge will be biased by the incentives created by retention systems, however, Redish pays no attention to the danger that a judge will be biased by his *own* political or ideological views. This is the hardest kind of bias to suppress, and English judges spent centuries cultivating an ideal of resistance to external *and internal* pressures to refrain from applying the positive law.<sup>37</sup> Anyone who

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37. For the history, see PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

thinks the dangers created by internal political and ideological biases are insignificant must be reading federal judicial opinions through some very rosy spectacles.<sup>38</sup>

The starting point for Redish's discussion of personal bias is a critique of *Caperton v. A. T. Massey Coal Co.*,<sup>39</sup> in which the Court found that due process was violated when a state judge sat on a case in which one of the litigants had made a large financial contribution to the judge's election campaign. Redish argues that the risk of bias arising from retrospective gratitude, as in this case, is smaller than the risk created by retention systems that generate fear of future consequences for unpopular decisions. And because these retention systems exist "out of tradition, not necessity" (p. 127), the Supreme Court should abolish them in the name of due process.

If that argument is correct, it should follow that federal judges should also be relieved from such prospective pressures to the maximum possible extent. Any judge who hopes to be promoted to a higher court faces an implicit pressure to please the politicians who control such promotions. The effects are pretty easy to see in the opinions of some federal judges, and it is probably much harder to resist that pressure than for state judges to stick to the law in the face of adverse public sentiment.<sup>40</sup> It would therefore seem that due process requires a rule that no sitting or former judge may be promoted to a higher court. This would obviously have some effects that might be undesirable,

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38. Redish takes it to be self-evident that when faced with a choice between over- and under-protection of a constitutional right, over-protection must be chosen if at all possible (p. 127). But he does not seem even to recognize our constitutional right to be free from unconstitutional laws illegally imposed on us by judges. Consider two of the most prominent modern examples of judges who lost retention elections because of their judicial decisions. Rose Bird and two other members of the California Supreme Court lost their seats because they persistently frustrated the operation of the state's capital punishment laws. Three members of the Iowa Supreme Court lost a retention election after they voted to create a right to same-sex marriage. In both cases, the unpopular decisions can also very plausibly be described as willful defiance of the law. Redish does not provide a single example of any judge having been removed from office for making lawful decisions that proved to be unpopular.

39. 556 U.S. 868 (2009).

40. Although it is no doubt true that a relatively small proportion of federal judges are hoping for promotion in the near term, it is also true that the entire lifetime record of any candidate for promotion is likely to be scrutinized with some care, not only by judge pickers in the executive branch, but also by Senate staff and a variety of interest groups. State judges subject to retention elections will almost never be called on to faithfully apply the law in a case that is likely to become a matter of significant public controversy, let alone likely to drive a majority of the voters to remove the judge from office.

such as a total lack of trial court experience among appellate judges. But life tenure also has some unquestionably undesirable effects, such as allowing judges to get away with imposing their personal political and ideological agendas on their fellow citizens.

While insisting that the logic of due process requires a radical revamping of the judicial systems in many states, Redish refuses to accept that the same logic requires a much more modest alteration of federal practice. In one of his endnotes, Redish concedes that federal judges could “conceivably” shape their decisions to curry favor with those empowered to promote them (p. 235 n.99). He then asserts that a rule against such promotions would be “for a variety of obvious reasons, an untenable result” (p. 235 n.99). He never tells us what those obvious reasons are, and it is not obvious to me why such a rule would be “untenable.” The functions performed by appellate judges, for example, are so different from that of trial judges that nobody seems to think that experience on a trial bench should be a prerequisite to serving on an appellate court. Similarly, we have had many Supreme Court Justices with little or no experience on a lower court, and it is hardly obvious that such experience is even helpful, let alone necessary, in performing the kind of work that the Court has decided it wants to perform.

Here again, we can see why Redish is best characterized as a living constitutionalist. Although he calls himself a textualist and a traditionalist, his arguments for using the Supreme Court to impose judicial life tenure on the states are not based on the text of the Constitution, or on any tradition. Like so many other living constitutionalists, Redish fashions an argument that permits him to impute his own policy views to the Due Process Clauses. But does he really take the structural Constitution seriously? Or the importance of giving all adjudicators the independence of Article III judges?

Apparently not. He dismisses concerns about federalism, which is every bit as much a part of the structural Constitution as judicial independence, on the ground that they are “question-begging” (p. 112).<sup>41</sup> Even more strikingly, this book is completely silent about the massive amount of adjudication by the federal

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41. The relevant endnote (p. 230 n.9) offers a nonsensical “*id.*” citation to a concurrence by Justice Kennedy. Kennedy wrote the majority opinion in *Caperton*, and no opinion in the case includes the language quoted in the endnote.

government that takes place every day without anything close to the independence that state judges enjoy. The federal government deploys armies of *executive branch officials* to resolve cases in which the rights of American citizens are at stake. This aspect of the modern administrative state is, to put it mildly, highly questionable in light of the structural Constitution and the Fifth Amendment's Due Process Clause.<sup>42</sup> Can anyone really believe that federal bureaucrats are more neutral than state judges subject to retention elections? Redish's proposed abolition of judicial retention procedures resembles an effort to reduce air pollution by banning cigarettes in Yellowstone Park, all the while ignoring the gigantic billows of black smoke from a forest fire caused by an open campfire.

### C. LEGISLATIVE FRAUD

The book's neglect of the constitutional problems posed by executive-branch adjudication is particularly striking because the very next chapter asserts that the resolution of individual cases falls within the judicial power by definition; it therefore belongs to "the one branch vested with the 'judicial power'" (p. 146). Rather than attend to the implications of this principle with respect to executive adjudication, Redish draws the following novel inference: "the judiciary has the constitutional power and obligation to assure that Congress not deceive the electorate as to the manner in which its legislation actually alters the preexisting legal, political, social, or economic topography" (p. 140). The putative deception with which Redish is concerned here occurs when a legislature enacts a procedural or evidentiary rule that affects the operation of a substantive statute in a way that transforms its "essence" (pp. 141, 158-162).<sup>43</sup>

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42. See generally PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014). In a subsequent chapter, Redish assumes that hearings conducted by executive officials can be consistent with due process because the Supreme Court has said so (pp. 191-92). He seems to think that this is permissible because review of constitutional questions raised in these cases is available in Article III courts (p. 192). But the Supreme Court is also available to review constitutional questions raised by decisions of state judges who are subject to retention procedures. Redish never explains why the availability of appellate review is sufficient in one case and not the other. His reliance on Supreme Court case law seems, to use his term, question-begging.

43. Redish uses the term "DNA" to describe what he calls a statute's "essence." I do not understand the metaphor, which may have some significance that has escaped me.

Redish finds this theory lurking in the Supreme Court's notoriously confusing opinion in *United States v. Klein*.<sup>44</sup> I will pass over his lengthy analysis of the case for three reasons. First, he does not claim that his theory is actually articulated in the *Klein* opinion, and he acknowledges that the Court may not have "fully grasped" the theoretical implications of what it did say (p. 142). Second, the Court has never interpreted *Klein* the way Redish does (p. 142). Third, it is apparent from his discussion that Redish would think that his conclusions are dictated by the Constitution and would therefore be valid even if *Klein* had never been decided.

The essence of Redish's reasoning is that basic democratic theory requires legislators to be accountable to the public for their votes. If they enact a substantive statute that says "A" and a procedural or evidentiary rule that causes the effect of the statute to be "B" or "not A," the legislature has committed a "fraud on the public" in which the courts should refuse to become complicit (pp. 68, 154-156, 162-163).<sup>45</sup>

Redish offers only one example of such unconstitutional behavior, which he finds in *Michael H. v. Gerald D.*<sup>46</sup> The case involved a California statute that established a presumption, rebuttable only by the husband or wife, that a husband who is not sterile or impotent is the father of a child born to his wife while they were cohabiting. In this case, a blood test showed that a man

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44. 80 U.S. 128 (1872). *Klein* declared unconstitutional a statutory provision whose substance the Court described as follows: "an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it, both in the Court of Claims and in this court on appeal." *Id.* at 144.

45. When it comes to fraud, Redish has very sensitive antennae. Without judicial supremacy, he thinks, the Constitution would be "rendered worse than meaningless, for it would then amount to a sham designed to defraud the populace into believing that the majoritarian branches are checked when in reality the check would be illusory" (p. 62).

46. 491 U.S. 110 (1989). Redish also discusses *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992), in which the Court interpreted *Klein* to allow Congress to refer to specific pending cases in a statute that changes the law so long as it does not direct courts to reach specific results in those cases under the previous law. Redish acknowledges that it is "at least arguable" that *Robertson* was correctly decided, but says "it would probably be wise" for the Court to announce a prophylactic rule forbidding Congress to direct findings in specific cases (p. 158).

The chapter also includes a long paragraph that seems to set forth a hypothetical involving tort law (p. 155), but I just could not understand what the author is talking about. This chapter has many conspicuous errors, such as endnotes with no discernable connection to the accompanying text, some of which may reflect foul-ups during the editing or production processes. Maybe that's what happened with the paragraph about tort law.

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## BOOK REVIEWS

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with whom a married woman had had an adulterous affair was probably the progenitor of a daughter born during her marriage to another man. The former paramour and the daughter (through a guardian ad litem) brought suit claiming that their due process rights were violated because the California courts denied visitation rights to the man who was probably the girl's biological father.

Unlike the Supreme Court, Redish believes the plaintiffs' due process rights were violated. Why? He says that the provision of California's Evidence Code that established the presumption of paternity "purports to have rights turn on the factual issue of who the natural father is" (p. 70 & n. 89). Shockingly, he quotes no language from this statute or anywhere else purporting to do any such thing.<sup>47</sup> As far as I can tell, and I admit I'm only guessing, Redish thinks the evidentiary rule in the statute conflicts with the substantive public policy that motivated the statute (see p. 70). But he never tells us where or how California informed the public about this supposed policy.

Why in the world would anyone think that a legislature defrauded the public by adopting a statute that means exactly what it says, and does not conflict on its face with any other law? As near as I can tell, Redish believes that what California did is like a consumer contract in which small-print boilerplate deceptively alters the terms in larger print (p. 159). "Society does not demand that all consumers possess the perspicacity of an experienced attorney" (p. 159). But if the rights that Redish thinks the *Michael H.* plaintiffs had been given by California were written in large print, they also seem to have been written with invisible ink. It would take a lawyer, not an ordinary consumer, to see a conflict between what a statute says and what the unstated public policy behind the statute is. And it takes a very bold lawyer to call a plainly worded statute a fraud on the public.

Even apart from the mysteries surrounding Redish's use of *Michael H.*, could it possibly make any sense for courts to treat statutes as though they were consumer contracts? That would seem to mean that legislatures are defrauding the public when they use legal terminology that lay readers are unfamiliar with, or when they rely on courts to apply canons of construction that lay

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47. The statute that establishes the presumption of paternity, which Redish never quotes, is set out in Justice Scalia's plurality opinion. *Michael H.*, 491 U.S. at 117-18.

people do not know about. How many statutes will survive that test?

Redish would undoubtedly resist this extension of his argument. He says that there will likely be few instances of the legislative deception that he thinks is unconstitutional (p. 162). He even says that there is some validity to the suggestion “that this chapter illustrates all too vividly what can happen to a Supreme Court decision [*viz. Klein*] when scholars get a hold of it” (p. 164). I’m afraid I have to add that this chapter illustrates what can happen when a scholar thinks up a solution to a problem that has not been shown to exist.

Apart from the absence of any evidence that Congress or state legislatures actually defraud the public by enacting procedural rules that alter the operation of substantive statutes, this book has nothing to say about *judicial* behavior that really does look fraudulent. Everyone whose job entails the study of appellate opinions is familiar with *sub silencio* overrulings, patently ludicrous characterizations of prior precedent, ridiculous result-oriented distinctions between similar cases, and interpretations of constitutional and statutory texts that would never occur to a disinterested reader.<sup>48</sup>

If one wanted to find a genuine case of fraud on the public, it might look a lot like *National Federation of Independent Business v. Sebelius*.<sup>49</sup> In that case, Congress imposed a requirement that some citizens purchase a certain kind of health insurance. The requirement was enforced by what the statute called a “penalty,” and justified by a series of statutory findings confirming that it set forth a legal requirement in the exercise of congressional regulatory power.<sup>50</sup> Characterizing this so-called individual mandate as a regulation, rather than a tax, was an important element in a strategy designed to protect those who voted for the Obamacare statute from political reprisals at the polls.<sup>51</sup>

The Supreme Court held that the mandate exceeded the regulatory authority of Congress, from which it followed inexorably that an enforcement penalty was also invalid.

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48. I assume that most readers of *Constitutional Commentary* will have their own favorite examples.

49. 567 U.S. 519 (2012).

50. For citations, see *id.* at 646 (Scalia, J., dissenting).

51. See, e.g., JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 96–102 (2013).

Nonetheless, Chief Justice Roberts wrote an opinion accepting the Obama administration's argument that the penalty could be treated instead as an exercise of Congress's taxation authority. This flew in the face of the plain language of the statute. It flew in the face of repeated statements by President Obama and the Obamacare bill's supporters that the individual mandate was not a tax.<sup>52</sup> And, as Chief Justice Roberts himself acknowledged, it was an interpretation of the statutory language that he adopted only because the regulatory requirement and accompanying penalty that Congress had purported to adopt were unconstitutional.<sup>53</sup> If all of this was not a fraud on the public, it's a lot closer to one than the *Michael H.* example. And the part of it that most closely resembles a fraud was the work of Chief Justice Roberts, not the Congress.<sup>54</sup>

#### D. HABEAS CORPUS

Another kind of fraud on the public was apparently committed by Congress, albeit unwittingly, when it proposed the Bill of Rights. According to Redish, the Fifth Amendment superseded the Suspension Clause of Article I.<sup>55</sup> His legal argument has a very simple structure: the Due Process Clause is inconsistent with the Suspension Clause; the Fifth Amendment post-dates the original Constitution; *ergo*, the Due Process Clause repealed the Suspension Clause.

Anyone familiar with the history of the founding era would probably wonder how this could be true. Redish does not pretend that James Madison or anyone else involved in drafting the Bill of Rights believed that they were repealing this or any other provision of the original Constitution. Nor does Redish suggest that anyone outside Congress had the slightest inkling of any inconsistency between the Fifth Amendment and the Suspension Clause. An originalist, moreover, could reconcile this historical background with the constitutional text by arguing that the

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52. *See id.*

53. 567 U.S. at 561–63.

54. *Cf.* p. 152 (“Congress might undermine the sound operation of the representative democratic process by enlisting the judiciary as a co-conspirator in a plan to deceive the electorate”).

55. U.S. CONST. art. I, § 9, cl. 2: (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

essential elements of due process were already implied by the separation of powers in the original Constitution.<sup>56</sup>

Redish, of course, claims to be a textualist, not an originalist. But where is the conflict between the texts of the two provisions? Whatever specific rights are protected by the Due Process Clause, none of which are set out in its text, the Suspension Clause on its face deals only with one particular remedy. The Suspension Clause does not purport to authorize any deprivations of whatever rights are entailed in due process, and the suspension of a particular remedial writ does not authorize the Executive to violate whatever due process rights a person may have. Redish never responds to this obvious objection to his position,<sup>57</sup> not to mention other textualist objections that could be made, such as one based on the canon that repeals by implication are disfavored.

Why is Redish sure that the Fifth Amendment has the “*textually* unambiguous and inescapable” effect of repealing the Suspension Clause (p. 167, emphasis added)?<sup>58</sup> Tellingly, he does not begin with the text of the Constitution but with what the Supreme Court has said about due process (pp. 173-174). He then asserts that suspension allows the Executive to ignore what the Supreme Court has said. *Ergo*, the Fifth Amendment must be deemed to supersede the Suspension Clause (p. 174). However appealing the policy behind the conclusion may be, this is not a textual argument.

Although Redish believes that this non-textual “textual interpretation” provides sufficient support for his position, he also

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56. See Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 B.Y.U. L. REV. 611 (2018).

57. The objection should be obvious to anyone familiar with the opinions in the *Hamdi* case, a decision to which Redish gives considerable attention in this chapter. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 594 (2004) (Thomas, J., dissenting) (“I do not see how suspension would make constitutional otherwise unconstitutional detentions ordered by the President. It simply removes a remedy.”). Oddly, the book has an endnote that refers to an academic article by Trevor Morrison, who maintains that suspension of the writ shifts responsibility for protection of due process rights to the Executive. Redish seeks to rebut Morrison by asserting that history shows that “the executive is all too happy to lock individuals up and throw away the key unless the courts step in and mandate individual hearings” (p. 250 n. 88). Whatever validity there is in this unsubstantiated assertion, and whatever relevance it may have to a living constitutionalist, it is emphatically not a textual argument.

58. See also p. 184 (“Because the due process guarantee is unlimited and unqualified in its reach, and appears in the form of a subsequently enacted amendment, it *indisputably* supersedes the inconsistent directive in the Suspension Clause purely as a matter of textual interpretation.” (emphasis added)).

advances what he thinks is an equally powerful argument based on the fundamental precepts of American constitutionalism (p. 179). Simply put, the argument is that “the Framers were centrally concerned with the dangers of tyranny” and the Suspension Clause would allow a President to become a tyrant (p. 180).<sup>59</sup> Well, one wonders, why did the Framers put the Suspension Clause in the Constitution? The answer Redish gives is a classically living-constitution formulation: “[T]he core concepts of our political theory were a work in progress at the time of the framing. That the Framers were merely groping towards an understanding of the central premises of American constitutionalism is a concept that has evolved, been refined, and gained force over the years” (p. 181).<sup>60</sup>

As we have come to expect by this point in the book, Redish goes on at great length about the terrible things that a President might do while the writ of habeas corpus is suspended. And, as we also expect, he exhibits no concern at all about the possibility that the courts might irresponsibly interfere with the public safety during a rebellion or invasion. Those responsible for framing a constitution would have good reason to worry about both dangers, and our Framers might reasonably have chosen to balance the competing desiderata differently than they did.<sup>61</sup> I can understand why a living constitutionalist might want the Supreme Court to repeal the Suspension Clause. What I cannot understand is why the rest of us should go along with the pretense that this judicial amendment of the Constitution should be called an “unambiguous and inescapable” dictate of the Constitution’s text (p. 167).

### III. CONCLUSION

The title of this book announces that it is about judicial independence and the Constitution. The author believes that

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59. Redish says that it “is difficult to imagine a starker example of tyrannical government” than denying someone who has been arrested the benefits of the writ of habeas corpus (p. 204). Just to pick a couple of specimens that come immediately to mind, the regimes of Kim Jong Un and Pol Pot strike me as much starker examples.

60. See also p. 196 (arguing that the Framers did not devote “sufficient attention to the text or the meaning of the Due Process Clause” but that they were “moving towards” the conclusion that Redish has reached).

61. As Redish points out, there was a debate at Philadelphia about just this question, and some very respectable statesmen argued against including the Suspension Clause in the Constitution (pp. 171-173).

“modern doctrine has too often failed to recognize the full implications of American constitutionalism for the nature and extent of judicial independence” (pp. 204-205). I do not think he comes anywhere close to making his case. But I am also baffled about why he tries to do so.

Judicial independence is an important part of our constitutional system. It is also among the least threatened aspects of that system. Redish never points to any serious attacks on the adjudicatory independence of the courts. When I tried to think of examples, the best I could come up with was *Stuart v. Laird*.<sup>62</sup> This case involved a statute that (1) imposed circuit-riding duties on Justices who had been appointed before the statute took effect and (2) abolished some lower courts, thus depriving several Article III judges of their offices. The Court avoided ruling on the constitutionality of the second provision, and it upheld the circuit-riding provision. The decision came after Congress abolished the Court’s 1802 term, and it may have resulted at least in part from fear of what the new Jeffersonian Congress might do next.<sup>63</sup> Whatever the motivations of the Justices, however, the one clear lasting effect was that their circuit riding obligations continued for another century. In itself, that was probably a good thing for the nation, and the case did not set a judicial precedent for allowing Congress to evade Article III’s tenure provision.

Congress has very powerful tools that it could use to bend the federal courts to its will. The Constitution requires the Supreme Court to exist, but Congress can alter the number of Supreme Court Justices, as it has done repeatedly, and it can abolish inferior courts, as it has also done in the past. Congress could effectively emasculate the Supreme Court by depriving it of the assistance of the inferior courts, manipulating its jurisdiction, or altering the size of the Court in response to unpopular decisions. Except for diminishing the salary of sitting judges, Congress can do whatever it wants with judicial budgets. There are infinite ways in which this power could be used to make the judicial life a lot less pleasant than it is now.<sup>64</sup> Congress could also bring back

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62. 5 U.S. (1 Cranch) 299 (1803).

63. The Justices had previously discussed among themselves whether they should refuse on constitutional grounds to sit on circuit courts. See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888*, 77-78 n.102 (1985).

64. At one point, Redish seems to indicate that he regards such budgetary retaliation as constitutionally permissible (p. 57). Later, he seems to equivocate (p. 60).

circuit riding and mandatory jurisdiction, both of which were curtailed at the request of Justices who wanted to be free to decide only the cases they wanted to decide, thus magnifying their power to act as general superintendents of the nation.<sup>65</sup>

Congress never uses any of these powers, let alone its power of impeachment, to punish judges for deciding cases differently than Congress wants them decided. And it is not as though judges are shy about making politically controversial decisions. The enormous increase in the power of the federal judiciary, which Congress has not just tolerated, but affirmatively facilitated, raises a number of interesting political science questions. One can also raise reasonable questions about whether this power has become a tool of an oligarchic elite that is effectively undermining democratic governance. But how can anyone seriously maintain that the federal courts have too little independence, or that their constitutionally appropriate independence is threatened in any way?

Using the familiar tools of living constitutionalism, Redish articulates principles that he thinks are implied by the spirit of the Constitution, and he frequently invokes the philosopher's stone that we call "due process." He then draws startling inferences from the principles he has inferred. But why does he draw the particular inferences set forth in this book? Living constitutionalists usually have political views that are easy to discern from the results to which their mode of interpretation leads them. And that makes sense because a political agenda provides a powerful reason to reject originalism and to disrespect settled precedents. What makes this book very odd is the absence—apart from a vague distrust of popular government and a touching faith in federal judges—of any obvious political or ideological agenda. In a certain way, this is a refreshingly academic quality. If the book's arguments were stronger than they are, it would also be an admirably academic quality. But it is very hard to see why one would make patently untentable arguments in support of recommendations that would have only marginal effects if they were adopted. This book thus seems entirely unsuccessful either as an academic exercise or as legal advocacy.

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65. See, e.g., Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255 (2010).