THE FEDERALIST'S PLAIN MEANING: REPLY TO TUSHNET

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*1701 The Federalist is a polemical defense of the proposed 1787 Constitution of the United States. [FN1] The series of eighty-five essays composed by James Madison, Alexander Hamilton and John Jay was first published in New York newspapers under the collective pseudonym Publius. Through his original reading of The Federalist, Professor Tushnet charts unexplored connections among theories of judicial selection and tenure, judicial accountability, and constitutional interpretation.

Tushnet maintains that there is a sinkhole in The Federalist's landscape. Publius would require life-tenure federal judges to be kept accountable to the enlightened preferences of a free people by doing the impossible: interpreting legal texts in accordance with their plain or common sense meanings. Yet, Tushnet urges, experience and theory demonstrate that legal texts do not have 'plain meaning.' The reality of honest disputes over meaning devastates 'the interpretative project of The Federalist, and with it The Federalist's defense of judicial review.' [FN2]

My response to Professor Tushnet comes in the form of reactions to the arguments set out in his paper. The three Parts below present my understanding and assessment of those arguments. I am in sympathy both with Tushnet's descriptive analysis of The Federalist and with his conviction that there is no easy sanctuary in plain meaning adjudication. Much of what I will say is thus corroborative. [FN3]

*1702 The thrust of my critical commentary is, first, to emphasize that although The Federalist relies on common sense and common law approaches to interpretation, no single theory of constitutional interpretation receives a sustained development or defense. Despite internal and external evidence of a plain meaning theory, recalcitrant passages in the essays appear to deny that written law has plain meaning. These passages demand reconciliation. Second, the lack of definition in the plain meaning theories which Tushnet ascribed both to The Federalist and recent Supreme Court opinions blunts the impact of his central claims. Third, while Tushnet contends plain meaning interpretation cannot measure up to 'modernist social and linguistic philosophy,' [FN4] the yardstick he employs is of uncertain philosophic dimensions. As a consequence, his seemingly broad assertion that any and all versions of plain meaning theory are futile is not entirely convincing. [FN5]

I.

The pivotal thesis of Professor Tushnet's paper is that The Federalist assumes an untenable plain meaning theory of constitutional interpretation. Is he correct? Does The Federalist assume a plain meaning theory? *1703 Tushnet's affirmative answer relies upon both internal (textual and logical) and external (historical) evidence. Before turning to
his evidence, I would like to air preliminary concerns about the meaning of ‘plain meaning.’

The meaning of ‘plain meaning’ and the central tenets of the plain meaning interpretative theory which Tushnet found in *The Federalist* were never spelled out. Yet, as a term applied to describe a normative theory of interpretation, ‘plain meaning’ lacks plain meaning. A definition of this term quickly becomes crucial for deciding whether *The Federalist* assumes a plain meaning theory and no other. Absent a working understanding of the expression ‘plain meaning theory,’ the search for internal evidence of a plain meaning theory in *The Federalist* cannot have a precise direction.

Precision is needed to decide the functional equivalence (or other pertinent relationship) of the various interpretative norms Tushnet attributes to *The Federalist* and the Supreme Court: namely, that judges ought to render the law in accordance with (1) common sense, (2) natural and obvious senses, (3) manifest tenor, (4) explicit and unambiguous language, (5) precise terms, and (6) plain meaning. Tushnet's criticisms are only as powerful as his intended target is well-defined. [FN6]

Tushnet argued that *The Federalist* relied upon a futile plain meaning theory. Not only was it futile in theory, as established by modern linguistics and social theory, but it was also futile in practice, as evidenced by recent Supreme Court opinions ostensibly undertaking plain meaning adjudication. [FN7] A degree of precision about plain meaning and related interpretative theories is important for Tushnet's cross-historical argument. He argued that contemporary failures at adjudication through appeal to, for example, ‘explicit and unambiguous provisions' also evidence the futility of *The Federalist'*s plain meaning theory. [FN8] Yet, Tushnet himself made the point that the changed meaning of ‘common *1704* sense’ would complicate contemporary adaptation of plain meaning theory. [FN9] No straightforward identification of *The Federalist*’s reliance on ‘common sense’ construction with contemporary reliance on what we call ‘common sense’ is really possible. Tushnet has put his finger on one important instance of a general problem that can only be solved by an exposition, more specific than the one has given, of the tenets of the plain meaning theory attributed to *The Federalist*.

In all likelihood The plain meaning theory attacked in Tushnet's Symposium paper is a brand of the ‘extremely implausible’ textualism he has sought to discredit elsewhere on the ground, *inter alia*, that it purports to give us courts without politics. [FN10] Textualism is any antiinterpretivist theory of legal interpretation which contends:

[A]t least some provisions of the Constitution need not be interpreted but only applied because they are entirely clear, because the meaning of the text is available to courts without interpretation, or because the text itself excludes enough possible interpretations to reduce the dangers thought to lurk in unrestrained constitutional interpretation.' [FN11]

The textualist contention, when expanded beyond the Constitution to include legislative texts, appears to form the core of the plain meaning theory which Tushnet alleges *The Federalist* proffers as a solution to the problem of judicial unaccountability.

II.

Notwithstanding the problem of defining ‘plain meaning,’ I now consider whether Tushnet is correct that *The Federalist* assumes a plain meaning theory. I will proceed with a rough understanding of plain meaning theory as the view that (to paraphrase Tushnet) grasping the meaning of legal texts does not require interpretation or that the meaning of such texts is plain enough to exclude sufficient interpretations to diminish the dangers of unrestrained interpretation.

Relying on logical, historical and textual evidence, Tushnet argues that *The Federalist* assumes a ‘strong theory about interpretation,’ namely, a plain meaning theory. [FN12] As logical evidence Tushnet uses his deduction that the plain meaning theory is a virtual entailment of *The Federalist*’s view of government and judicial review. The argument
from *1705 logic also reflects a sense of history. Tushnet suggests that the internal logic of *The Federalist* moves ineluctably toward the need for a normative theory of interpretation. Such a theory augments the fruits of the ‘incredibly productive’ [FN13] search for structural guarantees that led to the idea of federalism, the separation of powers, and a life-tenured federal judiciary. At stake in the search was nothing less than the enlightened protection of natural rights and the public good. A normative theory was needed to reconcile judicial review and the possibility of factious judicial tyranny with judicial accountability to a democratic people.

For what reason did the authors of *The Federalist* assume the plain meaning theory over other normative theories? Tushnet's answer is that they made the assumption naturally, because doing so was an easy adaptation of Enlightenment assumptions about the powers of human reason [FN14] and prevailing common law interpretative traditions. [FN15] He also answers that they did so prudently, because Hamilton feared that a more subtle theory might alienate ordinary citizens from constitutional discourse. I suppose the idea here is that even if Hamilton believed that a more subtle theory were true, he still would have advanced the plain meaning theory to facilitate civic education about republican judicial review.

Tushnet's answer is in line with H. Jefferson Powell's conclusion that ‘The Philadelphia framers' primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language.’ [FN16] Hamilton and other federalists defended the Constitution against antifederalist skeptics by arguing that ‘It was . . . the people's unquestionably republican intention, evinced in the plain, obvious meaning of the text, that would control future interpretations.’ [FN17]

Powell's historical perspectives do not rule out, however, alternatives to the plain meaning theory. Eighteenth-century republican theory is compatible with an interpretive strategy that is frankly contractarian. [FN18] *1706 A contractarian theory would prescribe that the meaning of constitutional text is to be determined by reference to ‘what rights and powers sovereign polities and individuals could delegate to a common agent without destroying their own essential autonomy.’ [FN19] Contractarian interpretative theory may be more subtle than simple-minded plain meaning theory. But, as argued below, no simple-minded plain meaning theory can be plausibly attributed to *The Federalist*. It is not obvious, then, that a contractarian interpretative theory would have struck early federalists as significantly more subtle-or less restrictive-than a plain meaning theory. Indeed it could be argued that knowledge of the requirements of rational agreement and moral autonomy on which social contract theory rests would have been deemed as accessible as knowledge of the plain meaning of fundamental law. Both would have been conceived of as accessible to reason and common sense.

One finds very little direct internal textual evidence for the view that *The Federalist* assumes a plain meaning interpretative theory. Tushnet seems to have correctly identified the best evidence of this theory at work in Hamilton's claim, in *The Federalist* 83, that ‘the natural and obvious sense of [the Constitution's] provisions, apart from any technical rules, is the true criterion of construction.’ [FN20] Hamilton's reference to the ‘natural and obvious sense’ of constitutional provisions implies that the Constitution is accessible by virtue of its alleged plain meaning. Hamilton's reference in *The Federalist* 78 to the ‘manifest tenor of the constitution,’ may carry the same implication. [FN21]

While passages in *The Federalist* 83 bring to mind a plain meaning theory, language in other passages can be read as a rejection of a plain meaning theory. Most notably, language in *The Federalist* 22 seems to *1707 go against the grain of plain meaning theories. Addressing the arguments of his confederationist opponents against a federal judiciary, Hamilton wrote that, ‘Laws are a dead letter without courts to expound and define their true meaning and operation.’ [FN22] Hamilton's words are ambiguous; yet, they can be readily construed as the words of a ‘judicial activist’ or other interpretivist who rejects plain meaning and holds that courts impart meaning to law through appeal to political, moral or economic goals rather than ‘dead letter’ scratches in ink. It would be admittedly absurd to imply without regard to extrinsic evidence that Hamilton was a proponent of a strongly interpretivist theory. I merely suggest that not everything said about the judicial role in *The Federalist* points unambiguously towards a plain meaning theory of interpretation.
In *The Federalist* 22, continuing his defense of a federal judiciary, Hamilton contended as follows respecting the treaties of the United States: ‘Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL.’ [FN23] This argument for a federal judiciary is based on the need for uniformity and finality and implies that treaties and other legal documents do not have plain meaning. For adjudicative uniformity and finality would seem to follow from interpretative uniformity and finality, which would itself seem to follow from the practice of rendering texts in accordance with their plain meaning. Hamilton's concern for uniformity and finality implies that he held one of two beliefs about the need for a federal judiciary. He must have believed either that (1) the meaning of texts is significantly and impracticably indeterminate and a final arbiter is needed, or (2) state judges lack the common sense, reason, skill, and character needed to decide cases in accordance with the plain meaning of the written law.

According to Tushnet, *The Federalist*’s vision of democratic government and judicial review requires a normative theory of interpretation that keeps the structurally independent judiciary accountable to the will of the people as expressed in their constitution and statutes. A normative theory of interpretation which obliges judges to place democratic ideals and individual rights above their own preferences is called for by *The Federalist*’s conception of government and judicial review. A plain meaning theory could fill the bill and, according to Tushnet, it did.

*1708* It is important to keep in mind that a normative theory of interpretation was not a device that the authors of *The Federalist* emphasized. Insofar as the plain meaning theory can be found, expressly or by implication, in *The Federalist*, it is offered alongside a variety of other theories and arguments aimed at assuring readers that the institution of life-tenure federal judges would further, rather than undermine, the public good, individual rights, and majoritarian self-government.

In the first instance, *The Federalist* stressed the structural constraints on the judiciary. The judiciary was but one branch of government in the constitutional scheme. Judges who breached standards of ‘good behavior’ were subject to impeachment by Congress. *The Federalist* 78 and 81 stressed the judiciary's lack of the power of the purse and the sword. Even if the judiciary developed a will contrary to the public interest and ceased to exercise proper judgment, it had no means to finance or execute its will.

*The Federalist* recognized that structural constraints are not absolutely infallible. But the main point is that a good deal of faith was placed in them. Hamilton argued that structural constraints are so effective in general that practical persons who know history, political science, and human nature have no genuine grounds for concern:

It may in the last place be observed that the supposed danger of judiciary encroachments on the legislative authority which has been upon many occasions reiterated is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power, from the objects to which it relates, from the manner in which it is exercised, from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the . . . important constitutional check which is the power of instituting impeachments in one part of the legislative body, and of determining them upon them the other . . . This is alone a complete security. . . . [J]udges . . . would hazard the united resentment of the [legislature] . . . while its body was possessed of the means of punishing their presumption by degrading them from their stations. [FN24]

Nonetheless, as if anticipating that the existence of structural safe-guards would fail to convince every reader that federal judges would not *1709* exceed their just and intended bounds, *The Federalist* offered bits of normative theory. It offered normative theories of judicial role morality and judicial character. It offered, as discussed, normative theories of interpretation. Both types of normative theories imply guidelines for judicial selection and training. The judicial role calls for individuals with common sense, uncommon rational judgment, knowledge of legal traditions, (including traditions of interpretation and construction), and knowledge of the public good. The judicial role also requires control

over passions that cloud judgment and weaken one's ability to repress self-interest for the sake of the public good. *The Federalist*'s message is that such 'philosopher judges' exist and have been relied on in the past with overwhelmingly positive results.

III.

As previously noted, Tushnet argues that 'it [is] futile at best to rely on *The Federalist*'s theory of constitutional interpretation.' [FN25] In effect, he argues that it is futile in practice and in theory.

It is futile in practice because 'contrary to recent commentary, even separation of powers decisions cannot readily rest on plain meaning analysis.' [FN26] *Immigration and Naturalization Service v. Chadha,* [FN27] the legislative veto case, serves as an illustrative example. In *Chadha* the Court ruled unconstitutional provisions of the Immigration and Nationality Act ('Act') empowering either House of Congress to overturn by resolution a decision of the Executive Branch. The Court affirmed a Ninth Circuit ruling that under the separation of powers doctrine the House of Representatives lacked constitutional authority to deport an alien whose deportation an Immigration Judge had suspended on account of extreme hardship pursuant to authority delegated by Congress to the Attorney General. In addition to the Act's legislative veto provision, the legislative veto provisions of numerous federal statutes in which Congress had retained the authority to undo the determinations of agencies to which it had delegated powers fell. [FN28]

*Chadha* depicted utilitarian or functional interpretations of the Constitution as a threat to the values of democratic self-government. Functional interpretation is unwarranted where '[e]xPLICIT and unambiguous *1710 provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive.' [FN29] Tushnet shows that the *Chadha* case is an object lesson in the futility of plain meaning interpretative theories since even constitutional provisions defining and prescribing legislative and executive functions prove to be less than 'explicit and unambiguous.' Tushnet's analysis reveals that the Supreme Court was simply mistaken in its claim that the case before it could be decided solely by reference to the Constitution's 'explicit and unambiguous' language. For example, the Chief Justice asserted the case would be resolved by the 'precise terms' of the Constitution. [FN30] Yet, the Court had to decide at least one matter not subject to resolution by the 'precise terms' of the Constitution: whether a one-house veto based on a resolution entered by a single member of Congress was an exercise of legislative power. The Court reached its decision about whether legislative power had been exercised by assessing the purposes and effects of the action taken by the House.

Tushnet argues that it is fitile in theory to rely on plain meaning analysis because modern social philosophy and philosophy of language indicate that there are no plain meanings. He states that plain meaning analysis is at odds with the 'unavailability of plain meanings to resolve normative disputes.' [FN31] He also takes the position that the phenomenon of honest disputes over the meaning of texts would seem to prove that written law lacks plain meaning of the requisite sort. Tushnet thus concludes that plain meaning analysis is opposed both by the social reality of disputes over the meaning of legal texts and by the fundamentally nonlinguistic character of those disputes.

Tushnet interprets modern philosophy of language, symbolized by ideas associated with the enigmatic philosopher Ludwig Wittgenstein, to support one of three alternative propositions, each of which he believes to be devastating to the plain meaning interpretative theory. The propositions are that: (1) real contests over the common sense meanings of words cannot occur; (2) real contests over the common sense meanings of words can occur, but the winners are those who rely on ordinary language; or (3) real contests over the common sense meanings of words can *1711 occur, but there can be no winners because disputes over language meaning have no rational resolution. It is far from obvious that these ‘Wittgensteinian’ propositions can indeed be adapted from their home in puzzlement over metaphysical, epistemological, and metaethical discourse to puzzles over ordinary legal discourse. [FN32]

Assuming the plausibility of Tushnet's adaptation, his conclusion that plain meaning analysis is a sinkhole looks
promising. For if the first `Wittgensteinian’ proposition is true, one must explain away the appearance of real disputes over the meaning of ordinary legal discourse. If the second is true, judges must be viewed as arbiters of common sense and some political account for why they should have that role must be given. If the third proposition is true, courts are robbed of any ability to rationalize their resolution of disputes about what the written law requires. There would be nothing for the courts to say once, to borrow a line from Wittgenstein, they had shown the fly the way out of the fly-bottle. [FN33]

*1712 Viewed through Tushnet's eyes as essays impossibly premised on the possibility of plain meaning interpretation, The Federalist is a work of considerable irony. Addressed to the citizens of New York, The Federalist papers were intended to help persuade the public that opposition to the proposed federal Constitution was misguided. The irony is that efforts at persuading the public often involved explaining that the putative plain meaning of constitutional provisions had been `wrongly' interpreted in the popular press by intelligent opponents. This irony is perhaps nowhere more manifest than in The Federalist 83.

In The Federalist 83, Hamilton faced the difficult task of explaining the plain meaning of constitutional text while also explaining why that plain meaning had escaped his adversaries. Hamilton's specific aim was to counter the assertion that, since juries for criminal causes were expressly guaranteed, the silence of the proposed Constitution as to jury trials in civil cases entailed the constitutional abolition of civil jury trials. Hamilton sought to counter any misconception that the Constitution diminished such a cherished individual right. Casting the issue as one of the proper interpretation of the meaning of a text, Hamilton undertook to consider whether a text granting a right in one context could be interpreted as denying the right in another.

It seems that if the Constitution's words had plain meaning, the dispute about whether the Constitution abolished civil jury trials would not have arisen. Hamilton's account of why it arose attests to the strength of his reliance, at least in The Federalist 83, on the plain meaning theory. The dispute did not exist, according to Hamilton, because the meaning of the text was unavailable to common sense for the text was perfectly clear when read in accordance with the rigors of common sense, logic, and traditional maxims of legal construction, correctly applied. [FN34] Hamilton's ultimate explanation for the dispute was his opponents' intellectual bad faith. [FN35] The strongly implied that their rights-based opposition dishonestly masked a partisan anti-federalist political agenda.

Significantly, Hamilton did not ask the plain meaning argument to stand alone in The Federalist 83. He also sought to convince his readers that the lack of express provision for civil jury trial was of no practical importance because the right to a civil jury was well-grounded in common law. Civil jury rights were recognized, he assured his readers, even in states like Connecticut where the written law made no express provision for them. [FN36] Interestingly, the Chadha case seems to rest on the same logic that Hamilton ridiculed in The Federalist 83. In Chadha, the Chief Justice argued as follows: since the framers had expressly provided certain exceptions to biameralism and presidential presentment, it must be inferred that other exceptions to biameralism and presentment, such as the one-house veto, were prohibited. [FN37] In The Federalist 83 Hamilton ridiculed anti-federalists who relied on the maxim that ‘the expression of one thing is the exclusion of another.’ [FN38] Yet this would appear to be the maxim of construction on which Chadha relied: the expression of exceptions to biameralism and presidential presentment excludes further exceptions.

The matter is more complicated. Hamilton did not ridicule all uses of the above maxim. He seemed to imply that the maxim itself had ‘true meaning,’ but was subject to ‘perverted’ applications. An application is perverse when it is contrary to common sense and reason. The difficulty Hamilton's assessment poses is the uncertainty it raises about how to determine when a use of a maxim of construction is perverse and when it is true.

Hamilton himself thought it was as clear as ‘the existence of matter’ that his opponent's application was perverted. [FN39] However, in a post-Cartesian world, even matter is up for grabs. More to the point, the legal conclusions we
care most about rarely ‘by their own internal evidence force conviction.’ [FN40] This makes Hamilton's plain meaning remedy useless unless it is somehow possible to specify the methods of common sense, reason, and construction that courts should rely on to reveal whether a maxim of construction applies in a given instance, and with what result.

If Hamilton would not balk at the maxim of construction Chadha relied on, he might nonetheless be unsettled by a Supreme Court that purports to safeguard majoritarian legislation by declining to be wise: *1714 ‘We begin, of course, with the presumption that the challenged statute is valid. Its wisdom is not the concern of the court; if a challenged action does not violate the Constitution, it must be sustained.’ [FN41] This is the ‘judgment’ to which Justices of the Supreme Court have sometimes aspired. It is a process of blind application of Constitution to statute, a process which purportedly depends upon ascertaining the unambiguous meanings of each.

Outside of the confines of theories of interpretation and adjudication, ‘judgment’ today connotes a process that engages all of a person's cognitive and moral resources. Judgment is a weighing of wants and needs, deserts and merits, morality and utility. This weighing, of course, is precisely what judicial judgment is not according to Chadha. [FN42] The narrower scope of judicial judgment advocated in Chadha is impossible, if Tushnet's critique of plain meaning is correct, for it presupposes that legal texts have meanings apart from those a court might like most to attach to them and that a good judge is able to discern those meanings. [FN43]

In The Federalist 78 Hamilton wrote that under the new Constitution federal judges would be expected to exercise ‘judgment’ rather than ‘will.’ Any will they exercised as a co-equal branch would presumably be the will to judge in accordance with the law. Hamilton believed that the judiciary was the most ‘feeble’ and least dangerous branch. The legislature ‘commands the purse’ and ‘prescribes the rules’ and the judiciary ‘must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.’ [FN44] But it is doubtful that Hamilton, who believed the judiciary was essential to safeguard liberty, would *1715 have accepted the formulation of Chadha whereby concern for the wisdom of a decision is contrasted with concern for its bare constitutionality. For the guiding assumption of The Federalist was that the Constitution—'the intention of the people'—is to be ‘regarded by the judges as, a fundamental law’ for the advancement of the public good and individual rights. [FN45]

To the extent of their skepticism about objectively valid conceptions of ‘natural rights' and ‘the public good,’ contemporary plain meaning theorists are hard pressed to reconcile what they ask judges to do with fuller, contemporary conceptions of judgment. Plain meaning theory was perhaps better suited to a less skeptical, less relativist era.

The Federalist 83 is an especially good indicator that the plain meaning theory that can be attributed to The Federalist is not a simple-minded one. Consider a simple-minded plain meaning theory holding that each canonical text in a language has a set of distinct meanings and that these meanings will always be plain to any speaker of the language. This simple-minded theory essentially denies ambiguity, ignorance, and other barriers to written communication. It is a ‘straw man’ theory too implausible to be taken seriously. As Tushnet understands, textualist theories can be very sophisticated. [FN46] The ironic ‘meaning-explaining’ character of The Federalist project, Hamilton's treatment of a meaning dispute in The Federalist 83, and the recalcitrant ‘dead letter’ language of The Federalist 22, are all indications of the complexity and sophistication of any plain meaning theory that is fairly attributed to The Federalist. For Publius, the meaning of written law is plain, but only when texts are well-drafted in modes of discourse open to discernment, reason and common sense, and when those who purport to apply the texts rely on true and proper maxims of construction.

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[FN3]. I do not plan to separately discuss Tushnet's contention that *The Federalist* papers imply an important connection between judicial tenure and theory of interpretation. As Tushnet explains in his article, Tushnet, *supra* note 2, at 1680-89, *The Federalist*'s democratic vision requires judicial accountability; but, contrary to Madison's and Hamilton's arguments, it does not require judges to be appointed as opposed to elected or to have life tenure. Tushnet's insight is that Madison's arguments only support the appointment of judges for terms which are relatively long when compared to the terms of members of the political branches. These long terms insulate judges from powerful minority factions and powerful majorities that, from time to time, lose sight of the public good. The structural safeguard of a separate, independent federal judiciary is a good practical assurance but it is not foolproof. Like other citizens, judges are capable of losing sight of the public good and becoming a powerful minority faction. A normative theory of interpretation is needed to account for how courts are obligated to apply the fundamental law of the people.

A few brief remarks about the necessity *vel non* of life-tenure. Judges who know they are likely to return to private life after a term of years on the bench will have special incentives to decide cases so as to enhance their retirement from among those in the private sector on whose good graces they will most depend after retirement from the bench. This could result in individual judges subtly aligning themselves with special interests. To minimize this possibility, life-tenure and attractive fixed salaries, as urged in *The Federalist*, would seem prudent.

That the institution of life-tenure relies heavily on the personal commitments of judges cannot be overstressed. Life-tenure works only if judges accede to the expectation that they remain in office for extended periods. If appointed or elected judges were frequently to resign their posts in pursuit of greater opportunity, life-tenure and the values it protects would be threatened. The notions of ‘judicial character’ and ‘judicial temperament’ surely ought to include a personal commitment to substantial longevity and isolation on the bench.


[FN5]. Tushnet raises the possibility that some sophisticated contemporary version of plain meaning theory might escape his criticisms. See *id.* at 1688. But I read him as unpersuaded and raising objections which, if they panned out, would be objections in principle.

[FN6]. Consider what would be involved in specifying the terms of a plain meaning theory. Most words have meanings, but some, like articles and expletives, seem sometimes only to have function. The meaning of a word can be distinguished from its senses, its senses from its referents, and its denotations from its connotations. And to what is plain meaning to be contrasted-ambiguous meaning? vagueness? obscurity? meaninglessness? pointlessness? On what does plain meaning depend-internal logic? mental states? purposes? uses? All these questions about word meaning arise before one even gets to analogous inquires about propositional meaning.


[FN8]. See *infra* notes 24-30 and accompanying text (summary of Tushnet's argument that contemporary and 18th century plain meaning theories are similarly flawed).


[FN11]. *Id.* at 683.

[FN13]. Id. at 1688.


[FN16]. Id. at 903.

[FN17]. Id. at 907.


[FN21]. THE FEDERALIST NO. 78, at 466 (A. Hamilton) (C. Rossiter ed. 1961). Hamilton's reference to the ‘manifest tenor of the Constitution’ can be read as implying that, when encountered by a person competent in the English language, the Constitution has a readily discernible (i.e., plain) meaning which courts should apply. But the proposed reading places a great deal of weight on the word ‘manifest,’ while it ignores the ambiguity of the word ‘tenor.’ It is not apparent from the context why one should construe ‘tenor’ as synonymous with ‘meaning.’ Hamilton's exact statement was that ‘Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.’ THE FEDERALIST 78, at 466 (A. Hamilton) (C. rossiter ed. 1961). Under present day idiomatic American usage, ‘tenor’ and ‘meaning’ are seldom synonyms except possibly where ‘meaning’ is used to refer to connotative, as opposed to denotative, meaning. So used, the ‘tenor’ of a text could refer to the set of all that the text connotes.


[FN23]. Id.


[FN25]. Tushnet, supra note 2, at 1693.

[FN26]. Id.


[FN29]. Chadha, 462 U.S. at 945.

[FN30]. Id. Article I, section 1, of the Constitution providing that ‘All legislative powers herein granted shall be vested
in a Congress of the United States, which shall consist of a Senate and a House of Representatives,’ was the key constitutional provision with ‘precise terms’ that the court found ‘critical to the resolution.’ Id. This is the so-called bicameralism requirement.

[FN31]. Tushnet, supra note 2, at 1693.

[FN32]. Wittgenstein had a great deal to say about language meaning. In Tractatus-Logico Philosophicus, he advanced the view that the meaning, if any, of a proposition that is neither empirically or logically grounded is unspeakable; hence the cryptic ending of his book: ‘What we cannot speak about we must pass over in silence-twice alluded to in Tushnet's symposium paper. See generally L. WITTGENSTEIN, TRACTATUS-LOGICO PHILOSOPHICUS (1921) (analysis of relationships among propositional logic, facts, and hearing). Wittgenstein's views underwent a significant change after Tractatus. The views both of the 'early' and the 'later' Wittgenstein seem to have influenced Tushnet.

In Philosophical Investigations Wittgenstein suggested that the key to meaning is often to be found in language use; language as used in what he called 'language games' rooted in so-called 'forms of life.' See generally L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, (G.E.M. Anscombe trans. 3d ed. 1958) (exposition of the linguistic nature of philosophical problems). Wittgenstein's attack on traditional philosophy, the heart of his work, was that philosophical propositions were not part of a language game rooted in a genuine form of life. The real task of philosophy is not ethical or metaphysical, but grammatical. Its proper role is 'uncovering . . . plain nonsense and . . . bumps understanding has got running its head up against the limits of language.' Id. ¶119, at 48.

Wittgenstein was centrally concerned with the methods of philosophy and the possibility of philosophical discourse. He made no direct contributions to the analysis of legal discourse. The crucial determination of a Wittgensteinian analysis of legal discourse may be whether we can think of legal discourse as an ordinary language game situated within a form of life. If we can, adopting Wittgenstein's functional approach to the meaning of legal propositions is indicated.

Wittgenstein had a great deal to say about meaning and almost nothing to say about law. He rarely used legal examples. But see L. WITTGENSTEIN, ZETTEL 22 (G.E.M. Anscombe trans. 1970) (posthumous compilation of fragmentary notes) (“This law was not given with such cases in view.' Does that mean it is senseless?’). He wrote about rules, see, e.g., PHILOSOPHICAL INVESTIGATIONS, supra, ¶¶201, 240, but usually about 'rules' of language games. My very tentative conclusion is that Wittgenstein's analysis of rules does not lend unqualified support to the proponents of legal rule-indeterminacy in the current rule-indeterminacy debates. Cf. Solum, On the Indeterminacy Crisis: Critiquing Critical Dogma, 54 U. CHI. L. REV. 464, 477 (1987) (disputing the notion that language and legal rules are significantly indeterminate).

[FN33]. L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, supra note 32, at 103 (309).

[FN34]. THE FEDERALIST NO. 83, at 495-96 (A. Hamilton) (C. Rossiter ed. 1961) (“To argue with respect to the latter would, however, be as vain and fruitless as to attempt the serious proof of the existence of matter, or to demonstrate any of those propositions which, by their own internal evidence, force conviction when expressed in language adapted to convey their meaning.’).

[FN35]. Opponents resort to 'contemptible' subtleties, they pervert 'true meaning,' they deny what is plain to 'E'very man of discernment.’ Id. at 496.

[FN36]. Id. at 503.


[FN39]. \textit{Id.} at 496 (‘But as the inventors of this fallacy have attempted to support it by certain legal maxims of interpretation which they have perverted from their true meaning . . .’).

[FN40]. \textit{Id.}

[FN41]. Hamilton stated, ‘The rules of legal interpretation are rules of common sense, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them is its conformity to the source from which they are derived. This being the case, let me ask if it is consistent with reason or common sense to suppose, that a provision obliging the legislative power to commit the trial of criminal causes to juries is a privation of its right to authorize or permit that mode of trial in other cases?’ \textit{Id.} at 496.

If this fails as a \textit{reductio ad absurdum} of the anti-federalist criticism of the Constitution, it is because whether things not promised in a writing are excluded depends upon customary understandings and practices rather than the rules of deductive logic.

[FN42]. 462 U.S. at 944.

[FN43]. 462 U.S. at 944 (‘the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution’).

[FN44]. Hence the Court could cite with approval: ‘Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.’ \textit{TVA v. Hill}, 437 U.S. 153, 194-95 (1978), \textit{cited in INS v. Chadha}, 462 U.S. 919, 944 (1982).


[FN46]. Tushnet, \textit{supra} note 10, at 690.

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