

Constitution Outside the Courts

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BOOK REVIEW

THE CONSTITUTION OUTSIDE THE COURTS

TAKING THE CONSTITUTION AWAY FROM THE COURTS. By *Mark Tushnet*.† Princeton: Princeton University Press, 1999. Pp. 254. \$29.95.

James E. Fleming††

In recent years, many scholars have called for taking the Constitution seriously outside the courts, and thus looking to legislatures, executives, and citizens generally for fuller protection of constitutional norms. In his book, Taking the Constitution Away from the Courts, Mark Tushnet supports this view and travels "beyond judicial minimalism" in order to argue that constitutional interpretation belongs outside the courts and directly in the hands of the people.

In this Book Review, Professor Fleming examines Professor Tushnet's arguments against judicial supremacy and in support of making constitutional interpretation less court-centered to pursue a populist constitutional law. The review concedes that Professor Tushnet's arguments that the "thick Constitution"—in particular, its commitments to federalism, states' rights, and separation of powers—is self-enforcing through the political processes are compelling. But it contends that he fails to make the case that the "thin Constitution"—for example, its fundamental guarantees of equality, freedom of expression, and liberty—should be treated as similarly self-enforcing. Furthermore, Professor Fleming charges that Professor Tushnet does not adequately elaborate how legislatures, executives, and citizens should conscientiously interpret the Constitution, or sufficiently consider how to revise our current practice to make it more likely that these bodies will fulfill their obligations to do so. Finally, he argues that Tushnet's notion of the thin Constitution is too thin to constitute us as a people. Nonetheless, the review concludes

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†† Professor of Law, Fordham University School of Law; Faculty Fellow in Ethics, Harvard University Center for Ethics and the Professions, 1999-2000. I am grateful to Linda McClain for helpful comments on a draft of this paper and to Arthur Appalbaum, Jack Balkin, Sot Barber, Dick Fallon, Martin Flaherty, Bob Gordon, Abner Greene, Frank Michelman, Larry Sager, Dennis Thompson, Bill Treanor, Keith Whittington, and Ben Zipursky for instructive conversations concerning its arguments. More generally, I am indebted to Sandy Levinson for many fruitful conversations over the years about the question, *Who* may authoritatively interpret the Constitution?, and for his efforts in tirelessly calling for a "protestant" rather than a court-centered "catholic" approach to that question. I presented drafts in the Fordham Faculty Workshop Series and in the Harvard Seminar on Ethics and the Professions and benefitted greatly from doing so.

that Professor Tushnet has helped lay the groundwork for taking the Constitution seriously outside the courts, not by taking it away from courts, but instead by taking it to legislatures, executives, and citizens generally. Moreover, Professor Fleming concludes that Professor Tushnet's book is the most provocative and significant contribution to this project to date.

INTRODUCTION

In the wake of the Warren Court, constitutional law scholars with misgivings about judicial interpretation and enforcement of the Constitution by the Burger and Rehnquist Courts have repeatedly called for taking the Constitution seriously outside the courts, and thus looking to legislatures and executives for fuller protection of constitutional norms.¹ Mark Tushnet's *Taking the Constitution Away from the Courts*² is the most comprehensive, thoughtful, and provocative answer to those calls to date. For that reason, it warrants careful attention and serious criticism.

Tushnet offers powerful arguments against judicial supremacy in constitutional interpretation and provides an assessment of judicial review that should sober even the most committed, court-loving constitutionalists. In addition, he advances the best arguments I have encountered for the proposition that the Constitution is self-enforcing through the political processes rather than through judicial review. Finally, he sketches an attractive vision of populist constitutional law outside the courts. On this vision, the "thin Constitution"—the principles, aspirations, and ends proclaimed in the Declaration of Independence and the Preamble to the Constitution—constitutes us as a people. And we the people, who are engaged in a project of self-government in pursuit of those principles, aspirations, and ends, are charged with, and are worthy of, the responsibility of interpreting the Constitution ourselves as well as through our legislatures and executives.

¹ See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 9-10 (1993); ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM* 190-210 (1994); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) [hereinafter Sager, *Fair Measure*]; Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410 (1993) [hereinafter Sager, *Thinness*]. A notable earlier book challenged the view that the Constitution is solely what the courts say it is and analyzed the responsibility of members of Congress to deliberate on constitutional issues. See DONALD G. MORGAN, *CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY* (1966). Notable recent works that take the Constitution seriously outside the courts include PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* (4th ed. 2000); STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (1996); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); WAYNE D. MOORE, *CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE* (1996); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999).

² MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

But Tushnet fails adequately to elaborate how legislatures, executives, and citizens should conscientiously interpret the Constitution. Furthermore, he fails sufficiently to consider how to revise our current practice to make it more likely that these bodies will fulfill their obligations to do so. My general criticism is that Tushnet does not establish that taking the Constitution seriously outside the courts requires, in his terms, "taking the Constitution *away from* the courts." Rather, I contend, it requires taking the Constitution *to* legislatures, executives, and citizens in order that these bodies might better frame and guide their reflections, deliberations, and decisions by constitutional principles, aspirations, and ends.

Furthermore, instead of eliminating judicial review, we should restrict it to provisions and commitments of the Constitution that are properly judicially enforceable, and leave the enforcement of other provisions and commitments to legislatures, executives, and citizens. This approach entails judicially enforcing constitutional norms in situations where the political processes are systematically untrustworthy, but judicially "underenforcing" constitutional norms (to use Lawrence Sager's term)³ in situations in which the political processes are systematically trustworthy. In the latter situations, where we can trust legislatures and executives to enforce constitutional norms, we should indeed take the Constitution away from the courts.⁴

In criticizing Tushnet's book, I focus on three main points. In Part I of this Review, I assess Tushnet's arguments against judicial supremacy. Although his arguments are powerful and persuasive, I maintain that they work better as a conscientious legislator's, executive's, and citizen's guide to constitutional interpretation, within a system otherwise characterized by judicial supremacy, than as a refutation of judicial supremacy itself. In Part II, I consider his arguments against judicial review and for the self-enforcing Constitution. I concede that his arguments that the "thick Constitution"—in particular, commitments to federalism, states' rights, and separation of pow-

³ Sager, *Fair Measure*, *supra* note 1, at 1213; Sager, *Thinness*, *supra* note 1, at 419.

⁴ See James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 291-92, 296-97 (1993) [hereinafter Fleming, *Constructing*]; James E. Fleming, *Fidelity, Basic Liberties, and the Specter of Lochner*, 41 WM. & MARY L. REV. 147, 147, 165-72 (1999) [hereinafter Fleming, *Fidelity*]; James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 22-23 (1995) [hereinafter Fleming, *Securing*]. My approach has important affinities with John Hart Ely's famous theory of "democracy and distrust," which suggests that judicial review is justified in situations in which the political processes are systematically untrustworthy. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 101-04 (1980). My approach differs in at least two significant respects: it identifies the situations of distrust differently (largely because it is grounded in a different conception of democracy), and it develops the idea of judicial underenforcement of norms in situations in which the political processes are systematically trustworthy (an idea that is at best implicit in Ely's analysis).

ers—is self-enforcing through the political processes are compelling. However, I contend that his arguments that the “thin Constitution” should be treated as self-enforcing are unpersuasive. In Part III, I take up Tushnet’s arguments for a populist constitutional law. I argue that his notion of the “thin Constitution” is too thin to constitute us as a people, and I suggest that there are better ways of thinking about the thinness or thickness of constitutional law.

Finally, in Part IV, I develop the implications of my prior work for the project of taking the Constitution seriously outside the courts—not by taking it *away from* courts, but by taking it *to* legislatures, executives, and citizens generally. Despite my criticisms, Tushnet’s book is provocative and radical in a good sense: It goes to the root of the matter, addressing the fundamental question in constitutional theory of *who* may authoritatively interpret the Constitution. Perhaps one measure of the success of Tushnet’s book is that I—an unabashed Dworkinian and a propounder of what might appear to be one of the grandest court-centered constitutional theories of them all⁵—am persuaded by his arguments against judicial review and for the self-enforcing Constitution to the extent that I am. It bears noting that many progressives like Tushnet have been dubious about judicial review and skeptical about the Constitution in light of their progressive and egalitarian political and moral commitments.⁶ To the extent that Tushnet’s book proves successful, it may mark a point in history at which progressives learn to hate judicial review but to love the Constitution, or at least to affirm their faith in the Constitution without placing any hope in courts for the realization of its core commitments.

I

TUSHNET’S ARGUMENTS AGAINST JUDICIAL SUPREMACY

A. Who May Authoritatively Interpret the Constitution?

In developing his argument against judicial supremacy and for a populist constitutional law, Tushnet advances a distinction between the thick and the thin Constitution. The thick Constitution, accord-

⁵ See Fleming, *Constructing*, *supra* note 4, at 226, 282; James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 *FORDHAM L. REV.* 1335, 1338-39 (1997); Fleming, *Securing*, *supra* note 4, at 9. In all of these pieces, I draw upon Dworkin’s work, both for its conception of the character of constitutional interpretation and for its conception of the substance of our constitutional commitments. See, e.g., RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996) [hereinafter *DWORKIN, MORAL READING*]; RONALD DWORKIN, *LIFE’S DOMINION* (1993).

⁶ See, e.g., WEST, *supra* note 1, at 160-61 (mentioning Tushnet, among others, as such a progressive constitutional skeptic); Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 *U. COLO. L. REV.* 975 (1993); Mary E. Becker, *The Politics of Women’s Wrongs and the Bill of “Rights”: A Bicentennial Perspective*, 59 *U. CHI. L. REV.* 453 (1992).

ing to Tushnet, “contains a lot of detailed provisions describing how the government is to be organized.”⁷ These provisions include evidently minor provisions, such as the “opinions in writing” clause and many administrative provisions. They also include “detailed arrangements regarding federalism, states’ rights, and the separation of powers.”⁸ Tushnet suggests that the thick Constitution’s provisions meet with “public indifference,” for they “do not thrill the heart” or “generate impassioned declarations.”⁹

The thin Constitution consists of “its fundamental guarantees of equality, freedom of expression, and liberty.”¹⁰ Tushnet draws upon the work of Gary Jacobsohn, who, quoting Abraham Lincoln, describes “[t]he Union and the Constitution” as “the picture of silver,” the “frame[],” around the “apple of gold,” the principles of the Declaration of Independence.¹¹ Tushnet adds, quoting Lincoln: “The picture was made for the apple—not the apple for the picture.”¹² That is, “the frame of silver . . . was made for the apple of gold.”¹³ He contends, and interprets Lincoln as believing, that “[t]he project the Constitution established for the people of the United States . . . was the vindication of the Declaration’s principles: the principle that all people were created equal, the principle that all had inalienable rights.”¹⁴

Furthermore, Tushnet asserts that “the national project includes vindicating the parts of the Constitution’s Preamble that resonate with the Declaration: the nation’s commitment to ‘establish Justice, ensure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to . . . our [P]osterity.’”¹⁵ Notably, Tushnet omits from this quotation the first purpose or aspiration stated in the Preamble: “to form a more perfect Union.”¹⁶ He believes that this end “does not resonate with the Declaration’s principles as the other purposes recited in the Preamble do.”¹⁷ Evidently he believes that it does not partly constitute us as a people.

7 TUSHNET, *supra* note 2, at 9.

8 *Id.* at 14.

9 *Id.* at 10.

10 *Id.* at 11.

11 *Id.* (quoting GARY JACOBSON, *APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES* 3 (1993) (alteration in original)).

12 *Id.* (quoting JACOBSON, *supra* note 11, at 3).

13 *Id.* at 14.

14 *Id.* at 11.

15 *Id.* at 12 (quoting U.S. CONST. pmb.).

16 U.S. CONST. pmb.

17 TUSHNET, *supra* note 2, at 14.

Tushnet states that “[p]opulist constitutional law vindicates the thin Constitution.”¹⁸ Most importantly, he contends, “the nation’s commitment to the thin Constitution constitutes us as the people of the United States.”¹⁹ He adds: “constituting a people is a morally worthy project,” and “the thin Constitution . . . is an element in a good society.”²⁰ Together, Tushnet maintains, “[t]he Declaration and the Preamble provide the substantive criteria for identifying the people’s vital interests.”²¹ Finally, he submits that “the thinness of the populist Constitution is essential if the position I am developing is to be at all defensible.”²² This submission, however, may undermine the entire enterprise, as we shall see.

Two observations are in order here. First, there is nothing inherently populist about the idea that the project that the Constitution establishes for the people of the United States is the vindication of the Declaration’s principles and the Preamble’s aspirations. Second, there is nothing about this idea that is necessarily against judicial supremacy. For one can certainly believe that a constitutional theorist could embrace this vision of the project, yet be altogether antipopulist and projudicial supremacy. For example, Sotirios Barber embraces this view in *On What the Constitution Means*²³ and *The Constitution of Judicial Power*.²⁴ Additionally, one could characterize Dworkin’s constitutional theory along similar lines.²⁵ On Barber’s view, the Declaration and the Preamble express our noblest commitments and our highest aspirations, which courts as the forum of principle are obligated to vindicate against popular encroachment or neglect.²⁶ Of course, Tushnet might well retort to Barber, “the constitution of judicial power indeed!”

Readers familiar with Tushnet’s prior work (which is among the best work to grow out of the Critical Legal Studies movement)²⁷ may be surprised with his argument that the thin Constitution—which commits us to the project of vindicating the “inalienable rights,” “uni-

18 *Id.* at 12.

19 *Id.*

20 *Id.*

21 *Id.* at 13.

22 *Id.*

23 SOTIRIOS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* 11-12 (1984).

24 SOTIRIOS A. BARBER, *THE CONSTITUTION OF JUDICIAL POWER* 42-43 (1993).

25 *See, e.g.*, RONALD DWORKIN, *A MATTER OF PRINCIPLE* 33-71 (1985) (arguing in a chapter entitled “The Forum of Principle” that the Constitution incorporates substantive principles of political morality and that courts should be a forum for protecting those principles); DWORKIN, *MORAL READING*, *supra* note 5, at 32 (arguing for a “moral reading” of the Constitution, which conceives it as embodying abstract moral principles, and defending judicial vindication of such principles).

26 *See* BARBER, *supra* note 23, at 9.

27 *See, e.g.*, MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

versal human rights," and "unassailable moral truths" proclaimed in the Declaration of Independence—constitutes us as a people.²⁸ For he has been quite skeptical about rights,²⁹ and indeed remains so, with certain qualifications, in this book.³⁰ In addition, he is famous for making statements like "[c]ritique is all there is,"³¹ which appear to be in tension with such an evidently constructive and morally ambitious project. As a liberal who "takes rights seriously,"³² I am pleased to see a crit like Tushnet come out so unapologetically in support of inalienable rights, universal human rights, and unassailable moral truths.

Before assessing Tushnet's arguments against judicial supremacy, we need to draw two further distinctions. We should distinguish two common conceptions of judicial supremacy, which I shall frame in terms of paraphrases of Chief Justice Marshall's famous utterance in *Marbury v. Madison*: "It is emphatically the province and duty of the judicial department to say what the law is."³³ One is that the Supreme Court is the *exclusive* interpreter of the Constitution. Or, to paraphrase Marshall in *Marbury*, "It is emphatically the province and duty of *the judicial department*—and no one else—to say what the law is."³⁴ On this view, questions about what the Constitution means are nothing but questions about what the courts have said, or are likely to say, about what the Constitution means. It is not required, and indeed not appropriate, for legislatures, executives, and citizens to engage in independent constitutional interpretation.

The other conception of judicial supremacy is that the Supreme Court is the *ultimate* interpreter of the Constitution. Or, again to paraphrase *Marbury*, "It is emphatically the province and duty of the judicial department—ultimately, after the other branches of government have conscientiously considered what the Constitution requires of them—to say what the law is." On this view, legislatures, executives, and citizens generally have the obligation in the first instance to consider conscientiously what the Constitution requires of them before taking contemplated actions. However, in the final analysis, the courts must authoritatively interpret the Constitution and decide whether those actions comport with the Constitution. Constitutional theorists like Barber or Dworkin can embrace this position, yet also argue ultimately for aggressive judicial review. To generalize, we

²⁸ TUSHNET, *supra* note 2, at 11, 31, 181.

²⁹ See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

³⁰ See, e.g., TUSHNET, *supra* note 2, at 137-43.

³¹ TUSHNET, *supra* note 27, at 318.

³² I allude, of course, to RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

³³ 5 U.S. (1 Cranch) 137, 177 (1803).

³⁴ Tushnet offers this very paraphrase as a formulation of a conception of judicial supremacy. See TUSHNET, *supra* note 2, at 7.

should distinguish answers to the question *who* may authoritatively interpret the Constitution from conceptions of the proper scope of judicial review.

It is also important to distinguish two common readings of *Marbury*.³⁵ One is the broad view that it is the special province of the courts to guard the Constitution against legislative and executive encroachment. The other is the narrow view that it is only incidentally the province of the courts, when they otherwise must interpret the Constitution, to enforce it against legislative or executive encroachment. The former reading leads to a dim view of the idea of the Constitution outside the courts. But the latter reading is not necessarily incompatible with a view that we should take seriously the idea of the Constitution outside the courts.

It is striking and problematic that Tushnet alludes to each of these distinctions,³⁶ but then elides each of them—and in turn elides each into the other—and simply criticizes “a general theory of judicial supremacy.”³⁷ He may believe that these distinctions are distinctions without a difference from the standpoint of his larger project of taking the Constitution away from the courts. However, maintaining these distinctions will enable us to see that although he fails to make the case for taking the Constitution away from the courts altogether, he succeeds marvelously in showing certain ways in which our current practice, rightly understood, already contemplates that legislatures, executives, and citizens generally may engage in independent constitutional interpretation.

Tushnet challenges the general theory of judicial supremacy in several ways. First, he mentions the political question doctrine, which “leaves some constitutional decisions to Congress and the president with no possibility of judicial review.”³⁸ Second, he notes other “situations in which it might seem that an official could reject the Supreme Court’s constitutional interpretations without running the risk of becoming the defendant in a lawsuit,” and thus giving the Court an opportunity ultimately to reaffirm its interpretations.³⁹ Here he refers to certain famous instances in which courts upheld the constitutionality of legislation, but then executives concluded instead that the legislation was unconstitutional. For example, President Jefferson pardoned political allies convicted under the antisediton statute on the ground that it violated the First Amendment’s protection of freedom of

³⁵ For a distinction along these lines between two readings of *Marbury*, see, for example, GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 2-3 (13th ed. 1997).

³⁶ See TUSHNET, *supra* note 2, at 6-7.

³⁷ *Id.* at 17, 22, 32.

³⁸ *Id.* at 16.

³⁹ *Id.* at 15.

speech, notwithstanding the judicial determinations that the statute was constitutional.⁴⁰ And President Jackson vetoed the national bank bill on the ground that it was unconstitutional, notwithstanding the Supreme Court's holding in *McCulloch v. Maryland* that it was constitutional.⁴¹

Tushnet rightly concludes, however, that "the fact that our constitutional system does not have a way to get the courts to review some official decisions that conflict with the courts' constitutional interpretations does not really counter the theory of judicial supremacy."⁴² He then asks, "When may a legislator disregard the courts' constitutional interpretations?"⁴³ Drawing upon President Abraham Lincoln's analysis, he suggests that "sometimes legislative action apparently inconsistent with a prior judicial constitutional interpretation is not inconsistent with a general theory of judicial supremacy."⁴⁴ He states, however, that "sometimes it is."⁴⁵ Tushnet continues: "But in *those* situations the case for judicial supremacy is weak and the case for a populist constitutional law implementing the thin Constitution is strong."⁴⁶

Let us begin with the first scenario. For example, proposed legislation may be distinguishable from legislation that the courts have held unconstitutional.⁴⁷ Or, prior legislative action—or inaction—may be relevant to the courts' constitutional decisions.⁴⁸ Additionally, "[a] legislator might disregard an apparently controlling precedent, Lincoln suggested, when it was reached in 'ordinary litigation between parties in personal actions.'⁴⁹ Or, again according to Lincoln, "a legislator may support a law indistinguishable from one held unconstitutional when there is a 'chance that [the earlier decision] might be overruled.'⁵⁰ Constitutional scholars celebrating or assuming judicial supremacy commonly fail to acknowledge these situations as part of our practice. Yet they are, by Tushnet's own analysis, "fully compatible with a general theory of judicial supremacy."⁵¹

Next, let us address the second scenario. This includes situations in which public officials' disregard of clearly controlling Supreme Court precedents may provoke a constitutional crisis. Tushnet con-

40 *See id.*

41 *See id.* (alluding to *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

42 *Id.* at 16-17.

43 *Id.* at 17.

44 *Id.*

45 *Id.*

46 *Id.*

47 *See id.* at 17-18.

48 *See id.* at 18-19.

49 *Id.* at 19.

50 *Id.* at 19-20.

51 *Id.* at 22.

tends that "[t]here is nothing wrong in principle with constitutional disagreements, or even with constitutional crises as such."⁵² Or, adapting one of Lincoln's phrases, Tushnet suggests that "a constitutional crisis may be a good thing when 'vital questions affecting the whole people' are involved."⁵³ He states that the criteria for identifying when a constitutional crisis is a good thing—when the vital interests of the whole people are at stake—are provided by the thin Constitution.⁵⁴ He contends that only a political leader who speaks "for 'the people as a whole' can fairly identify their vital interests."⁵⁵ He also claims that such a leader is justified in ignoring Supreme Court precedents, and thus risking a constitutional crisis, in order to further the vital interests of the whole people at stake on his or her reasonable interpretation of the thin Constitution.⁵⁶

Finally, he asks when ordinary citizens may disregard controlling Supreme Court opinions.⁵⁷ The answer, again, is that "people acting outside the courts can ignore what the courts say about the Constitution, as long as they are pursuing reasonable interpretations of the thin Constitution."⁵⁸ In doing so, Tushnet submits, ordinary citizens are continuing the Declaration's project.

Tushnet's chapter title, "Against Judicial Supremacy,"⁵⁹ is an overstatement, or a misnomer. For his argument in the chapter does not succeed as an argument against judicial supremacy altogether. It is more successful as an account of what nonjudicial actors legitimately may do in acting upon conscientious interpretations of the Constitution in the face of contrary judicial interpretations, even within a general theory of judicial supremacy (as ultimacy). A better title for the chapter—to paraphrase the title of Paul Brest's famous article⁶⁰—would be "A Conscientious Legislator's, Executive's, and Citizen's Guide to Constitutional Interpretation in the Face of Erroneous Judicial Interpretations."⁶¹

Tushnet overstates his arguments, in part because he fails to maintain the distinctions between ultimate and exclusive interpreter

⁵² *Id.*

⁵³ *Id.* at 23.

⁵⁴ *See id.* at 24.

⁵⁵ *Id.*

⁵⁶ *See id.* at 22-26.

⁵⁷ *See id.* at 30-31.

⁵⁸ *Id.* at 33.

⁵⁹ *Id.* at 6.

⁶⁰ *See* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

⁶¹ My claim applies more obviously to the first situations mentioned above, but it also applies to the second. A theory of constitutional crisis or constitutional revolution operates outside the circumstances of judicial supremacy. Thus, acknowledging the second situation—and that a constitutional crisis or revolution might be a good thing—does not preclude one from subscribing to a general theory of judicial supremacy.

and between the narrow and broad readings of *Marbury*. Tushnet's arguments are dispositive against the conception of judicial supremacy that views the Supreme Court as the exclusive interpreter and against the broad reading of *Marbury*. The practices that he describes involve legislators, executives, and citizens taking the Constitution seriously outside the courts in ways not contemplated or permitted by such views. But they are not dispositive with respect to the conception of judicial supremacy that views the Supreme Court generally as the ultimate interpreter and with respect to the narrow reading of *Marbury*. Those practices are entirely compatible with such views.

Therefore, Tushnet has not accomplished the central aim of his own project: that of making arguments against judicial supremacy that are sufficient to underwrite the project of taking the Constitution seriously outside the courts by taking it *away from* the courts. Nonetheless, he leaves standing the possibility that one could incorporate his analysis into the project of taking the Constitution seriously outside the courts by instead taking the Constitution *to* legislatures, executives, and citizens generally. Tushnet has cleared the ground for the latter project, to which I wish to contribute by drawing upon his analysis.

B. Why Has Constitutional Theory Remained So Court-Centered?

At the beginning of this Review, I noted that there have been repeated calls to take the Constitution seriously outside the courts. Despite these repeated calls, why has constitutional theory remained so court-centered? And how might constitutional theorists break the stranglehold of this court-centeredness?⁶² I shall mention six reasons why constitutional theory has remained so court-centered, or six factors with which any constitutional theorist who seeks to break that stranglehold, such as Tushnet, must reckon.

The first reason commonly offered is that liberals and progressives who idealize the Warren Court still may believe, despite contrary developments in the last thirty years, "that the Supreme Court under Earl Warren—who left the Court in 1969—is the Supreme Court today."⁶³ This hypothesis is good for a laugh; no one enjoys taking jabs at law professors more than other law professors. It reflects the tendency of law professors (and Tushnet more than most) to reduce everything to political terms. But we must ponder the question more deeply.

⁶² Of course, from the standpoint of a court-centered view of constitutional law, we might also ask the opposite and prior question, why have there been repeated calls to take the Constitution seriously outside the courts?

⁶³ TUSHNET, *supra* note 2, at 129.

The second reason is a more modest, and more plausible, version of the first. Liberals and progressives realize that, although the Warren Court is long gone, the Burger Court proved to be the conservative "counter-revolution that wasn't."⁶⁴ They also sigh with relief that, although the Rehnquist Court repeatedly gives indications that the conservative counterrevolution finally is in full swing, it typically does so in 5-4 decisions. They comfort themselves with the thought that the election of President Clinton and his appointments of Justices Ginsburg and Breyer have moderated the Rehnquist Court somewhat. And so, they hope, "if only Clinton could get a couple more appointments to the Supreme Court." And, "if only Vice-President Gore could get elected and get a couple more appointments." Then, "if only," and so on.

Furthermore, the Rehnquist Court—notwithstanding the strenuous efforts of Chief Justice Rehnquist and Justices Scalia and Thomas—has thrown enough crumbs from the table to liberals and progressives to keep their hope in the courts alive.⁶⁵ Some scholars have disparaged, as a "hollow hope," the idea that courts can bring about social change.⁶⁶ Any hope for liberal and progressive goals growing out of occasional victories in the Rehnquist Court is surely a foolish hope. We should look beyond these two political reasons for the persistence of court-centeredness in constitutional theory and take up law professors' assumptions about the differences between courts and legislatures, which will suggest four institutional reasons for it.

The third reason is rooted in constitutional theorists' yearnings for *coherence*, or for a coherent body of constitutional law. Based on assumptions about the differences between courts and legislatures, they believe that under a regime of judicial review—indeed judicial supremacy—we will get a more coherent body of constitutional law than we would get in a regime that left most or all constitutional questions ultimately or exclusively to legislatures, executives, and citizens.

⁶⁴ I refer to the title of a well-known book. *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Vincent A. Blasi ed., 1983).

⁶⁵ See, e.g., *Nixon v. Shrink Mo. Gov't PAC*, 120 S. Ct. 897 (2000) (upholding, over First Amendment challenges, a Missouri statute limiting campaign contributions); *Saenz v. Roe*, 526 U.S. 489 (1999) (striking down, as violative of the right to travel secured by the Privileges or Immunities Clause of the Fourteenth Amendment, California's durational residency requirement imposed on recipients of welfare); *United States v. Virginia*, 518 U.S. 515 (1996) (finding that Virginia Military Institute's exclusion of women violated the Equal Protection Clause of the Fourteenth Amendment); *Romer v. Evans*, 517 U.S. 620 (1996) (striking down, on equal protection grounds, Colorado's constitutional amendment prohibiting legislative, executive, or judicial action designed to protect homosexuals).

⁶⁶ See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

Even if Tushnet were able to persuade such law professors that legislatures and executives historically have proven to be more coherent over time—and courts less coherent over time—than they assume, they still would maintain that courts enjoy comparative institutional advantages over those branches in this regard.

The fourth derives from law professors' desire for *uniformity*, or for a uniform body of constitutional law (which is not the same thing as a coherent body of constitutional law). The points just made about coherence hold with respect to uniformity as well. This yearning has particular force in our federal system, with a national government and fifty state governments, not to mention countless local governments.

The fifth reason stems from constitutional theorists' yearnings for texts that express our national commitments, ideals, and aspirations. They yearn for sources that express commitments worthy of our aspirations and that exhort us to honor those commitments. Whatever the shortcomings of Supreme Court opinions as articulations of principles, ideals, and aspirations (as distinguished from exercises in compromise, accommodation, and coalition-building), such opinions clearly enjoy advantages in this regard over statutes, administrative regulations, and executive orders (which typically at best implement, rather than articulate, such commitments). Besides, law professors love discussing the educative, expressive, and hortatory functions of Supreme Court opinions.⁶⁷ Although presidents can, and do, deliver inspiring addresses, members of Congress are more limited in this respect; even if they make eloquent speeches, or insert eloquent papers into the *Congressional Record*, they typically speak only for themselves. One can imagine Congress revising its practices to provide opportunities for fuller and richer institutional expression of commitments, ideals, and aspirations, for example, in committee reports on bills. But it is hard to imagine that such reports or other institutional expressions could satisfy the yearning under consideration better than a good court opinion or body of opinions. Thus, even if law professors exaggerate the educative, expressive, and hortatory functions of Supreme Court opinions, they are not unreasonable in thinking that courts enjoy comparative institutional advantages over legislatures and executives in this respect.

A final, related reason stems from constitutional theorists' yearnings for an institution that might be, or might aspire to be, a "forum of principle."⁶⁸ Many are in the grips of a reductive, overdrawn contrast between courts and legislatures that leads them to glorify courts

⁶⁷ See, e.g., Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

⁶⁸ DWORRIN, A MATTER OF PRINCIPLE, *supra* note 25, at 33.

and to disparage legislatures. They no doubt hold too exalted a view of courts and too dismal a view of legislatures. Yet whatever the shortcomings of courts, constitutional theorists are likely to believe that courts offer greater promise than legislatures and executives in this regard. However, some theorists, like Sunstein, have partially flipped this contrast and argued that legislatures and executives, not courts, are the true fora of principle.⁶⁹

For a scholar who believes in taking the Constitution away from courts, Tushnet does not adequately address these yearnings or reasons for resistance. He does address arguments for judicial supremacy grounded in the view that it provides greater stability, refuting claims or assumptions that constitutional law inside the courts is more stable than constitutional law outside the courts would be.⁷⁰ Tushnet might think that the desire for stability subsumes the other concerns articulated above. But it does not. Even if it did, a more fine-grained analysis would be needed.

Tushnet might claim that he has addressed the yearning for texts expressing national commitments, ideals, and aspirations and the yearning for a forum of principle. In arguing against judicial review, he effectively debunks the idea that the Supreme Court is an educational institution or a "teacher" in a "vital national seminar."⁷¹ But this is not sufficient. Even if this idea is overblown and in need of being deflated, courts may enjoy relative institutional advantages over legislatures and executives in this regard.

II

TUSHNET'S ARGUMENTS FOR THE SELF-ENFORCING CONSTITUTION

Tushnet argues that the entire Constitution is self-enforcing through the political processes.⁷² He analyzes the capacities and incentives of legislators and executives to engage in responsible constitutional interpretation outside the courts.⁷³ Tushnet also ingeniously develops the idea of an "incentive-compatible" or self-enforcing Constitution.⁷⁴ This idea suggests that the incentives of legislatures and executives within the political processes make it likely that they will enforce the Constitution, or at any rate do a better job of enforcing it than courts acting outside the political processes.⁷⁵ In doing so, he reworks James Madison's classic arguments in *The Federalist 10* and *51*

⁶⁹ See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 59-60 (1996).

⁷⁰ See TUSHNET, *supra* note 2, at 26-30.

⁷¹ See *id.* at 129-53, 154-76. The quotation in the text is from Rostow, *supra* note 67, at 208.

⁷² See TUSHNET, *supra* note 2, at 14.

⁷³ See *id.* at 54-71, 95-128.

⁷⁴ *Id.* at 95.

⁷⁵ See *id.* at 95-128.

about the extended republic and about how “[a]mbition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”⁷⁶ Tushnet argues that “judicial overhang”—the distorted way in which legislatures and executives view the Constitution in the courts’ shadow—has stunted the capacities of legislators and executives (and our views of their capacities).⁷⁷ He argues that legislatures and executives might do a better job of fulfilling their constitutional responsibilities to interpret the Constitution if we eliminated this judicial overhang by taking the Constitution away from the courts.

First, he argues that the “thick Constitution” is self-enforcing.⁷⁸ Second, he suggests that the “thin Constitution” should also be treated as self-enforcing.⁷⁹ Tushnet makes a powerful and persuasive argument that the thick Constitution is self-enforcing through the political processes. In particular, he argues that it is self-enforcing with respect to federalism and separation of powers. There are familiar versions of this argument: Herbert Wechsler’s famous argument about the political safeguards of federalism,⁸⁰ itself based on Madison’s classical arguments in *The Federalist* 45 and 46,⁸¹ and a version of which the Supreme Court, per Justice Blackmun, adopted in *Garcia v. San Antonio Metropolitan Transit Authority*.⁸² Justice White’s argument about judicial deference with respect to separation of powers issues⁸³ can be understood, or reconstructed, as an argument about self-enforcement.⁸⁴ In addition, Jesse Choper wove together such arguments about federalism and separation of powers, although to some extent his argument was not just about self-enforcement, but also about the need for the Supreme Court to preserve its limited institutional capi-

⁷⁶ *Id.* at 98 (quoting THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961)).

⁷⁷ *Id.* at 57-65.

⁷⁸ *See id.* at 95-123.

⁷⁹ *See id.* at 123-28.

⁸⁰ *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). For a sophisticated and powerful reworking of Wechsler’s basic idea, see Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000).

⁸¹ THE FEDERALIST NOS. 45, 46 (James Madison).

⁸² 469 U.S. 528, 551 (1985) (arguing that the political process inherent in American federalism, as characterized by Madison and Wechsler, adequately safeguarded the Metropolitan Transit Authority from congressional abuse of its power to regulate interstate commerce).

⁸³ *See, e.g.,* *Bowsher v. Synar*, 478 U.S. 714, 759-76 (1986) (White, J., dissenting) (arguing that congressional delegation of power to the Comptroller General to implement the budget reduction provisions of the Gramm-Rudman-Hollings Act does not violate the principle of separation of powers); *INS v. Chadha*, 462 U.S. 919, 967-1003 (1983) (White, J., dissenting) (arguing that the legislative veto does not violate the principle of separation of powers).

⁸⁴ *See* TUSHNET, *supra* note 2, at 98-99.

tal in order to enable it to vindicate individual rights.⁸⁵ But Tushnet formulates this argument in an especially sophisticated and compelling manner. He satisfies the yearning of constitutional designers for "a machine that would go of itself."⁸⁶ In sum, he argues that we can trust the outcomes of the national political processes with regard to protection of constitutional commitments to federalism and separation of powers.

Constitutional scholars commonly argue that the Constitution is self-enforcing with respect to separation of powers and federalism, but that it is not self-enforcing with respect to other provisions and commitments.⁸⁷ We could generalize the idea of self-enforcement and include Ely's well-known argument for judicial review to reinforce the political processes in situations of distrust. According to Ely, we can trust the national political processes to enforce the Constitution properly when separation of powers and federalism are concerned, but we cannot trust those processes to do so when there are restrictions upon the political processes or prejudice against discrete and insular minorities. Thus, according to Ely, we need judicial reinforcement of the preconditions for democracy in those situations.⁸⁸

Tushnet, however, presents a different argument. He argues that not only the thick Constitution—including separation of powers and federalism—but also the thin Constitution—including individual rights and the preconditions for democracy—is self-enforcing through the political processes. Tushnet grants that it might be attractive to develop a constitutional theory that views the thick Constitution as self-enforcing, yet views judicial review as necessary to reinforce or secure the thin Constitution (in particular, the preconditions for democracy or for populist constitutional law).⁸⁹ Although he does not spell out this possibility, given his invocation of Ely's theory, it is clear how the argument would go. The idea would be that we cannot trust the political processes with respect to the basic liberties that are preconditions for democracy (as understood within his conception of populist constitutional law), and therefore we need judicial review to reinforce or secure those preconditions. Given the structure

⁸⁵ See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 129-70 (1980).

⁸⁶ MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE (1986).

⁸⁷ See, e.g., CHOPER, *supra* note 85 (arguing for judicial deference with respect to separation of powers and federalism but for judicial protection of individual rights); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 154-55 (1893) (arguing for judicial deference with respect to the national representative processes and institutions, but suggesting that, because state governments are not coordinate, those arguments for judicial deference do not apply).

⁸⁸ See ELY, *supra* note 4, at 101-04.

⁸⁹ See TUSHNET, *supra* note 2, at 125-26, 157-63.

of my own theory, as a Constitution-perfecting theory that is analogous to Ely's process-perfecting theory, I take particular interest in this possibility.⁹⁰ Tushnet mentions voting, free expression, and privacy among such preconditions.⁹¹ But then he makes, and too readily accepts, skeptical objections to this approach.⁹² Furthermore, Tushnet fails to consider the possibility that even if the Constitution, thick and thin, is self-enforcing through the national political processes, it is not self-enforcing through the state political processes.

III

REFLECTIONS ON THE THINNESS OF TUSHNET'S POPULIST CONSTITUTIONAL LAW

Next, I take up Tushnet's arguments for a populist constitutional law. His notion of the "thin Constitution" is too thin to do the work of constituting us as a people. And there are better ways of thinking about the thinness or thickness of constitutional law.⁹³

A. The Constitution Through Thick and Thin

First, let us analyze Tushnet's distinction between the thick and the thin Constitution. Although one might draw a useful distinction between the thick and the thin Constitution, it is odd that Tushnet draws the distinction he does, and calls the detailed provisions regarding governmental structures and administrative matters the thick Constitution and the commitments of the Declaration of Independence and the Preamble the thin Constitution. For one thing, the provisions of the thick Constitution, on Tushnet's own analysis, are not as rich as, are less likely "to thrill the heart" than, and are more "desiccated" than, those of the thin Constitution.⁹⁴ For another, the provisions of the thick Constitution are more obviously self-enforcing through the political processes, even on Tushnet's own analysis, than are those of the thin Constitution.⁹⁵ Thus, the case for judicial enforcement of the former is weaker, or thinner, than that for the latter. From this perspective, the thick Constitution is thinner with respect to the justification for enforcing it judicially.

⁹⁰ See Fleming, *Constructing*, *supra* note 4, at 214; Fleming, *Securing*, *supra* note 4, at 15.

⁹¹ See TUSHNET, *supra* note 2, at 157-63.

⁹² See *id.* at 158-62.

⁹³ For further reflections on the thinness of Tushnet's thin Constitution, see Frank I. Michelman, *Populist Natural Law (Reflections on Tushnet's 'Thin Constitution')*, 34 U. RICH. L. REV. 461 (2000).

⁹⁴ TUSHNET, *supra* note 2, at 10, 11.

⁹⁵ Tushnet argues straightforwardly that the provisions of the thick Constitution are self-enforcing. See *id.* at 95-123. By contrast, he argues that the thin Constitution should be treated as self-enforcing if we assume certain things. See *id.* at 128.

Tushnet ignores Larry Sager's illuminating reflections on the thinness of constitutional law in terms of judicial enforceability.⁹⁶ Sager observes that a striking feature of constitutional law is that the judicially enforceable Constitution is thinner than the fuller Constitution that imposes obligations outside the courts which are judicially underenforced or even unenforced.⁹⁷ This is not just a terminological quibble about the usage of the words thick and thin. There are also substantive problems with Tushnet's distinction.

Second, let us ponder what Tushnet includes in the thick Constitution as distinguished from the thin Constitution. It is notable that, in a book published in 1999, Tushnet throws provisions and commitments regarding federalism, states' rights, and separation of powers into the thick Constitution and claims that they are not part of the Constitution that constitutes us as a people.⁹⁸ For we are in the midst of yet another new federalism in American politics and constitutional law. And the revival of aggressive judicial protection of federalism, states' rights, and separation of powers is well underway.⁹⁹ In addition, there is of course a longstanding tradition in American constitutional thought holding that commitments to federalism and states' rights—even more than commitments to individual rights—constitute us as a people. Finally, there are insightful and powerful arguments that these structural commitments, together with commitments to individual rights, establish a scheme of multiple repositories of power and are constitutive of us as a people.¹⁰⁰

Indeed, it is telling that Tushnet argues that the Preamble to the Constitution is part of what constitutes us as a people, yet in his initial quotation from the Preamble, he omits the aspiration "to form a more perfect union."¹⁰¹ Although he later acknowledges this omission, and the link between that aspiration and the tradition of federalism and

⁹⁶ See Sager, *Thinness*, *supra* note 1.

⁹⁷ See *id.* at 421-22.

⁹⁸ See TUSHNET, *supra* note 2, at 9-14.

⁹⁹ See, e.g., *Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating the Line Item Veto Act on separation of powers grounds); *Printz v. United States*, 521 U.S. 898 (1997) (invalidating federal gun control statute based on federalism concerns); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating federal gun control statute based on federalism concerns); *New York v. United States*, 505 U.S. 144 (1992) (invalidating a portion of a federal statute requiring states to take title of radioactive waste based on federalism concerns); *Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating, on separation of powers grounds, a federal statute that would have allowed Comptroller General to exercise executive functions); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto on separation of powers grounds).

¹⁰⁰ See, e.g., Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477 *passim* (2000); Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 14-16 (1996).

¹⁰¹ See TUSHNET, *supra* note 2, at 12.

states' rights,¹⁰² he fails to consider seriously the possibility that this aspiration might partly constitute us as a people.

It is understandable why liberals or progressives committed to realizing the other purposes of the Preamble and the principles of the Declaration of Independence might be wary of federalism and states' rights (and to a lesser extent separation of powers). After all, commitments to federalism and states' rights have long been identified with regressive and illiberal commitments and have long stood in the way of liberal and progressive national reforms. But I would have thought that such liberals or progressives would stress "to form a more perfect union" as importantly constitutive of us as a people and as partially repudiating the states' rights tradition. One of the principal purposes of the Constitution was to form a more perfect union than existed under the Articles of Confederation (which was more strongly states' rightist).¹⁰³ Similarly, one of the principal purposes of Reconstruction, and the Thirteenth, Fourteenth, and Fifteenth Amendments, was to form a more perfect union than existed before the Civil War.¹⁰⁴

A fundamental criticism of contemporary Supreme Court Justices who have revived aggressive judicial protection of federalism and states' rights is that they do not appreciate the importance of the transformation from the Articles of Confederation to the more perfect union of the Constitution, as well as the importance of the Reconstruction amendments, in constituting us as a people. Furthermore, liberals and progressives committed to vindicating the principles of the Declaration and furthering the purposes of the Preamble—as against state encroachment and as against states' rights conceptions—should stress "to form a more perfect union" and our Constitution's commitment to a strong national government that is more perfect in securing those principles and the status of free and equal citizenship for all.

Tushnet might not include commitments to federalism and states' rights in the thin Constitution because he is cynical about those commitments or regards them as sham covers for conservative policies. The performance of recent Republican Congresses supposedly committed to federalism and states' rights provides good cause for such cynicism. Conservatives profess respect for federalism and states' rights, unless a state tries to secure a right that liberals support and conservatives oppose. For example, the passage of the Oregon refer-

¹⁰² See *id.* at 14.

¹⁰³ See, e.g., RICHARD B. MORRIS, *THE FORGING OF THE UNION: 1781-1789*, at 80-91 (1987).

¹⁰⁴ See, e.g., HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* 301 (1975); DAVID A. J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* 137-48 (1993).

endum on death with dignity spawned the federal Pain Relief Promotion Act.¹⁰⁵ Conservatives claim that family law and tort law are within the province of state governments, unless they have a vision that they want to impose nationally, for example, the Defense of Marriage Act¹⁰⁶ and tort reform. Moreover, conservatives typically criticize the movement for an independent jurisprudence of state constitutional law, whereby state courts interpreting state constitutions provide greater protection for certain rights than has been afforded by the United States Supreme Court interpreting the United States Constitution. Some examples are the Kentucky Supreme Court on homosexuals' right to privacy and equality (notwithstanding *Bowers v. Hardwick*)¹⁰⁷ and the Hawaii Supreme Court and the Vermont Supreme Court on same-sex marriage.¹⁰⁸

Or perhaps Tushnet believes that the forces of nationalism really have won and that the latest new federalism is just the last gasp of a dying tradition. If so, it might be a mistake to include federalism and states' rights in the thin Constitution as constitutive of us as a people. But such a belief surely would be short-sighted, in light of the tenacity of the states' rights tradition (no matter how wrong and wrong-headed that tradition is).

Finally, we can eliminate another speculation. One can imagine a constitutional theorist who might wish to distinguish between provisions of the Constitution that are self-enforcing through the political processes and those that are properly judicially enforced. Such a theorist might want to put federalism, states' rights, and separation of powers in the former category, but to keep rights of equality, freedom of expression, and liberty in the latter category. But, as we have seen, Tushnet is not such a constitutional theorist. Although he begins with an argument that the provisions and commitments of the thick Constitution are self-enforcing, he ultimately argues that the provisions and principles of the thin Constitution—those which constitute us as a people—should also be treated as self-enforcing.

I believe that our constitutional commitments to federalism and separation of powers partly constitute us as a people, not only in their own right, but also in their connection with substantive commitments

¹⁰⁵ H.R. 2260, 106th Cong. (1999).

¹⁰⁶ 28 U.S.C. § 1738C (1994).

¹⁰⁷ 478 U.S. 186 (1986) (upholding Georgia statute criminalizing sodomy as applied to homosexuals).

¹⁰⁸ See, e.g., *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that exclusion of same-sex couples from marriage violates common benefits clause of state constitution); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (striking down statute limiting marriage to opposite-sex partners on equal protection grounds under state constitution); *Commonwealth v. Watson*, 842 S.W.2d 487 (Ky. 1992) (striking down state statute criminalizing sodomy on grounds of state constitution's protection of privacy and equal protection).

to freedom, equality, and justice. Yet those commitments are properly treated as self-enforcing through the political processes. There is neither a need, nor a good argument, for aggressive judicial enforcement of them, notwithstanding the Rehnquist Court's misguided revival of aggressive judicial review in the areas of federalism and separation of powers.

Now let us take up the thin Constitution as Tushnet conceives it. The first thing to note about Tushnet's conception is just how thin it is in what it includes. The thin Constitution consists of "its fundamental guarantees of equality, freedom of expression, and liberty," along with the principles of the Declaration of Independence and the purposes of the Preamble that resonate with the Declaration.¹⁰⁹ It is not clear whether it includes the provisions of the Bill of Rights as a whole, to say nothing of President Franklin Roosevelt's "second Bill of Rights" dealing with economics and social welfare.¹¹⁰

The second thing to note is the thinness of Tushnet's account of the principles of the thin Constitution. He does not elaborate its principles in a substantive constitutional or political theory. This is notable because many constitutional theorists who have invoked the Declaration of Independence and the Preamble in constitutional interpretation have done so to bolster a substantive constitutional or political theory, as against other constitutional theories that are said to omit, exclude, or ignore certain of our deepest commitments expressed in those texts. Such theorists invoke the Declaration and Preamble in service of a substantive vision of the commitments of the Constitution.¹¹¹

By contrast, in Tushnet's analysis, the thin Constitution serves not as a substantive vision but instead as a frame in terms of which we should carry out constitutional interpretation and argumentation. A conscientious legislator, executive, or citizen should frame his or her arguments about the Constitution in terms of carrying on the project

¹⁰⁹ TUSHNET, *supra* note 2, at 11.

¹¹⁰ Tushnet states: "The second Bill of Rights, along with the first, would, in Roosevelt's view, carry out the project the United States began in the Declaration of Independence." *Id.* at 172. From this statement, however, it is not clear whether Tushnet endorses Roosevelt's view of the Bill of Rights and the "second Bill of Rights."

¹¹¹ See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS 27-28, 47, 298-99* (1998); BARBER, *supra* note 23, at 33-35, 51-53; Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 *CONST. COMMENT.* 93, 105-13 (1995); Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 *COLUM. L. REV.* 1103 *passim* (1986); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 *S. CAL. L. REV.* 703, 747-50 (1980). Two Justices of the current Supreme Court have invoked the Declaration of Independence to bolster their particular substantive conceptions of the Constitution. See *Cruzan v. Missouri*, 497 U.S. 261, 330-57 (1990) (Stevens, J., dissenting); *Meachum v. Fano*, 427 U.S. 215, 229-35 (1976) (Stevens, J., dissenting); Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 *How. L.J.* 983 (1987).

of realizing certain commitments expressed in the Declaration and the Preamble. This is ironic, given that Tushnet builds upon Lincoln's image of the Constitution being the frame for the Declaration, the apple of gold or the picture.¹¹² For it appears that in Tushnet's analysis, the Declaration itself serves as a frame, rather than as a picture or substantive vision.

Put another way, Tushnet's notion of the thin Constitution as constituting us as a people stems from a view of the thin Constitution not as manifesting a substantive vision, but as expressing an attitude of conscientious faith in the project of realizing the commitments of the Declaration and the Preamble—whatever the people may decide they turn out to be. This should come as no surprise, given Tushnet's heartfelt acknowledgment in the preface of his book to Sanford Levinson,¹¹³ the author of *Constitutional Faith*, a book that propounds such a view.¹¹⁴ Tushnet offers glimmerings of a substantive vision of what those commitments are, beyond an attitude of commitment to a constitutional faith in the thin Constitution. Yet, he does not elaborate those glimmerings, perhaps because doing so, on his view, might undermine the project of populist constitutional law. Indeed, Tushnet differentiates his project of populist constitutional law from a view that the principles of the Declaration of Independence and Preamble can be elaborated without reference to what the people, acting through self-government, actually decide to pursue.¹¹⁵ Presumably, he refers to the approach taken by constitutional theorists who elaborate a substantive vision of the commitments of the Declaration and the Preamble.

B. Is the Thinness of Tushnet's Thin Constitution a Weakness or a Strength?

Tushnet's thin Constitution is too thin to do the work of constituting us as a people. Furthermore, his account of how the thin Constitution constitutes us as a people is too thin. He neither adequately explains what it means to constitute us as a people nor gives an adequate account of what he means by a people. Although he gives some examples of conceptions of what it means to be an American,¹¹⁶ all of those conceptions are quite thin.

Tushnet likely would reply that, far from being a weakness, the thinness of the thin Constitution is a strength. He states that "the thinness of the populist Constitution is essential if the position I am

¹¹² See TUSHNET, *supra* note 2, at 14.

¹¹³ See *id.* at xii.

¹¹⁴ See LEVINSON, *supra* note 1.

¹¹⁵ See TUSHNET, *supra* note 2, at 183.

¹¹⁶ See *id.* at 182.

developing is to be at all defensible."¹¹⁷ He evidently believes that this very thinness is what enables the thin Constitution to constitute us as a people in a project of populist constitutional law and self-government. He might say that, to pursue this project, we do not need a brilliant liberal or progressive political or constitutional theorist to elaborate the substantive vision of the Declaration and the Preamble and then to argue for imposing it upon an unwilling people from the top down. Instead, he might say, we need a text or texts for our constitutional faith, and we need to encourage legislators, executives, and citizens, along with judges, to reflect conscientiously upon the meaning and entailments of its commitments and how better to realize them over time.

I want to reflect upon Tushnet's views that the thin Constitution constitutes us as a people and that its thinness is a virtue. I shall do so in light of arguments by both civic republicans and civic liberals that we need a thicker formative project or public philosophy (than the one that allegedly prevails) to constitute us as a people. The very thinness of Tushnet's thin Constitution is notable at the present time, when both civic republicans and civic liberals manifest such yearnings for a thicker vision.¹¹⁸ Tushnet's thin Constitution is also notable for being even thinner than the visions of some prominent constitutional theorists who have made the thinness of constitutional law a virtue.¹¹⁹

First, if the thin Constitution is as thin as Tushnet says it is, can it really do the work of constituting us as a people? At its worst, its commitments may amount to little more than the stuff of relatively vacuous slogans at Fourth of July celebrations. At its best, its commitments may prove to be nothing more than a frame, or attitude, in the sense described above. Of course, Tushnet might say that a thin Constitution as a frame or attitude is quite enough, and it is problematically elitist for constitutional theorists to hanker for a substantive constitutional theory that would constrain popular self-government.¹²⁰

He also might say that the project of constituting us as a people is appropriately thin in a regime of populist constitutional law, in which the point is to enable the people to govern themselves rather than to impose a conception of justice or a conception of the good upon the

¹¹⁷ *Id.* at 13.

¹¹⁸ See, e.g., MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 4-7, 25-28 (1996) (developing a civic republicanism); STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 8-10 (2000) (developing a civic liberalism).

¹¹⁹ See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3-6 (1999).

¹²⁰ For an example of a work of populist constitutional law that sounds such an anti-elitist note, see RICHARD D. PARKER, *"HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO* (1994).

people in the name of constituting them as a people. For, he might contend, to constitute a people is not the same thing as to govern them or to constrain their self-government. Rather, it is to establish a workable framework or appropriate attitude and to leave it to the people to reflect, deliberate, and decide about the meaning and entailments of our commitments in the Declaration and the Preamble through a project of self-government and populist constitutional law. He might argue that it is especially appropriate that the thin Constitution be very thin, given what Rawls calls "the fact of reasonable [moral] pluralism" as a permanent feature of our constitutional democracy¹²¹ (although Tushnet's project proves to be thinner, in those circumstances, than a Rawlsian project would be).

Whether Tushnet's thin Constitution is thick enough to constitute us as a people depends importantly upon what we mean by "constituting." It could mean something as thin as establishing a people in the nominal sense: a people consists of those persons who profess a faith in the principles of the Declaration and the Preamble, however they understand them or come to understand them over time through a project of self-government. It could also mean something as thick as establishing a people in a formative sense: developing in citizens the capacities for self-government, inculcating in them the attitudes, traits of character, and civic virtues necessary for self-government, or indeed inculcating in citizens a conception of justice or a conception of the good.

For example, Sandel's notion of a formative project of government to cultivate the capacities, traits of character, and civic virtues required for republican self-government reflects a conception of what it means to constitute a people.¹²² His idea of a formative project of constituting citizens for a civic republican polity is much thicker than the project Tushnet contemplates. Moreover, Sandel's idea leads to substantive moral argument—not only in political discourse, but also in constitutional law (along with a rich public philosophy)—of a sort too thick for Tushnet's taste, especially to the extent Sandel contemplates judicial enforcement of that public philosophy, or of constitutional commitments in its name (as he does in certain respects).¹²³ From Sandel's standpoint, the allegedly prevailing liberal public philosophy is too thin, and the constitutional law that it sponsors is too de-moralized, to constitute us as a people. By analogy to Sandel's civic republicanism, Macedo advances a civic liberalism that espouses a

¹²¹ TUSHNET, *supra* note 2, at 77-86 (discussing Rawls's arguments about reasonable pluralism and public reason, as developed in JOHN RAWLS, *POLITICAL LIBERALISM* (1993)).

¹²² See SANDEL, *supra* note 118, at 5-7, 128-33.

¹²³ Elsewhere, I have assessed Sandel's call for substantive moral argument in constitutional law. See James E. Fleming & Linda C. McClain, *In Search of a Substantive Republic*, 76 TEX. L. REV. 509 (1997) (reviewing SANDEL, *supra* note 118).

formative project of developing in citizens the capacities, traits of character, and civic virtues required for liberal constitutional democracy (as understood within Rawls's political liberalism).¹²⁴

From Tushnet's perspective, the projects of Sandel and Macedo, and perhaps even those of the allegedly prevailing liberal public philosophy and constitutional law, are too thick. The latter point is suggested by Tushnet's analysis of "the constitutional law of religion outside the courts."¹²⁵ On Tushnet's view, only a thinner Constitution can constitute us as a people—one that can embrace both Ronald Dworkin and Clarence Thomas, both Justice Brennan and Justice Scalia.

It may be illuminating to compare Tushnet's thin constitutionalism with that of his sometime coauthor, Cass Sunstein.¹²⁶ Each of them proposes to take the Constitution seriously outside the courts. And each of them attempts to develop a theory that is thinner than prevailing theories, thus making the thinness of constitutional law a virtue. Sunstein's development of judicial minimalism in his new book, *One Case at a Time*,¹²⁷ can be interpreted, in part, as an answer to his own earlier call in *The Partial Constitution* for taking seriously the idea of the Constitution outside the courts.¹²⁸ One might think that this call means that not just courts, but also legislatures and executives, should be fora of principle. As such, it is a valuable corrective to overdrawn contrasts between courts as the forum of principle and legislatures as the battleground of power politics. But for Sunstein, who argues that legislatures and executives, rather than courts, are the true fora of principle,¹²⁹ the slogan "the Constitution outside the courts" practically has come to mean "get the Constitution outside of the courts!"

One also might think that the call for the Constitution outside the courts promises to liberate constitutional theory from its court-centeredness—whether it be the court-centeredness of those who are obsessed with courts as vindicators of rights or of those who are obsessed with the institutional limits of courts—or, in Mark Graber's term, to "delegalize" it.¹³⁰ Yet, ironically, Sunstein's recent work may

¹²⁴ See MACEDO, *supra* note 118, at 169-72.

¹²⁵ TUSHNET, *supra* note 2, at 72-94.

¹²⁶ Tushnet and Sunstein are coauthors of a leading casebook in constitutional law. See GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, *CONSTITUTIONAL LAW* (3d ed. 1996).

¹²⁷ SUNSTEIN, *supra* note 119. In this paragraph in the text, along with the following paragraph, I draw upon an argument that I made elsewhere. See Fleming & McClain, *supra* note 123, at 546.

¹²⁸ See SUNSTEIN, *supra* note 1, at 9-10.

¹²⁹ See SUNSTEIN, *supra* note 69, at 7, 59-60.

¹³⁰ Mark A. Graber, *Delegalizing Constitutional Theory*, *Good Soc'y*, Fall 1996, at 47.

shackle constitutional theory to concern for institutional limits of courts—or legalize it with a vengeance.

Tushnet carries this quest for thinness and minimalism even further. His avowed aim is to take the Constitution away from the courts. And there is little risk that he will “legalize” the Constitution through judicial minimalism, for he disparages the “formulaic Constitution” as uninspiring—even “desiccated”—and ill-suited for the hortatory purposes of the Constitution in populist constitutional law.¹³¹ Tushnet goes far beyond Sunstein’s theory of judicial minimalism, which seeks to make judicial review democracy-forcing or -reinforcing. Tushnet goes all the way to a theory of the self-enforcing Constitution, in order to let the people rule.

IV

CONSTITUTIONAL CONSTRUCTIVISM OUTSIDE THE COURTS

In previous work, I outlined and developed a constitutional constructivism or a Constitution-perfecting theory—a theory that reinforces not only the procedural liberties, but also the substantive liberties embodied in our Constitution—by analogy to a process-perfecting theory of the sort famously propounded by Ely and Sunstein.¹³² At first glance, my theory might appear to entail an aggressive theory of judicial supremacy; indeed, it might appear to be one of the grandest, court-loving theories of them all. For one thing, my theory builds upon and has deep affinities with the constitutional theory of Dworkin, who is generally regarded as one of the most judicial-supremacist, court-centered theorists around. In addition, it argues for courts securing not only the basic liberties that are preconditions for deliberative democracy, much like Ely and Sunstein, but also those that are preconditions for deliberative autonomy—basic liberties with respect to which many constitutional theories advocate deference to legislatures for one reason or another.¹³³

¹³¹ TUSHNET, *supra* note 2, at 11, 111-12 (drawing from ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* (1989)).

¹³² See Fleming, *Constructing*, *supra* note 4, at 214-17; Fleming, *Securing*, *supra* note 4, at 15.

¹³³ See Fleming, *Constructing*, *supra* note 4, at 218, 233-35, 252-60; Fleming, *Securing*, *supra* note 4, at 2-3, 14-15. Indeed, one scholar, reflecting upon the bicentennial of *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)—and its classic debate between Justices Chase as constitutional idealist and Iredell as constitutional skeptic—has characterized my theory as that of a latter-day Justice Chase (and Jeremy Waldron’s theory, see *infra* text accompanying notes 166-67, as that of a latter-day Justice Iredell). See Edward B. Foley, *The Bicentennial of Calder v. Bull: In Defense of a Democratic Middle Ground*, 59 OHIO ST. L.J. 1599 (1998). Foley charges me, like Justice Chase, with “largely ignor[ing] the institutional issue of who should decide controversial questions concerning the proper scope of personal liberties” and in that sense being court-centered. *Id.* at 1612.

Yet, in the first instance, constitutional constructivism is a theory of *what* the Constitution is and *how* it ought to be interpreted, not primarily a theory of *who* may authoritatively interpret it. It is a substantive constitutional theory that claims to provide the best interpretation—in Dworkin's terms, the best fit and justification—of the American constitutional document and underlying constitutional order, or to make them the best they can be.¹³⁴ It is neither merely a theory of judicial review, nor does it automatically entail that all its principles, aspirations, and ends are to be judicially enforced. It is addressed not only to courts, but also to legislatures, executives, and citizens generally.

Here I want to address the question of *who* may authoritatively interpret the Constitution, with particular reference to the idea of taking the Constitution seriously outside the courts. First, I draw together several intimations of a general view appearing in my prior work. Second, I develop those intimations further.

In *Constructing the Substantive Constitution*, I note that “[i]n general, constitutional constructivism is a conception of *what* the Constitution is, *how* it ought to be interpreted, and *who* may authoritatively interpret it.”¹³⁵ With respect to *who*, I state that constitutional constructivism holds that, although the Supreme Court generally is the ultimate (but not the exclusive) institutional interpreter in any given case, We the People are the ultimate interpreters of the Constitution.¹³⁶ It entails what Levinson has called a “protestant” as opposed to a court-centered “catholic” conception of *who* may authoritatively interpret the Constitution.¹³⁷ On this view, the Constitution is addressed not merely, and not even in the first instance, to courts; it is addressed also to legislatures, executives, and citizens generally. To paraphrase *Marbury* again, “It is emphatically the province and duty of the judicial department, the legislative department, the executive department, and the citizenry generally to say what the law is.” This view is consistent with the best reading of *Marbury*: the narrow as opposed to the broad reading. It is also consistent with the long tradition and practice of the president, Congress, and citizens claiming authority to interpret the Constitution independently from courts. In short, the Constitution imposes obligations upon legislatures, executive officials, judges, and citizens to take the Constitution seriously and to consider

134 See Fleming, *Constructing*, *supra* note 4, at 282; Fleming, *Securing*, *supra* note 4, at 14.

135 Fleming, *Constructing*, *supra* note 4, at 290.

136 See *id.* at 291.

137 LEVINSON, *supra* note 1, at 27-53, 29 (describing the “protestant” position as “based on the legitimacy of individualized (or at least nonhierarchical communal) interpretation,” while the “catholic” position is that “the Supreme Court is the dispenser of ultimate interpretation”).

conscientiously its implications for contemplated actions before taking them.

Furthermore, I distinguish between the partial, judicially enforceable Constitution and the whole Constitution, which is binding outside the courts upon legislatures, executive officials, and citizens generally in our constitutional democracy (unless and until they amend it).¹³⁸ For example, although the Constitution might impose affirmative obligations upon the legislative and executive branches of government, such as a constitutional obligation to provide a social minimum of goods and services to meet the basic needs of all citizens, it might not accord a judicially enforceable right to such subsistence in the absence of legislative or executive measures. Other constitutional theorists, upon whose work I have built, have expressed similar views concerning the gap between the judicially enforceable Constitution and the Constitution that is binding outside the courts.¹³⁹

I also argue, drawing upon Rawls and Dworkin, respectively, that the Supreme Court is an "exemplar of public reason" in a "forum of principle."¹⁴⁰ But, like Rawls and unlike Dworkin, I argue that it is not the exclusive voice of such reason, nor is it the sole forum of principle: "[W]hile the Court is special in this respect, the other branches of government can certainly, if they would but do so, be forums of principle along with it in debating constitutional questions."¹⁴¹ In other words, constitutional constructivism is a theory of the Constitution, not merely a theory of judicial review. Moreover, judicial review is subject to certain institutional limits in carrying out social reform.

In *American Constitutional Interpretation*,¹⁴² a casebook I coauthored with Walter Murphy and Sotirios Barber, we conceive the enterprise of constitutional interpretation on the basis of three basic interrogatives: *What* is the Constitution?; *Who* may authoritatively interpret it?; and *How* ought it to be interpreted?¹⁴³ In our treatment of the questions *What?* and *Who?* and in our selection of cases and materials bearing on those questions, we commit ourselves to a rather muscular conception of the Constitution outside the courts, rather than simply focusing on constitutional interpretation by courts and on constitutional law as the product of Supreme Court decisions. In *The Canon and the Constitution Outside the Courts*, Barber and I briefly develop

¹³⁸ See Fleming, *Constructing*, *supra* note 4, at 291.

¹³⁹ See, e.g., SUNSTEIN, *supra* note 1, at 9-10, 138-40, 145-61, 350; Sager, *Fair Measure*, *supra* note 1, at 1213-28; Sager, *Thinness*, *supra* note 1, at 414-19.

¹⁴⁰ Fleming, *Constructing*, *supra* note 4, at 291-92 (citing RAWLS, *supra* note 121, at 231, 235-57, 240, and DWORKIN, *supra* note 25, at 69-71 (internal quotation marks omitted)).

¹⁴¹ Fleming, *Constructing*, *supra* note 4, at 292 (quoting RAWLS, *supra* note 121, at 240).

¹⁴² See WALTER F. MURPHY, JAMES E. FLEMING & SOTIRIOS A. BARBER, *AMERICAN CONSTITUTIONAL INTERPRETATION* (2d ed. 1995).

¹⁴³ See *id.* at 16-19.

that conception with reference to the issue of "the canon of constitutional law."¹⁴⁴

Finally, in *Fidelity, Basic Liberties, and the Specter of Lochner*,¹⁴⁵ I argue for judicial underenforcement of economic liberties and property rights. I grant that economic liberties and property rights, like personal liberties, are fundamental rights secured by our Constitution.¹⁴⁶ In fact, I contend that economic liberties and property rights are so fundamental in our constitutional scheme, and so sacred in our constitutional culture, that there is no need, and no good argument, for aggressive judicial protection of them.¹⁴⁷ Rather, such liberties are properly understood as "judicially underenforced norms," to use Sager's term.¹⁴⁸ Their fuller enforcement and protection is secure with legislatures and executives in "the Constitution outside the Courts," as Sunstein would put it.¹⁴⁹

I also criticize the organizers of—and most of the participants in—the symposium in which that paper appeared for failing to recognize the distinction between the judicially enforceable Constitution and the Constitution that is binding outside the courts.¹⁵⁰ What turns on this distinction is whether protection of constitutional rights is confined to judicial enforcement or whether it also includes enforcement by legislatures and executives. Also at stake is whether legislatures and executives, when acting in the absence of judicially enforceable rights, should be seen as bound by constitutionally imposed obligations or instead as free to act in constitutionally gratuitous ways. To say that a right is not judicially enforceable is not to say that it concerns a matter that is constitutionally gratuitous in the sense that legislatures, executives, and citizens generally are free to protect it or not as they wish. Rather, a right that is not judicially enforceable imposes obligations upon legislatures, executives, and citizens to respect it or indeed to protect it affirmatively. Legislatures and executives, as well as courts, have responsibilities to interpret the Constitution conscientiously and to secure our basic liberties.

In elaborating on this argument, I incorporate portions of Tushnet's analysis but also point out the need for certain things that are missing from his analysis. I have stated that in talking about judicial supremacy, it is important to distinguish between two versions, ultimate (or final) and exclusive (or only). Many constitutional theo-

¹⁴⁴ See Sotirios A. Barber & James E. Fleming, *The Canon and the Constitution Outside the Courts*, 17 CONST. COMMENT. (forthcoming 2000).

¹⁴⁵ See Fleming, *Fidelity*, *supra* note 4.

¹⁴⁶ See *id.* at 164-73.

¹⁴⁷ See *id.* at 147.

¹⁴⁸ Sager, *Fair Measure*, *supra* note 1, at 1213; Sager, *Thinness*, *supra* note 1, at 419.

¹⁴⁹ SUNSTEIN, *supra* note 1, at 9-10.

¹⁵⁰ See Fleming, *Fidelity*, *supra* note 4, at 168-69.

rists, including Tushnet, acknowledge that distinction, yet put it aside or ignore it. In fact, Tushnet's arguments against judicial supremacy are cogent against the exclusivity version of it, but not with respect to the ultimacy version. Indeed, Tushnet carefully couches his arguments, making claims about what nonjudicial actors who disagree with courts may conscientiously do even in a regime with a general theory of judicial supremacy. Here he surely means judicial supremacy as ultimacy, because his claims would not make sense in a regime of judicial supremacy as exclusivity. Tushnet, however, then proceeds as if he demolished judicial supremacy as ultimacy as well. Not so fast. It is possible, and eminently defensible, to adopt his arguments against judicial supremacy without foreswearing judicial supremacy as ultimacy.

Tushnet's analysis suggests some of the things we should do if we are to take the Constitution seriously outside the courts. First, we should develop, or reinvigorate, a rigorous and coherent notion of political questions, that is, questions the resolution of which the Constitution commits to institutions besides the courts. We need not only a carefully articulated justification for the idea of political questions in general (after all, the doctrine has taken a beating from court-centered or court-loving judicial supremacists), but also a clearly specified set of political questions.

Second, we should generalize the notion of political questions in service of an argument that nonjudicial actors have an obligation to take the Constitution seriously outside the courts, as well as in service of an argument for judicial deference to such actors in certain circumstances. Many arguments for judicial deference to the judgments of legislatures and executives simply emphasize the respect that courts owe the coordinate branches of government. Those arguments should go deeper, and ask why respect should be due a coordinate branch of government. The most defensible answer to that question is that the coordinate branch of government, like courts, is under the obligation conscientiously to interpret the Constitution before taking contemplated actions and is presumed to have discharged that obligation.

Put another way, we should revive, but reconstruct and prune, an element in Thayer's classic argument for judicial deference to the national legislature and executive.¹⁵¹ Thayer presumed that Congress and the president, not courts, had primary authority to interpret the Constitution. For him, the question of judicial review was not a question of what the Constitution means, but instead a question of whether the judgment of Congress or the president about what the Constitution means was itself reasonable, or at any rate not clearly un-

¹⁵¹ See Thayer, *supra* note 87, at 148-56.

reasonable.¹⁵² The part of Thayer that I would reconstruct and prune is the idea that legislatures and executives have the authority and the obligation independently to interpret the Constitution. The part of Thayer that I would eliminate is the idea that courts are to be concerned solely with the question of reasonableness, not with the question of constitutionality. Furthermore, I would reject his stance of judicial deference to the national political processes across the board; instead, I would favor such deference only outside the situations in which we have good reason to distrust those processes.

We must recognize, as Tushnet argues, that the Constitution is self-enforcing through the political processes in large areas in which the Supreme Court is quite aggressive today, including most importantly the areas of federalism, states' rights, and separation of powers.¹⁵³

We must also recognize that the Constitution is not self-enforcing through the political processes in general or in certain other areas. In particular, it is not self-enforcing with respect to individual rights in what Tushnet calls the thin Constitution, especially those rights which are preconditions for the trustworthiness of the outcomes of the political processes. Thus, a Constitution-perfecting or Constitution-reinforcing approach to judicial review is warranted in these areas.

Finally, we must recognize that the contrast between courts as the forum of principle and legislatures as the battleground of power politics is overstated. In constitutional theory, there are several familiar responses to this contrast, including several familiar attempts to blunt it. One approach is to obliterate the contrast, saying that neither institution is a forum of principle and that not only legislatures but also courts are battlegrounds of power politics. This approach is common in both political science literature about courts and in public choice literature in legal scholarship.¹⁵⁴

A second approach is partially to invert the contrast and to say that, historically, legislatures and executives have been the true fora of principle, or at least better fora of principle than courts.¹⁵⁵ Propo-

¹⁵² See *id.* at 150.

¹⁵³ When I say that the Constitution is self-enforcing with respect to federalism and states' rights, I am speaking of the idea that there are federalism-related limitations upon Congress's otherwise plenary powers. I emphatically am not speaking of federalism and states' rights in the sense of state laws in general, nor am I saying that the Constitution is self-enforcing in general with respect to the actions of state governments. Not even Thayer advocated judicial deference to state laws, though this is commonly overlooked. See *id.* at 154-55.

¹⁵⁴ See, e.g., JEFFREY SEGAL & HAROLD SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); Frank B. Cross, *The Judiciary and Public Choice*, 50 *HASTINGS L.J.* 355 (1999); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 *Nw. U. L. REV.* 251 (1997).

¹⁵⁵ See, e.g., SUNSTEIN, *supra* note 69, at 7, 59-60.

nents of this approach typically charge that the contrast rests upon a historically myopic idolization of the Warren Court. This approach does not literally invert the contrast because it does not claim that courts are a battleground of power politics. The typical view, instead, is that courts "follow the election returns" rather than being an independent bulwark of rights or forum of principle. Another variation posits that when courts do not follow the election returns, they typically lag behind rather than forge ahead and therefore, historically, have largely been conservative rather than liberal or progressive. Thus, this approach leads to the claim that legislatures and executives, historically, have been more reliable and more effective forces for liberal or progressive change—and for the fuller realization of constitutional principles of freedom, equality, and justice—than have courts.

A third approach, which I take, is to argue that taking the Constitution seriously outside the courts requires that legislatures and executives, along with courts, be fora of principle in certain respects. This approach is implicit in Rawls's statement, quoted above: "[W]hile the Court is special in this respect [as an "exemplar of public reason" in a "forum of principle"], the other branches of government can certainly, if they would but do so, be forums of principle along with it in debating constitutional questions."¹⁵⁶ Such an approach grows out of Rawls's conception of constitutional democracy. I believe that such an approach is broadly compatible with Gutmann and Thompson's conception of deliberative democracy in *Democracy and Disagreement*.¹⁵⁷ This approach might seem to reflect a view that legislatures and executives are no different from courts in this respect, but it need not. The point is that the contrast is overdrawn and that legislatures and executives, like courts, have obligations conscientiously to engage in constitutional interpretation and to vindicate constitutional norms.

For this approach to get off the ground, we need an account of constitutional interpretation outside the courts. That is, we need an account of what legislatures and executives are supposed to do when they engage in conscientious constitutional interpretation. It would be unpersuasive to contend that legislatures and executives are obligated to do exactly what courts must do when they engage in conscientious constitutional interpretation. Such an approach is both unrealistic and undesirable. We need and benefit from an institutional division of labor, even if we should not overstate what that division of labor is.

At the same time, it would be unpersuasive to say that we should take the Constitution away from the courts and just let legislatures and

¹⁵⁶ See *supra* note 140 and accompanying text.

¹⁵⁷ See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 34, 45-47 (1996).

executives go on as before. This course of action might be more acceptable for the president than for Congress, given the practice of the Office of Legal Counsel (OLC) in advising the President on constitutional issues. To be sure, the advice that the OLC renders is probably more court-centered than would be desirable in a "protestant" constitutional regime that takes the Constitution seriously outside the courts, but at least it is something.¹⁵⁸ Furthermore, because presidents in our "extended republic" may have more critical distance and detachment from the pressure of particular interests than do representatives and even senators, they may have more room to reflect upon and deliberate about constitutional questions.

Tushnet does not provide a full account of how legislatures and executives should go about interpreting the Constitution once we "take the Constitution away from courts." He mainly clears the ground for such an account and implies, in arguing against judicial supremacy, that legislators and executives may be more conscientious in resisting judicial interpretations of the Constitution than is commonly recognized.¹⁵⁹ He also says, in defending the capacities of legislators and executives to engage in conscientious constitutional interpretation, that "judicial overhang" may stunt the growth of such capacities.¹⁶⁰ He strongly implies that legislators and executives would do a better job of interpreting the Constitution if judicial overhang were eliminated by taking the Constitution away from courts.¹⁶¹ He is far less cynical, and far more sanguine, in assessing the incentives of legislatures and executives to engage in conscientious constitutional interpretation, than are most constitutional law professors and political science professors.¹⁶²

Fair enough. But we still need a fuller account of how legislators and executives should go about conscientiously interpreting the Constitution. Of course, Tushnet might contend that we do not need such an account because, on his view, the thick Constitution is already

¹⁵⁸ The Senate and House also have their own offices of legal counsel—the Office of Senate Legal Counsel and the General Counsel to the House—but those bodies (more than the executive branch's Office of Legal Counsel) mainly engage in constitutional review in a defensive posture, after legislation has been passed and is being challenged in litigation. On the one hand, one might think that such an after-the-fact practice makes it less likely that the Senate and House would conscientiously consider constitutional questions before passing legislation. On the other hand, one might think that bringing such offices into the legislative process to seek their advice on constitutional questions before legislation is passed would lead to a form of abdication: members of the Senate and House, instead of conscientiously deliberating about their responsibilities under the Constitution, might conceive constitutional questions as questions for their chambers' lawyers in their office of legal counsel.

¹⁵⁹ See TUSHNET, *supra* note 2, at 14-26.

¹⁶⁰ *Id.* at 57-65.

¹⁶¹ See *id.* at 65.

¹⁶² See *id.* at 95-128.

self-enforcing through the political processes and the thin Constitution should be treated as self-enforcing. Perhaps Tushnet's argument entails nothing more than the suggestion that legislators, executives, and citizens should frame their reflections, deliberations, and decisions more explicitly in terms of furthering the project of the thin Constitution. Thus, once we take the Constitution away from courts, it might turn out that the reflections, deliberations, and decisions of conscientious legislators, executives, or citizens would otherwise go on pretty much as before. In other words, Tushnet may have propounded as full an account of constitutional interpretation outside the courts as he needs or wants, given his conception of the thin Constitution and of its role in populist constitutional law.

But it seems that we need a richer account of constitutional interpretation outside the courts by legislatures, executives, and even citizens generally than Tushnet provides, as well as a richer account of legislation itself. One account, implicitly provided by Louis Fisher in his voluminous work on the Constitution outside the courts,¹⁶³ is that Congress and the president do a better job of protecting constitutional structures and rights than court-loving constitutional scholars would ever appreciate or acknowledge. Indeed, he claims that legislatures and executives do a better job than courts in this respect. This account reflects the view that Congress and the president have engaged in conscientious constitutional interpretation all along, even if they have not had a well articulated account of how to do so.

Another account, offered by Keith Whittington in *Constitutional Construction*,¹⁶⁴ is that Congress and the president are obligated to engage in, and have engaged in (to a larger extent than is realized), a practice of constitutional *construction* as distinguished from the practice of constitutional *interpretation* as it is carried on by courts.¹⁶⁵ One might welcome Whittington's account of construction without accepting his contrasting account of judicial interpretation. Furthermore, one might combine Whittington's account of constitutional construction by legislatures and executives with a Dworkinian account of constitutional interpretation by judges.

Still another approach, offered by Jeremy Waldron in *The Dignity of Legislation*,¹⁶⁶ is to provide a more positive picture of legislation than that which has characterized recent discussions of the relative institutional competences of courts and legislatures. This picture, as his title

¹⁶³ See, e.g., LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988); LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW (2d ed. 1996); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985).

¹⁶⁴ WHITTINGTON, *supra* note 1.

¹⁶⁵ See *id.* at 1-30.

¹⁶⁶ JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999).

suggests, would stress the dignity of legislation. Waldron evidently aspires to do for legislation what Dworkin is thought to have done for adjudication.¹⁶⁷ At the same time, Waldron also offers a more disparaging picture of adjudication than is common in the work of American constitutional scholars. Although Waldron's project of dignifying legislation certainly is a worthy one, it is not clear that he has realized it or that American legislatures are likely to live up to it. At the very least, however, Waldron has persuaded me that we must rethink our overly disparaging picture of legislation. Together, Waldron and Tushnet have persuaded me that we must rethink our overly glorifying picture of adjudication.

CONCLUSION

Realization of the calls for taking the Constitution seriously outside the courts and for developing forms of constitutional theory that are less court-centered has been slower than we might have hoped or expected. Tushnet's *Taking the Constitution Away from the Courts* makes considerable progress on this project. Notwithstanding my criticisms, I believe it to be Tushnet's best book yet and to be as provocative and significant a contribution to this project as we have seen to date. It certainly has helped clear the ground for others to carry forward this project.

¹⁶⁷ See *id.* at 1.

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