

## HERBERT WECHSLER'S COMPLAINT AND THE REVIVAL OF GRAND CONSTITUTIONAL THEORY

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In 1988, Mark Tushnet noted the “revival of grand theory in constitutional law.”<sup>1</sup> Tushnet was somewhat unusual in specifying the object of contemporary constitutional theory so precisely. As he noted, what had been revived in the late twentieth century was an “interest in comprehensive normative theories of constitutional law.”<sup>2</sup> There was relatively little broad concern with constitutionalism in this revival, but quite a lot of concern with justifying and elaborating the preferred constitutional decisions of the Supreme Court in specific cases.<sup>3</sup> Having “just published a book on constitutional theory that I unsurprisingly but undoubtedly erroneously regard as the last word on the subject,” Tushnet pronounced it time “to start doing something else.”<sup>4</sup> Just over a decade later, Tushnet has returned to constitutional theory with another book, but fortunately he has still produced “something else.” Rather than offering yet another comprehensive normative theory of constitutional law, Tushnet has engaged a different, grander tradition of constitutional theory that is more concerned with governmental systems and political authority than with judicial doctrine. His contribution to the revival of this tradition of grand constitutional theory is most welcome.

This new effort, *Taking the Constitution Away from the Courts*,<sup>5</sup> is a welcome relief from the usual project of praising or denouncing the constitutional law produced by the Warren, Burger, and Rehnquist Courts. The basic questions it asks—who should interpret the Constitution and what would be the consequences of sharply curtailing judicial review<sup>6</sup>—are radically different than the usual questions that law professors ask and that have dominated recent

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1. MARK V. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 1 (1988).

2. *Id.*

3. *See id.* at 1-2.

4. Mark V. Tushnet, *Constitutional Scholarship: What's Next?*, 5 *CONST. COMMENTARY* 28, 32 (1988).

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

6. *See id.* at x-xii.

constitutional theory. As a political scientist, I must admit that I found Tushnet's questions to be quite congenial, even when I disagreed with his particular arguments and conclusions. Mainstream constitutional theory has not generally asked such questions. Instead, it has been a deeply partisan enterprise and not only in the usual sense of the term. Constitutional theorists have been committed to looking over the shoulders of the Justices, "looking out and down from the perspective of [their] place."<sup>7</sup> Their problems have been the Justices' problems—how to interpret the Constitution and how to maintain judicial legitimacy.

To be sure, Tushnet's current effort still reflects the brooding presence of the Supreme Court. Congressional passage of the Religious Freedom Restoration Act of 1993<sup>8</sup> ensured that the Court would soon have to address the problem of who authoritatively interprets the Constitution, and the Court did not disappoint with its ardent assertion of judicial supremacy in *City of Boerne v. Flores*.<sup>9</sup> The problem of judicial supremacy ceased to be a matter of historical and theoretical interest and became a present issue in constitutional law.

The conservative Rehnquist Court is itself inherently disruptive to mainstream constitutional theory, encouraging a change in focus.<sup>10</sup> As Tushnet observed in 1988, constitutional theory "ha[d] been living off the remains of the Warren Court."<sup>11</sup> The Warren Court was activist and deferential in all the right places—expanding civil liberties while legitimating the nationalization and centralization of political decision-making.<sup>12</sup> The substantive commitments of the Warren Court and legal academics were in synch. But the Warren Court has been gone a long time, and the Rehnquist Court follows a different program. The Rehnquist Court seems unlikely to heed the recommendations of academic constitutional theorists, and its reduced caseload and more compromised rulings have encour-

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7. RICHARD E. NEUSTADT, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* at xxi (1990).

8. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

9. 521 U.S. 507, 536 (1997) (holding that the Religious Freedom Restoration Act of 1993 was unconstitutional).

10. See Sanford Levinson, *The Audience for Constitutional Meta-Theory (or, Why and to Whom, Do I Write the Things I Do?)*, 63 U. COLO. L. REV. 389, 403-07 (1992).

11. Tushnet, *supra* note 4, at 28.

12. See *id.* at 28-29.

aged even law professors to reconsider whether the Court stands at the center of the political universe. Moreover, the Court seems to have become activist in areas such as federalism, about which traditional constitutional theory has relatively little to say. The time may be ripe for legal academics to become interested in the question of whether the Constitution should be taken away from the Court. It is at least fitting that Tushnet, the great student of Thurgood Marshall, should be asking whether the Constitution ought to be taken away from *this* Court.

The specter of the Court hangs over this book in another way as well. When considering what should be next for constitutional theory in the late 1980s, Tushnet noted that one possibility was for constitutional theory to “turn away from its obsession with the Supreme Court.”<sup>13</sup> But, he added, “I think this is unlikely and perhaps even unwise.”<sup>14</sup> Tushnet may have overcome his fears of turning away from the Court by keeping one hand on the old and familiar. Judicial cases, legal problems, and legal arguments are prominent throughout the book and help structure the discussion. At the same time, however, Tushnet broadens the types of questions that constitutional theory should be asking and expands the types of considerations, evidence, and scholarship that will be necessary to address adequately those questions. Ultimately, the comparative institutional analysis for which he calls should engage a wide range of scholars from a number of disciplines. Hopefully, those ranks will include law professors. It should be an agenda-setting book, as well. This is an interesting and valuable book, filled with insights and thought-provoking discussions.

In this article, I want to suggest some of the ways in which this book challenges constitutional theory to move in a new direction. In the first section, I review some of the themes that I take to be characteristic features of constitutional theory over the past four decades. In the second section, I discuss several ways that Tushnet breaks from those traditional themes. In the third section, I briefly raise some concerns about his particular substantive arguments.

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13. *Id.*

14. *Id.*

## I. CONSTITUTIONAL THEORY AFTER WECHSLER

Contemporary constitutional theory has fairly specific origins from the late 1950s. Those origins also marked it with a fairly specific set of concerns raised most directly by the Court's decision in *Brown v. Board of Education*.<sup>15</sup> *Brown* posed basic problems to two cherished commitments of constitutional scholarship in the 1950s. The first commitment was political and reflected the New Deal's triumph over the *Lochner* Court.<sup>16</sup> Having struggled with decades of judicial intransigence to liberal reform and progressive legislation, the New Dealers were sharp critics of judicial activism.<sup>17</sup> The New Dealers portrayed their difficulties with the Court as a clear conflict between "democracy" and "nine old men."<sup>18</sup> There was a "basic inconsistency between popular government and judicial supremacy" that raised troubling problems of legitimacy for the Court.<sup>19</sup> The course of the struggle between the Roosevelt administration and the Court also taught an important political lesson—an activist judiciary is vulnerable to political attack.<sup>20</sup> The near success of the Court-packing plan emphasized the vulnerability of the Court. Political and popular tolerance of the Court was limited; judicial legitimacy was fragile.<sup>21</sup> An incautious Court could lose its independence.

The second commitment of constitutional scholars in the postwar period was jurisprudential, though this too was influenced by the New Deal experience. An essential feature of the law and the judicial articulation of the law was sound reasoning.<sup>22</sup> An important function of the courts was to be principled and reasonable. Moreover, this professional and institutional obligation on the part of the courts was also essential to its legitimacy.<sup>23</sup> In the postwar period, the law needed to be reconstructed in response not only to the

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15. 347 U.S. 483 (1954).

16. The Court derived this name from its decision in *Lochner v. New York*, 198 U.S. 45 (1905), and other decisions it made in that time period.

17. See generally ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941).

18. DREW PEARSON & ROBERT S. ALLEN, *THE NINE OLD MEN* (1936) (providing a journalistic account of the Court that popularized the view that the Justices were old men out of touch with the times).

19. JACKSON, *supra* note 17, at vii.

20. See *id.* at 323-24 ("By impairing its own prestige through risking it in the field of policy, it may impair its ability to defend our liberties.")

21. See *id.* at xix.

22. See NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 258-59 (1995).

23. See *id.* at 258-60.

challenge of the Legal Realists, but also to the challenge of the New Deal's rejection of decades of constitutional law precedent. For postwar constitutional scholars, the answer could be found in the *Lochner* Court's substitution of politics for principle. The Roosevelt administration mounted an attack on "an abuse of power, not on the institution itself."<sup>24</sup>

Constitutional theory was given its modern form by Herbert Wechsler's complaint about *Brown*.<sup>25</sup> Wechsler articulated the basic challenge that *Brown* represented to this post-New Deal scholarly consensus; consequently, constitutional theory has been struggling to accommodate decisions like *Brown* within that framework ever since.<sup>26</sup> In essence, modern constitutional theory was driven by Wechsler's professional complaint that the Court in *Brown* did not adequately adhere to norms of principled justification when explaining its decision.<sup>27</sup> Stephen Griffin called the style of constitutional theory at mid-century "the learned tradition," centrally concerned with "proper craftsmanship."<sup>28</sup> Constitutional theorists provided the "descriptive-explanatory and evaluative-prescriptive" framework that could be used to guide and critique the Court's constitutional efforts, while justifying the Court's role in exercising the power of judicial review.<sup>29</sup>

Wechsler defined the theoretical agenda with his 1959 Holmes Lecture at Harvard Law School.<sup>30</sup> In the 1958 Holmes Lecture, Judge Learned Hand, arguing that only a sharply restrained Court could avoid becoming "a third legislative chamber," threw down the gauntlet to defenders of the Court.<sup>31</sup> Picking up that gauntlet, Wechsler defined the task of constitutional theory as explaining how an activist judiciary could function as "courts of law" rather than "as a naked power organ."<sup>32</sup> This distinction has a long pedigree in American constitutional thought, dating back to Alexander Hamilton and John Marshall. It periodically comes under siege, however,

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24. JACKSON, *supra* note 17, at xiii.

25. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing that courts have the power and duty to decide all constitutional cases where jurisdictional and procedural requirements are met).

26. See *id.* at 22-24.

27. See *id.*

28. Stephen M. Griffin, *What Is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. CAL. L. REV. 493, 498 (1989).

29. *Id.*

30. See Wechsler, *supra* note 25, at 1.

31. LEARNED HAND, *THE BILL OF RIGHTS* 55 (1958).

32. Wechsler, *supra* note 25, at 12.

as it did from the Legal Realists.<sup>33</sup> Although critical of Hand's conclusions favoring a fairly radical judicial restraint, Wechsler was similarly concerned that the Supreme Court was abandoning its legitimate role and risking the "misuse of judicial power."<sup>34</sup> Even before the *Brown* case was argued and decided, Wechsler voiced similar concerns about the inadequate constitutional reasoning of the desegregationists in an NAACP strategy session.<sup>35</sup> Desegregation was an admirable political goal, but Wechsler did not see how it could be achieved by the Court's employment of traditional legal tools.<sup>36</sup>

Not all constitutional scholars agreed with Wechsler's complaint about the Court's action and reasoning in cases like *Brown*.<sup>37</sup> Nonetheless, Wechsler's concern was grounded in widespread post-New Deal understandings about the role of the judiciary in the American constitutional system.<sup>38</sup> His articulation of those themes was decisive in shaping contemporary constitutional theory. An activist judiciary created real intellectual problems for those of Wechsler's generation, given the centrality of their opposition to the *Lochner* Court to their political experience.<sup>39</sup> Being substantively more sympathetic to the actions of the Warren Court, the emerging constitutional theory revolved around the effort to legitimate activist judicial review. The Warren Court tended to define the experience of a subsequent generation of constitutional scholars, who unsurprisingly were more confident in their efforts to justify

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33. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); THE FEDERALIST NO. 78 (Alexander Hamilton); see also SILVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 109-75 (1990); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 53-60, 196-200 (1988).

34. Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 U. COLO. L. REV. 854, 929 (1993).

35. See, e.g., RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 529-30 (1975).

36. See Wechsler, *supra* note 25, at 27-33.

37. See, e.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Charles E. Clark, *A Plea for the Unprincipled Decision*, 49 VA. L. REV. 660 (1963); Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections between Law and Political Science*, 20 STAN. L. REV. 169 (1968); Eugene V. Rostow, *American Legal Realism and the Sense of the Profession*, 34 ROCKY MTN. L. REV. 123 (1962); Benjamin F. Wright, *The Supreme Court Cannot Be Neutral*, 40 TEX. L. REV. 599 (1962).

38. See Silber & Miller, *supra* note 34, at 925 (claiming that there was "nothing novel" in Wechsler's core theory).

39. See *id.* at 924 ("Having learned through that experience of the consequences of judicial excess, we became highly sensitive to it, and on the whole, I should say, eager to develop the type of critique that would contribute to avoiding it.").

judicial review and more specific in their efforts to guide judicial doctrine.<sup>40</sup>

The purpose of post-Wechslerian constitutional theory is “to develop a generally accepted theory to guide the interpretation of the Constitution of the United States” by the federal judiciary.<sup>41</sup> Constitutional theorists “refine the raw materials” of judicial opinions, seeking to “develop justificatory theories that provide a more comprehensive account of the judges’ actions than the judges themselves could offer.”<sup>42</sup> This goal has severely limited the scope of the theoretical enterprise. Judge Learned Hand’s critique of judicial review was not integrated into constitutional theory; it was the rationale for theorizing. Constitutional theorists have been advocates for their preferred judicial doctrines, for their preferred judicial opinions, and for the institution of judicial review itself. For some, defending the institution of judicial review required limiting its scope, as Alexander Bickel and Robert Bork have argued.<sup>43</sup> For many others, the purpose of defending judicial review was to expand its scope.<sup>44</sup> In either case, the Court and its work were not merely at the center of the scholarly enterprise, but defined its very purpose. As Wechsler later explained, his article “was a defense of judicial review,”<sup>45</sup> and as he noted at its beginning, “I have not the slightest doubt about the legitimacy of judicial review.”<sup>46</sup> The question is simply how that power should be exercised.

Wechsler’s specific argument defending the Court also became a dominant theme of contemporary constitutional theory. Principled reasoning, according to much of contemporary constitutional theory, is the exclusive preserve of the courts. Wechsler himself asserted that “no one will deny, that principles are largely instrumental as they are employed in politics, instrumental in relation to results

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40. See Martin Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in *THE BURGER COURT* 218-23, 236-38 (Vincent Blasi ed., 1983).

41. Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 1 (1998).

42. Mark V. Tushnet, *Judges and Constitutional Theory: A View from History*, 63 U. COLO. L. REV. 425, 426 (1992).

43. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1962) [hereinafter BICKEL, *THE LEAST DANGEROUS BRANCH*]; ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 173-81 (1970); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 139-60, 241-65 (1990).

44. See, e.g., RONALD M. DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 261-347 (1996).

45. Silber & Miller, *supra* note 34, at 931.

46. Wechsler, *supra* note 25, at 2.

that a controlling sentiment demands at any given time.”<sup>47</sup> Principles are “reduced to a manipulative tool” in politics.<sup>48</sup> By contrast, “the main constituent of the judicial process is precisely that it must be genuinely principled.”<sup>49</sup> Henry Hart lauded the Court as “a voice of reason” among American political institutions, and Alexander Bickel similarly thought that, whereas legislatures were motivated by mere expediency, the Court provided what the political system otherwise lacked—principled reasoning.<sup>50</sup> Ronald Dworkin, perhaps the leading current proponent of this view, asserted that the Court is a unique “institution that calls some issues from the battleground of power politics to the forum of principle.”<sup>51</sup>

It is worth calling attention to three separate features of this argument. First, it assumes the Court does in fact engage in principled reasoning. Wechsler himself was somewhat ambiguous about the nature of his claim, sometimes suggesting that reasoned elaboration of the basis for decisions was normatively important for courts and sometimes suggesting that it was descriptively central to the judicial process.<sup>52</sup> That tension has been retained in constitutional theory, which continues to assert a desire to “explain the evolving content of constitutional law” in terms of principled reasoning.<sup>53</sup> Second, it assumes that other political actors do not engage in principled reasoning. The elected branches of government are understood to be disinterested in and incapable of reasoning about constitutional meaning. As Owen Fiss asserted most directly, legislatures “are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preference of the people—what they want and what they believe should be done.”<sup>54</sup> Similarly, Dworkin has dismissed legislatures as concerned with issues of political power alone rather than with

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47. *Id.* at 14.

48. *Id.* at 15.

49. *Id.*

50. Henry M. Hart, Jr., *The Time Chart of the Justices—Foreword*, 73 HARV. L. REV. 84, 99 (1959); BICKEL, *THE LEAST DANGEROUS BRANCH*, *supra* note 43, at 58.

51. RONALD M. DWORKIN, *A MATTER OF PRINCIPLE* 71 (1985).

52. *See* Wechsler, *supra* note 25, at 19; *see also* DUXBURY, *supra* note 22, at 269-70.

53. Terrance Sandalow, *Judicial Protections of Minorities*, 75 MICH. L. REV. 1162, 1165 (1977); *see also* STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM* 156-58 (1996); Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1767 (1997).

54. Owen Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 10 (1980).



issues of principle.<sup>55</sup> Third, it is understood that constitutionalism is centrally about matters of principled reasoning, morality, and justice. Constitutions are about removing some decisions of principle from the hands of political majorities who merely seek to assert their will.<sup>56</sup> The value of judicial reasoning is that it converts questions of naked power and occurrent preferences into questions of justice.<sup>57</sup> Dworkin concludes that some might “call that religion or prophecy,” but he “call[s] it law.”<sup>58</sup> Wechsler would have understood.

## II. THE *OTHER* GRAND CONSTITUTIONAL THEORY

Tushnet’s book breaks from the Wechslerian theoretical project. In doing so, it joins a rather different tradition of grand constitutional theorizing that has deeper historical roots and broader political aspirations. In this book, Tushnet does not offer yet another defense of *Brown*<sup>59</sup> and *Roe*,<sup>60</sup> and he does not ask us to ponder how the Court should decide its next set of constitutional cases, nor what might be a better rationale for the Court’s recent decisions. The book does not ask that most basic of legal questions—what does this Constitution mean?—nor does it develop an interpretive theory that would tell us how to answer that question. This is not a book of constitutional interpretation.<sup>61</sup>

A second tradition of grand constitutional theorizing has operated alongside the Wechslerian tradition. Unlike theory in the Wechslerian vein, this second theoretical tradition has not concentrated on constitutional law.<sup>62</sup> Instead of interpreting this Constitu-

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55. See DWORKIN, *supra* note 51, at 70.

56. See *id.* at 69-70; see also Paul W. Kahn, *Reason and Will in the Origins of American Constitutionalism*, 98 YALE L.J. 449 (1989).

57. See Wechsler, *supra* note 25, at 12; see also DWORKIN, *supra* note 51, at 71; Fiss, *supra* note 54, at 10.

58. DWORKIN, *supra* note 51, at 71.

59. *Brown v. Board of Education*, 347 U.S. 483 (1954).

60. *Roe v. Wade*, 410 U.S. 959 (1973).

61. Cf. Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984) (“We are all interpretivists; the real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt.”).

62. The broader approach to constitutional theory has been maintained in a variety of scholarly communities, from the British jurisprudential school, to the “Princeton school” of constitutional studies nurtured by Walter Murphy, to the Political Economy for a Good Society group, to the “constitutional political economy” of public-choice scholars. See generally

tion, this second tradition has been concerned with broad constitutionalism.<sup>63</sup> It has asked how constitutions work, how they are maintained over time, and what the conditions of their success are.<sup>64</sup> This theoretical tradition has deep roots in political philosophy and political practice, and it includes the efforts of the American Founders themselves.<sup>65</sup> More recent scholarly efforts in this mode have largely, though not entirely, occurred outside the law schools.

### 1. From "How to Interpret?" to "Who Interprets?"<sup>66</sup>

Tushnet departs from the mainstream of contemporary constitutional theory in a number of ways. He begins his book by shifting the basic question of his constitutional theory from how to interpret the Constitution to who should interpret the Constitution.<sup>67</sup> This question has gained new currency as a result of the high profile congressional challenge to the Court's interpretation of the Free Exercise Clause<sup>68</sup> and the Court's subsequent rejection of this legislative challenge to judicial supremacy.<sup>69</sup> The *Boerne* Court, quoting Marshall, argued that "if Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts . . . alterable when the legislature shall please to alter it.'"<sup>70</sup> Not surprisingly, the Court concluded, "Under this approach, it is difficult to conceive of a principle that would limit congressional power."<sup>71</sup> The Court begged the question,

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CONSTITUTIONAL THEORY AND CONSTITUTIONAL STUDIES (Sotirios A. Barber & Robert P. George, eds., forthcoming) (on file with author); A NEW CONSTITUTIONALISM: DESIGNING POLITICAL INSTITUTIONS FOR A GOOD SOCIETY (Stephen L. Elkin & Karol Edward Soltan, eds., 1993); CHARLES K. ROWLEY, CONSTITUTIONAL POLITICAL ECONOMY IN A PUBLIC CHOICE PERSPECTIVE (1997).

63. See discussion *supra* note 62.

64. See discussion *supra* note 62.

65. See discussion *supra* note 62.

66. Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. OF POL. 401, 403-06 (1986); see also WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 14-19 (2d ed. 1995).

67. See TUSHNET, *supra* note 5, at ix-xii.

68. U.S. CONST. amend. I.

69. See, e.g., Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997); Symposium, *Reflections on City of Boerne v. Flores*, 39 WM. & MARY L. REV. 601 (1998).

70. *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall, C.J.)).

71. *Id.*

however, of whether congressional *interpretation* of its constitutionally delegated powers is equivalent to congressional *alteration* of those powers and of constitutional meaning. Certainly, the Court would deny that its own interpretive efforts amount to "altering the Fourteenth Amendment's meaning,"<sup>72</sup> though outside observers, including many in Congress, may be inclined to disagree.

The prospect of constitutionalism outside the courts has attracted increasing attention from constitutional theorists over the past several years. Paul Brest and Sanford Levinson have long encouraged constitutional theorists to look beyond the courts.<sup>73</sup> Bruce Ackerman's expansive *We the People* project has developed a theory of constitutional politics that supplements the written Constitution with unconventional amendments to be interpreted by the Court.<sup>74</sup> Rather differently, Cass Sunstein has called for a judicial minimalism that would leave room for constitutional deliberation outside the courtroom.<sup>75</sup> Such works tend to remain centrally interested, however, in the old questions of judicial legitimacy, the degree of deference the Court should show elected officials, and court-centered constitutional interpretation. The Reagan administration's criticisms of the Court and judicial supremacy sparked some interest in the problem of judicial authority and the President's independent constitutional responsibilities.<sup>76</sup> *Boerne* may help push constitutional theorists to engage in further fundamental considerations of who should, and does, interpret the Constitution.<sup>77</sup>

In recent years, the problem of judicial supremacy and who should interpret the Constitution was posed most directly and forcefully by Walter Murphy and a cluster of constitutional scholars loosely associated with Princeton University.<sup>78</sup> Murphy himself emphasized that the question of who should interpret the Constitution has been a persistent one in American political history and is theoretically

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72. *Id.*

73. See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (2000); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123 (1980).

74. See 1 BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE A. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

75. See CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3-72 (1999); CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 145-53 (1993).

76. See Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 906 (1990); Edwin Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979, 984-88 (1987).

77. See generally *City of Boerne v. Flores*, 521 U.S. 507 (1997).

78. See generally CONSTITUTIONAL THEORY AND CONSTITUTIONAL STUDIES, *supra* note 62.

distinct from the more commonly asked question of how it should be interpreted.<sup>79</sup> Wechslerian constitutional theory did not bother to pose the question of who should interpret. Its starting point was the assertion that the Court was the special guardian of the Constitution and that, if the judiciary did not take care to interpret the Constitution, then no one else would.<sup>80</sup> A number of scholars have been skeptical of that claim.<sup>81</sup> Political actors outside the courts often took the Constitution seriously and offered their own independent interpretations of it.<sup>82</sup> Moreover, they often challenged the supremacy of the judiciary by choosing among competing interpretations of the constitutional text.<sup>83</sup> In the midst of the New Deal debates about the scope of judicial authority over the Constitution, the great Princeton constitutional scholar Edward Corwin labeled this alternative conception of constitutional interpretation departmentalism, in which each branch of government has equal authority to interpret the Constitution.<sup>84</sup> He traced its pedigree back to Thomas Jefferson and noted both its formal logic and its historical persistence.<sup>85</sup> Sanford Levinson's notion of constitutional Protestantism further broadens interpretive authority beyond government institutions to individuals.<sup>86</sup>

Notably, the theoretical challenge to judicial supremacy makes it possible to move the Constitution beyond the control of a judicial elite. Tushnet exploits that opportunity in his call for a populist constitutional law.<sup>87</sup> His constitutional populism is not simply a

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79. See Murphy, *supra* note 66, at 410-17.

80. See Wechsler, *supra* note 25, at 3.

81. See generally SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY (1992); JOHN J. DINAN, KEEPING THE PEOPLE'S LIBERTIES: LEGISLATORS, CITIZENS, AND JUDGES AS GUARDIANS OF RIGHTS (1998); GRIFFIN, *supra* note 53; DONALD MORGAN, CONGRESS AND THE CONSTITUTION (1966); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985); Mark A. Graber, *Delegalizing Constitutional Theory*, 6 THE GOOD SOCIETY 47 (1996).

82. See generally NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES (1996); DINAN, *supra* note 81; LOUIS FISHER, CONSTITUTIONAL DIALOGUES (1988); MORGAN, *supra* note 81; WHITTINGTON, *supra* note 81; Fisher, *supra* note 81.

83. See Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 366-89 (1997); Murphy, *supra* note 66, at 410-12; Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994).

84. See EDWARD S. CORWIN, COURT OVER CONSTITUTION 4-7 (1938).

85. See *id.* at 7, 69-70.

86. See Levinson, *supra* note 73, at 137-48.

87. See TUSHNET, *supra* note 5, at x-xi.

metaphor for how the Court should interpret the Constitution.<sup>88</sup> His point is not that the Court should take the people seriously as a source of or audience for constitutional law, but that the people have the right to seize control of constitutional interpretation and engage directly in a constructive constitutional project.<sup>89</sup> Wechslerian constitutional theory tended to be fairly skeptical of the preferences and moral opinions of the people and the threat that they posed to judicially understood constitutional law.<sup>90</sup> Tushnet insists that we question the authority of the Court to control the terms of constitutional debate.<sup>91</sup>

Importantly, Tushnet emphasizes that political actors will engage in a substantively different process of realizing constitutional values than that which characterizes judicial proceedings.<sup>92</sup> In discussing the Senate debates over the confirmation of Judge Robert Bork's nomination to the Supreme Court, Tushnet notes that Bork and the senators "were discussing the Constitution in front of the American people."<sup>93</sup> In doing so, "they were *constructing* the First Amendment for public edification, not *construing* it. To criticize them for misunderstanding the Court's doctrine is itself to misunderstand the activity in which they were engaged."<sup>94</sup> In form, substance, and purpose, constitutionalism outside the courts is unlikely to resemble constitutionalism inside the courts. The existing apparatus of constitutional theory cannot simply be transferred from the courtroom to the legislature and be employed as before. A new type of theory will be necessary to advance our understanding of nonjudicial constitutionalism.

### B. *Taking Judicial Review Seriously*

Wechslerian constitutional theory began with the rejection of Judge Learned Hand's radical challenge to judicial review. Although

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88. Cf. RICHARD D. PARKER, *HERE, THE PEOPLE RULE* 108-09 (1994) ("The Populist solution to the problem, I believe, is to deflate constitutional discourse, to deflate its pretension to argue about, and in the name of, 'higher' law.>").

89. See TUSHNET, *supra* note 5, at 181-94.

90. See DWORKIN, *supra* note 51, at 69; FISS, *supra* note 54, at 10.

91. See TUSHNET, *supra* note 5, at 6-32.

92. See *id.* at 51-71. Perhaps fortuitously, I have also emphasized the political construction of constitutional meaning as a distinct activity from the judicial interpretation of the text.

93. *Id.* at 64.

94. *Id.*; see WHITTINGTON, *supra* note 81, at 1-19.

Tushnet's argumentative substance and tone are different than Hand's, he reopens the questions asked by Hand and insists that the basic legitimacy and desirability of judicial review not be taken for granted.<sup>95</sup> I must admit that I find Tushnet's critique of judicial review somewhat unfortunate in the context of this book. Tushnet begins the book with the problem of judicial supremacy and that issue occupies most of its pages.<sup>96</sup> Tushnet's analysis of the problems of judicial supremacy is sophisticated and useful; the linkage of that analysis with his ultimate rejection of judicial review itself is likely to diminish the influence of his earlier arguments.<sup>97</sup> Critics of judicial supremacy have often been dismissed as enemies of judicial review, and Tushnet may feed that inclination by exposing departmentalism's secret agenda. In his review of the book, for example, Judge Richard Posner makes no distinction between the two parts of Tushnet's analysis, and simply regards the whole book as an "interesting heresy" that is "quixotic" in its "attacks on judicial review."<sup>98</sup> Judicial supremacy and judicial review are related but nonetheless distinct constitutional concepts, and they must ultimately be judged on their own independent merits and receive separate hearings.

Having said that, Tushnet's radical critique of judicial review is a valuable one. I will leave aside for now a particular consideration of whether Tushnet might actually be right in his attack on judicial review.<sup>99</sup> If he is, then the value of the critique would be self-evident. At the very least, it is useful to have those debates now and again. Tushnet's work, along with the rather different work of the political theorist Jeremy Waldron,<sup>100</sup> should at least shake us from our intellectual complacency and force us to develop more careful and compelling defenses of judicial review. Tushnet forces us to rethink judicial review and American constitutional practice from the ground up,<sup>101</sup> and we might well find a number of problems with the existing edifice as we proceed with the examination. The institution that we decide is defensible may bear little resemblance to the institution with which we live today.

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95. See TUSHNET, *supra* note 5, at 129-53 (assessing judicial review).

96. See, e.g., *id.* at 6-32 (discussing theories opposed to judicial supremacy).

97. See *id.*

98. Richard A. Posner, *Appeal and Consent*, THE NEW REPUBLIC, Aug. 16, 1999, at 36 (reviewing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)).

99. See discussion and notes *infra* Part III.

100. See JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

101. See, e.g., TUSHNET, *supra* note 5, at 154-76.

The critique is also a valuable one because it helps break the institutional bias of Wechslerian constitutional theory.<sup>102</sup> That institutional bias has had numerous baneful consequences for constitutional theory. It has limited the scope of the questions that scholars have been willing to pursue and contributed to their obsession with legal advocacy for favored constitutional doctrines. The problems of the Court become the problems of constitutional theory. As a consequence, the theoretical debate congregates at the margins of current judicial practice. Substantive constitutional issues or positions that are unlikely to be heard or adopted by the Court are left underexamined. Adopting the perspective of the Court encourages the theorist to embrace judicial power and expand the scope of judicial review. All of our theoretical sympathies are aligned with one institutional actor, at the expense of others.

Beyond the normative implications of such institutional partisanship, the judicial perspective also limits our capacity to understand our historical constitutional practice. Scholarship is biased toward those subjects that might prove useful for the judiciary.<sup>103</sup> As a consequence, constitutional theory tends to privilege texts over political practice, legally significant historical periods over other periods of American history, and theories of constitutional interpretation over theories of constitutional operation. Breaking free from the judicial perspective may serve to expand the constitutional canon and open up new areas of scholarly inquiry.<sup>104</sup>

Tushnet's willingness to reconsider the foundations of judicial review also opens the possibility of a more objective examination of the judiciary itself and of more serious comparative institutional analysis. Constitutional theory has relied on a highly idealized vision of the Court—rational, noble, and omnipotent. Tushnet quite rightly insists that we take the actual practice of judicial review more seriously before we build our lofty theoretical fabrications on top of it.<sup>105</sup> As political scientists have long argued, Tushnet points

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102. See discussion and notes *supra* Part I.

103. See, e.g., J.M. Balkin & Sanford Levinson, *Commentary: The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1016 (1998) (arguing that casebooks' "willful ignorance of nonjudicial interpreters" causes law students to "end up believing that constitutional interpretation is the exclusive province of the judiciary").

104. See *id.* at 1014-18.

105. See TUSHNET, *supra* note 5, at 154-76 (arguing against judicial review).

out that the Court is a political institution.<sup>106</sup> It is political not only in the types of questions it must answer, but also in the types of answers it provides.<sup>107</sup> It is political in that the Justices are not sealed off from their outside environment. Rather, the Court often reflects the interests and opinions of those who occupy political power in the other branches of government. As Robert Dahl long ago observed, the Court is more likely to be a partner with the rest of the national government than its watchdog.<sup>108</sup> Even if the Court was inclined to resist the concerted efforts of other powerful political actors, it is far from certain that it would have the institutional capacity to succeed.<sup>109</sup> Tushnet overstates the case in concluding that “judicial review basically amounts to noise around zero”<sup>110</sup> and that “vigorous judicial review does not make much difference one way or the other,”<sup>111</sup> but his skepticism of the ultimate value of judicial review is certainly warranted.

Constitutional theory has too often relied on a rosy picture of the judiciary and on images of the legislature that are not valued for any particular descriptive verisimilitude.<sup>112</sup> Surely normative constitutional theory should take greater account of what we know about how government institutions actually operate. This will require some adjustments in what legal academics regard as “relevant” scholarship.<sup>113</sup> There is little point to incorporating better understandings of judicial behavior into constitutional theory if the intended audience is primarily composed of judges looking for well-

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106. For recent overviews, see, for example, SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999), and THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Cornell Clayton & Howard Gillman eds., 1999).

107. Cf. Wechsler, *supra* note 25, at 15. Wechsler notes that courts in constitutional determinations face issues that are inescapably “political” . . . in that they involve a choice among competing values or desires, a choice reflected in the legislative or executive action in question, which the court must either condemn or condone. . . . But what is crucial, I submit, is not the nature of the answer that may validly be given by the courts.

*Id.*

108. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 293 (1957) (“The Supreme Court is not, however, simply an *agent* of the alliance. It is an essential part of the political leadership . . .”).

109. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 10-21 (1991).

110. TUSHNET, *supra* note 5, at 153.

111. *Id.* at 174.

112. See WALDRON, *supra* note 100, at 31-32.

113. See Symposium, *Ira C. Rothberger, Jr. Conference on Constitutional Law: Constitutional Theory and the Practice of Judging*, 63 U. COLO. L. REV. 291 (1992).



argued legal briefs. Legal advocacy may well improve if it is grounded on an appropriate appreciation of the nature and limits of judicial decision-making, but the more central point is that it is high time for those who hope to understand the Constitution to move beyond what Woodrow Wilson denounced as “literary theory.”<sup>114</sup> Not only is normative argument likely to be ineffective if too abstracted from political reality, but it is also likely to be bad normative argument.

The Wechslerian defense of judicial review, and of subsequent defenses of activist judicial review, is grounded in a particular image of the political branches as venal, unprincipled, and small-minded.<sup>115</sup> If that portrait proves to be flawed, then the dominant assumptions about when and why judicial review should be exercised are wrong. Constitutional theory has built elaborate castles in the air. Tushnet is at least proposing that we build our theories on firmer foundations. Constitutional theory in the future should have far more empirical and political analysis than it generally does at present.

### C. *Beyond Moral and Legal Theory*<sup>116</sup>

*Taking the Constitution Away from the Courts* is a ready response to Chief Judge Richard Posner’s complaint that constitutional theory has given over to moral philosophizing.<sup>117</sup> Like most contemporary constitutional theory, this work is normative in its goals. Tushnet is concerned with mounting a serious critique of judicial review and arguing for the positive virtues of a constitutional regime without judicial review.

Beyond the radical particulars of Tushnet’s conclusion, however, his argument is distinguished by its emphasis on the institutional rather than the legal. His concern is strictly with the scope of judicial review rather than with the particular use of judicial review. Moreover, his interest in judicial review does not primarily hinge on its substantive outcomes, at least not in the usual sense.

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114. See WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 31 (1st ed. 1956).

115. See *supra* notes 41-58 and accompanying text.

116. See Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998).

117. See *id.* at 1638.

He criticizes the Court for its effects on the political system as a whole, rather than for reaching bad results in the cases it decides. The particular direction of the Court's decisions is less important than the fact that it distracts other political actors from their own constitutional responsibilities.<sup>118</sup>

Unlike many critics of the Court, Tushnet is not frightened by the possibility of judicial tyranny. As Alexander Hamilton observed, the Court is simply too weak to be much of a threat to the type of preferred political order Tushnet advances.<sup>119</sup> At the same time, it is too weak to be much of an asset in bringing about that ideal order as well. Tushnet grounds his critique less in the moral culpability of the Court than in its political inadequacy. Moral philosophy is less useful in building such a case than is political science. Tushnet's argument is grounded in a positive normative vision, but the structure of the argument is morally thin.

Moral philosophy comes most directly into play in the book through Tushnet's argument in favor of a "thin Constitution."<sup>120</sup> Tushnet draws a contrast between the "thick Constitution" that provides the structural details of government and the various specific rules governing political behavior<sup>121</sup> and the "thin Constitution" that is rooted in the principles of the Declaration of Independence and sets out the great, and abstract, principles of liberty and self-governance.<sup>122</sup> The American political system is valuable to the extent that it adheres to the thin Constitution, not to the thick.<sup>123</sup> The thick Constitution simply provides the messy, pragmatic, mutable details that help realize the goals of the thin Constitution.<sup>124</sup> It is the thin Constitution that Tushnet wants to defend and that provides the basis of his populist constitutional law.<sup>125</sup> Somewhat surprisingly, however, Tushnet has little of substance to say about the thin Constitution. The thin Constitution remains extremely thin in *Taking the Constitution Away from the Courts*. The Constitution Tushnet wants to defend, and thinks Americans

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118. See, e.g., TUSHNET, *supra* note 5, at 6-32 (arguing against judicial supremacy).

119. See THE FEDERALIST NO. 78, *supra* note 33.

120. See TUSHNET, *supra* note 5, at 9-14.

121. See *id.* at 9.

122. See *id.* at 11.

123. See *id.* at 14.

124. See *id.* at 9.

125. See *id.* at 13.

generally want to defend,<sup>126</sup> seems to consist of little more than a few rhetorical slogans.

In keeping with the theoretical aims of the book as a whole, Tushnet does not seek to interpret this thin Constitution. He does not tell us what this Constitution is or how we should interpret it. The process of fleshing out the basic skeleton of the thin Constitution is presumably a political task for the people.<sup>127</sup> Nonetheless, it is easy to imagine future constitutional theorists, perhaps Tushnet himself, returning to this interpretive task and offering guidance and advice on how political actors should interpret the Constitution and, indeed, on what the Constitution really means. Unavoidably, moral philosophy will rush back into that new interpretive project.

For now, however, Tushnet focuses on questions of constitutional design rather than of particular substantive content. Most of contemporary constitutional theory emphasizes the philosophical question of the appropriate limits to political power and consequent scope of individual rights and the judicial enforcement of that boundary. By contrast, Tushnet's analysis focuses on the operation of the institutions that must exercise political power. Despite Tushnet's rejection of the thick Constitution as highly mutable,<sup>128</sup> his theoretical concerns are largely structural—in a political, rather than an interpretive, sense. His analysis is Madisonian in its emphasis on practical consequences and significance of checks and balances, divided powers, and patterns of electoral representation.<sup>129</sup> Such an approach is critical not only for evaluating the influence of the institution of judicial review on the actions of the other branches of government, but also for considering the determinants of substantive political decisions. Is judicial review really necessary to the healthy functioning of the political system? Does the judiciary's activity indicate that it is actually altering the course of political outcomes, or does it merely obscure the workings of more fundamental political dynamics?

Tushnet's approach is also a significant advancement in its effort to incorporate political incentives into constitutional theory.<sup>130</sup> Such

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126. *See id.* at 12 (“[O]rdinary people could be committed to the thin Constitution in ways they could never be committed to the thick Constitution.”).

127. *See id.* at 14 (arguing that “disagreements over the thin Constitution’s meaning are best conducted by *the people*, in the ordinary venues for political discussion”).

128. *See id.* at 9.

129. *See, e.g., id.* at 96-123.

130. *See id.* at 95-128 (discussing the incentive-compatible Constitution).

efforts will be essential to integrating an empirical analysis of the actual operation of the constitutional system into constitutional theory. Wechslerian constitutional theory has posited a judiciary removed from politics, as well as a political system largely incapable of preserving constitutional values absent judicial intervention. The judiciary cannot be understood as operating outside of any political context. The Court is responsive to and constrained by the larger political environment. If constitutional values are to be preserved, they must be preserved within the operation of the constitutional system as a whole and not through the *deus ex machina* of an idealized judicial review. The Constitution must ultimately be “incentive-compatible” or “self-enforcing,” for there is no force external to politics that is capable of enforcing its terms.<sup>131</sup> In one of the strongest chapters in the book, Tushnet provides a very interesting exploration of the concept of an incentive-compatible Constitution and how it might be applied to the American context.<sup>132</sup> As he notes, “[i]ncentive-compatibility arguments may inevitably rest on empirical judgments that are both contentious and changeable.”<sup>133</sup> To be operative at all, the Constitution must in some sense be incentive-compatible—those who must live within the Constitution must have incentives to maintain rather than subvert it. The operation of those political incentives is likely to change over time, however. The political supports for decentralized federalism, for example, were largely washed away in the late nineteenth and early twentieth centuries, and the shape of the American federal system was transformed as a consequence.<sup>134</sup> Likewise, as a result of demographic trends, the slave-holding states gradually lost electoral influence in the antebellum Congress, weakening the constitutional security of slavery until the national commitment to the protection of slave property was no longer credible, and the Union itself collapsed.<sup>135</sup> The constitutional system is fluid.

Recognizing the importance of political incentives, however, need not exclude values from the realm of politics and constitutionalism. As Tushnet usefully points out, we can have “a *value-based* rather

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131. *See id.* at 95.

132. *See id.* at 95-128.

133. *Id.* at 99.

134. *See* Keith E. Whittington, *Dismantling the Modern State? The Changing Structural Foundations of Federalism*, 25 HASTINGS CONST. L.Q. 483, 483-88 (1998).

135. *See* MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (forthcoming) (on file with author); Barry R. Weingast, *Political Stability and Civil War: Institutions, Commitment, and American Democracy*, in ANALYTIC NARRATIVES 148 (Robert H. Bates et al. eds., 1998).

than a structure-based account of self-enforcing constitutional provisions.<sup>136</sup> Political actors, including voters, are part of an ongoing constitutional culture. They take constitutional values seriously, and thus often refrain from abusing the powers with which they have been entrusted.<sup>137</sup> This insight could be used simply to legitimate a preaching normative constitutional theory, ostensibly intended to shape and refine our substantive constitutional values. More interestingly, it suggests the need for constitutional scholars to explore what actual values motivate political actors, how they are formed, how they change, and how they are effectuated in political practice. Ultimately, it may be that constitutional culture that is most important to ensuring both individual rights and political justice.<sup>138</sup>

#### D. *Beyond "Advocacy Scholarship"*<sup>139</sup>

In reviewing John Rawls's recent work, and, by implication, political philosophy more generally, Jeremy Waldron observed that

Rawls cannot simply confront disagreements about justice as a spectator—carefully noting the diversity of views, the extent of disagreement, etc. For he *is* a theorist of justice. He engages in these kinds of disagreements *as a participant*, and as an uncompromising opponent of conceptions other than his own. . . .

. . . He is simply claiming truth for his theory and the falsity of any theory that contradicts it.<sup>140</sup>

Waldron finds this to be an acceptable way of thinking about justice, but an unproductive way to think about the "politics of justice".<sup>141</sup>

Now I can certainly think about politics without ceasing to be the partisan of a particular conception of justice competing uncompromisingly with its rivals in the political arena. But I cannot do so if my thinking about political and constitutional procedure is conducted entirely in the shadow of my substantive convictions.<sup>142</sup>

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136. TUSHNET, *supra* note 5, at 107.

137. *See id.* at 311.

138. *See* WALDRON, *supra* note 100, at 309-12.

139. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1109 (1981).

140. WALDRON, *supra* note 100, at 159.

141. *Id.*

142. *Id.* at 160.

To think about politics, as opposed to thinking about justice, "I must be willing to address, in a relatively impartial way, the question of what is to be done about the fact that people like me disagree with others in society about justice."<sup>143</sup>

The same might be said of contemporary constitutional theory. Wechslerian constitutional theory emerged out of a law school tradition in which constitutional scholars considered themselves to be advocates, if not shadow justices, before a judicial audience.<sup>144</sup> As Paul Brest concluded two decades ago, most constitutional theory is "advocacy scholarship—amicus briefs ultimately designed to persuade the Court to adopt our various notions of the public good."<sup>145</sup> One might well question the likely quality of scholarship that takes this starkly partisan form, but, less contentiously, one can at least note the limitations inherent in such an approach to constitutional theory. Advocacy scholarship faces "an inevitable dead end."<sup>146</sup> Such "constitutional theory has no power to command agreement from people not already predisposed to accept the theorist's policy prescriptions."<sup>147</sup> Despite the continuing disagreement among theorists, the theories themselves are cast as prescriptions for judicial action. As a consequence, constitutional theory necessarily takes on a rather authoritarian cast, perhaps reinforcing the perceived "counter-majoritarian difficulty" of judicial review.

*Taking the Constitution Away from the Courts* also has a normative, perhaps even utopian, quality.<sup>148</sup> Even so, Tushnet is less concerned with debating the substance of constitutional meaning as a participant than with examining constitutional politics as an interested observer. He recognizes that politics involve making decisions regarding contested values.<sup>149</sup> He challenges us to consider who should be making those choices and under what circumstances, and not merely what those choices should be.<sup>150</sup> The drafting of the

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143. *Id.*

144. Tushnet has noted the legal process scholars of the 1950s and 1960s felt that audience more acutely than have more recent constitutional scholars. See Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENTARY 463, 490 (1994-1995).

145. Brest, *supra* note 139, at 1109.

146. Griffin, *supra* note 28, at 538.

147. Posner, *supra* note 41, at 3.

148. See Robert Post, *Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship*, 11 CONST. COMMENTARY 185, 189-90 (1994).

149. See TUSHNET, *supra* note 5, at 31.

150. See *id.*

Constitution did not preclude later constitutional choices; it structured how those decisions would be made. I would have preferred Tushnet to note more emphatically the controversial character of those continuing constitutional choices. His notion of the thin Constitution obscures, perhaps inadvertently, the disagreements that continue to exist over the content of even those most basic of constitutional commitments. After all, it is less “the Constitution” that we would be taking away from the courts than a specific set of constitutional decisions, less the “constitutional law” whose “narrative” unites us “*as a people*” than the constitutional disagreements that also divide us.<sup>151</sup> The book is nonetheless important because it focuses on how those inevitable disagreements might be resolved or overcome, rather than offering another argument for why there really should be no disagreements.<sup>152</sup>

Moving beyond advocacy opens up a number of important issues to constitutional theory. A theory oriented to constitutionalism outside the judicial context may be more likely to address problems of constitutional and political authority, for example. To be sure, Wechslerian constitutional theory was deeply concerned with the question of judicial legitimacy, with the answer usually involving some variation on the claim that only the Court would behave rationally in addressing some particular constitutional problem.<sup>153</sup> Addressing the reality of genuine constitutional disagreements outside the privileged context of judicial decisions—where both constitutional and judicial authority are taken as givens—forces us to think more seriously about why particular constitutional and political decisions should be regarded as authoritative for those who disagree with their substance.

Considering the Constitution outside the courts should also lead us away from the constitutional law paradigm. In this work, Tushnet continues to talk about “doing constitutional law outside the courts,”<sup>154</sup> but the new institutional context is likely to emphasize the ways in which the Constitution serves as something other than a source of law. Legislators, for example, are faced with many circumstances in which the Constitution may provide guidance but does not provide rules. In such situations, we may need a theory of

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151. *Id.* at 182. For an examination of how one such dispute eventually created two peoples, rather than one, see MARK E. BRANDON, *FREE IN THE WORLD* (1998).

152. See TUSHNET, *supra* note 5, at 177-94.

153. See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* (1999).

154. TUSHNET, *supra* note 5, at 33.

constitutional ethics to supplement our theories of constitutional law.<sup>155</sup> Along these lines, Tushnet's consideration of "the Mitchell problem" for Senate confirmations led him to raise squarely the question of what it means to be constitutionally conscientious, an issue that does not often arise in judicially centered constitutional theory.<sup>156</sup> Moreover, the constitutional law rendered by judges has traditionally been concerned with the Constitution as a system of restraints on political action. But the Constitution empowers as well as constrains, and nonjudicial actors tend to be faced more directly with the problem of how constitutional powers are to be used in an appropriate and responsible manner.<sup>157</sup> Likewise, we will want to examine the process by which the Constitution helps to constitute us as a people. Understanding the narrative uses of the Constitution and the ways that the Constitution enters into our political and social narratives will require examining the Constitution as a cultural artifact rather than as a source of law.<sup>158</sup>

### III. CONSTITUTIONALISM, THROUGH THICK AND THIN?

As these remarks indicate, I find *Taking the Constitution Away from the Courts* to be most useful as a model for a different sort of constitutional theory, rather than as an attack on judicial review. In this fascinating book, Tushnet does not really offer an extended argument against judicial review. His critique is surprisingly cautious. How bad would it really be if we abandoned this practice of judicial review? Would we not wind up in largely the same place? Do we not lose a little something—some of the constitutive aspect of citizenship—when we rely so heavily on the Court to do our constitutional thinking for us?<sup>159</sup> These are important and interesting questions, but they are unlikely to persuade us to abandon such an entrenched political institution. What Tushnet offers is less a brief for ending the tyranny of the judiciary, than a series of meditations on the constitutional world outside the courts. I found those meditations to be provocative, insightful, and productive. Tushnet

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155. See Keith E. Whittington, *On the Need for a Theory of Constitutional Ethics*, GOOD SOCIETY 9 (forthcoming 2000).

156. See TUSHNET, *supra* note 5, at 51.

157. See WHITTINGTON, *supra* note 81, at 2; Keith E. Whittington, *The Road Not Taken: Dred Scott, Judicial Authority, and Political Questions*, (Nov. 18, 1999) (unpublished manuscript, on file with author).

158. For a pioneering effort in this regard, see MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* (1986).

159. See TUSHNET, *supra* note 5, at 154.



takes off in a new direction and invites constitutional theory to come along. I would hope that a significant number of us will take him up on the invitation.

I was less struck by the disagreements I had with the arguments in the book than by the doubts and questions that I was left with about the constitutional vision that Tushnet sketches within its pages. I have little doubt that constitutional deliberation and activity can and do take place outside the courts, that the courts are substantially more constrained in their desire and ability to alter political outcomes than the mythology of the Warren Court would suggest, and that the judiciary is a somewhat problematic guardian of our constitutional heritage. I am rather less certain about the contours and desirability of Tushnet's "populist constitutional law."

*A. Is the Thin Constitution Still a Law?*

Despite his populism and his skepticism about the details and longevity of the thick Constitution, Tushnet is still committed to the notion of constitutional law and a Constitution that operates on the legal model. The responsibility for interpreting and enforcing the populist constitutional law will be expanded beyond the narrow confines of the judiciary to include all participants in the political process, but the Constitution is still available to be interpreted and is still intended to be binding on political actors.<sup>160</sup> My uncertainty derives from the thinness of Tushnet's authoritative Constitution.

The thin Constitution is quite thin. Tushnet explains that the thin Constitution consists of the "fundamental guarantees of equality, freedom of expression, and liberty."<sup>161</sup> Populist constitutional law is "a law oriented to realizing the principles of the Declaration of Independence and the Constitution's Preamble. More specifically, it is a law committed to the principle of universal human rights justifiable by reason in the service of self-government."<sup>162</sup> "[T]he principle that all people were created equal, the principle that all had inalienable rights. This is the thin Constitution."<sup>163</sup> Those are good principles, and most Americans would find it hard to argue

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160. See *id.* at 186 ("Populist constitutional law returns constitutional law to the people, acting through politics.").

161. *Id.* at 11.

162. *Id.* at 181 (citation omitted).

163. *Id.* at 11.

with them—and that is part of the point. They constitute us, as Americans, and they define who we are as a people. But is that a law, and what does Tushnet mean by calling this a law?

The Founders certainly did not think that the vague principles articulated in the first few lines of the Declaration of Independence and the Preamble themselves could serve as a Constitution. The rest of the constitutional text, the “thick Constitution,” was not merely a potentially fallible device to vindicate those principles; it was *the* Constitution. The Preamble laid out the goals of the new political nation.<sup>164</sup> The Constitution laid out the means for realizing those goals. The Declaration of Independence may have constituted us as a nation—though prior to the Civil War that would have been a highly contested claim—but it did not constitute a government. Tushnet seems so concerned with the process of ideological nation-building and citizenship that he loses track of the actual structures of governance.

In concluding his discussion of the “Saxbe fix” and the “Mitchell problem,” Tushnet contends that the notion of a thin Constitution “shows why a Senator who disregards the Emoluments Clause is not acting in a way inconsistent with the rule of law . . . . The Senator . . . would be doing *what the law requires*—what is consistent with the thin Constitution even though it is inconsistent with the Emoluments Clause.”<sup>165</sup> I have difficulty seeing this as doing what the law requires. I am skeptical of the idea that a senator may, consistent with the law, disregard the Emoluments Clause while operating within the interpretive context of an existent constitution. If nothing else, it seems insufficiently populist for senators to imagine that they are authorized to ignore the rules governing their office. More to the immediate point, I am uncertain how the principles of the Declaration of Independence can really serve as a law in this context. The purpose of law is to settle disputes. A text is hardly functioning as law if it does not have fairly thick substantive content that can specify determinate answers to controversial questions. The very general principles of the thin Constitution would not seem to satisfy that requirement. Such a law adds little to our ability to resolve contested matters in American politics. To that extent, the Declaration of Independence has been so successful in constituting us as a nation that it is no longer relevant to the

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164. See U.S. CONST. preamble.

165. TUSHNET, *supra* note 5, at 52.

normal course of our internal politics. Any number of possible political actions and arrangements are consistent with the principles of the Declaration of Independence. Tushnet's hypothetical senator may be doing what the (thin constitutional) law allows, but so would the other senators who would adhere to the Emoluments Clause.

A law with so little substantive content is no law at all. To voice an objection that Tushnet anticipates, but does not really answer, this reduces constitutional interpretation to little more than moral philosophy.<sup>166</sup> There are ways of making this Constitution a bit more constraining. The thin Constitution may be a source of law, rather than a law itself. The law in Tushnet's constitutional system comes from the "populist constitutional law" laid down by the political actors inspired by the Constitution. Perhaps by "populist constitutional law," Tushnet has something like the Civil Rights Act of 1964 in mind—a substantive legal directive that bears some derivative connection to the principles of the thin Constitution.<sup>167</sup> Perhaps less formally, he has in mind our various national traditions—our state and federal laws, our private social practices, our public speeches, our literary texts—that provide a more substantive spin on the general principles laid out in the Declaration of Independence and help distinguish what we Americans mean by "promoting the general welfare"<sup>168</sup> from what those Hungarians mean. Or he could simply smuggle a whole philosophical system under the guise of a "thin" Constitution. It would not be the first time that a putatively "thin" political theory turned out to be thick with substantive, and contestable, philosophical assumptions.<sup>169</sup> Tushnet starts to play this game when he asserts that "Governor Faubus could not plausibly have claimed that his actions advanced the Declaration's project. The most he could establish was that he was acting on behalf of states' rights . . ."<sup>170</sup> In the first instance, we might note that an appeal to "states' rights" draws upon particular conceptions

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166. *See id.*

167. *See id.* at 168-69 ("Law professor Ira Lupa calls such laws 'statutes revolving in constitutional orbits.'").

168. U.S. CONST. preamble.

169. *See* WALDRON, *supra* note 100, at 147-208; William A. Galston, *Defending Liberalism*, 76 AM. POL. SCI. REV. 621, 625-29 (1983); R.M. Hare, *Critical Studies on Rawls' Theory of Justice*, in *READING RAWLS* 81 (Norman Daniels ed., 1975).

170. *See* TUSHNET, *supra* note 5, at 14. Given Faubus's status as a constitutional thinker, he shows up surprisingly often in this book. *See id.* at 238. With eleven references noted in the index, Faubus easily surpasses Frederick Douglass, Andrew Jackson, Martin Luther King, and John Marshall combined. *See id.*

of democracy and community, as well as upon the specific structures of the original thick Constitution. More generally, though Faubus himself may not have had a liberal principle on which to stand, the theory of racial segregation, if not this particular practice, could be regarded as consistent with the basic principles of the thin Constitution. Indeed, the attorneys who defended southern segregation made exactly those arguments, and Wechsler was troubled by their plausibility.<sup>171</sup> We may not find segregation to be a very compelling constitutional vision, but Tushnet makes his task too easy by simply dismissing even the segregationists as irrational.<sup>172</sup>

Such efforts to give substantive content to the thin Constitution—to make it into something that can serve as a law—lead us back to the (or, in any case, a) thick Constitution. The particular Constitution that the Founders drafted is, of course, not the only constitution that would be consistent with the principles of the Declaration of Independence. There are other imaginable texts that could also “promote the general Welfare” and “establish Justice.”<sup>173</sup> If we were free to ignore this thick Constitution because we could imagine other thick constitutions that would also be consistent with the principles of democracy and liberty, then we would be very free indeed.

Judicial review does not appear to be Tushnet’s real target in this book. His real target appears to be the idea of a written constitution.<sup>174</sup> I have argued elsewhere that judicial review is implicated in the choice to have a written constitution, but a nation may have a written constitution without having judicial review.<sup>175</sup> John Marshall and *Marbury*<sup>176</sup> notwithstanding, Congress may still be bound by the Constitution even if it, rather than the Supreme Court, has final responsibility for interpreting its terms. The written Constitution has determinate and interpretable content, regardless of who does the interpreting. We can lay aside judicial review without laying aside the terms of the written Constitution. But Tushnet specifically wants to be able to lay aside the terms of the written Constitution, not because they are particularly flawed, but simply because they could be or could become worse than some

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171. See Wechsler, *supra* note 25, at 26-35.

172. See TUSHNET, *supra* note 5, at 8.

173. U.S. CONST. preamble.

174. See TUSHNET, *supra* note 5, at 39-42.

175. See WHITTINGTON, *supra* note 153, at 47-61.

176. 5 U.S. (1 Cranch) 137 (1803).

imaginable alternative. This may be a defensible position. One can certainly argue, and some have, that the Constitution as written has made little difference to American freedoms and democracy. I just wish that Tushnet had been more direct in his argument and written more systematically about the virtues of living under an unwritten constitution in the British style, rather than mingling that quite distinct argument with arguments over judicial supremacy and judicial review.

### B. *Abolishing Judicial Review—A Step Too Far?*

At the end of his book, Tushnet takes the radical step of rejecting judicial review *in toto*.<sup>177</sup> One can be sympathetic to his complaints about the theory and practice of judicial review and still wonder why this step is really necessary. One may be even more hesitant to take that leap of faith with Tushnet given that Tushnet himself seems to have pointed out a less radical alternative—the rejection of judicial supremacy—and given that he does not elaborate very fully how he expects the constitutional system to operate in the absence of judicial review.<sup>178</sup> I find cases such as the congressional exercise of the impeachment power to be suggestive, but hardly decisive.<sup>179</sup> We might well wonder if congressmen are more cognizant of constitutional values when considering an impeachment than when passing drug crime or internet pornography legislation.

Even if Tushnet is right in his argument that judicial review mostly amounts to “noise around zero,”<sup>180</sup> in this context the noise might matter. The judiciary may well provide a safety net that is sometimes useful. Although judges, acting by themselves, are unlikely to be able to make radical changes in the political system, judges do make a difference on the margin, which may be enough to justify judicial review. Even if we do not want (and cannot expect) an independent judiciary making basic value judgments at odds with those of most elected officials, we may still want a separate institution to review legislation for mistakes—constitutional defects that were insufficiently considered by legislators in the press of business. The courts may not save us from a political system acting

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177. See TUSHNET, *supra* note 5, at 154.

178. See *id.* at 163-74.

179. See *id.* at 107.

180. *Id.* at 153.

at its worst, but they may well improve the situation when Congress has a “moderately bad day.”<sup>181</sup> Mark Graber has identified such error-correction as an important element of the Supreme Court’s activity in reviewing the constitutionality of federal legislation prior to *Dred Scott*.<sup>182</sup> In granting titles to land in the western territories, Congress sometimes impaired existing land titles.<sup>183</sup> In arbitrating among these land disputes, the Court was forced to reemphasize the constitutional limits on Congress’s legislative power to alter existing property rights, including those rooted in Congress’s own prior legislation.<sup>184</sup> A court system empowered with judicial review may be a useful mechanism for monitoring legislative output and correcting mistakes.

Somewhat differently, judicial review may provide an opportunity for sober second thoughts.<sup>185</sup> Unconstitutional legislation may pass as the result of innocent oversights on the part of a Congress whose attention is elsewhere. Such legislation may also pass as the result of misplaced emotion and temporary preferences. On further reflection, many legislators may regret their initial decision. The courts may limit the damage done by such ill-considered legislative actions. Tushnet is not indifferent to this concern.<sup>186</sup> He correctly points out that judicial review may in fact encourage the passage of such legislation by rendering it costless.<sup>187</sup> Knowing that the courts will clean up their messes, legislators are free to act irresponsibly. Even if the presence of judicial review encourages the passage of some unconstitutional legislation, it is surely the case that not all unconstitutional legislation is so induced. It is true that such statutes are unlikely to set us “down a path at the end of which is

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181. *Id.* at 106.

182. See Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73 (2000).

183. See *id.* at 91-98.

184. See *id.*

185. See TUSHNET, *supra* note 5, at 67; see also ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992).

186. See TUSHNET, *supra* note 5, at 57-58.

187. See *id.*

Stalinist Russia,”<sup>188</sup> but we are still better than we would be in a world without judicial review.

Legislatures and the courts have different priorities and face different political incentives. These differences may work to our advantage in preserving constitutional values. Tushnet notes that both legislators and judges face incentives that prevent either from being completely “disinterested” and that may “distort” their judgments.<sup>189</sup> The concepts of distortion and disinterest are not adequate, however, in capturing the differences between these institutions and how they may approach constitutional issues. We will need a much more extensive analysis of these institutions, their differences, and their interaction before we can reach a conclusion about the utility of judicial review. Tushnet asserts that “judges have *only* value-based incentives to respect” the Constitution’s terms,<sup>190</sup> but that may not make judges any less reliable in enforcing constitutional values. The particular institutional environment of the judiciary may serve to intensify those “value-based incentives” and minimize distractions from the central mission of preserving constitutional values. Judges may also feel external pressures that may affect their actions, such as the desire to maintain a good reputation among professional colleagues, legal academics, and social peers, or concern for the eventual judgment of history. Tushnet asserts that such desires in judges “may produce distortions parallel to the ones that affect politicians,” but too much is packed into the words “distortions” and “parallel.”<sup>191</sup> Such pressures are different from the electoral pressures felt by legislators, for example, and may well lead to countervailing rather than “parallel”

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188. *Id.* at 106. Tushnet makes other, quite sophisticated points in his defense that I cannot consider here but that I think will be central to future theorizing about the ultimate value of judicial review and constitutional law generally. First, he notes that courts, as well as Congress, can make mistakes. *See id.* at 107. Evaluating judicial review will require a comparative institutional analysis that systematically considers the tendencies of both Congress and the courts, as well as their interaction, and the types of “errors” to which each is susceptible. *See id.* at 104-08, 128, 163-72. This is a difficult empirical and normative task, and Tushnet points us in the right direction. Second, he notes the complexities involved in distinguishing and evaluating short-term and long-term preferences, rash decisions, and “sober second thoughts.” *Id.* at 67. As a political community we are faced with the possibility of conflicts among our constitutional values and reasonable disagreement over their substantive content and particular applications. A rhetoric of constitutional “mistakes” might well mask simple disagreement and the necessity of constitutional choices. For a more extended consideration of this point, see WALDRON, *supra* note 100.

189. *See* TUSHNET, *supra* note 5, at 108.

190. *Id.* In this quote, Tushnet is specifically referring to “the Constitution’s division of authority between state and nation,” *id.*, but the point can be generalized.

191. *Id.*

results while discouraging rather than encouraging the “distortion” of constitutional meaning.

It seems clear that politicians have some problematic incentives relative to maintaining constitutional values. Legislators, for example, would prefer to avoid electorally risky behavior. Most obviously, this may lead them to favor political majorities over political minorities and individuals. It may also lead them to avoid potentially risky or controversial decisions or to at least hide their participation in such decisions. As Graber has insightfully developed, this may encourage legislators to throw some constitutional issues to the courts to resolve.<sup>192</sup> Simply removing the power of judicial review may not force legislators to be any more conscientious in carrying out their responsibilities. Congress has passed a wide variety of political hot potatoes to institutions other than the courts in the past, including the executive bureaucracy.<sup>193</sup> Legislators use a variety of devices to minimize their accountability for their costly decisions, from omnibus budget packages that obscure taxing and spending decisions, to “unfunded mandates” and conditional funds that burden the states with and implicate them in federal policy.<sup>194</sup> The institutional alternatives to the judicial involvement in constitutional decisions may be even less attractive. Risk aversion, combined with collective action problems, may tend to keep some constitutional issues off the legislative agenda entirely. Rather than encouraging more democratic and open deliberation and decision on contested constitutional issues, the end of judicial review may result in some constitutional concerns simply going unaddressed. The status and number of individuals affected by a malfunctioning criminal justice system, for example, may be inadequate to force such concerns onto the broader political agenda, perhaps leaving in place abusive police practices, haphazard judicial proceedings, and antiquated contraceptive prohibitions. Reforming such practices may only affect the margins of political life, but the consequences for those immediately affected may be enormous.

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192. See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 *STUD. IN AM. POL. DEV.* 35, 37 (1993) (“Elected officials in the United States encourage or tacitly support judicial policymaking both as a means of avoiding responsibility for making tough decisions and as a means of pursuing controversial policy goals that they cannot publicly advance through open legislative and electoral politics.”).

193. See *id.* at 45-61.

194. See, e.g., *id.* at 35; see also R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* 99-108 (1990).



It is also somewhat frustrating that *Taking the Constitution Away from the Courts* is short on specifics about the precise nature of Tushnet's proposal. Tushnet briefly notes, for example, the possibility of *ultra vires* doctrine in forcing Congress to make explicit, and thus presumably more costly, its deviations from established constitutional norms.<sup>195</sup> This seems like a promising path for further exploration, but Tushnet only offers the barest gestures at its possible outlines here. More importantly, Tushnet makes no real effort to distinguish between the judicial review of congressional statutes and the federal judicial review of state political actions or, for that matter, to discuss state judiciaries except by implication. The distinction is an old one in debates over judicial supremacy and the scope of judicial review. When Judge John Gibson of Pennsylvania famously voiced objections to the logic of *Marbury v. Madison* in 1825, he specifically limited his concerns to the judicial review of the coordinate branches of the national government.<sup>196</sup> There are legal, institutional, and philosophical arguments against federal judicial review of either federal or state actions, or both. Tushnet's emphasis on the insignificance of judicial review generally, the problematic incentives it creates for political deliberation, and the priority of the thin over the thick Constitution would all seem to suggest that he means to attack judicial review in all forms, regardless of the government actions being reviewed. But as Oliver Wendell Holmes once observed, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."<sup>197</sup> We might add a concern for Tushnet's thin Constitution to Holmes's specific concern with the Union. Tushnet gives no consideration to the activities of the states' governments, either individually or collectively. Are they as likely to adhere to constitutional values as the national government is? Is there a need for uniformity in their local interpretations of the principles of the Declaration of Independence? Certainly Tushnet's claim that judicial review is marginal to political outcomes<sup>198</sup> would require greater scrutiny if judicial review of state actions, ranging from progressive reform legislation to criminal procedures to legislative apportionment, were taken into account.

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195. See TUSHNET, *supra* note 5, at 163-65.

196. See *Eakin v. Raub*, 12 Serg. & Rawle 330, 356 (Pa. 1825).

197. OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 295-96 (1952).

198. See TUSHNET, *supra* note 5, at 153, 174.

Perhaps Tushnet is presuming an expanded congressional supremacy over the states absent judicial review, but such a proposal would also need further elaboration and defense. Once we deemphasize the thick Constitution and its distribution of political authority to different government entities, then greater state autonomy would seem to be as much of an option as intensified centralization and as consistent with the thin Constitution.

#### IV. CONSTITUTIONAL THEORY AS POLITICAL SCIENCE

About halfway through *Taking the Constitution Away from the Courts*, Tushnet makes an important point that should push constitutional theory in entirely new directions. Having questioned whether the courts will necessarily do a better job than Congress in preserving constitutional values, Tushnet concludes, "The real question is which of these two imperfect ways of organizing a government gets us closer to what we want. The case for self-enforcement is stronger than our current legal culture thinks it is."<sup>199</sup> These two sentences hold the promise of a new kind of constitutional theory, one that bears a closer relationship to political science than to traditional legal scholarship. The "real question" that Tushnet poses is difficult to ask within the confines of constitutional theory in the Wechslerian mode. Contemporary constitutional theory is almost exclusively concerned with substantive political goals. Tushnet asks us to think instead about the political mechanisms that would help us realize those or any goals. Contemporary constitutional theory is primarily concerned with principled absolutes and their vindication. Tushnet instead asks us to think about trade-offs between imperfect arrangements. Contemporary constitutional theory is institutionally partisan, defined by the mission of defending judicial review and specifying its uses. Tushnet asks us to take off the judicial robes and adopt the perspective of a constitutional designer, who must evaluate different institutions and choose between them.<sup>200</sup> Tushnet is not alone in asking such questions, but he is no longer operating within the paradigm established by the "revival of grand theory in constitutional law."<sup>201</sup>

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199. *Id.* at 108.

200. *See id.* at 93-128, 154-76.

201. TUSHNET, *supra* note 1, at 1.

*Taking the Constitution Away from the Courts* represents a genuinely interdisciplinary constitutional theory, though one whose heart may be closer to political science than to traditional legal scholarship. It calls for a normative and empirical theory that is concerned with comparative institutional analysis and the actual operation of political systems. It suggests the need for a historical and interpretive theory that is concerned with how the Constitution operates outside of the courts and what the Constitution has come to mean to those not mired in judicial doctrine. It emphasizes that many of the assumptions of traditional constitutional theory are deeply problematic and should be held up to analysis rather than asserted as axioms. This is an extremely useful project, and Tushnet has offered a fine example of how it can be done.

