

## BOOK REVIEW

### COORDINATE CONSTRUCTION, CONSTITUTIONAL THICKNESS, AND REMEMBERING THE LYRE OF ORPHEUS

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

*Reviewed by Bruce G. Peabody\**

#### I. INTRODUCTION: RETHINKING CONSTITUTIONAL LAW

What is American constitutional law? A traditional, and widely accepted<sup>1</sup> response to this seemingly naive question looks to the seven articles of the original U.S. Constitution, its twenty-seven amendments,<sup>2</sup> and the enormous body of decisions by the judiciary—especially the Supreme Court—scrutinizing and applying these provisions.

Increasingly, however, this account is being reexamined. A growing body of legal and political science scholars are questioning the descriptive accuracy (and normative appeal) of a picture of constitutional law premised on the legal opinions of judges. In opposition to *judicial supremacy* (the doctrine holding that the courts retain the final and most important word on constitutional questions) many of these scholars invoke the notion of *constitutional supremacy*. Under this conception, the constitutional aspiration<sup>3</sup>

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<sup>1</sup> See, e.g., JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 102 (1984) (noting that “the common public and academic opinion of judicial power today firmly supports a rather simple doctrine of judicial finality, a notion that the Court is, in brief, the last word in constitutional government”); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359, 362 (1997) (describing “[t]he prevailing view . . . that the Supreme Court—and the ‘lower’ federal courts—interprets the Constitution and decides its meaning”).

<sup>2</sup> While some commentators treat the legal status of the Twenty-seventh Amendment as unproblematic, a number of scholars have pointed out that its unique ratification history poses considerable theoretical and practical difficulties in determining whether it is part of the U.S. Constitution. The Twenty-seventh Amendment was originally drafted in 1789 (as a proposed “Second Amendment”), but did not receive the requisite number of state ratification votes until 1992. While the Twenty-seventh Amendment did not specify a particular deadline for ratification, there still is some question whether an amendment can be properly ratified over 203 years and by so many different generations. See generally Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment*, 11 CONST. COMMENTARY 101 (1994).

<sup>3</sup> See SOTIRIOS A. BARBER, *ON WHAT THE CONSTITUTION MEANS* 179 (1984) (discussing “con-

to bind the entire polity to a set of commands and values implies a reciprocal responsibility by citizens and politicians to comprehend and even apply the Constitution on their own; we must look not just to the courts and judges, but to a whole set of politically coordinate institutions and individuals in order to ascertain constitutional meaning.<sup>4</sup>

In *Taking the Constitution Away from the Courts*,<sup>5</sup> Mark Tushnet offers one of the more recent entries into this important and lively debate, and one of the more sharply drawn contrasts to the traditional, court-centered approach to American constitutional law.<sup>6</sup> Tushnet argues that judicial constitutional interpretation fails to give full expression to our most cherished political commitments, and he proposes that the courts *discontinue* examining constitutional questions, thereby ending both judicial supremacy and “judicial review”—the practice through which courts invalidate laws (and other political initiatives and procedures) on the grounds that they are unconstitutional.<sup>7</sup> Instead, he calls for a “populist” form of constitutional interpretation, in which political leaders and the citizenry draw upon and validate the Constitution’s “fundamental guarantees,” not the constitutional text generally.<sup>8</sup>

*Taking the Constitution Away from the Courts* provides an incisive cri-

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stitutional aspirations”).

<sup>4</sup> “Coordinate construction” is but one of many names that scholars have used to describe constitutional interpretation by nonjudicial institutions and individuals. For a sample of the literature examining this topic see SUSAN R. BURGESS, *CONTEST FOR CONSTITUTIONAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES* (1992); JESSE CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); NEAL DEVINS, *SHAPING CONSTITUTIONAL VALUES* (1996); LOUIS FISHER, *CONSTITUTIONAL DIALOGUES* (1988); GARY JACOBSON, *SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION* (1986); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* (1999); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985); Gant, *supra* note 1; Eugene W. Hickok, Jr., *The Framers’ Understanding of Constitutional Deliberations in Congress*, 21 GA. L. REV. 217 (1986); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

<sup>5</sup> MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

<sup>6</sup> Identifying the “court-centered approach” as American is not meant to imply that judicial review or judicial supremacy are unique to the United States. See, e.g., Steven G. Calabresi, *Thayer’s Clear Mistake*, 88 NW. U. L. REV. 269 (discussing a “global trend” toward “written, judicially-enforced constitutions”). Nevertheless, the degree to which U.S. courts, and especially the Supreme Court, have parlayed the practice of judicial review into institutional power does seem exceptional. See, e.g., ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 221 (Sanford Levinson rev., 2d ed. 1994) (“The Supreme Court of the United States undoubtedly remains the most powerful court of any in the world . . .”).

<sup>7</sup> While often conflated in scholars’ minds, judicial review and judicial supremacy are logically distinct. One might recognize the authority of courts to declare legislation (and executive action) as unconstitutional without conceding their supreme interpretive power. See, e.g., Gant, *supra* note 1, at 368 (“[T]he concept of judicial review is not synonymous with the concept of judicial supremacy.”). For a very different argument that also seems to draw a distinction between judicial review and judicial supremacy see Paulsen, *supra* note 4.

<sup>8</sup> See TUSHNET, *supra* note 5, at 11.

tique of our contemporary practices of constitutional interpretation and sketches a bold, imaginatively conceived alternative. Tushnet's articulation and defense of populist constitutional law should receive attention from a number of different audiences, including critics of the contemporary courts, those interested in nonjudicial interpretation of the Constitution, and constitutional theorists.

Notwithstanding the considerable power of Tushnet's criticisms of judicial supremacy and judicial review, and the attractiveness of his vision of constitutionalism, there are a number of ways in which his arguments against judicial constitutional interpretation are overstated and his own account is incomplete. As this essay will suggest, it is both possible and desirable to reconfigure American constitutional law without abandoning the bulk of the constitutional text or the distinctive contributions of our courts. In building this case, I examine what appear to be the two primary components of Tushnet's argument for populist constitutional law: his discussion of the political values that American constitutional law should honor, and his suggestion that constitutional interpretation be taken away from the judiciary and ceded to the people and their political leaders.

## II. THE THIN AND THICK CONSTITUTIONS

Tushnet urges us to base our constitutional law on the "thin Constitution"<sup>9</sup>—the Constitution's "fundamental guarantees of equality, freedom of expression, and liberty"<sup>10</sup>—and not the aggregated provisions and clauses of our entire constitutional text.<sup>11</sup> This thin Constitution, best captured by the "the principles of the Declaration of Independence and the Constitution's Preamble,"<sup>12</sup> should be promoted because it is both morally compelling and essential to our self-understanding: it provides a prescriptive vision for America and an account of our most significant political values. Tushnet declares that "[w]e ought to take as our project realizing the Declaration's principles because, in the end, those principles are good ones,"<sup>13</sup> while also insisting that "historically the American people have been committed to [the principles of the thin Constitution], at least as aspirations."<sup>14</sup> The thin Constitution, Tushnet believes, draws from the best parts of our political traditions.<sup>15</sup>

The thin Constitution is "thin" in the sense that it is not terribly restrictive; its precepts can have different expressions and can be applied in a va-

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<sup>9</sup> *Id.* at 11.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 181 (citations omitted).

<sup>13</sup> *Id.* at 193.

<sup>14</sup> *Id.* at 127; *see also id.* at 181 (stating that the thin Constitution "deals with the values that ought to animate our public life" and "[t]he idea of universal human rights resonates powerfully with the historical experience of the people of the United States").

<sup>15</sup> *See id.* at 193 (contrasting the thin Constitution with the American tradition of "nativism"); *see also id.* at 174 (describing the thin Constitution as comprising "the best in us").

riety of ways. Focusing on the thin Constitution “does not determine the outcomes of [particular] political controversies or dictate much about public policy. Instead, it orients us as we think about and discuss where our country ought to go.”<sup>16</sup> Thus, both proponents of affirmative action as well as advocates of a “color-blind” Constitution can uphold the values of the thin Constitution provided their arguments are rooted in its promise of equality and universal human rights. Furthermore, we can be committed to the precepts of the thin Constitution and still “constitute ourselves either as fractious or pacific, contentious or civil . . . .”<sup>17</sup>

How should we understand the rest of the Constitution—the numerous particular provisions and clauses that form the body of the constitutional text and serve as the basis for traditional conceptions of constitutional law? Most of the Constitution, according to Tushnet, consists of the “thick” Constitution, “detailed provisions describing how the government is to be organized.”<sup>18</sup> The thick Constitution exists merely to support and frame the essence of our constitutional order, the principles expressed in the Preamble and Declaration (i.e., the thin Constitution).

While the notion is not fully developed, Tushnet suggests that in addition to the thick Constitution, there are a number of “important” constitutional provisions that seem to give direct expression to the thin Constitution—the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, for example.<sup>19</sup> Despite the greater significance of *these* specific constitutional provisions relative to the thick Constitution as a whole, Tushnet urges us to remain focused on the general guarantees of the thin Constitution lest we mistakenly think “that the thin Constitution consists of, or is the same as, what the Supreme Court has said about [these ‘important’ constitutional] provisions.”<sup>20</sup>

Tushnet’s discussion of the relationship between the thin and thick Constitutions gives rise to an important question. Can we ignore the constitutional text—at least its less important components—in the service of the thin Constitution? Tushnet concludes that we can.<sup>21</sup> He notes, however, that we might hesitate in violating specific provisions of the Constitution out of a belief that they represent valuable rules or principles on their own, even if they do not necessarily advance the fundamental commitments of the thin Constitution:

[p]erhaps the specific provisions function as default rules written by particularly intelligent people, and so ought to be followed unless it seems worth ex-

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<sup>16</sup> *Id.* at 194.

<sup>17</sup> *Id.* at 186.

<sup>18</sup> *Id.* at 9.

<sup>19</sup> *Id.* at 11.

<sup>20</sup> *Id.* We might turn away from even important specific constitutional provisions for another reason. Even when these provisions appear to be based on the commitments of the thin Constitution, they are, at best, derivative and auxiliary. They can and should be abandoned if a different manifestation of the thin Constitution better secures our “fundamental guarantees of equality, freedom of expression, and liberty.” *Id.*

<sup>21</sup> See generally *id.* at ch. 2 (“Doing Constitutional Law Outside the Courts”).

pending the political energy to displace those rules, in circumstances where, on reflection, the default rules appear to obstruct the promotion of the general welfare.<sup>22</sup>

But even if one were to accept this argument for preserving particular clauses of the Constitution, it would not seem to impose terribly stringent legal obligations, especially when measured against traditional understandings of the binding quality of our supreme law. Conceiving of our constitutional text as a series of “default rules” means only that we cannot treat these specific provisions capriciously; we might nevertheless ignore them when we have good reasons to do so, and we surely should ignore them, according to Tushnet, when doing so would promote the thin Constitution.<sup>23</sup>

We can imagine a quite different argument for adhering to specific constitutional provisions even when they seem to be in tension with the commitments of the thin Constitution: perhaps we should embrace these provisions because they form an integral part of our self-understanding. While we might have cause to abandon particular provisions of the constitutional text, doing so could “threaten our national identity” if the thick Constitution contributes to our constitution as a people.<sup>24</sup> Tushnet, however, rejects this suggestion: “we are constituted as a people by the thin Constitution, not the thick one.”<sup>25</sup> We can reject specific constitutional provisions in order to advance the thin Constitution without fear of compromising our common political culture.<sup>26</sup>

### III. DEFENDING CONSTITUTIONAL THICKNESS

Tushnet’s argument for a system of constitutional law based strictly on the thin Constitution might strike a reader as strange, and even troubling, for several reasons. To begin with, as an argument about what our constitutionalism *should be*, Tushnet’s account seems incomplete. Tushnet describes the thin Constitution as embodying “the material out of which Fourth of July speeches are fashioned,” that is, the principles culled from

<sup>22</sup> *Id.* at 52.

<sup>23</sup> *See id.* at 51-52 (defending a hypothetical Senator who ignores the Constitution’s “Emoluments Clause” in order to promote the thin Constitution). Of course, even the traditional judicial understanding of constitutional law allows for specific textual provisions to be seemingly ignored in some circumstances. Consider, for example, that if the state can identify a “compelling interest” it can escape or at least attenuate the commands of particular constitutional clauses. Thus, despite the First Amendment’s specification that “Congress shall make *no* law . . . abridging the freedom of speech,” the Supreme Court has upheld federal and state legislation that restricts speech interests. U.S. CONST. amend. I (emphasis added).

<sup>24</sup> TUSHNET, *supra* note 5, at 192.

<sup>25</sup> *Id.* at 50; *see also id.* at 12 (“[T]he people are unconcerned about the thick Constitution”).

<sup>26</sup> While Tushnet does not make the argument, it is possible to claim that what he alludes to as the “important” specific provisions of the Constitution shape our national identity even if the specific provisions of the thick Constitution generally do not. *See supra* text accompanying notes 19-20. It is difficult, however, to identify what provisions these would be (perhaps the First Amendment)? In any event, it seems somewhat unlikely that these provisions would shape our national identity more powerfully than the general precepts of the thin Constitution.

the Preamble and Declaration.<sup>27</sup> But while the values celebrated in these speeches may point us toward our polity's most compelling ideals, they do not exhaust our preeminent constitutional concerns. Our Constitution surely includes commitments that reflect not our nation's most honorable impulses and ideals, but our deepest seated anxieties about political behavior. These latter commitments, while important, are unlikely to be honored in Fourth of July speeches. In other words, Tushnet's thin Constitution does not appear to encompass a major component of our constitutionalism—a preoccupation with the dangers posed by human fallibility.

Much of our Constitution's text and structure is based on a set of political judgments about human nature and its corruptibility, and the ways in which individual passion and self-interest can work against the public good.<sup>28</sup> If we accept that our constitutional law ought to recognize and account for these failings of human nature, numerous aspects of the thick Constitution—bicameralism, fixed elections, federalism, the constitutional amendment process—take on a renewed importance, and provide a basis for challenging Tushnet's evaluation of the thick Constitution and its contributions to our polity. Various constitutional provisions establishing representative government (intended to refine and enlarge public views that are often led by passion rather than reason),<sup>29</sup> the Constitution's separation of powers system (a network of countervailing powers and institutions arranged to channel potentially destructive individual ambition in ways that promote the public good),<sup>30</sup> and procedural checks designed to slow the potentially tempestuous course of political change,<sup>31</sup> are all central to the normative argument for our constitutional order, and yet peripheral to (and perhaps even at odds with) Tushnet's vision of constitutionalism. An example drawn from history will help demonstrate the implications of Tushnet's reliance on the thin Constitution (and inattention to the thick Constitution) as the basis for constitutional law.

In the summer of 1864, as civil war casualties mounted and end-the-war agitation increased, it seemed a genuine possibility that Democrat George McClellan, and not Abraham Lincoln, would be elected President. A McClellan victory would have likely preserved some form of southern independence and the continued enslavement of over 4 million African-

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<sup>27</sup> TUSHNET, *supra* note 5, at 12.

<sup>28</sup> Some of the Constitution's safeguards against corruption owe their origins to what historians have described as a "whiggish" theory of rights and representation popular at the time of the American Revolution. See SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993).

<sup>29</sup> See THE FEDERALIST NO. 10 (James Madison).

<sup>30</sup> See THE FEDERALIST NO. 51 (James Madison). But see Theodore J. Lowi, *Constitutional Merry-Go-Round: The First Time Tragedy, the Second Time Farce*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 189 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (associating a number of political vices with the separation of powers system).

<sup>31</sup> See Charles M. Hardin, *The Separation of Powers Needs Major Revision*, in SEPARATION OF POWERS—DOES IT STILL WORK? 90, 101-06 (Robert A. Goldwin & Art Kaufman eds., 1986) (discussing the arguments of James Q. Wilson on the advantages of incremental change).

Americans.<sup>32</sup> Would Lincoln have been *constitutionally* justified in postponing the presidential election until after the war?<sup>33</sup> Presumably, Tushnet's response would be a fairly unproblematic "yes": despite the moral inadequacies of Lincoln's position on slavery, the thin Constitution's fundamental guarantees would surely have been advanced by Lincoln's leadership and degraded by a McClellan presidency.<sup>34</sup>

For most people, however, a decision by Lincoln—or a contemporary President facing similarly difficult choices—to ignore specific constitutional provisions setting the length of presidential service and the mechanisms for election would be troubling. Fixed and stable governing procedures, including the electoral process, form a critical part of the Constitution's protection against political tyranny and even in the face of exigency, we should be reluctant to violate these procedures.<sup>35</sup> But Tushnet's vision of constitutional law gives such overriding weight to the values of the thin Constitution that the procedural protections of the thick Constitution against human fallibility threaten to be rendered nugatory.<sup>36</sup>

<sup>32</sup> See DAVID HERBERT DONALD, *LINCOLN* ch. 19 (1995) ("I Am Pretty Sure-Footed").

<sup>33</sup> I have included the proviso, "after the war," to head off the objection that Lincoln's hypothetical move would have unacceptably impinged upon the thin Constitution's commitment to democratic rule.

<sup>34</sup> While the ultimate likelihood of Northern victory seemed fairly secure by 1864 (especially in light of the outcomes at Gettysburg and Vicksburg in the summer of 1863), it is not difficult (given the hard-fought nature of these battles and the frequent ineptitude of Union military leadership) to construct alternate scenarios in which Lincoln would have been even harder pressed politically (and therefore, perhaps, even more tempted to suspend the 1864 election). Lincoln himself despaired as late as August that the election would be lost. See Abraham Lincoln, Memorandum on Probable Failure of Re-election (August 23, 1864), in 1 ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 624 (Don E. Fehrenbacher ed., 1989).

<sup>35</sup> Which does not mean, of course, that it would never be appropriate to violate "fixed and stable governing procedures" in the service of other constitutional ends. See *supra* note 23 and accompanying text (observing that even the "traditional" approach to constitutional law allows for some flexibility and pragmatism in applying the constitutional text); Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 2 ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 246-61 (Don E. Fehrenbacher ed., 1989) (defending, among other things, his decision to suspend the writ of habeas corpus).

<sup>36</sup> In addition to being suggested by the Lincoln example, this outcome becomes apparent in trying to construct a theory of constitutional change consistent with Tushnet's thin Constitution. Notwithstanding Article V (which delineates the Constitution's formal amendment procedures), Tushnet would, presumably, sanction amendment of the Constitution through any number of means so long as the change promoted the thin Constitution. After all, the Fourteenth Amendment, ratified under extraordinary and coercive conditions and outside of the strict legal parameters of Article V, is still a legitimate, legally binding alteration of the preexisting political order. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991). See generally *RESPONDING TO IMPERFECTION* (Sanford Levinson ed., 1995).

While Ackerman has delineated a relatively identifiable (and historically unusual) set of circumstances under which a non-Article V amendment can take place, Tushnet seems to have no such restrictions. Thus, in addition to supporting the Fourteenth Amendment, Tushnet is committed to even more legally controversial alterations of the thick Constitution, provided these changes support the thin Constitution's "fundamental guarantees of equality, freedom of expression, and liberty." TUSHNET, *supra* note 5, at 11. Under Tushnet's theory, would not Woodrow Wilson have been justified in using military occupation to facilitate passage of the Nineteenth Amendment (extending suffrage to women)? And what, if any, constitutional restrictions would prevent contemporary political leaders from using Reconstruction-era tactics to ensure ratification of a new (and perhaps more expansive) Equal Rights Amendment designed to advance the thin Constitution? These examples point to some troubling impli-

Tushnet's account of the thick and thin Constitutions suffers from a descriptive oversight in addition to its normative shortcomings. Tushnet argues not only that the thin Constitution captures what our fundamental commitments should be, but also that it represents the most significant values constituting our national political community.<sup>37</sup> But some aspects of the *thick* Constitution are essential to our self-understanding. While Tushnet argues that we would be unlikely to go to war to preserve the president's "right to require opinions in writing from cabinet members," the nation *did* go to war (with itself) at least in part over questions about state power and the nature of American federalism.<sup>38</sup>

#### IV. TAKING THE CONSTITUTION AWAY FROM THE COURTS

In addition to arguing that our constitutional law should be based on redeeming the values of the thin Constitution, Tushnet contends that political leaders and the populace, rather than the courts, should interpret the Constitution:

[D]isagreements over the thin Constitution's meaning are best conducted *by the people*, in the ordinary venues for political discussion. Discussions *among* the people are not discussion by the people *alone*, however. Politics does not occur without politicians, and political leaders play an important role in the account of populist constitutional law I develop here.<sup>39</sup>

Tushnet calls for taking the Constitution away from the courts (and bringing an end to judicial supremacy) by phasing out judicial review.<sup>40</sup> In supporting this proposal, he points to a number of problems associated with judicial review and judicial supremacy, while also anticipating and confronting likely objections to his alternative—a system of constitutional interpretation carried out by the people acting in traditional political forums.

Tushnet concedes that achieving his proposal will be difficult: the Court's role as authoritative interpreter of the Constitution appears to be

cations of Tushnet's willingness to abandon the thick Constitution and embrace a theory of thin constitutionalism.

<sup>37</sup> See TUSHNET, *supra* note 5, at 12, 50.

<sup>38</sup> *Id.* at 11. Many aspects of the thick Constitution are duplicated in state constitutions, further suggesting that these elements may comprise a part of our national political culture. See MORRIS P. FIORINA & PAUL E. PETERSON, *THE NEW AMERICAN DEMOCRACY* 92 (1998) (noting that every state has adopted some form of separation of powers governance, and every state except Nebraska provides for a two-house legislature in its constitution).

<sup>39</sup> TUSHNET, *supra* note 5, at 14 (emphasis in original).

<sup>40</sup> See *supra* note 7 and accompanying text (distinguishing judicial review and judicial supremacy). For classical defenses of judicial review, see generally *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *THE FEDERALIST* NO. 78 (Alexander Hamilton). For recent defenses of judicial supremacy, see Alexander & Schauer, *supra* note 4, and Gant, *supra* note 1.

It is not entirely clear whether Tushnet is committed to ending judicial supremacy, judicial review, or judicial interpretation of the Constitution more generally. As noted earlier, judicial supremacy and judicial review are not synonymous, and even if both practices were discontinued, the courts might still offer (non-binding) interpretations of the Constitution. See, e.g., Paulsen, *supra* note 4. For purposes of simplicity, I generally assume Tushnet is criticizing *both* judicial review and judicial supremacy, unless his arguments suggest otherwise.

widely accepted throughout our political order.<sup>41</sup> Nevertheless, he believes that an especially “talented” political leader could make the failings of both judicial review and judicial supremacy widely apparent, and consequently initiate a transformation of our constitutional self-understanding by “appealing to the best in us, the tradition linked to the thin Constitution in which we take an active role in constructing our constitutional rights without relying on the courts to save us from ourselves.”<sup>42</sup>

While Tushnet’s thin Constitution is largely a novel invention, his suggestion that constitutional interpretation be pried from the hands of the judiciary is not.<sup>43</sup> Nevertheless, *Taking the Constitution Away from the Courts* makes an innovative contribution to the burgeoning debate on constitutional interpretation by nonjudicial actors. Tushnet systematically and subtly examines several questions that previous scholars have engaged only in piecemeal fashion, if at all: What is to be gained by “distribut[ing] constitutional responsibility throughout the population?”<sup>44</sup> What are the political and legal implications of such a move?

Tushnet begins addressing these questions by making a case against judicial supremacy and judicial review. He argues that these practices limit our understanding of the Constitution’s role in our political life.<sup>45</sup> To the extent that the courts are the exclusive interpreters of the Constitution—or at least retain the power to invalidate legislative and executive action—politicians and citizens are likely to be constrained by the judiciary’s vision of constitutionalism.<sup>46</sup> For Tushnet, this is primarily troubling because the courts have given insufficient expression to the thin Constitution. “[W]hat the courts say about the Constitution is specialized and driven at times by [their] special institutional concerns”<sup>47</sup> with the result that court decisions “may be more qualified than we should like.”<sup>48</sup> The complex categories, classifications, and doctrines the judiciary uses to develop its understandings of constitutional meaning “are not what ordinary citizens need to recite when we try to figure out what [the thin Constitution] requires.”<sup>49</sup>

According to Tushnet, judicial supremacy and judicial review are problematic for another reason. Even when the courts issue decisions that ostensibly advance the thin Constitution, these decisions are unlikely to

<sup>41</sup> See TUSHNET, *supra* note 5, at 174 (“[V]igorous judicial review is [currently] part of our self-constitution.”)

<sup>42</sup> *Id.*

<sup>43</sup> See generally sources cited *supra* note 4. Cf. RICHARD D. PARKER, *HERE, THE PEOPLE RULE 115* (1994) (concluding that “there is no constitutionalism” distinguishable from the choices of the people).

<sup>44</sup> TUSHNET, *supra* note 5, at 174.

<sup>45</sup> See TUSHNET, *supra* note 5, at 168 (“The lessons people learn about equality from Supreme Court decisions . . . and the lessons they learn about free speech . . . may be more qualified than . . . [they] like.”).

<sup>46</sup> *But see* Gant, *supra* note 1, at 392-96 (arguing that even judicial supremacy need not foreclose constitutional interpretation by nonjudicial actors).

<sup>47</sup> TUSHNET, *supra* note 5, at 168.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 11. Indeed, the judiciary’s legal and technical language makes their interpretation of the Constitution often inscrutable to the public.

have much of an effect. Tushnet's examination of "the historical record and considerations of constitutional theory and structure suggest[s] that judicial review does not make much difference one way or the other" with respect to making significant social changes or protecting the liberties of the American people.<sup>50</sup> As numerous scholars have illustrated, the courts' decisions can be shaped and their influence limited through an array of political forces.<sup>51</sup> As a result, Tushnet concludes "that judicial review is likely simply to reinforce whatever a political movement can get outside the courts."<sup>52</sup> Efforts to achieve particular constitutional outcomes by focusing on the courts are largely misguided.

Turning the Constitution over to the people by embracing populist constitutional law would allow the nation as a whole to give its own, effective expression to the thin Constitution, and not simply echo the courts' legalisms. But what, if anything, might be lost with such an approach? One of the most prominent criticisms leveled against those seeking to broaden the role of nonjudicial actors in constitutional interpretation is that such a move would induce instability and even chaos into our legal system, and ultimately the political order as a whole.<sup>53</sup> As Tushnet points out, however, the courts have not always produced enduring legal norms, and there is nothing in principle prohibiting political leaders (working with their constituents) from producing constitutional understandings that are at least as stable.<sup>54</sup> After all, the courts have frequently demonstrated a willingness to overturn important precedents, while the executive and legislative branches do not regularly induce policy upheavals even after the most contentious political debates.<sup>55</sup>

But perhaps it is wise to refrain from "taking the Constitution away from the courts" because of the institutional incapacity of Congress and the President to interpret the Constitution responsibly. Don't the political insulation, professional training, and institutional norms of the courts suggest that they are best qualified to provide principled and reasoned interpretations of the nation's most important legal document? Tushnet thinks otherwise. There are certainly episodes of deficient, not to mention politically motivated,<sup>56</sup> judicial decisionmaking, and overall "courts actually have not

<sup>50</sup> *Id.* at 154. See generally *id.* at ch. 6 ("Assessing Judicial Review").

<sup>51</sup> For a small sample of the literature examining this point, see DEVINS, *supra* note 4; FISHER, *supra* note 4; GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

<sup>52</sup> TUSHNET, *supra* note 5, at 135.

<sup>53</sup> See generally Alexander & Schauer, *supra* note 4 (arguing that the Supreme Court must be the authoritative interpreter of the Constitution in order to secure legal stability).

<sup>54</sup> See TUSHNET, *supra* note 5, at 28 ("[Court] decisions regularly modify or undermine precedents in ways that open up new vistas for constitutional transformation.").

<sup>55</sup> See, e.g., Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 106 (1988) (arguing, in contrast to Alexander & Schauer, that coordinate construction will induce "true stability" not "interpretive anarchy").

<sup>56</sup> The observation that judicial constitutional interpretation has a political dimension is surely not in itself troubling to Tushnet; Tushnet, after all, freely concedes that political considerations inform his understanding of constitutional law. See TUSHNET, *supra* note 5, at xi (explaining that populist consti-

done such a wonderful job [interpreting the Constitution] as to distinguish them sharply from legislatures.”<sup>57</sup> Moreover, if we accept Tushnet’s assertion that the fundamental guarantees of the thin Constitution are the values that actually constitute our national identity, we should anticipate that the political leaders and institutions most responsive to the electorate will have powerful incentives to promote these values.

Tushnet’s criticisms of judicial interpretation of the Constitution are frequently telling: he provides numerous examples of the courts’ inconsistency, poor record of rights protection, and ineffectiveness in implementing important social and political changes.<sup>58</sup> He also constructs a strong theoretical case that the courts cannot be relied upon to secure our fundamental constitutional values (in part due to institutional limitations such as legal norms), and that we ought to give our political leaders a greater opportunity to give expression to the thin Constitution.<sup>59</sup>

But Tushnet’s arguments lead only to the conclusion that our polity is ill-served by leaving constitutional interpretation *solely* to the judiciary. Conceding the necessity of constitutional construction by elected officials, the shortcomings of strictly legal constitutional analysis, and even the importance of the thin Constitution, does not necessarily lead to the conclusion that the courts cannot contribute to constitutional law. *Taking the Constitution Away from the Courts* is most effective as a brief against judicial supremacy, rather than as a denunciation of judicial interpretation generally, or even judicial review. Even if one accepted the core of Tushnet’s case against exclusive or authoritative interpretation by the judiciary, why couldn’t we advance constitutional values by combining some form of judicial review with constitutional interpretation by political officials—thereby drawing upon the distinctive perspectives, political strengths, and constituencies of each institution?

Tushnet’s response is that this alternative to his populist constitutional law “probably will not work.”<sup>60</sup> In order to ensure that constitutional values would be promoted in a system of shared interpretive responsibility, the courts would need to intervene when politicians lacked sufficient incentive to enforce the thin Constitution on their own. Tushnet doubts that judges—

tutional law “is not in the first instance either the expression of pure preferences by [public] officials and voters or the expression of unfiltered moral judgments. In short, it is not ‘mere’ politics, nor is it ‘simply’ philosophy”—it is both). But we might well be skeptical about the courts’ ability to understand and apply relevant political information to constitutional interpretation, especially compared to elected officials. *See id.* at 126.

<sup>57</sup> *Id.* at 129. The problem of determining the relative capacity of politicians vis-a-vis the courts is complicated by what Tushnet identifies as the “judicial overhang”: the pervasive (and distorting) influence of the courts on political actors’ understanding of constitutional interpretation. *See generally id.* at 57-65. As Tushnet explains, “[t]he judicial overhang may make the Constitution outside the courts worse than it might be.” *Id.* at 58.

<sup>58</sup> *See, e.g., TUSHNET, supra note 5, at 104-08* (discussing the Court’s assessment of the constitutionality of legislative veto).

<sup>59</sup> *See id.* at 12 (discussing the merits of allowing the people to give expression to the thin Constitution).

<sup>60</sup> *Id.* at 125.

who generally have little political experience and are detached from everyday “political realities”—would have the capacity to make this assessment effectively.<sup>61</sup> He concludes that the issue of constitutional interpretation is dichotomous: our constitutional values should be enforced either by the courts or by politicians.<sup>62</sup>

This determination is hardly inescapable, however. Conceiving of constitutional interpretation as a shared activity, and not the unique responsibility of the courts, does not mean that the courts must still monitor politicians’ incentives to protect constitutional values. Alternatively, we can imagine a system of constitutional interpretation in which each political institution invokes the Constitution in defending its distinctive responsibilities. In such a system, each branch could assess and even refute its rivals’ constitutional interpretation of specific issues without ultimately evaluating their interpretive capacities and priorities. This “pluralist” approach to constitutional interpretation comports with a particular conception of our separation of power system in which political authority, including interpretive authority, is deliberately dispersed among competing institutions in order to promote the public interest.<sup>63</sup> In this view, each branch of government has a specialized interpretive role corresponding to its unique constitutional powers and duties. Courts, which are institutionally and historically disposed to identifying and protecting rights, would invoke the Constitution in pursuit of that end, while political actors would simultaneously attempt to advance their special functions.<sup>64</sup>

A recent work by political scientist Keith Whittington suggests the extent to which constitutional interpretation by the courts can subsist alongside what he calls “constitutional construction” by elected officials.<sup>65</sup> Using four case studies to support and illustrate his nuanced constitutional theory, Whittington identifies a distinctive political approach to “construing constitutional meaning . . . [which] elucidate[s] the text in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules.”<sup>66</sup> Whittington argues not only that judicially-centered legal analysis of the Constitution can develop concurrently with constitutional construction by politicians, but that these two forms of constitutional “de-

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<sup>61</sup> *Id.* at 126.

<sup>62</sup> *See id.* In addition, it may be difficult to have meaningful nonjudicial interpretation alongside interpretation by the courts because of the “judicial overhang.” *See supra* note 57 and accompanying text.

<sup>63</sup> This argument builds on an understanding of the Constitution’s separation of powers system described in JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987).

<sup>64</sup> *See* Bruce G. Peabody, *Nonjudicial Constitutional Interpretation, Authoritative Settlement, and a New Agenda for Research*, 16 *CONST. COMMENTARY* 63, 68-72 (1999). *Cf.* Eisgruber, *supra* note 4 (offering a different understanding of how we might combine judicial and nonjudicial constitutional interpretation).

<sup>65</sup> *See* WHITTINGTON, *supra* note 4, at 3-9 (distinguishing “constitutional construction” from “constitutional interpretation”).

<sup>66</sup> *Id.* at 5.

liberation" are in some ways symbiotic.<sup>67</sup>

## V. CONCLUSION: THE MAST AND THE LYRE

One of the more popular analogies in constitutional scholarship draws from the myth of Ulysses and the Sirens.<sup>68</sup> In the course of his journeys, the hero Ulysses discovers that his ship will pass near the island of the Sirens, whose bewitching songs have lured countless prior sailors to leap from their ships and face certain death, either through drowning, or at the claws of the monsters themselves. Ulysses, intent upon hearing the Sirens' songs and surviving the experience, fixes upon an ingenious solution. He instructs his crew to tie him to one of the ships' masts while his men fill their ears with wax, allowing him to hear the Sirens' beautiful but deadly cries while they remain unaffected.

Ulysses' innovation bears some resemblance to the project of constitutionalism. Through constitutions a polity binds itself with (often cumbersome) commands so that it might preserve a set of values and a way of life from numerous threats, the most grave being its own weakness.<sup>69</sup> But there is another myth involving the Sirens, a myth more consonant with the picture of constitutionalism laid out in *Taking the Constitution Away from the Courts*. When Jason of Iolcus passes by the island of the Sirens he faces the same peril as Ulysses. But Jason and his argonauts are saved not by lashing themselves to the mast and stopping their ears, but by the musician Orpheus, whose lyre produces such soothing, captivating notes that the heroes forget the Sirens' songs and sail to safer waters.

Embedded in the myth of Orpheus and the Sirens is a reminder that constitutions should not be understood solely as a set of commands that limit our actions. In order for constitutions to serve as effective and enduring political projects, they also must capture and give expression to commitments that the polity perceives as genuinely shared and attractive, if not preeminent. Constitutions should not simply bind us, they should inspire us, pointing us toward morally compelling goals and commitments.

*Taking the Constitution Away from the Courts* provides a powerful reminder of the fundamental values at the heart of our constitutional order, and makes a provocative and impressive case that these values cannot be sufficiently protected by the courts. In remembering the aspirational component of our constitutionalism, however, we should not lose sight of its

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<sup>67</sup> See *id.* ("The jurisprudential model needs to be supplemented with a more explicitly political one that describes a distinct effort to understand and rework the meaning of a received constitutional text."); see also MARK E. BRANDON, *FREE IN THE WORLD: AMERICAN SLAVERY AND CONSTITUTIONAL FAILURE* (1998) (discussing the distinctive ways Congress, in the nineteenth century, addressed constitutional issues intrinsic to slavery). For an important earlier effort to distinguish legal and political approaches to constitutional interpretation, see DONALD G. MORGAN, *CONGRESS AND THE CONSTITUTION* (1966).

<sup>68</sup> See, e.g., JOHN E. FINN, *CONSTITUTIONS IN CRISIS* (1991); Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997).

<sup>69</sup> See FINN, *supra* note 68, at 3-6.

constraining functions, and in reflecting on the limitations of judges as constitutional interpreters, we should not dismiss their potential contributions to constitutionalism's multiple and complex objectives.