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RESPONSE

POLITICS, NATIONAL IDENTITY, AND THE THIN CONSTITUTION

*Mark Tushnet**

I. INTRODUCTION

Any author would be pleased at having his or her work taken as seriously as mine has been by the contributors to this Symposium. As I wrote in *Taking the Constitution Away from the Courts*,¹ my aim was not so much to place on the table a serious policy proposal—elimination of judicial review—but rather was to broaden a discussion about constitutionalism and judicial review that has been far too narrow.² For a decade or more, constitutional theory and theorists have been overly concerned with questions about constitutional interpretation that are the legacy of controversies over the Warren Court's liberal activism.³ The advent of a new constitutional era, characterized in part by conservative judicial activism, makes it possible for someone with my political inclinations to pay attention to the more fundamental questions of constitutionalism that I sought to raise in *Taking the Constitution Away from the Courts*. Most contributors to this Symposium agree that the

* Carmack Waterhouse Professor of Constitutional Law, Georgetown University Law Center; Visiting Professor of Law, Columbia University, 1999-2000. In addition to the contributors to this Symposium, I would like to thank Michael Dorf, Jean Cohen, and other participants in the Colloquium on Political Theory held at Columbia University on March 2, 2000, for comments that materially advanced my progress on the issues I discuss here.

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

2. *See id.* at 174 (asserting that “[t]hinking about a world without judicial review” might “contribute” to the goal of “distribut[ing] constitutional responsibility throughout the population”).

3. The time limit does not exempt my own contributions to those discussions. *See* MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988).

questions I raise are worth more discussion than they have received from most constitutional theorists. Most disagree with my answers to some of the questions. But their engagement with my argument advances the goal of *discussing* them, and that is more than I could fairly have hoped for when I wrote the book.

In this response I do not intend to address all the interesting and important observations made in this Symposium. It should come as no surprise that I agree entirely with the comments praising the book and particular arguments in it. It may come as a slight surprise that I agree with many of the comments criticizing some of my arguments. The criticisms are all respectful, and no one—or at least not me—thinks that he or she gets everything right even after thinking hard about the entire set of arguments for a rather extended period. So, I take most of the criticisms as corrections to an argument that is stronger for them. I will use this response, then, to deal with some more general themes that occur in several of my critics' comments, and to elaborate on the most serious deficiency they have identified in *Taking the Constitution Away from the Courts*—the less-than-complete description and defense of thinning down the Constitution with which we today should be concerned.

I begin by describing the audience for the book, as a way of locating it politically. The sections that follow take up two related themes. Section III describes the difference between a populist constitutionalism and populist politics, bringing out the importance of questions of national identity in my overall argument. Section IV opens by addressing the concern that nonjudicial institutions need supplementation if the thin Constitution's values are to be honored. The answer it offers returns to the question of national identity broached in section III.

II. LOCATING THE POLITICS OF *TAKING THE CONSTITUTION AWAY FROM THE COURTS*

Professor Graber raises a serious question about the audience for the book, but I think he misunderstands the politics that underlies my endeavor.⁴ Professor Graber finds it peculiar that an academic

4. See Mark A. Graber, *The Law Professor as Populist*, 34 U. RICH. L. REV. 373, 376 (2000). As a matter of personal privilege, however, I think it fair for me to note that my inability to locate a trade press to publish the book says more about the politics of publication

at an elite university publishes a book urging—on whom?—some form of populist politics.⁵ I am, frankly, baffled at the suggestion, if there is one, that people who teach at elite universities are by that fact disabled from seeing the merit of populist constitutionalism.⁶ I would have thought that the point of being an academic was to figure out what was “right” or “true.” If populist constitutionalism is right or true, I would think that it was the *job* of an academic to say so, whether he or she teaches at an elite university or a community college. We should therefore put aside Professor Graber’s odd comments about elite populism, and focus on the more important point he makes, which is about the book’s audience.

Professor Graber appears to believe that I wrote the book as a political tract or “broadside,” hoping to rally support among the masses for abolishing judicial review and reasserting popular control over the Constitution.⁷ I cannot imagine why he might think that. I am, as he stresses, a legal academic, not a political pamphle-

than it does about either my intentions or the book’s merit. Not to be overly crude about it, but I am confident that a trade press would have published the book, word for word, had I been the subject of a heated public controversy and an extended Senate debate. Although I have no knowledge about the matter, I am quite confident that no trade press would have published the collected law review articles of Lani Guinier had she not satisfied those conditions. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994). This is such a collection, prefaced by a short memoir of the controversy over Professor Guinier’s aborted nomination to head the Justice Department’s Civil Rights Division, and which was published by the Free Press, a trade press. (I am reminded of Bob Dylan’s line: “There’s no success like failure,” although he also adds that “failure’s no success at all.”) There is, I think, one qualification to this: Perhaps a trade press would have published something not quite so far from the mainstream as my work. But, again, my inability to locate a trade press willing to publish the book—and I looked for one—says next to nothing about my intentions or politics.

5. See Graber, *supra* note 4, at 376.

6. I note as well that Professor Graber’s misidentification of support for legal abortion with support for abortion on demand weakens his claim that attending a fund-raising rally in support of legal abortion is in tension with a commitment to populism. See Graber, *supra* note 4, at 377. The abortion example crops up recurrently in Professor Graber’s contribution. All that I can say is that he is simply wrong in his claims regarding my views about populism’s relation to the abortion issue. I take comfort in the belief that the people, on reflection, will not recriminalize abortion entirely. That belief is supported by the evidence Professor Graber supplies in his book on the issue. See MARK A. GRABER, *RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION AND REPRODUCTIVE POLITICS* (1996). But I would remain a populist even if the people did so; I would then engage in political action to reestablish the right.

Professor Graber’s view that populist political action consists solely in demonstrating, marching, or gathering overlooks such things as the activities reasonably undertaken at different periods in a person’s life-cycle and opportunities for alternative forms of political action. For the record, I have taken part in my share of demonstrations, marches, and the like.

7. See Graber, *supra* note 4, at 376.

teer, and I have the talents of the former and not the latter. Who, then, was I writing for?

One group I had in mind in writing the book was conservatives who had developed what they thought was a biting critique of judicial activism. Of course my arguments were not cast in terms designed to convert them to populism. I did hope to bring out the hypocrisy of their purportedly populist attacks on judicial review by showing that someone from the reasonably far Left could mount a truly populist attack on the institution. And, to some degree, I succeeded. An article in the neoconservative journal *Commentary* was visibly uncomfortable with an attack on judicial review from the Left, and in the end found itself forced to deny that I really did want to eliminate judicial review.⁸ Another conservative reviewer addressed my argument on the merits, and found it wanting.⁹

I am pretty sure I understand why. The politics of attacks on judicial review are reasonably straightforward. You can criticize the courts on two grounds if you do not like what they are doing. You can say that they are wrong, and you can say that they should not be interfering with the judgments made by the people's representatives in the legislatures.¹⁰ During the Warren and Burger Court years, conservatives tried to make both arguments, but the first one did not have much purchase because the Court's decisions were, on the whole, rather popular.¹¹ (Consider here the Court's reapportion-

8. See Gary Rosen, *Triangulating the Constitution*, 108 COMMENTARY 59 (July 1999). I must add that Professor Lino Graglia, no hypocrite on this matter, responded sympathetically to my argument in a letter to the editor published in a later issue of the magazine. See Lino Graglia, *Letter from Readers*, 108 COMMENTARY 3 (Nov. 1999).

9. See Saikrishna Prakash, *America's Aristocracy*, 109 YALE L.J. 541, 543 (1999). I found it amusing that Professor Prakash described Michael Stokes Paulsen's 142-page law review article, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994), as a "better treatment" of the argument I made in 19 pages of the book. See Prakash, *supra* at 551 n.68; TUSHNET, *supra* note 1, at 6-26; see also *id.* at 16 (citing Paulsen, *supra*). My book has 225 pages of text and endnotes; I can only imagine how long it would have been had I developed each argument in it at law review length. Of course Professor Paulsen's argument was "better" in the sense of more fully developed; whether it would be "better" had it been part of a book is, I think, a rather different question.

10. Charles Tiefer, in this Symposium, makes a similar point about the structure of critical commentary on the Court. See Charles Tiefer, *Comparing Alternative Approaches about Congress's Role in Constitutional Law*, 34 U. RICH. L. REV. 489 (2000).

11. So much so that Alexander Bickel felt himself compelled to rethink the grounds of his criticism of the Warren Court. See ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 3-8 (1970) (continuing to criticize the Warren Court while acknowledging that many of its most important decisions had the public's approval).

ment decisions,¹² or its decisions establishing a high barrier to the enactment or enforcement of laws discriminating against women.¹³) Conservatives were thus driven to present their substantive disagreements with the Warren and Burger Courts as grounded in the second, populist critique of judicial review. But in the past few years a conservative majority on the Supreme Court has been making decisions that conservatives like.¹⁴ Now a populist attack on judicial review seems to conservatives like dirty pool: “We wanted to take judicial review away from you, the liberals, but now that we have succeeded, you want to take it away from us—and by using the arguments we made against you. That’s hardly fair.”¹⁵ I have always been uneasy with the aphorism that hypocrisy is the tribute that vice plays to virtue, but maybe it is accurate here: Vice is judicial review, virtue is the populist attack on judicial review, and hypocrisy is what conservatives have been engaged in.

Of course conservatives were not the primary audience I had in mind in writing the book. But, Professor Graber to the contrary, neither were Left-liberal political activists.¹⁶ As Professor Graber points out, the book is not written in a style congenial to political

12. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964) (Warren, C.J.) (holding that Alabama legislature’s apportionment plans were invalid under the Equal Protection Clause in that the apportionment was not on a population basis).

13. See, e.g., *United States v. Virginia*, 518 U.S. 515, 531 (1996) (holding that “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action”).

14. Two decisions early this term provide an instructive contrast. In upholding a federal law limiting the circumstances under which state motor vehicle authorities could disclose information on drivers’ licenses, Chief Justice Rehnquist sounded the populist anti-judicial review theme: “We of course begin with the time-honored presumption that the [statute] is a ‘constitutional exercise of legislative power.’” *Reno v. Condon*, 120 S.Ct. 666, 670 (2000) (quoting *Close v. Glenwood Cemetery*, 107 U.S. 466, 475 (1883)). The day before, however, the Court had invalidated a statute imposing monetary liability on state agencies that violated laws against discrimination on the basis of age, and with not a word said about a presumption of constitutionality nor any deference whatever to Congress’s populist or fact-finding credentials. See *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631, 649-50 (2000).

15. Again as something like a point of personal privilege, I note that I myself was making arguments against judicial review before conservatives had reliably gained control of the Court, and was chastised by people on the Left for doing so. See Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). It is of course true, however, that my critique is offered from a Left perspective, and that I hope that the populist constitutionalism I advocate would advance progressive goals. But, as I discuss more fully below, I do not believe that progressive outcomes are guaranteed.

16. It may be worth noting that I expressly disclaimed the position that Left-liberals should relinquish their commitment to judicial review in a sort of unilateral disarmament. See TUSHNET, *supra* note 1, at 175 (“Unilateral disarmament is rarely a good idea. . . . The only way to make sure that both sides disarm completely is to amend the Constitution.”).

activists.¹⁷ The arguments are too abstract, the examples too esoteric. More important, though, few political activists are committed to judicial review in principle. They go to court when they think they can get something out of the courts, and they go elsewhere when their strategic calculations tell them they have a better chance there. The only thing such activists would have to worry about if my arguments began to affect actual practices is that I might be taking away from them one weapon, out of many, that they occasionally find useful.

My argument has only two quite modest things to say to political activists who see the courts as strategic assets. First, they may be overlooking some adverse ideological costs to leftist programs from the courts' commitment to the individualist ideals that characterize American rights-based constitutional adjudication. But those costs are likely to be small. Second, the activists may not fully appreciate that their opponents also find occasionally the same weapon they do. Professor Mandel offers the strongest version of this point when he argues that judicial review, examined over the course of constitutional history, has been on balance a bad thing for political activists on the Left.¹⁸ My evaluation of judicial review is that it has not been quite as bad as that. As I put it, judicial review has been basically "noise around zero," a sort of random disruption of the results achieved in the fora of nonjudicial politics.¹⁹ If I am right, progressive political activists should take into account the risk that their opponents benefit more from judicial review than leftists do. Because the risk is not that large, however, the progressives' strategic calculations probably ought not change dramatically.

So, again, for whom is the book written? Well, academics,²⁰ I suppose (and say at various points in the book).²¹ Is there anything peculiar about a populist academic writing a book whose intended audience is other academics? I have already given one reason to think not: My job includes making good arguments about constitutional law, and I think the arguments in *Taking the Constitution Away from the Courts* are good ones. So what if only other academics

17. See Graber, *supra* note 4, at 376.

18. See Michael Mandel, *Against Constitutional Law (Populist or Otherwise)*, 34 U. RICH. L. REV. 443, 444-46 (2000).

19. TUSHNET, *supra* note 1, at 153.

20. I define *academics* here to include students as well as people with jobs teaching them.

21. See, e.g., TUSHNET, *supra* note 1, at 174 ("A modest conclusion, perhaps, but probably the only one an academic's analysis can provide. What a political leader might do is, of course, another question.")

read the book? Of course I would like the book to have some effects on constitutional policy, because, again, I think the arguments I made are good arguments and I think that it would be nice if good arguments had some effects. But I am not so deluded as to think that there is anything like a direct line between making a good argument and having some effects on policy.²²

One final point about audience and style: As Professor Michelman's contribution to this Symposium makes clear,²³ I think it mistaken to regard my argument as culminating in a serious policy proposal to eliminate judicial review by constitutional amendment. But, after all, I did make such a proposal. Why? As Professor Graber suggests, my primary aim was to open up a conversation about some fundamental aspects of constitutionalism and politics, not to influence constitutional politics in any direct way.²⁴ Once opened up, the conversation might conclude that some other policy changes were more attractive: term limits for judges, for example,²⁵ or an override mechanism like that in Canada's Charter.²⁶ Professor Hirschl's comparative perspective is particularly helpful in suggesting alternative constitutional policies.²⁷ As Professor Mandel's comments on the Canadian system suggest, with respect to each policy proposal, we would have to examine the politics associated with the proposal and the politics that might arise were the policy to be implemented.²⁸ The latter, counterfactual inquiry is of course likely to be quite difficult (and controversial), as the book's sketch of a world without judicial review suggests.

22. I therefore agree with Professor Mandel to the extent that he disagrees with the view that arguments against judicial review constitute a complete political strategy for weakening an institution that was created and persists because it advances particular political interests. I would not, however, rule out the possibility that such arguments might be a useful component of a broader political strategy in appropriate circumstances.

23. See Frank I. Michelman, *Populist Natural Law (Reflections on Tushnet's "Thin Constitution")*, 34 U. RICH. L. REV. 461 (2000).

24. See Graber, *supra* note 4, at 377 n.24. Again, Professor Graber inexplicably seems to think that having such an aim is somehow in tension with adhering to a populist constitutionalism.

25. See Prakash, *supra* note 9, at 569 n.31. The cynic in me whispers in my ear that this proposal originates in the author's coming to realize that conservative Republicans do not have a lock on the presidency (and that well-funded conservative demagogues are likely to do reasonably well in judicial elections, perhaps better than they would in the aggregate under the present system). The cynic's view might be rejected on the basis of the details of Prakash's proposal, but he does not provide any.

26. See TUSHNET, *supra* note 1, at 127.

27. See Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forwards: Judicial Review vs. Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415 (2000).

28. See Mandel, *supra* note 18, at 446-49.

Professor Graber would expand our vision even further, to include proposals for political reform that might advance a thicker populist agenda than the one I describe.²⁹ I have no quarrel with his observation that eliminating judicial review would not reduce the advantages elites have in nonjudicial fora, nor with his observation that those advantages should be as troublesome to a populist constitutionalist as judicial review is to me.³⁰ But I am a legal academic, writing about what I know. It is hardly the case that every author must take on every aspect of every issue relevant to the one he or she chooses to write about.

Walking home from work, I sometimes let my thoughts wander and spell out a social theory that describes how my good ideas might work their way into the policy universe. Usually, though, by the time I get home, I understand that the most that can be said for my work is that it is right. And I am satisfied with that.

III. POPULIST CONSTITUTIONALISM AND (OR VERSUS) POPULIST POLITICS

In different ways Professors Graber and Mandel question the coherence of a defense of populist constitutionalism that is distinct from a populist politics. In writing *Taking the Constitution Away from the Courts* I was quite conscious of my decision to refrain from identifying the political positions I hold with the outcomes I believed would occur in a populist constitutionalist system. I made that decision primarily because of my belief that constitutional theory has been degraded by the nearly universal practice of creating theories that map almost precisely on to the political outcomes the theorist desires.³¹ As I suggest in the book, some degree of overlap is inevitable: One would have to be a lunatic to adopt an interpretive theory that systematically produced outcomes one found morally outrageous, at least as long as a plausible alternative theory with less unattractive results was available. And some degree of discrepancy is probably inevitable also, if only to preserve some

29. See Graber, *supra* note 4.

30. See *id.* at 378.

31. Probably the most notable recent example is Michael McConnell's strenuous effort to defend *Brown v. Board of Education*, 347 U.S. 483 (1954), on originalist terms. See Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 953 (1995). In the course of that defense, Professor McConnell relies heavily on a form of subsequent legislative history that originalists usually (and properly, given their general theory) disclaim. See *id.*

credibility to the claim that one is articulating a constitutional theory that is in some significant sense different from one's political commitments. Still, the large degree of overlap and the small amount of discrepancy in most academic writing on constitutional theory is striking.

In contrast, my populist constitutionalism was designed to make possible large differences between my own views about good public policy and the outcomes that might occur in a populist constitutionalist system. My thought was that I could then preserve a significant domain for politics itself. Reflecting on the comments made by Professors Graber and Mandel, I have concluded that the distinction I sought to draw between a populist constitutionalism and populist politics is thinner than I had hoped. It does exist, however.

Professor Graber's excursion into the history of populism in the United States is interesting, but, I think, largely off the point, as his remarks near the conclusion of his contribution suggest.³² He may want to define *populism* to be identical with the program of the Populist Party of the 1890s, including producerism and protestant religiosity.³³ He offers no reasons for doing so, however. One could—and I did—use an idea of populism that is, once again, thinner than the specific commitments of any self-identified populists: Populism for me means the enactment into public policy of the people's views, whatever they happen to be. Producerism could be a specific version of populism, as could, more broadly, a political stance in which all that mattered was the people's unreflective will. But the kind of commitment to constitutional values that I attribute to the people of the United States can also be populist.³⁴

Professor Graber's more interesting questions go to the relation between the thin Constitution and the democratic values associated with political participation. He points out that I do not defend participation as valuable in itself, that is, as an important means of

32. See Graber, *supra* note 4, at 411.

33. See *id.* at 386-87

34. For this reason I do not quite understand Professor Graber's attribution to me of the view that populism is fine because it matters "only when different institutional forms are likely to yield similar results." *Id.* at 378. At most, I think, he can find in the book my *hope* that the people adhere to the thin Constitution's values, but I am reasonably explicit in asserting that, should things turn out otherwise, I would still adhere to my populism unless a real disaster loomed. See TUSHNET, *supra* note 1, at 31 ("Of course if democracy regularly produced disagreeable results, or occasionally produced truly vile ones, I would rethink my commitment to democracy"; this clearly implies that I would retain my commitment to democracy if it occasionally produced disagreeable but not truly vile results.).

improving our capacity as humans, nor as instrumentally valuable, that is, as a way of maximizing the chances that particular programs will be adopted.³⁵ I do talk about the value of participation, however, albeit in perhaps idiosyncratic terms. For me participation is valuable because it is one of the ways in which we define ourselves as a people. Populist constitutionalism is the way we explore our national self-identity in the political realm.³⁶ And, for me, institutions that enable such explorations are valuable.

We can begin to see the relation between populist constitutionalism and national self-identity by noting a problem with what I have written so far. Assume that the people of the United States are committed to implementing their desires or interests in a way compatible with the thin Constitution. Assume as well, as I do, that the thin Constitution covers an extremely wide domain of politics—albeit, of course, thinly.³⁷ Together these assumptions imply that the thin Constitution will be implicated in nearly every political decision—perhaps not in the decision whether to build one dam rather than another or to close one military base rather than another, but certainly in the decision to spend money on dams rather than on military preparedness. Have I not squeezed out all the space that politics could occupy in attempting to preserve a large domain for it?

I think not. Populist constitutionalism is, in the end, about the nature of the American people. Perhaps it is true that nearly every political decision *could* be discussed in terms of the thin Constitution: We can always ask, “Will reducing military preparedness or expanding natural resource conservation promote the thin Constitution’s values?” And, questions like that will be beneath the surface all the time to the extent that the people are committed to the thin Constitution. Usually they will not be asked. Resource allocation decisions will be made on the basis of pure policy concerns such as efficiency or, more generally, the people’s unreflective will.

35. See Graber, *supra* note 4, at 390.

36. Again, I make no claim that populist constitutionalism is the only way we do so. It is the way of doing so that an academic lawyer like me finds easiest to talk about.

37. See TUSHNET, *supra* note 1, at 169-72 (describing the political implementation of constitutional social-welfare rights associated with the thin Constitution).

Sometimes, however, a political leader will see advantage in raising the question: "What kind of people are we if we . . . ?"³⁸ Populist constitutionalism, that is, is always ready to be deployed in any political controversy. In that sense the distinction between populist constitutionalism and ordinary politics is quite thin. But we can still maintain a practical difference between populist constitutionalism and populist politics because populist constitutionalism will not always be deployed—and sometimes, when it is, the political leader who tries to do it will be ineffective. We engage in populist politics when we seek to discover and implement the people's will. We operate in the constitutionalist mode when we self-consciously reflect on the relation between the programs we are pursuing—the people's will—and the nature of our national identity. Providing an academic's view of such self-conscious reflection is no easy task, as I argue in the next section.

IV. THE SELF-LIMITING AND SELF-DEFINING ASPECTS OF THE THIN CONSTITUTION

Taking the Constitution Away from the Courts argues against judicial review,³⁹ but not against constitutionalism. It explores what Professor Michelman has called the paradox of democratic constitutionalism: Democracy requires that we be self-governing,

38. My emphasis throughout the book on the role of political leaders in populist constitutionalism shows that I do not identify populism with some undifferentiated mass of "The People." It also shows, I believe, that populist constitutionalism is a form of politics, an activity that always involves a distinction between political leaders and the general citizenry.

39. I confine to this footnote my disagreement with Professor Whittington's arguments that judicial review can serve as a valuable safety net or the venue for sober second-thought. See Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 507, 538 (2000). I argued in *Taking the Constitution Away from the Courts* that these arguments, while correct within their limited domain, do not overcome the difficulties associated with judicial review. On the safety-net metaphor: Sometimes legislatures fling things off the high platform, and properly so; these discarded programs ought to crash to earth. But the courts, acting as a safety net, might perpetuate the programs. The real question is whether the courts save enough things from crashing to earth that ought to be saved, relative to bouncing back things that ought to be discarded. Professor Whittington's assertion about the value of the safety net thus needs a more comprehensive defense. On the sober second-thought idea: Here too the problem is that the courts may require a second thought when the first one was perfectly fine. With respect to both arguments, what we need to know is the degree to which the courts demand a second thought or act as a safety net when they should, the degree to which they do so when they should not, and the importance of the issues in both categories. My general claim about judicial review is that courts are not a particularly valuable safety net or venue for a sober second thought, taking everything into consideration.

but constitutionalism limits what we can do in the course of governing ourselves.⁴⁰ I offered populist constitutionalism as a way of creating a system of self-monitoring self-government.⁴¹ The difficulty with judicial review, on this conception, is that it cannot readily be described as “self”-monitoring.⁴² In contrast, representative institutions can be so described, subject to Professor Graber’s clearly correct observation that elites play a distinctive role in those institutions too.⁴³

As Professors Tiefer and Devins both emphasize, I spend some time trying to determine the extent to which our existing nonjudicial institutions can perform the task of self-monitoring.⁴⁴ Both agree that constitutional theory would benefit from a closer examination of existing nonjudicial practices implicating the Constitution, and both agree that those practices, both legislative and executive, look better than many constitutional theorists assume before they have done the empirical work.⁴⁵ But no one could sensibly contend that monitoring by Congress and the Executive themselves would produce results identical to those produced by judicial monitoring. How serious would the differences be?

40. See FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 5-6 (1999).

41. I draw this helpful phrase from comments on *Taking the Constitution Away from the Courts* offered by political scientist Jean Cohen at the Columbia Colloquium on Political Theory, March 2, 2000.

42. Except insofar as a democratic people accepts judicial review as part of their own system of self-monitoring, a possibility I discuss in my book. See TUSHNET, *supra* note 1, at 173-74.

43. See Graber, *supra* note 4, at 377.

44. See Neal Devins, *Reanimator: Mark Tushnet and the Second Coming of the Imperial Presidency*, 34 U. RICH. L. REV. 359, 367-69 (2000); Tiefer, *supra* note 10, at 493-94.

45. Professors Tiefer, Devins, and I all focus on nonjudicial practices in the national government. One could fairly ask whether the picture is the same at the state and local level. I do not know of any useful works systematically examining those practices. For myself, I have a fairly formalistic response to those who think that, whatever the case with respect to actions by the national government, judicial review is needed to deal with state and local legislation, likely to be the product of processes even less respectful than national ones of constitutional values. As Professor Whittington anticipates, that response is that the national government clearly has the power to displace unconstitutional state laws and local ordinances, pursuant to its enumerated powers interpreted properly (that is, in light of the thin Constitution’s principles, and not as the Supreme Court interpreted them in *City of Boerne v. Flores*, 521 U.S. 507 (1997)). Congress’s capacity to do so is obviously limited, but we could easily design administrative mechanisms to perform this surveillance function. The administrative body would be something like James Madison’s Council of Revision, a proposal the Constitutional Convention rejected. Even taking originalism into account, however, one might note that the adoption of the Fourteenth Amendment changed the nature of American federalism in ways that make a Council of Revision focused on adherence to fundamental constitutional norms more compatible with federalism today than it would have been in 1789.

Professor Devins suggests that the degree of monitoring would drop dramatically, for two reasons. First, the Executive's ability to take the initiative would lead presidential positions to overwhelm congressional ones,⁴⁶ and the Executive's internal monitor, the Office of Legal Counsel, would be even more vigorous in defending Executive prerogatives if it did not have to take judicial doctrine into account.⁴⁷ Second, and in my view more important, monitoring for constitutionality is not politically attractive.⁴⁸ Here Professor Devins points to the difficulty congressional leaders have in attracting legislators to serve on the Judiciary Committees, especially legislators representative of the range of ideological views within each party's caucus.⁴⁹

The counterfactual nature of my argument poses an obvious difficulty at this point. I have no way of establishing that Professor Devins is wrong. I would note several things, however. The relative power of Congress and the President has changed over time, with Congress sometimes more powerful than the President, sometimes less. Perhaps there has been a permanent shift in power in the direction of the Presidency, but I would like to see a more thorough defense of that proposition before I yielded.⁵⁰ The Office of Legal Counsel is a bear about protecting presidential authority, and it might be even more forceful if it did not have to take judicial doctrine into account. But it is not clear to me that it has an institutional interest one way or the other about the thin Constitution's values. In the end, what I am concerned with is the degree to which the institutions of the national government monitor their own behavior with respect to those values. I am not yet convinced that even a permanent accretion of power to the Presidency would have substantial effects on the ability and willingness of Congress and the Presidency to monitor behavior affecting those values.

46. See Devins, *supra* note 44, at 368.

47. See *id.* at 370-71.

48. See *id.* at 365-67.

49. See *id.*

50. Even the obvious point that the President gained a great deal of power in areas related to national security after World War II may have less force after the end of the Cold War. More generally, political scientists seem to have established that Congress delegates less authority to Presidents during periods of divided government, and that we are likely to experience divided government for the foreseeable future. On delegation, see generally DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999). On divided government see generally MORRIS FIORINA, *DIVIDED GOVERNMENT* (2d ed. 1996).

The counterfactual problem is even more serious with respect to Professor Devins's point about the Judiciary Committees.⁵¹ They may be unattractive today, given their responsibilities. But perhaps they would be more politically attractive if they served as gatekeepers for all legislation, as the House Rules Committee does. Or each house might create a new Committee on the Constitution, assigned the task of allowing legislation to proceed to floor debate only if the committee certified that there were substantial grounds for believing that the legislation was constitutional.⁵² I do not know enough about the political incentives within Congress to know whether serving on such a committee would be politically attractive, indifferent, or unattractive. Perhaps such committees would be political plums in a world where the only monitoring occurred within the nonjudicial branches, and where the people were concerned about constitutionality.

In the end, however, it is hard to make progress in thinking through a counterfactual where something as basic to existing practices as judicial review is taken out of the system. Professor Devins might be right in thinking that eliminating judicial review would reduce the effectiveness of self-monitoring.⁵³ I am more hopeful. In part my hopes derive from the very thinness of the Constitution whose implementation needs self-monitoring. It is to a defense of the thin Constitution I now turn.

My critics offer two challenges to my identification of the thin Constitution with a narrative of the nation's identity. The thin Constitution, they say, is so thin—anorexic, to use one critic's term⁵⁴—that it cannot do any work at all. One might take Professor Michelman as suggesting that the thin Constitution, as I describe it, is no different from the commitments all democrats have to self-government subject to the rule of law. How, the critics ask, can *that* Constitution contribute to the construction of a distinctively American national self-identity? Professor Mandel offers a second kind of criticism. The thin Constitution is, one might say, too

51. See Devins, *supra* note 44, at 365-66.

52. Other, mostly parliamentary systems have such constitutional committees. I define the task of the committees as relatively limited—not determining constitutionality, but certifying a substantial basis for believing that a proposal is constitutional—to ensure that the constitutional issues are debated widely in Congress.

53. See Devins, *supra* note 44.

54. See Prakash, *supra* note 9, at 543. I must note that I remain troubled by what seem to me the sexist overtones of Prakash's term.

happy.⁵⁵ Saying that the national self-identity of the people of the United States consists in the principles of the Declaration of Independence and the Constitution's Preamble overlooks the nation's sorry history of slavery, racism, nativism, imperialism—and the list goes on.⁵⁶ Further, the retrospective nature of the construction of narratives of continuity might be thought to give my approach an undesirable attachment to the status quo. And its emphasis on national identity might generate an unattractive nationalistic identity-politics.⁵⁷ I believe that *Taking the Constitution Away from the Courts* anticipated and, in my view, met these criticisms.

To explain why, I think it appropriate to step back to outline the argument that culminates in my concern about national self-identity. As Professor Whittington points out, the underlying question is about constitutionalism itself: If we are to be a self-governing people, why should we accept *any* limits on our ability to govern ourselves?⁵⁸ Two standard answers can, I think, be put aside. Sometimes we limit ourselves because, knowing ourselves fairly well, we can predict that we will make errors of judgment about what is best for us. Constitutional limitations aimed at identifying areas of predictable misjudgment serve the interests we actually have, and so are consistent with our desire to govern ourselves in accordance with those interests. In addition, sometimes we limit ourselves because we know that spending political time and energy on a particular issue will disable us from addressing a broad range of other issues, in the practical sense that political time and energy are limited. So, for example, we might know that we would spend ninety percent of our political time and energy debating some issue about religious establishment. We probably would arrive at no stable conclusion about that issue. And having spent so much time and energy on it, we would not have enough left over to deal with questions about regulating the economy, the environment, and more—questions as to which we might actually come to some conclusions.

55. See Mandel, *supra* note 18, at 453.

56. See *id.*

57. One might, for example, see this risk realized in Justice Scalia's racialization of national identity, when he wrote, "In the eyes of government, we are just one race here. It is American." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

58. See Whittington, *supra* note 39, at 536-37. Professor Whittington limits his observations to the case in which a people chooses to have a written constitution. See *id.*

These are good arguments for a certain kind of self-limitation, but not one that helps us understand U.S. constitutionalism. The problem is that they explain why we might want to limit ourselves, but they do not explain why we ought to take seriously the limitations imposed on us by prior generations. The basic problem is straightforward.⁵⁹ The Constitution's framers in 1789 and its amenders in later years might well have known the distinctive risks of misjudgment run by the people of those times, but they could not have known the distinctive risks of misjudgment that we today run. Similarly, they might have done quite a good job in identifying the issues that would be too divisive in 1789, but there is little reason to think that those same issues have the same diversionary potential today. The result is that the Constitution will bar us from making decisions that we could make quite well, and from dealing with issues that are no longer divisive. And it may allow us to make decisions where our judgments are predictably bad (from our own perspective) and may not bar us from taking up political time and energy on issues that have become divisive since the Constitution was written.⁶⁰

A third standard answer to the question of justifying limits on self-government is that we have rights that are either essential to the preservation of self-government or are fundamental human rights independent of their connection to self-government. So, for example, we cannot have a system of self-government unless we have rights to expression, to political participation, to equality, and to autonomy.⁶¹ Or, whether or not we are concerned with self-government, human beings have rights to autonomy by virtue of our humanity. *Taking the Constitution Away from the Courts* addressed briefly the problem of a rights-based justification for limitations on our ability to govern ourselves: There is reasonable disagreement about what the real content of those rights is, and that disagreement can only be resolved by political processes if we are to remain

59. With a qualification noted *infra* in note 60.

60. The qualification to all this is that we might independently conclude that past judgments about misjudgment and divisiveness remain valid. *Cf.* TUSHNET, *supra* note 1, at 39-40 (discussing the "James Madison was a smart guy" argument). Then, however, the fact that the judgments were made in the past carries no independent weight. We are deciding for ourselves to limit our own action, and that is not inconsistent with self-government.

61. Rights to autonomy are connected to self-government because self-government would be illusory if a majority at one moment could enact legislation that precludes potential dissidents from having the mental space within which they could develop dissenting views. *See id.* at 158.

self-governing.⁶² No harm is done in asserting that we have rights of the relevant sorts, but the most we are going to be able to do is identify the rights quite abstractly. We will be able to say, uncontroversially, that a democratically self-governing people must have and respect rights of free expression and equality, for example, but we are not going to be able to say that laws against flag-burning as a means of political protest, or affirmative action programs, are inconsistent with those rights. In short, the rights we uncontroversially have are precisely the ones I have identified with the thin Constitution.⁶³

A rights-based argument of the sort I outlined in the preceding paragraph resolves the paradox of democratic constitutionalism quite generally. The U.S. Constitution enters the argument only because it happens to refer explicitly to the rights at issue. But, those rights inhere in all democratic systems of self-government.⁶⁴ I think that this is the ground that, according to Professor Michelman, connects my analysis to that of John Rawls.⁶⁵

I could leave the argument here, because it would have established the relevance—indeed, I think, the *exclusive* relevance—of the thin Constitution to a system of self-monitoring self-government. But I am bothered by the fact that the rights-based argument is one about constitutionalism generally, and not about whatever might be

62. *See id.* at 157-63.

63. I give essentially the same response to the argument that the Constitution serves a valuable coordination function. We need some way, for example, to pick members of the House of Representatives. Any way is arbitrary to some extent, but the one specified in the Constitution is at least as good as any other. The thick Constitution addresses the coordination problem. And interesting issues arise, as with the Emoluments Clause problem I discuss in the book, when someone claims that the thick Constitution impedes advancing the thin Constitution's goals. *See id.* at 33-36.

64. *See Hirschl, supra* note 27. Professor Hirschl commends attention to constitutional law in systems other than the United States, a recommendation that is particularly valuable at this point in the argument, because the argument suggests that we should be able to locate thin constitutional rights in all democratic constitutional systems. In this connection, I have regularly adverted to *Australian Capital Television Proprietary Ltd. v. Commonwealth of Australia*, (1992) 177 C.L.R. 106 (Austl.). The case involved a constitutional challenge to Australia's system of campaign finance, which the High Court understood to give a systematic advantage to the major incumbent parties. *See id.* at 107. Australia does have a constitution, but its drafters consciously omitted protections for free expression and equality rights of the sort relevant to addressing such a challenge. Nonetheless, the High Court found the statute unconstitutional, with the predominant view being that inequality in campaign finance was inconsistent with the nation's commitment to democracy. *See id.* at 107-08.

65. *See Michelman, supra* note 23, at 487. I feel compelled to note that sometimes, when I read Professor Michelman's contribution to this Symposium, I think that he has described quite accurately the logic of my argument, and that at other times I think he has made it better than it really is.

distinctive about the U.S. form of constitutionalism.⁶⁶ Saying why the U.S. Constitution is distinctive leads us, finally, to the thin Constitution as an expression of a narrative of national continuity.

Consider again the proposition that constitutionalism makes sense when it is understood to consist in self-imposed restrictions on self-government. My objections to restricting us by decisions made by a prior generation was that those decisions could not readily be described as “our” decisions. But perhaps they can be so described. What is needed is some account that connects us to the people who made the decisions. Somehow, “they” have to become “us.”

It is at this point that narratives of national continuity enter. “They” will be “us” if we understand ourselves to be part of the same nation—even though many years have passed, even though the activities of the governmental entity called “the United States of America” does very different things today from what it did then, and, most important, even though many of us have no genetic connection whatever to the people who adopted the Constitution. Narratives of national continuity provide us with the resources to develop that understanding. The thin Constitution—referring specifically to the U.S. Constitution—becomes our Constitution rather than a mere example of some generic constitutionalism once we do so.

Several points about the construction of these narratives seem worth making explicit. The narratives are *constructions*. And they are *contemporary* constructions, stories someone today tells about the kind of people we have been and are. Narratives of national continuity are not objective accounts of what really happened. Further, a wide range of possible narratives of national continuity are available at any time. On what basis should we choose among

66. Obviously the thick Constitution is distinctive: Perfectly decent constitutional systems exist without an Emoluments Clause, for example. Perhaps, as one passage in Professor Whittington’s contribution suggests, one could talk about the distinctiveness of the U.S. Constitution by bifurcating it. See Whittington, *supra* note 39, at 534 (“Tushnet seems so concerned with the process of ideological nation-building and citizenship that he loses track of the actual structures of governance.”). The Constitution of rights, thinly specified, is a version of democratic constitutionalism generally, while the thick Constitution is the distinctively American institutionalization of democratic constitutionalism. My difficulty with such an approach is captured by the observation that it has no room for treating Abraham Lincoln as someone who spoke deeply about the distinctive U.S. Constitution. The bifurcation strategy cannot comfortably deal with Lincoln’s constitutionalism, which was about rights, not about particular institutions, and was also about American constitutionalism as a distinctive practice.

the available narratives? As Professor Michelman suggests,⁶⁷ I think we ought to choose the one that is most attractive, in the sense that it provides the best account of a normatively attractive project that can be fairly attributed to the people of the United States extended over time. I acknowledge here, although I did not do so in the book, that the weakest part of my argument is my endorsement of a specific narrative. I assert, without providing evidence, that the people of the United States are in fact committed to the value-based system that I associate with the thin Constitution. One would draw different conclusions, or find a different narrative of national continuity more attractive, were my factual claims proven false. Finally, and for me most important, the construction of a narrative of national continuity allows us to develop a theory of *American* constitutionalism as a species of constitutionalism more generally.

Professor Whittington questions whether the thin Constitution, understood in the way I have presented it, is law in any meaningful sense.⁶⁸ He is of course correct in saying that the Constitution's adopters did not think that the Preamble and, more broadly, the principles enunciated in the Declaration of Independence were law in the conventional sense.⁶⁹ But, of course, Professor Whittington does not rely heavily on this originalist point. It may be that our disagreement is simply only of terminology: I am willing to say, with Dworkin,⁷⁰ that the principles that animate our interpretation and application of what is uncontroversially law are also part of the law, while Professor Whittington may want to maintain a distinction between those principles and the law itself. For him, law must have a "fairly thick" content if it is to perform the task of settling disputes. At this point, I think we face a simple but deep jurisprudential divide. I regard myself as a legal realist to the bone, and my legal realism tells me that no law, no matter how thick, can settle disputes in the way that Professor Whittington requires.⁷¹ So, for me, it is precisely true that, to take Professor Whittington's example discussing my treatment of the "Mitchell problem," a Senator who disregards the Emoluments Clause acts in accordance with law, as

67. See Michelman, *supra* note 23.

68. See Whittington, *supra* note 39, at 533.

69. See *id.* at 534.

70. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 28 (1977) (asserting that "principles play an essential part in arguments supporting judgments about particular legal rights and obligations").

71. This response is clearly not the place to develop the legal realist argument. For a short presentation of my views on it, see Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 *QUINNIPIAC L. REV.* 339 (1996).

does a Senator who votes to deny Mitchell his seat on the Supreme Court.⁷² This result does indeed follow from the thinness of the thin Constitution, but it does not, in my view, demonstrate that the thin Constitution is not law. Or, to restate the jurisprudential point, the fact that the thin Constitution does not settle disputes does not establish that the thin Constitution is not law because law cannot do what Professor Whittington asks of it—settle disputes (in the relevant sense).⁷³

My emphasis on the contemporary construction of retrospective narratives of national continuity explains why I think that Professor Mandel's criticism is misplaced. We construct our narratives today although they look to the past. As I acknowledge in *Taking the Constitution Away from the Courts*, political theory imposes no duty on us to ensure continuity with the past.⁷⁴ We should simply abandon the search for a connection to the past and rely entirely on the general defense of constitutionalism I have already outlined if we thought that the best narrative of national continuity was the bleak one described by Professor Mandel.⁷⁵ I argued, in contrast, that the best narrative we can construct would be complex, incorporating the history that Professor Mandel describes. Such a narrative is likely to be better than the denatured, celebratory narrative that Professor Mandel fears might emerge, because it will provide a firmer foundation for the forward-looking projects in which the people engage.⁷⁶

A complex narrative of national continuity need not reproduce the status quo or perpetuate nativism, either. As I suggested in my comments on American national identity in *Taking the Constitution Away from the Courts*, one can describe us as a self-transforming people, recurrently incorporating immigrants into the people,

72. See Whittington, *supra* note 39, at 534.

73. Professor Whittington correctly points out that using Governor Orval Faubus's opposition to the desegregation of Little Rock's schools as an example of an action that could not be connected to the thin Constitution was underdeveloped, see Whittington, *supra* note 39, at 535, and I agree that one might generate an account of states' rights that connected the discretion Faubus exercised to the thin Constitution's principles. I disagree, however, that segregation could be *directly* defended as consistent with the thin Constitution's principles.

74. See TUSHNET, *supra* note 1, at 183-85.

75. See Mandel, *supra* note 18. It might be that the general defense of constitutionalism would produce some results different from those produced by creating a narrative of national continuity around the thin Constitution, although the thinness of the latter suggests that the differences would have to be rather small.

76. I drew the analogy to processes of personal self-understanding, in which an individual's ability to go forward is enhanced by his or her appreciation of the bad side of his or her personality as exhibited in past behavior. See TUSHNET, *supra* note 1, at 184.

expanding the domain of citizenship, and treating previously undervalued citizens with increasing respect.⁷⁷ As Rogers Smith emphasizes, this description competes with one in which national self-identity is manipulated by politicians who seek parochial advantage in a nativism that takes the American character as already formed and unalterable.⁷⁸ As this indicates, Smith understands that claims about national self-identity are weapons in political struggle. They are weapons available to both sides, however. Smith points out that we see ourselves as self-transforming when other politicians seek their own advantages from offering us that description.⁷⁹ As a result, we have available to us a national identity that is not tied to the status quo or to a nativist nationalism, although we may choose some other description (wrongly, in my view). The possibility of seeing ourselves as self-transforming is enough to demonstrate that my argument does not necessarily have the troubling biases critics might find in it.

As with the entire argument, here too I have to insist that there are no guarantees. Constructing a narrative of national continuity is, at its heart, a rhetorical enterprise. That is why Abraham Lincoln plays such a large role in the book: Lincoln's rhetoric when he addressed fundamental questions about the Constitution is among the best in our tradition.⁸⁰ Rhetoric's role in the argument also explains the important place political leaders have in my account, because they—among others—are the ones who articulate the national self-understanding that justifies constitutionalism. But stressing the role of political leaders immediately opens up the possibility that we will choose bad leaders rather than good ones, demagogues rather than “enlightened statesmen,” who, James Madison reminded us, “will not always be at the helm.”⁸¹ I have no real response to this except Learned Hand's, that if the people are so misguided as to select demagogues to lead us, we are unlikely to find much help from any other institution, including a judiciary committed in principle to protecting human rights.⁸²

77. *See id.* at 191-92.

78. *See id.* at 173-74 (discussing work of Rogers Smith).

79. *See id.*

80. Although James Madison, John Marshall, and Thomas Jefferson sometimes came up to Lincoln's standard.

81. THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

82. *See* Learned Hand, The Contribution of an Independent Judiciary to Civilization, in THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 155, 164 (Irving Dilliard ed., 2d ed. 1953) (arguing that “a society so riven that the spirit of moderation is gone, no court *can save*” (emphasis added)).

V. CONCLUSION

The comments on *Taking the Constitution Away from the Courts* presented in this Symposium have deepened my understanding of my own argument, and have led me to modify it in some respects. I now understand more clearly than before that the book's project is to defend a distinctive American constitutionalism. The thin Constitution, I argue, provides the best narrative of national continuity, and thereby explains why we as Americans should be committed to advancing its project, why we as Americans should take as our goal the increasingly broad realization and implementation of universal human rights justified by reason.⁸³ In this way a distinctive American constitutionalism can be connected to Professor Michelman's more universalistic constitutionalism. We are, I have argued, a particular people committed to a universal program. As I put it in *Taking the Constitution Away from the Courts*, this is "not an entirely unattractive self-understanding."⁸⁴

83. As Professor Graber's comments suggest, I believe that I have identified the right vision in *Taking the Constitution Away from the Courts*, but not that I have actually provided it, because providing the right description is a job for someone with talents other than the ones I have.

84. TUSHNET, *supra* note 1, at 53.