

# Thick and Thin: Interdisciplinary Conversations on Populism, Law, Political Science, and Constitutional Change

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## INTRODUCTION

My contribution to a *University of Richmond Law Review* symposium honoring *Taking the Constitution Away from the Courts*<sup>1</sup> claimed that Professor Mark Tushnet is not a populist because he does not share the religious, producerist, and anti-elitist sensibilities historically associated with populism.<sup>2</sup> Professor Tushnet responded that he is a populist. "Populism for [him] means the enactment into public policy of the people's views, whatever they happen to be."<sup>3</sup> We are both right and we are both wrong. Each essay accurately described what populism means in the portion of the academic universe that we inhabit, while misperceiving in different ways what populism means in the portion of the academic universe that the other inhabits. By talking past each other, we missed an opportunity to have an important conversation on matters central to Professor Tushnet's work: the nature of the present constitutional regime and how left-wing constitutional theory might assist, if at all, in efforts to bring about a more favorable political order.

This Essay explores the dispute between Professor Tushnet and me over the meaning of populism as a vehicle for improving interdisciplinary conversations about American constitutional development, theory, and practice. Professor Tushnet is comfortable with an understanding of populism that is partly tied to how contemporary popular culture understands populism. I am more insistent on a definition that is tied to historical practice (though not a particular historical movement). Each of us found the other's understanding puzzling because neither of us was fully aware that both were relying on a particularly disciplinary conception of populism rooted in distinctive disciplinary assumptions. While attempting to talk to each other about our mutual interest in the constitutional functions of courts, we did not realize that we were speaking in partly distinctive disciplinary languages. The result was a failure by each of us to engage the other in vital questions associated with present constitutional capacity for populist change in the United States, how that change may occur, and whether that change is desirable.

Our exchange, and other interdisciplinary conversations, may benefit from

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

2. Mark A. Graber, *The Law Professor as Populist*, 34 U. RICH. L. REV. 373, 380-95 (2000).

3. Mark Tushnet, *Politics, National Identity, and the Thin Constitution*, 34 U. RICH. L. REV. 545, 553 (2000).

more conscious awareness of different disciplinary norms. The first half of this Essay attempts to locate the different ways academic lawyers and students of political development understand populism in the distinctive disciplinary norms of law and political science. My tribe of political scientists<sup>4</sup> prefers thick description that closely ties political identifications to actual historical practice.<sup>5</sup> Professor Tushnet's tribe of academic lawyers is more comfortable proclaiming thin historical identities and commitments that abstract considerably from actual historical practices. The second half of this Essay suggests that these disciplinary norms are grounded in practical concerns with the political universe and are not simply rules of grammar. Political scientists adopt thick historical understandings of populism and related historical phenomena partly because they believe that certain kinds of reform movements require substantial support by working-class citizens and that only arguments of a certain sort are likely to mobilize the working class. Lawyers, I suspect, adopt thin historical understandings of populism and related phenomena because they engage in far more popular forms of rhetoric than political scientists.

This Essay reflects my partisan perspective as a political scientist. That perspective encompasses my expertise, interests, and values. As the director of graduate studies in a political science department, I am obviously far more aware of the disciplinary norms in political science than I am responsible for instilling in my students and charges than the disciplinary norms that structure scholarship in the law reviews.<sup>6</sup> This Essay also reflects a social scientist's interest in such questions as "what is necessary to make a valid knowledge claim." Such questions play central roles in political science training and scholarship, but seem absent in legal scholarship and the introductory course in legal method. Most important, this is not a work in anthropology designed simply to set out how two different cultures approach populism and other topics. I am a cultural imperialist. Scholarship would be better off, I believe, if both lawyers and political scientists used the thicker description of populism noted below. I freely recognize, however, that I am not fully aware of the reasons why academic lawyers are more comfortable with the way popular

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4. The recent grassroots rebellion in political science makes clear that political scientists as a group do not agree on the proper disciplinary norms of political science. See Emily Eakin, *Political Scientists Leading a Revolt, Not Studying One*, N.Y. TIMES, Nov. 4, 2000, at B11. The day after the Tushnet symposium, I attended a conference with mostly behavioral political scientists and academic lawyers. My perspectives were far closer to those of the lawyers than to those of the more scientific members of my home discipline.

Analogous factional disputes no doubt exist in the legal academy. I am vaguely aware of some and oblivious of others. One element of the disciplinary nature of interdisciplinary scholarship, my limited experience suggests, is that participants are very concerned about factional struggles in their discipline, while relatively unconcerned with factional struggles in other disciplines.

5. See Howard Gillman, *The Court as an Idea, Not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 65, 87 (Cornell W. Clayton & Howard Gillman eds., 1999).

6. This Essay, one should note, is far too speculative to pass muster in a faculty-refereed political science journal.

culture understands populism. In the best spirit of conversation, this Essay is offered as an effort to persuade others—as they should feel free to persuade me in return.

# I. PROFESSOR TUSHNET AND THE STATE OF INTERDISCIPLINARY CONSTITUTIONAL SCHOLARSHIP

Professor Tushnet is celebrated in the portion of the academic universe inhabited by PhDs interested in constitutional development as the most distinguished law professor actively promoting conversations between law professors and members of other academic disciplines.<sup>7</sup> *Taking the Constitution Away from the Courts* is the only major contemporary work by an academic lawyer that seriously engages the relevant social science literature on the function of judicial review.<sup>8</sup> His *Foreword* to the *Harvard Law Review* similarly relies heavily on political science and related scholarship when determining the nature of the American constitutional order at the turn of the twenty-first century.<sup>9</sup> That persons in my home discipline consider such interdisciplinary analysis a significant advance in legal theory is hardly surprising. This entire Essay could be devoted to illustrating how Professor Tushnet's work demonstrates the superiority of constitutional scholarship rooted in the best present understandings of what various government institutions do or are capable of doing to constitutional scholarship that largely implores justices and (rarely) other constitutional authorities to act in ways that those government officials do not want and have almost never wanted to act. That presentation would have only two difficulties. The first point is obvious: If members of a given institution have rarely if ever made certain policies, then the institution is clearly not well designed to promote those policies. Second, Professor Tushnet's recent writings highlight far better than this Essay the virtues of a constitutional scholarship that takes seriously the structure of the present constitutional universe. Constitutional lawyers who write in the wake of *Taking the Constitution Away from the Courts* will face a difficult challenge explaining why their "natter(ing) at judges"<sup>10</sup> will be more successful than past natterings. If the point of constitutional theory is to

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7. Professor Sandy Levinson's efforts should also be noted, though unlike Professor Tushnet, Professor Levinson has a Ph.D. in political science and a part-time appointment in a political science department. Professor Stephen Griffin deserves special plaudits as the leading younger scholar interested in promoting dialogue between political scientists and academic lawyers. Professors Barry Friedman, Michael Klarman, and Frank Cross also merit special mention. For representative works, see STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (1996); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529 (2000); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1 (1996).

8. See TUSHNET, *supra* note 1, at 129–53.

9. Mark Tushnet, *The Supreme Court 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Ambition*, 113 HARV. L. REV. 29, 34–69 (1999).

10. TUSHNET, *supra* note 1, at 155.

instruct Justices as to the right reasons for reaching the right results in constitutional cases, then liberal constitutional theory has almost no point while the Rehnquist Court sits.<sup>11</sup>

Professor Tushnet is also celebrated in my academic universe for promoting participation by political scientists in the central constitutional dialogues of contemporary public law. He was the manuscript reviewer responsible for bringing to light works by Howard Gillman,<sup>12</sup> Pamela Brandwein,<sup>13</sup> and others<sup>14</sup> at a time when senior social scientists were advising more junior scholars to study "any public law other than constitutional law, any court other than the Supreme Court, any public lawmaker other than the judge, and any country other than the United States."<sup>15</sup> His "schmoozes" and other sponsored symposia have increasingly become the places in the academy where political scientists and academic lawyers actually meet for face-to-face discussions on constitutional topics of mutual interest. More recently, Professor Tushnet helped organize the first conference on constitutionalism jointly sponsored by the American Association of Law Schools and the American Political Science Association. In short, Professor Tushnet's writings and activities demonstrate a commitment to engaging as much of the literature on constitutionalism and the judicial function as humanly possible, and an equal commitment to fostering nurturing environments for all scholars who are thinking about similar matters.

The interdisciplinary relationships that Professor Tushnet and others are fostering are not entirely harmonious. Political scientists frequently complain that academic lawyers do not quite get it. Legal scholarship, they mutter to each other, remains too court-centered and rarely qualifies as true social science. Why should the main agenda of a populist constitutionalism be taking the Constitution away from courts? And where is the research design for demonstrating that judicial review amounts to little more than noise around the mean? Less extensive conversations with academic lawyers suggest that they are similarly

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11. See Mark A. Graber, *Rethinking Equal Protection in Dark Times*, 4 U. PA. J. CONST. L. (forthcoming Jan. 2002).

12. HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993).

13. PAMELA BRANDWEIN, *RECONSTRUCTING RECONSTRUCTION: THE SUPREME COURT AND THE PRODUCTION OF HISTORICAL TRUTH* (1999).

14. He deserves similar censure for MARK A. GRABER, *RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS* (1996). Professor Tushnet's role as a reviewer for political science manuscripts highlights an important imbalance of power that helps structure relationships between law professors and political scientists. Junior law professors interested in questions of constitutional development and theory are tenured almost exclusively on the basis of law review articles. Junior political scientists interested in questions of constitutional development and theory are tenured almost exclusively on the basis of university press books. Senior political scientists have no influence over what law reviews publish, but senior law professors often review political science manuscripts for university presses. Hence, while junior law professors need not know the political science literature on their subjects to secure the publications necessary for tenure, junior political scientists had better know the relevant law review literature.

15. Martin Shapiro, *Political Jurisprudence, Public Law, and Post-Consequentialist Ethics: Comment on Professors Barber and Smith*, 3 STUD. AM. POL. DEV. 88, 102 (1989).

dissatisfied with much political science. Academic lawyers find unbearably dull both the topics and writing in much social science. Law professors quickly lose interest when they perceive that other academics are engaging in tendentious disciplinary struggles rather than directly engaging problems in the world. Who cares about the precise qualifications for wearing the populist label? Let's talk about whether we should take the Constitution away from the courts!<sup>16</sup> One side complains about imperial academic lawyers who cite each other religiously, ignoring relevant scholarship by persons in other disciplines.<sup>17</sup> The other side complains about imperial social scientists who prefer precision and statistics to providing interesting information about courts and constitutions.<sup>18</sup>

The flowering of interdisciplinary legal scholarship has occurred, in short, without anyone becoming a pure interdisciplinary scholar.<sup>19</sup> A quick glance at Professor Tushnet's acknowledgments and the participants in this symposium honoring his work indicates that Professor Tushnet is a law professor who spends the bulk of his time teaching law students and talking to other law professors. He has never claimed otherwise. A similar glance at the acknowledgments in works by Howard Gillman and Keith Whittington makes clear that they spend the bulk of their professional time teaching political science students and talking to other political scientists. They do not claim otherwise. We are law professors and political scientists who want to speak to and learn from each other. When we speak, we speak in the language of our discipline and in the dialect of our particular disciplinary tribe. When our minds are on our common interest in judicial review, we may each take for granted our distinctive disciplinary understandings of populism, unless we are also interested in having an interdisciplinary conversation about populism.

## II. POPULISM IN POLITICAL SCIENCE AND ACADEMIC LAW

The fable of the blind men describing the elephant probably inspired the way students of political development and law professors write about populism. Political scientists and historians have produced a rich literature on populism as a historical phenomenon.<sup>20</sup> Prominent academic lawyers have produced no

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16. The best illustrations of the ways lawyers and political scientists who genuinely admire the work of the other nevertheless complain about practice in foreign disciplines are the reviews Professor Gerald Rosenberg and Professor L.A. Powe wrote of each other's work. See L.A. Powe, Jr., *The Supreme Court, Social Change, and Legal Scholarship*, 44 STAN. L. REV. 1615 (1992) (reviewing GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991)); Gerald N. Rosenberg, *Bringing Politics Back In*, 95 NW. U. L. REV. 309 (2000) (reviewing L.A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000)).

17. See Judith A. Baer, Book Review, 5 L. & POL. BOOK REV. 130, 131-32 (1995); Mark A. Graber, Book Review, 9 L. & POL. BOOK REV. 50, 52 (1999).

18. See, e.g., POWE, *supra* note 16, at xii-xiii.

19. Professor Sandy Levinson probably comes closest to the mold.

20. See, e.g., MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* (1995)

analogous literature on the history of populist law.<sup>21</sup> Prominent law professors are elaborating a normative constitutional vision explicitly labeled "populist," but their theories do not elaborate on the visions of Ignatius Donnelly, William Jennings Bryan, or any other thinker discussed in the political development literature on populism. No prominent political scientist is spinning a self-identified "populist" political theory. Professor Benjamin Barber, whose views seem identical to many "populist" law professors, describes himself as a "strong democrat."<sup>22</sup> Carole Pateman advocates "participatory democracy," not "populist democracy."<sup>23</sup>

My thick description of populism as a historical practice is structured by the literature on American political development that I first confronted as a graduate student in political science and presently teach to political science graduate students. Populism in this academic tradition is not confined to the National People's Party of the 1890s, although that movement is usually considered to be the paradigm instance of populism.<sup>24</sup> Scholarship on populism in American political development seeks to distinguish the populist movement from other reform movements at the turn of the twentieth century, to highlight core populist values, to identify predecessor populist movements, and to determine which successor political movements should be considered populist. Richard Hofstadter's *The Age of Reform*<sup>25</sup> is probably the seminal study in the populist literature. Hofstadter, in that work, insisted on a sharp distinction between the populist and progressive movements, both in terms of their demographic appeal and political ideology.<sup>26</sup> In 1976, Lawrence Goodwyn issued a powerful challenge to Hofstadter's thesis, claiming that populists were both more democratic and more realistic than previous scholarship concluded.<sup>27</sup> Another important work in the political development tradition, Michael Paul Rogin's *The Intellectuals and McCarthy: The Radical Specter*,<sup>28</sup> "challenges the notion that McCarthy had agrarian radical roots."<sup>29</sup> No canonical understanding of populism presently exists.<sup>30</sup> Hofstadter, Goodwyn, and Rogin are all controversial. Still, students of

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21. For a brief discussion, see William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 43-51 (1999). Morton Horwitz discusses progressive legal conceptions at great length, but his study of American law from 1870 to 1960 does not even have an index entry for populism. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

22. BENJAMIN R. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 117-38 (1984).

23. CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 21 (1970).

24. See KAZIN, *supra* note 20, at 3-5; Graber, *supra* note 2, at 386-90.

25. RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955).

26. *Id.* at 131-73.

27. LAWRENCE GOODWYN, *DEMOCRATIC PROMISE: THE POPULIST MOMENT IN AMERICA*, at xv-xxiii (1976).

28. MICHAEL PAUL ROGIN, *THE INTELLECTUALS AND MCCARTHY: THE RADICAL SPECTER* (1967).

29. *Id.* at 5.

30. For the most recent important entry in this debate, see ELIZABETH SANDERS, *ROOTS OF REFORM: FARMERS, WORKERS, AND THE AMERICAN STATE, 1877-1917* (1999).

American political development agree that political ideas and movements are populist only if they display substantial affinities with past populist ideas and movements. Only the precise particular affinities are disputed.

Michael Kazin's important book, *The Populist Persuasion*,<sup>31</sup> identifies three tendencies in all populist movements: producerism, religiosity, and anti-elitism.<sup>32</sup> Some populist movements, he notes, placed greater emphasis on some themes rather than others. Still, working-class movements—from Jacksonian Democrats to the New Left—that purport to speak for the people, typically make extensive use of some of these rhetorics. One need not uncritically adopt Kazin's understanding of populism, as I did when I claimed that *Taking the Constitution Away from the Courts* was not a work of populist constitutional law because the work made no appeal to producerist, anti-elitist, and religious sentiments. Populism may be considered a more agrarian phenomenon, or rhetoric on behalf of the people may have other central elements. Any challenge to Kazin in the political development literature, however, would rely on fairly thick descriptions of past political movements that have mobilized less fortunate citizens.

By training, habit, inclination, and place in the academic universe, I was inclined to unthinkingly regard populism as requiring a good deal more than a commitment to public policy that reflected the will of the people. Scholarship on populism in my tribe must accept or contest, not ignore, the thick descriptions of populist identity found in the literature on American political development. No respectable faculty-refereed journal in history or political science would accept a paper claiming to present a populist perspective that did not engage Hofstadter, Rogin, Goodwyn, Kazin, or similar scholarship. Editors at the *University of Richmond Law Review* may not know this literature, but old habits die hard. While my contribution was partly written to be read by Mark Tushnet and the sort of academic lawyer who may be interested in a certain kind of political science, the essay was also aimed at such scholars as Howard Gillman, Keith Whittington, Rogers Smith, Karen Orren, and Michael Kazin. These historians and political scientists find my use of populism appropriate (though they may quibble with details) and the legal conception odd. They would understand if I were little more speculative in the law review context,<sup>33</sup> but not if I uprooted populism from its historical roots. One would not be doing political science if one described as "populist" the views Professor Tushnet and others associate with populist constitutional law.

Quite clearly, Professor Tushnet's training, habits, inclinations, and place in the academic universe do not lead him to find anything odd about attaching the populist label to any political program committed to public policy that reflects

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31. KAZIN, *supra* note 20.

32. For a summary of Kazin's findings, see Graber, *supra* note 2, at 387–88.

33. This clause is an example of the sort of speculation that never appears in a faculty-refereed political science journal.

the will of the people. Quite clearly, he feels no need to engage Kazin, Hofstadter, Goodwyn, Rogin, or other works on American political development that explore populism, writ large or writ small, or with any populist thinker who wrote before 1990. Mind reading is difficult, but claiming that Professor Tushnet's understanding of populism reflects neither a conscious acceptance nor rejection of the primary or secondary literature on populism seems safe. That literature was never cited in *Taking the Constitution Away from the Courts*. When challenged on his use of "populist," Professor Tushnet still felt no need to call the scholarly literature on populist movements in his defense. His response to my critique made clear that his populism had little in common with the sentiments expressed in any populist platform of the 1890s or any other populist manifesto.<sup>34</sup> Quite clearly, therefore, Professor Tushnet and other self-identified populists in the legal academy do not accept the norms that structure understandings of populism in political science.

Professor Tushnet's populism is the populism of Jack Balkin<sup>35</sup> and Sandy Levinson,<sup>36</sup> to a lesser degree the populism of Richard Parker<sup>37</sup> and Akhil Amar,<sup>38</sup> and to a more general degree the populism of the law review literature.<sup>39</sup> Populism in the law review literature apparently requires only a commitment to a strong congruence between public policy and popular opinion, or a commitment to more Protestant understandings of the Constitution.<sup>40</sup> With the important exception of a wonderful piece by Jack Balkin,<sup>41</sup> academic lawyers do not feel the need to draw strong distinctions between populist and progressive constitutionalism, or between populist and participatory democracy. Legal populists do not engage with the literature on American political development that explores, for example, working-class understandings of religious freedom. Populism in the legal academy is more rooted in contemporary culture than historical practice. What Al Gore and the *New York Times* mean by populism is more important than what Professor Goodwyn and *Studies in American Political Development* mean by populism. Contemporary culture does define as populist anything associated with "the people" rather than elites.<sup>42</sup> This apparently provides sufficient grounds for law professors to claim the populist mantle.

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34. Tushnet, *supra* note 3, at 553.

35. J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935 (1995).

36. Sanford Levinson, *Constitutional Populism: Is It Time for "We the People" to Demand an Article Five Convention?*, 4 WIDENER L. SYMP. J. 211 (1999).

37. RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994).

38. AKHIL REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS*, at xi (1998).

39. See Graber, *supra* note 2, at 373-74.

40. See, e.g., Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 482 (1998).

41. Balkin, *supra* note 35.

42. KAZIN, *supra* note 20, at 271.



Professor Tushnet's normative writings are more generally committed to thin interpretations of political phenomenon. *Taking the Constitution Away from the Courts* famously defends a "thin Constitution."<sup>43</sup> This Constitution consists of a commitment only to the principles laid down in the Declaration of Independence, probably of a commitment only to the principles laid down in the second paragraph of that document, and possibly of a commitment only to the principles laid down in the first sentence of the second paragraph. "[T]he thin Constitution," he writes, seeks "vindication of the Declaration's Principles: the principle that all people were created equal, the principle that all had inalienable rights."<sup>44</sup> When provisions of the thick Constitution, such as the Emoluments Clause,<sup>45</sup> conflict with the aspirations stated in the Declaration, Professor Tushnet believes Americans may constitutionally disregard the thick Constitution.<sup>46</sup> Professor Tushnet's Declaration of Independence is similarly thin, and not just because only one sentence seems constitutionally relevant. His Declaration expresses a generalized commitment to universal human rights, not a commitment to a specific conception of human rights. Professor Tushnet's analysis of the Declaration does not explore those primary or secondary sources that shed light on how Thomas Jefferson, other members of the Revolutionary generation, or other Americans throughout history understood the principles laid down by the Declaration.<sup>47</sup> These matters concern the thick Declaration, which is not an appropriate object for constitutional veneration. Professor Tushnet's Declaration, in short, has the same relation to the Declaration written in 1776 as his populism does to the populisms of the nineteenth and first three-quarters of the twentieth century.

Students of political development and constitutionalism articulate thicker understandings of the Constitution and the Declaration of Independence. Keith Whittington and Stephen Griffin point out that the functional Constitution consists not only of the text and judicial decisions highlighted by conventional legal analysis, but also of numerous constitutional constructions developed and maintained by officials in the elected branches of government.<sup>48</sup> A constitutional norm now exists against impeaching Supreme Court Justices for perceived erroneous decisions, a norm that can be found in neither the constitutional

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43. TUSHNET, *supra* note 1, at 11.

44. *Id.* Professor Tushnet never suggests principles laid down in the grievances section of the Declaration have independent constitutional significance.

45. U.S. CONST. art. I, § 9, cl. 8.

46. TUSHNET, *supra* note 1, at 33–53.

47. Professor Tushnet does identify his thin Declaration with the Declaration of Abraham Lincoln. *Id.* at 11. That thin Declaration, however, should not be confused with what Lincoln or others meant by equality or inalienable rights. For that Republican vision, see ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* (1970).

48. See GRIFFIN, *supra* note 7, at 72–87; KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 1–19 (1999); see also Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 63–64 (1998) (noting that "when mining our history, we need to look at the actions and positions of constitutional actors ranging well beyond the courts").

text nor judicial precedent.<sup>49</sup> Professor Stephen Elkin observes that constitutions consist of thick institutions capable of realizing certain aspirations and people capable of sharing those aspirations, as well as such aspirations as those found in the Declaration of Independence.<sup>50</sup> Constitutional decisionmakers, in his view, are charged with “choos[ing] the institutional maintenance strategies that strengthen the kind of political sociology the regime requires.”<sup>51</sup> Students of political development regard the Declaration as intricately linked to particular historical ideas and forces, and not as a detached statement of principle. Debates over the Declaration, among my tribe, concern the sources of Jefferson’s political beliefs and changing status of the Declaration in American history.<sup>52</sup> Political scientists are less likely than lawyers to point to the Declaration as a source of normative commitment because, as an influential essay convincingly points out, while Jefferson and most other American Revolutionaries believed that persons of color were entitled to fundamental human rights, American citizenship was not one such fundamental right.<sup>53</sup> This thick Declaration is far less supportive of equal citizenship than the thin Declaration. *Brown v. Board of Education*<sup>54</sup> follows unquestionably from Professor Tushnet’s thin Declaration. Jefferson’s and possibly even Lincoln’s thick Declaration<sup>55</sup> provide far less certain foundations for that decision.

Professor Tushnet and I were trying to engage in an interdisciplinary conversation, but our conversation was handicapped because we were simultaneously engaging in disciplinary conversations. We are not disembodied scholars, but established members of a particular discipline reaching out to members of other disciplines on some matters of mutual interest. On those matters on which we were not reaching out, we seem to have taken our disciplinary practices for granted. Professor Tushnet’s populist constitutional law wonderfully draws political scientists into the conversation on the function of judicial review by pointing out that what social scientists say about the Supreme Court is relevant to theories about the proper role of judicial review in a constitutional democracy. The populism in the populist constitutional law, however, was not intended

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49. For the political establishment of that norm, see WHITTINGTON, *supra* note 48, at 20–71.

50. Stephen L. Elkin, *The Constitutional Theory of the Commercial Republic*, 69 *FORDHAM L. REV.* 1933, 1943–49 (2001).

51. *Id.* at 1963.

52. For leading works, see PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* (1997); and GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE* (1979).

53. Herbert J. Storing, *Slavery and the Moral Foundations of the American Republic*, in *SLAVERY AND ITS CONSEQUENCES: THE CONSTITUTION, EQUALITY, AND RACE* 45, 50–51, 58–59 (Robert A. Goldwin & Art Kaufman eds., 1988).

54. 347 U.S. 483 (1954).

55. See Letter from Abraham Lincoln to James N. Brown (Oct. 18, 1858), in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 328 (Roy P. Basler ed., 1953); see also HARRY V. JAFFA, *CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATE* 378–81 (1959) (noting that Lincoln did not believe racial equality meant persons of color had the right to be equal citizens of the United States).

to foster discussion among students of American political development, but was an internal trope to the legal academy. Similarly, while my analysis of populist constitutional law was obviously directed at Professor Tushnet, the analysis of populism was informed entirely by scholars writing on American political development, my other audience. I simply assumed that, as a student of political development, the political science understanding of populism was authoritative. Professor Tushnet was both wrong and right when he declared that I “offer[ed] no reasons for . . . defin[ing] populism” to include “producerism and protestant religiosity.”<sup>56</sup> The almost obsessive citation to Kazin in my *University of Richmond Law Review* piece was an effort to indicate clearly that I was relying heavily on a standard understanding of populism within a field of academic thought.<sup>57</sup> The truth underlying Professor Tushnet’s assertion is that I offered no reason for privileging the use of populism in one literature—the literature on American political development—over the use of populism in another literature—the literature on populist constitutional law.

Neither of us explicitly realized our distinctively disciplinary understandings of “populism” even though our parochialism leaps off the pages of the *University of Richmond Law Review*. I had actually done a survey of the use of “populism” in legal literature.<sup>58</sup> When I discovered that the uses tended to be similar to that in *Taking the Constitution Away from the Courts*—that “populism” in law meant little more than a commitment to making public policy better reflect public opinion—my disciplinary imperialism led me to conclude simply that an entire discipline did not understand populism. Similarly, Professor Tushnet might have wondered why I was so concerned to cite Kazin and other students of American political development. My effort to ground populism in a literature might have helped him to recognize better that I was reporting on a disciplinary understanding rather than setting out a personal understanding of populism.<sup>59</sup>

Interdisciplinary work is also disciplinary work. Rather than working at the border of several disciplines, Professor Tushnet’s recent writings, everything I have written, and most scholarship with similar ambitions for a wide audience sometimes goes to the border and crosses over into other disciplines, but the vast bulk of the work is securely located in a particular field. Scholars, even those with nominal appointments in more than one discipline, are primarily socialized and live in one discipline. Like citizens who discover how American they are only when they go abroad, firm attachment to disciplinary norms may become apparent only when one is engaged with another, foreign discipline. We may think ourselves dissidents because we reject several of our home disci-

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56. Tushnet, *supra* note 3, at 553.

57. *See, e.g.*, Graber, *supra* note 2, at 385 & n.71 (citing KAZIN, *supra* note 20, at 271).

58. *Id.* at 373–74.

59. Another clue was our acknowledgments. Everything I write is likely to be vetted by known scholars in American political development who find as unproblematic my understanding of populism as the persons who vetted Professor Tushnet’s work find unproblematic his understanding of populism.

pline's norms, but we in fact accept far more than we reject. My response to Professor Tushnet highlights that I am a member of a dissident faction within political science, and not someone who sits on the border between disciplines. Professor Tushnet leads the dissident faction in law that challenges the grand theory of constitutional discourse, but he is still very much a member of a legal tribe.

### III. NORMS, AUDIENCE, AND CONSTITUTIONAL CHANGE

That lawyers are more inclined than political scientists to describe themselves as populists is an interesting cultural phenomenon. Tocqueville described the bar as the American aristocracy.<sup>60</sup> PhDs, however, more often demonstrate an aristocratic sensibility. Elite political science departments discourage writing for the general public. Merit in the social sciences means publication in faculty-refereed journals, publication in university presses, and increasingly, obtaining faculty reviewed grants.<sup>61</sup> Publishing a textbook is a way to make money, not to get ahead in the discipline. The broader the audience for the manuscript, the attitude sometimes seems to be, the more the professional disdain. The legal academy seems structured by more plebeian considerations. More law professors orient their writings to a broader audience. Many actively seek nonuniversity presses and media outlets for their work.<sup>62</sup> Distinguished law professors are often best known for their casebooks. Legal writing, in short, is more oriented to "the people" than is scholarship on American political development.<sup>63</sup>

The different understandings of populism in the legal and social science literature reflect the different audiences for social science and legal scholarship. Social science literature, aimed primarily at other social scientists, insists that the populist label be grounded in past scholarship on populism. Academic disciplines that disparage works aimed at broad audiences do not adopt popular understandings of populism or any other popular understanding. Academic lawyers are more comfortable addressing that broader audience. Hence, they are more comfortable with the understandings of populism taken from popular culture. Many law professors are uncomfortable with popular culture.<sup>64</sup> Unlike social scientists, who take all their categories from existing scholarship, however, legal scholars may be more willing to take their categories from popular culture unless they specifically wish to challenge those popular understandings.

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60. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 276 (Phillips Bradley ed., Henry Reeve trans., Francis Bowen rev., Vintage Classics 1990) (1835).

61. The baneful influence of grant-funded research in the academy is well documented in Ellen W. Schrecker, *Free Speech on Campus: Academic Freedom and the Corporations*, in *THE BOUNDARIES OF FREEDOM OF EXPRESSION & ORDER IN AMERICAN DEMOCRACY* (Thomas R. Hensley ed., 2001).

62. Among the many mistakes I made in my review was the assumption that Professor Tushnet preferred a university press to a trade press. See Tushnet, *supra* note 3, at 546-47 n.4.

63. Bruce Ackerman's somewhat folksy style particularly comes to mind. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 322 (1991) ("The choice, my friends, is yours.").

64. On the basis of experiences in law school and graduate school, however, I am inclined to think that more law professors are comfortable with popular culture than PhDs.

Other tribal commitments to thick or thin descriptions similarly reflect levels of comfort with popular culture. Professor Tushnet's thin Constitution and thin Declaration of Independence are well rooted in public opinion. Most Americans know little of the Scottish Enlightenment and are unaware that the Constitution contains the Emoluments Clause. The popular Declaration of Independence consists largely of the first sentence of the second paragraph. The popular Constitution consists largely of a commitment to realizing those detached principles. Political scientists' discussions of the whole Declaration begin from previous discussions of the whole Declaration. Scholarship intended to critique Carl Becker<sup>65</sup> is for scholars only. Only other scholars are likely to know who Carl Becker was and care whether his claims about the late eighteenth-century mind are correct.

#### A. THE POLITICS OF THIN DESCRIPTION

The way lawyers understand and influence political change supports their close connection to thin conceptions of political phenomenon and popular understandings. Lawyers are in the business of persuading persons who are not scholars—whether they be judges writing opinions, Justices listening to oral arguments, elected officials and their aides discussing legislation, or candidates running for public office. Lawyers must generally adopt popular understandings of populism, the Constitution, and the Declaration of Independence because popular audiences have little understanding or interest in thick populism, the thick Constitution, and the thick Declaration. Popular debaters concerned with whether Hofstadter or Goodwyn correctly describe populism are most likely to confuse and lose their audience. Lawyers and others using popular rhetoric also recognize that the general public likes to think of itself as populist, and regards both the Constitution and Declaration of Independence as sacred texts.<sup>66</sup> Hence, constitutional rhetoric aimed at the general public must generally explain why the Constitution, Declaration, and populist ideals support a particular political program. Only losing arguments explain why some programmatic ideal improves upon the ideals found in the Constitution, the Declaration, and populism.

Professor Tushnet recognizes that constitutionalists must tell an “attractive narrative of the constitution of the people of the United States.”<sup>67</sup> His narrative explains why the sacred texts and identities of American politics privilege the political left. Thick populism, the thick Constitution, and the thick Declaration cannot fulfill this narrative function. These texts and identities have, in practice, more often been arenas where particular values are contested, rather than where

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65. See CARL L. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* (1932).

66. See POWE, *supra* note 16, at 34 (“Americans believe the Constitution embraces and requires morally correct outcomes on key issues. America is good; the Constitution is good; therefore, the outcome of major constitutional cases should be good.”).

67. TUSHNET, *supra* note 1, at 193.

particular values are clearly expressed.<sup>68</sup> Constitutional rhetoric requires a thinner populism, Constitution, and Declaration that, acknowledging contrary historical readings and practices, provide less ambiguous foundations for social democracy. Thin populism fits easily with the thin Declaration. Thick populism has a more ambiguous relationship with the thick Declaration.

#### B. THE POLITICS OF THICK DESCRIPTION

The political science use of populism is, on closer inspection, as populist and as politically engaged as the law school understanding of populism. The political development literature takes past populist movements seriously. Political appeals earn the populist label only by demonstrating the capacity to inspire many ordinary citizens to political action. Being grounded in past challenges to the political status quo, the conception of populism in the political development literature more easily maintains the radical edge of past populist movements.<sup>69</sup> Law professors risk normalizing populism when they detach that phenomenon from its historical roots. Popular culture, structured to some fair degree by a plutocratic entertainment industry, may be advancing a particular deradicalized conception of populism. One qualifies as a populist, in this venue, by one's choice of consumer goods rather than by raising fundamental questions about consumer culture.<sup>70</sup> Professor Tushnet and other legal populists are obviously committed to overthrowing the reign of "Disney populism." Still, maintaining populism's radical edge will require more than attaching the populist label to whatever the mass media permits to be so identified. A populist understanding of populism must be capable of actually inspiring numerous citizens to challenge the constitutional status quo. The best evidence of what may presently inspire ordinary citizens to participate in reform movements may be what has previously inspired citizens to participate in reform movements. Law professors and other scholars interested in an authentic populism that actually inspires support will want to ask the question central to the scholarship on populism in American political development: What forms of rhetoric have historically proven able to engage ordinary persons in political struggles?<sup>71</sup>

The thick description of populism in social science literature is rooted in certain relatively enduring features of American society that legal reformers ignore at their peril. Populism, persons in my portion of the academy universe believe, describes a certain set of ideas that have historically appealed to a

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68. See generally DANIEL T. RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* (1987).

69. One should be fully aware, of course, that the radical rhetoric of the past is often deployed in defense of the status quo at present. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 384.

70. See KAZIN, *supra* note 20, at 71.

71. Liberal law professors should also be interested in questions, central to studies of American political development, concerning just how liberal the working-class movement is likely to be on such cultural issues as gay and lesbian rights.

certain kind of people.<sup>72</sup> The same is true of republicanism, progressivism, and other clusters of ideas. Change the cluster of ideas and you will likely change their appeal. A secular populism may not inspire the religious lower middle class. Appeal to a different audience and you may have to change the ideas. Attacks on the gold standard were more directed at Western mining interests than at working-class citizens.<sup>73</sup> The First Amendment and the disciplinary norms of the legal academy do permit law professors to label as populist (or republican) a broader range of ideas than the disciplinary norms of political development regard as populist (or republican).<sup>74</sup> The disciplinary norms of the legal academy, however, are too often indifferent to the probable appeal of certain ideas. Ideas do not appeal to a populist audience simply because they are labeled as populist. Persons seeking to speak in the name of the people and to inspire a people's movement must consider the radical populist notions that have previously moved ordinary people, rather than the deradicalized populism advanced by mass producers of consumer goods and entertainment.

Professor Kazin's understanding of populism as having producerist, anti-elitist, and religious tendencies was an effort to maintain the radical possibilities of populism against the mass market. He recognized that a certain type of reform movement in the United States was successful only when supported by significant numbers of working-class citizens.<sup>75</sup> His work suggests that a significant number of working-class citizens are unlikely to support any political movement that does not make extensive use of producerist, religious, or anti-elitist rhetoric. The relationship between the ideas is not logical. One can develop a perfectly coherent theory that isolates one element of populism from the rest. Claiming only that public policy should reflect the public will is a good example. Conceptions that thrive in theoretical zoos, however, may not thrive in the political wilds. Whatever the theoretical merits, "populist" appeals that deviate too far from historical populism are not likely to appeal to working-class citizens.

Thick descriptions require constitutionalists to make difficult choices obscured by thinner conceptions. Academic theories that isolate particular virtues of historical practices rarely describe actual political alternatives. If the political development literature is correct, then the next significant populist movement in the United States will exhibit the vices and virtues of past populist movements to a fair degree. Americans will not have the practical option of selecting a populism shorn of its producerist, religious, and anti-elitist elements, or of supporting the producerist element but not the religious dimension. The practical political choices, thick descriptions indicate, are likely to be between a populism, with all of its historical virtues and vices, and some other political

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72. See KAZIN, *supra* note 20, at 282–84.

73. See GOODWYN, *supra* note 27, at 426–92.

74. The freedom in neither discipline is absolute. Law review editors are not likely to accept understandings of populism that do not resonate in the popular culture.

75. KAZIN, *supra* note 20, at 284.

identity, with all of its historical virtues and vices. The left may have to choose between populism or progressivism, and that choice will not concern simply whether one takes the Constitution away from the courts, but whether one is willing to do so even if that means an increase in the producerist, religious, and anti-elitist strains in American political thought.

The thick Constitution and thick Declaration highlight other important constraints on political action. What goals a polity can achieve depends on what institutions are in place for achieving those goals and the extent to which the citizenry supports those goals.<sup>76</sup> While institutions can sometimes be adjusted to achieve certain goals more efficiently, constitutional ambitions must also sometimes be adjusted to be more congruent with thick constitutional institutions and even thicker popular sentiments.<sup>77</sup> The thick Declaration serves as an important reminder that all sorts of political programs have claimed that document's support. Social democrats are attracted by Frederick Douglass's interpretation of the Declaration.<sup>78</sup> They should recognize, however, that Roger Taney was equally capable of citing that text for his purposes.<sup>79</sup> The Declaration would not be a sacred text if that document clearly privileged one side in public debates.

Once unleashed, the specter of empiricism is not easily cabined. Inspired by Professor Tushnet, law professors increasingly recognize that normative theories about the judicial function must be informed by empirical investigations into the judicial function.<sup>80</sup> Populism is no exception to the underlying general rule. A political or constitutional theory that purports to be populist should be partly based on what appeals are likely to engage ordinary citizens in political struggles. The political development literature insists on a thick description of populism because present consensus is that appeals to ordinary citizens work best when couched in religious, anti-elitist, or producerist sentiments. The questions this Essay puts on the table concern the political motivation and implications of the thinner versions of populism found in the law reviews. Do law professors, who have historically had closer relationships with protest movements than political scientists, believe that thinner versions of populism, properly deployed, will have the same or greater capacity to generate strong reform movements as past forms of populist rhetoric? If not, do other reasons exist for deploying an apparently deradicalized "populist" label? What forms of rhetoric and political action are possible in the present constitutional universe that may transform that universe into a more egalitarian political order?

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76. See Elkin, *supra* note 50, at 1943–49.

77. See Mark A. Graber, *Social Democracy and Constitutional Theory: An Institutional Perspective*, 69 *FORDHAM L. REV.* 1969, 1985–86 (2001).

78. See Frederick Douglass, Fourth of July Oration (July 5, 1852), in *POLITICAL THOUGHT IN AMERICA: AN ANTHOLOGY* 262, 270–71 (Michael B. Levy ed., 1988).

79. Chief Justice Taney's opinion in *Dred Scott* cited the Declaration eleven times in support of his conclusion that former slaves could not become American citizens. See *Dred Scott v. Sandborn*, 60 U.S. 393, 407–410, 412, 425 (1856).

80. I should be so lucky convincing my colleagues in political science that empirical investigations into the judicial function must be informed by normative theories about the judicial function.



## IV. THICK AND THIN

The preference for thick or thin descriptions creates divisions within as well as between disciplines. Political scientists debate the appropriate density of description when studying courts empirically. My tribe prefers thick descriptions. Political scientists who celebrate the behavioral revolution rely on thin descriptions. Judicial votes and decisions in political science journals are routinely coded only as either liberal or conservative.<sup>81</sup> Should proponents of the popular attitudinal model of judicial decisionmaking operationalize populism, the measure they use may be a commitment to public policy grounded in public opinion. The appropriate density of description is similarly contested when law professors engage in normative theorizing. Professor Tushnet's tribe of academic lawyers prefers thin descriptions. Most law professors insist on a thicker Constitution. Law review articles that spell out, in minute detail, what particular provisions of the Constitution as a whole permit, forbid, and require are published daily.

Thick and thin complement as well as clash. Thick historical descriptions often support thin normative commitments. Thick historical narratives support thin constitutional principles when constitutional institutions cannot be maintained in their pristine form. Professor Gillman's acclaimed study of police powers jurisprudence from ratification until the New Deal details how original understandings of constitutional powers could no longer be applied to political problems in the wake of industrialization and urbanization.<sup>82</sup> "The story of the *Lochner* era," he writes, "is a story about judicial fidelity to crumbling foundations, not judicial infidelity to recoverable foundations."<sup>83</sup> Gillman's thick history reaches the thin Tushnetian conclusion that, in light of social change, we "should go forward unfettered by the fanciful claim that our burden is to rediscover ancient answers rather than forge agreement on the answers that seem best for us."<sup>84</sup> Other thick historical narratives conclude that maintaining constitutional institutions in their pristine form would be normatively undesirable. Professor Stephen Feldman provides significant evidence that the persons responsible for the First Amendment were primarily interested in protecting Protestant sects.<sup>85</sup> Joseph Story was one of many who maintained that "it is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that it is the especial duty of government to foster, and

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81. See, e.g., Scott D. Gerber & Keeok Park, *The Quixotic Search for Consensus on the U.S. Supreme Court: A Cross-Judicial Empirical Analysis of the Rehnquist Court Justices*, 91 AM. POL. SCI. REV. 390, 394-96 (1997); William Mishler & Reginald S. Sheehan, *The Supreme Court as a Counter-majoritarian Institution?: The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87, 90 (1993); see also JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 242-55 (1993) (classifying all judicial votes as either liberal or conservative).

82. GILLMAN, *supra* note 12, at 201-05.

83. *Id.* at 205.

84. *Id.*

85. STEPHEN M. FELDMAN, *PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE* 145-74 (1997).

encourage it among all the citizens and subjects.”<sup>86</sup> “The real object of the [first] amendment was,” Story continued, “not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects.”<sup>87</sup> This interpretation of religion garners little public support at the turn of the twenty-first century. Again, a thick description of what religious freedom has meant in the United States supports claims that present Americans should be committed only to a thinner notion of religious freedom.

Thick historical descriptions highlight the normative thinness of constitutional law. Virtually every political movement that has enjoyed substantial political success in the United States has eventually concluded that the Constitution of the United States privileges its particular political program.<sup>88</sup> Major political debates in the United States have always had constitutional dimensions, whether those debates are over a program of internal improvements, slavery in the territories, the relationship between employers and employees, or reproductive choice. Jurists who solemnly call on thick historical descriptions to defeat constitutional claims made by dominant national majorities are the contemporary analogue to medieval kings who commanded the tides be still.

The thick elements of American constitutionalism lie less in constitutional law than in constitutional institutions and constitutional sociology, or in the effort to align constitutional law, constitutional institutions, and constitutional sociology. The Senate, a constitutional stupidity when viewed from the thin Constitution,<sup>89</sup> is probably a permanent feature of the American constitutional order and plays a significant role in structuring official constitutional meanings.<sup>90</sup> Racism, an unmitigated evil when viewed from the thin Constitution, has been a permanent feature of the American constitutional order and has played a significant role in structuring official constitutional meanings.<sup>91</sup> Scholars debating the normative merits of some constitutional proposals are free to ignore the Senate and American racism. Activists seeking to realize those proposals as laws had better confront these thicker dimensions of American constitutionalism.

Populist constitutional law is thin, but populist constitutional politics and populist constitutionalism are not. Legal and popular norms permit the populist

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86. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 986, at 699 (Carolina Academic Press 1987) (1833).

87. *Id.* § 991, at 701.

88. See Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731, 798–99 (1997).

89. See Suzanna Sherry, *Our Unconstitutional Senate*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 95, 95–97 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); Mark Tushnet, *The Whole Thing*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES, *supra*, at 103, 104.

90. See FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* 186–222 (1999).

91. PHILIP A. KLINKNER WITH ROGERS M. SMITH, *THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA* 3–9 (1999).

label to be attached to any proposal that public policy reflect popular opinion. Political practice suggests that populism will need to be considerably thicker to influence official constitutional meanings. How thick populism, the Declaration of Independence, and the Constitution are in practice remains an open question that requires extensive investigation from numerous disciplinary perspectives. The virtue of Professor Tushnet's interdisciplinary-disciplinary scholarship is that reflection on his work not only promotes answers to questions of common interest to scholars in many fields, but also helps identify important questions of common interest to a wide scholarly community.

