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SYMPOSIUM

JUDICIAL INDEPENDENCE AND
JUDICIAL ACCOUNTABILITY:
SEARCHING FOR THE
RIGHT BALANCE

INTRODUCTION: "ATROCIOUS JUDGES"
AND "ODIOUS" COURTS REVISITED

Robert N. Strassfeld[†]

In 1968 the *Columbia Law Review* published Robert Cover's review of Richard Hildreth's book, *Atrocious Judges: Lives of Judges Infamous as Tools of Tyrants and Instruments of Oppression*, which Hildreth had published in 1856.¹ Even by the standards of legal publication, the 112-year lag is remarkable. Of course, neither Cover's review, nor Hildreth's book were what they appeared to be at first glance. Hildreth picked among the biographies of English judges in Lord Campbell's *Lives of the Chief Justices*,² and selected the biographies of the most contemptible to republish in his collection. To this, Hildreth, already known as an antislavery publicist, appended the petitions and opinions in the case of Passmore Williamson, a Philadelphia abolitionist, who was jailed for contempt of court for his role in abetting the escape of a slave family in defiance of the Fugitive Slave Act. Hildreth's point was obviously not to relive the worst of English judicial history, but to draw the comparison between his se-

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¹ Robert M. Cover, Book Review, 68 COLUM. L. REV. 1003 (1968) (reviewing RICHARD HILDRETH, *ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION* (1856)).

² There are several editions of Lord Campbell's book, published under slightly different titles. E.g. JOHN CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* (1873-1876).

lect assembly of servants of tyranny and an American judiciary that was nearly uniformly proslavery in its decisions.

Like Hildreth, Cover was speaking to his times. "The federal judiciary," Cover wrote, "has remained faithful to its long tradition as executors of immoral law."³ No longer, of course, were the issues the Fugitive Slave Act and support for slavery. Instead, Cover condemned judges as accessories to tyranny through their enforcement of the selective service laws against draft resisters during the Vietnam War. Cover concluded with the thought that the blood of American soldiers is on the hands not only of the Johnson administration, but of those judges and prosecutors who vigorously enforced the draft laws.⁴

Such attention to, and attacks on, the judiciary, especially the federal judiciary, recur throughout our history. In the late 19th and early 20th centuries, for instance, Populists, Progressives and trade unionists all condemned the federal bench as the servant of wealth and capital. These critics condemned the courts, and especially the United States Supreme Court, for an array of decisions and approaches, including the development of substantive due process jurisprudence, aggressive use of injunctions against labor unions and state regulatory commissions, and a general bias against unions and consumers and in favor of big business.⁵ Many of the criticisms sound familiar to the contemporary ear, though in modern times the criticism has more typically come from the other end of the political spectrum. Progressives decried the lack of deference to the democratic branches of the federal government and to state governments, and they accused the courts of acting as super legislatures willing to read the personal predilections of judges into statutes in defiance of the legislative and popular will.⁶

Progressives attacked the courts as antidemocratic and counter-majoritarian. In 1912, New York lawyer, Gilbert Roe, condemned the "judicial oligarchy" in a book bearing that title.⁷ In his introduction to Roe's book, the Progressive Wisconsin Senator, Robert La Follette wrote:

³ Cover, *supra* note 1, at 1005.

⁴ *Id.* at 1008.

⁵ EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* 11-16, 19-26 (2000); WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937*, at 10-21 *passim* (1994).

⁶ Other criticisms, notably the accusations of class bias, do not have such clear modern echoes.

⁷ GILBERT E. ROE, *OUR JUDICIAL OLIGARCHY* (1911).

Evidence abounds that, as constituted to-day, the courts pervert justice almost as often as they administer it. Precedent and procedure have combined to make one law for the rich and another for the poor. The regard of the courts for fossilized precedent, their absorption in technicalities, their detachment from the vital, living facts of the present day, their constant thinking on the side of the rich and powerful and privileged classes have brought our courts into conflict with the democratic spirit and purposes of this generation. Moreover, by usurping the power to declare statutes unconstitutional and by presuming to read their own views into statutes without regard to the plain intention of the legislators, they have become in reality the supreme law-making and law-giving institution of our government. They have taken to themselves a power it was never intended they should exercise; a power greater than that entrusted to the courts of any other enlightened nation. And because this tremendous power has been so generally exercised on the side of the wealthy and powerful few, the courts have become at last the strongest bulwark of special privilege.⁸

Roe and other critics, such as then-Professor Felix Frankfurter, questioned whether the Fourteenth Amendment should be repealed, given its transformation by the courts into an instrument for protecting business against regulation.⁹ Charles Amidon, a Progressive federal judge from North Dakota, simply pronounced that in their obstruction of reform the courts had become "odious."¹⁰

Armed with this critique, Progressives and other critics of judicial conservatism sought to rein in the courts. La Follette captured this spirit in writing that, "neither courts nor their decisions can properly remain above and beyond the control of the sovereign citizens. Judges cannot perform their high function in the public interest unless they are made acquainted with public needs and are responsive to the public will."¹¹ Most of their efforts were unsuccessful, including Nebraska Senator Norris's proposal to abolish diversity jurisdiction and La Follette's proposal of a constitutional amendment providing for the election of federal judges and of another that would permit Congress to reenact with a super-majority vote federal legislation that the

⁸ Robert M. La Follette, *Introduction to ROE*, *supra* note 7, at vi-vii.

⁹ ROSS, *supra* note 5, at 66-67, 291.

¹⁰ Charles F. Amidon to Oliver Wendell Holmes, Jr., Jan. 19, 1911, Holmes Papers, Box 37, Folder 20, quoted in PURCELL, *supra* note 5, at 14.

¹¹ La Follette, *supra* note 8, at vi.

Supreme Court had declared unconstitutional.¹² Congressional critics did succeed in curbing the power of the federal courts to issue labor injunctions, with the enactment of the Norris-LaGuardia Act.¹³ These battles ultimately culminated in President Roosevelt's ill-conceived and unsuccessful court-packing plan.

This symposium is the product of another moment of widespread criticism of the courts. That criticism appeared to come to a head in the final moments of the tragic drama revolving around Terry Schiavo, though it had been percolating for a long time before the Schiavo controversy. Those who rallied to the support of Schiavo's parents against her husband Michael's assertions regarding her wishes pertaining to heroic medical intervention to keep her alive attacked both the Florida state courts and the federal courts for their decisions in the case. Both Congress and the Florida state legislature, with the support of their respective Bush-brother Chief Executives, sought to advance the parents' position by undoing adverse court decisions. When, notwithstanding congressional intervention, Michael Schiavo prevailed in his effort to remove the feeding tube that was keeping his wife alive, congressional rhetoric became especially intemperate. House Speaker Tom DeLay threatened that the judges involved would be held to account, and spoke of imposing new limits on federal jurisdiction, while Texas Senator John Cornyn suggested that recent murders of judges and members of their families were somehow a response to "political decisions" rendered by an unaccountable judiciary.¹⁴ Representative Steve King of Iowa reminded us of the power that Congress wields over the federal district courts, stating that Congress has "the constitutional authority to eliminate any and all inferior courts," and threatening impeachment of noncompliant judges.¹⁵ Oklahoma Senator Tom Coburn's Chief of Staff, Michael Schwartz, suggested the possibility of "mass impeachment."¹⁶

As the examples of the Schiavo controversy and the Progressive critique of the judiciary show, calls for greater "accountability" or for preserving "independence" are products of their times. Much of the

¹² PURCELL, *supra* note 5, at 77-85; ROSS, *supra* note 5, at 193-217, 254-84.

¹³ 29 U.S.C.S. §§ 101-15 (LexisNexis 2006); see PURCELL, *supra* note 5, at 85-91.

¹⁴ Charles Babington, *Senator Links Violence to "Political" Decisions*, WASH. POST, Apr. 5, 2005, at A07; Charles Babington, *GOP Is Fracturing Over Power of Judiciary*, WASH. POST, Apr. 7, 2005, at A04 [hereinafter Babington, *GOP Is Fracturing*]; Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has "Run Amok," Adding Congress Is Partly To Blame*, N.Y. TIMES, Apr. 8, 2005, § A, at 21; Cynthia Tucker, *Fiery Rhetoric Could Explode*, ATLANTA J. & CONST., Apr. 10, 2005, at F6.

¹⁵ Babington, *GOP Is Fracturing*, *supra* note 14.

¹⁶ Hulse & Kirkpatrick, *supra* note 14. To be sure, to date Congress has not acted on these threats and the rhetoric has simmered down.

discussion is driven by dissatisfaction with the current direction of the courts, often focused on a small number of decisions, albeit ones that have a powerful political resonance. Like La Follette before him, Judge Robert Bork has advocated a constitutional amendment allowing Congress to overrule Supreme Court declarations of a statute's unconstitutionality, yet it is hard to imagine the two of them agreeing on much regarding the performance of the courts.¹⁷ Similarly, long before Congressman King's musings about abolishing the inferior federal courts, Progressive Nebraska Senator, George Norris, proposed the idea.¹⁸

Stripped of their context, the concepts of independence and accountability may be hollow and uninformative. Part of the problem is that both terms are relational. They only make sense in reference to something outside of the judiciary. To whom, or what, do we want judges to be accountable? Obvious, but very different possibilities include, the political branches, the popular will, the Constitution (not that we can agree on what fealty to the Constitution looks like) or a tradition of reasoned elaboration and commitment to precedent. From whom, or what, do we want them to be independent? Does independence mean that courts are dangerously poised to thwart the democratic will as their Progressive critics thought? Conversely, since the judiciary, especially where judges are not elected, is most immune from the growing sway of private power, has its independence become more important than ever?¹⁹

Wisely, the editors of the *Case Western Reserve Law Review*, in organizing this symposium quickly decided to look beyond the immediate debate over the Schiavo case and legislation. Instead, they invited scholars who go beyond the well-trodden controversies regarding judicial independence and accountability. While each participant obviously has his or her political commitments, the articles and responses that follow evince an effort to reach beyond the passions of the moment in order to say something more enduring about the relationship between the courts and the other branches of government.

As noted above, much of the discussion regarding the judiciary has consisted of little more than political sloganeering. Professor Charles

¹⁷ ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117-18 (1996). Judge Bork's proposal, actually goes well beyond La Follette's. It would make "any federal or state court decision subject to being overruled by a majority vote of each House of Congress." *Id.* at 117. To be sure, in support of his proposal, he invokes La Follette.

¹⁸ ROSS, *supra* note 5, at 188. Norris understood, however, that his proposal had no prospect for adoption, perhaps Congressman King did, as well.

¹⁹ See James G. Wilson, *Noam Chomsky and Judicial Review*, 44 CLEV. ST. L. REV. 439, 442-444 (1996).

Geyh²⁰ notes that calls for judicial accountability have typically served as a shorthand for greater restriction on the jurisdictional reach or the power of the courts and that proponents have typically been those who are hostile to the substantive leanings, or perceived leanings, of the courts. Those, in turn, who worry about the erosion of those substantive decisions tend to frame “accountability” and “independence” as polar opposites and raise the banner of “independence.” Geyh worries that such a mechanical invocation of “independence” in response to calls for “accountability” too quickly cedes the concept of accountability to the courts’ critics.

Professor Geyh attempts to rescue the discussion of accountability from political sloganeering by describing a typology of judicial accountability. In so doing, he shows that much of what we might mean by accountability is noncontroversial. For instance, no one would suggest that it is proper for judges to have a financial interest in the outcome of their cases. The consensus about accountability breaks down, however, when it comes to accountability for “decisional error.” Here, Professor Geyh distinguishes between inadvertent and deliberate decisional error and argues that only the latter should be sanctionable. Recognizing the difficulty of distinguishing intentional from unintentional error, he proposes to protect judges from perpetual harassment for unpopular decisions through a rebuttable presumption of good faith.

Professors Susan Bandes²¹ and William Marshall²² applaud the usefulness and clarity of Geyh’s typology. They question, however, whether Geyh’s distinction between intentional, and therefore, sanctionable decisional error, and unintentional nonsanctionable decisional error is either appropriate or meaningful. Marshall points to a number of Supreme Court decisions that one might characterize as deliberate distortions of the law in order to achieve a greater good and asks whether we really think that the Justices in those instances ought to have been punished. Noting that what seems to distinguish intentional from unintentional error in Geyh’s analysis is decision-making based on political rather than legal grounds, they question whether a regime of sanctions based on that distinction is either operable or jurisprudentially defensible. The effort to separate law from politics was very much at the heart of nineteenth-century classical legal

²⁰ Charles Gardner Geyh, *Rescuing Judicial Accountability from the Realm of Political Rhetoric*, 56 CASE W. RES. L. REV. 911 (2006).

²¹ Susan Bandes, *Judging, Politics, and Accountability: A Reply to Charles Geyh*, 56 CASE W. RES. L. REV. 947 (2006).

²² William P. Marshall, *Judicial Accountability in a Time of Legal Realism*, 56 CASE W. RES. L. REV. 937 (2006).

thought, but the notion that such a distinction is desirable and possible may not have survived legal realism.²³

Dean Lisa Kloppenberg²⁴ considers one practice that is ostensibly protective of judicial independence: the doctrine of constitutional avoidance. She focuses specifically on the canon of statutory construction that calls for narrow construction of a statute in order to avoid serious constitutional questions.

This longstanding rule of constitutional avoidance is among those articulated by Justice Brandeis in his *Ashwander* concurrence. Brandeis expected the courts to show proper deference to Congress and state legislatures, by avoiding, where possible, invalidation of their legislation.²⁵ In addition to showing proper respect for a coordinate branch of government, the practice of avoidance by narrow statutory construction is thought to promote judicial independence by avoiding conflict, and therefore, congressional reprisal. Finally, the doctrine's adherents suggest that its observance will promote constitutional dialogue among the branches, or with state governments.

Dean Kloppenberg criticizes this doctrine and the rationales offered for its support. Building on her prior work in the area, she argues that the doctrine disadvantages the poor and marginalized who generally lack access to influence the other branches.²⁶ She then turns to the claims that the doctrine protects judicial independence by avoiding unnecessary conflict with Congress or the states. She argues that in practice courts often employ the doctrine, not deferentially, but aggressively to rewrite, and distort, legislation and to engage in what amounts to constitutional decision-making on a subconstitutional level. She questions how effective these practices can be in fostering constitutional dialogue. Acknowledging that courts sometimes should avoid difficult constitutional questions, she calls for a reversal of the presumption that currently favors avoidance.

²³ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 9-31 *passim* (1992); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT*, 64-112 (1998).

²⁴ Lisa A. Kloppenberg, *Does Avoiding Constitutional Questions Promote Judicial Independence?*, 56 CASE W. RES. L. REV. 1031 (2006).

²⁵ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341, 348 (1936) (Brandeis, J., concurring).

²⁶ LISA A. KLOPPENBERG, *PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW* (2001); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1 (1996).

Both Professor Melvyn Durchslag²⁷ and Professor Michelle Slack²⁸ agree that the avoidance doctrines can have perverse consequences and may disadvantage the politically vulnerable. They share with Dean Kloppenberg a skepticism about how deferential the courts have really been in practice and how effective the avoidance doctrines have been in dispelling interbranch rivalry. Nevertheless, each takes issue with aspects of her analysis. Professor Durchslag, who professes ambivalence about avoidance techniques, argues that avoidance is both an inevitable consequence of our system of divided government, and, in some instances, both advantageous and, perhaps, no greater a source of constitutional uncertainty than divided constitutional decisions. Professor Slack reaches the same conclusion as Dean Kloppenberg, that the presumption should disfavor avoiding serious constitutional questions through narrow, all too often, distorting, statutory construction, but she differs in how she reaches that conclusion. She notes that unlike such other avoidance techniques as abstention and justiciability doctrines, the doctrine of avoidance through narrow construction does not bar the court house door. Indeed, by assuming the likelihood of constitutional difficulty and construing the statute to avoid confronting that constitutional difficulty, the doctrine tends “to overprotect those alleging constitutional infringement,” though without a clear statement of the constitutional right.²⁹ Thus, she faults the doctrine for tainting legislation with a presumption of unconstitutionality, thereby turning on its head the principal of statutory construction that statutes are entitled to a presumption of constitutionality.

Professors Jonathan Entin and Erik Jensen³⁰ venture where few constitutional and federal courts scholars dare go, into the realm of taxation. Specifically, they examine the purpose and application of the Compensation Clause,³¹ which, along with the grant of life tenure, is how the Constitution expressly protects judicial independence. Entin and Jensen first consider the original understanding of the Compensation Clause. They then examine the doctrinal history of the

²⁷ Melvyn R. Durchslag, *The Inevitability (and Desirability?) of Avoidance: A Response to Dean Kloppenberg*, 56 CASE W. RES. L. REV. 1043 (2006).

²⁸ Michelle R. Slack, *Avoiding Avoidance: Why Use of the Constitutional Avoidance Canon Undermines Judicial Independence—A Response to Lisa Kloppenberg*, 56 CASE W. RES. L. REV. 1057 (2006).

²⁹ *Id.* at 1061.

³⁰ Jonathan L. Entin & Erik M. Jensen, *Taxation, Compensation, and Judicial Independence*, 56 CASE W. RES. L. REV. 965 (2006).

³¹ U.S. CONST. art. III, § 1. The clause says that “The Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”

clause, focusing most extensively on a series of twentieth-century cases that involved the taxation of Article III judges. This history culminated in the Court's 2001 decision, *United States v. Hatter*,³² which the authors assume, and hope, is the Court's last word on the topic.

Retaliatory pay cuts, the scenario that the framers had in mind, are politically not a realistic threat. Rather, the Compensation Clause has been tested by instances where judges have been subjected to taxation. The question finally laid to rest in *Hatter* was whether Congress can extend a tax of general application to sitting judges, including judges who had previously been exempt from the tax. Professors Entin and Jensen argue that the Court correctly concluded that Congress may subject Article III judges to a tax of general application.³³ Though they conclude that *Hatter* should be the end of the story, they see on the horizon an understanding of the Compensation Clause, that the framer's intent was not merely to protect judicial independence, but to guarantee that compensation was sufficient to ensure that the right sort of people could be recruited to become judges, which might revivify claims of the Compensation Clause as a check on taxation of judges. Such a reading of the Compensation Clause, they argue is neither supported by the original understanding of the framers, nor a sensible approach toward judicial recruitment.

Professor Mark Miller³⁴ is skeptical of claims that any Supreme Court ruling is necessarily the final word on a constitutional subject, and therefore, takes a small exception to Professors Entin's and Jensen's analysis. Generally agreeing with their argument, he turns instead to an examination of other means available to Congress to express its displeasure with or attempt to control the federal judiciary.

At first blush, Professor Mark Tushnet³⁵ appears to have returned us to the midst of current controversies, since he focuses on pending legislation, the Constitution Restoration Act of 2005. However, the Act's proponents introduced the bill with little expectation of enactment, and Professor Tushnet chooses to focus on the more

³² 532 U.S. 557 (2001).

³³ They criticize, however, one part of the decision. The Court had to decide whether certain Social Security taxes could be extended to previously exempt federal judges. The Court held that extension of the Medicare tax was permissible, but that the extension of the Old Age, Survivors, and Disability Insurance (OASDI) tax was impermissible because the removal of that exemption was discriminatory. Entin and Jensen find this latter conclusion to be flawed.

³⁴ Mark C. Miller, *When Congress Attacks the Federal Courts*, 56 CASE W. RES. L. REV. 1015 (2006).

³⁵ Mark Tushnet, *The "Constitution Restoration Act" and Judicial Independence: Some Observations*, 56 CASE W. RES. L. REV. 1071 (2006).

obscure provisions of the bill.³⁶ Specifically, the Constitution Restoration Act would bar a court from relying on any foreign law, “other than English constitutional and common law up to the time of the adoption of the Constitution of the United States” when interpreting or applying the United States Constitution. Further, it deems violation of this provision an impeachable offense.³⁷ Thus an unlikely vehicle for discussion, a bill with no real prospect for passage, becomes an opportunity to explore the limits of permissible congressional interference with the operation of federal courts and the permissible grounds for impeachment.

Before considering these questions, Professor Tushnet briefly examines some of the difficulties posed by the bill on its own terms. What would constitute reliance on foreign law? How would we necessarily know if judges did so rely, unless they told us? Turning to his principal questions, Tushnet first asks whether Congress has the power to limit the sources of law relied upon for constitutional interpretation. The problem here is *United States v. Klein*,³⁸ which prohibits congressional interference with the courts’ rules of decision. Professor Tushnet argues that the *Klein* problem really involves a continuum of greater and lesser degrees of congressional interference with judicial interpretive methods, and, though he acknowledges that it would be a close case, he concludes that the Constitution Restoration Act would pass muster under a *Klein* analysis. Turning to the Act’s impeachment provision, Tushnet ponders whether the Act provides a sufficient “legal” basis for impeachment, to permit Congress, if it were unhappy with a particular judge’s reliance on foreign law in her decision-making, to impeach and remove that judge for more than mere political disagreement with how she had decided a case. Again he concludes that the Act would pass constitutional muster.

³⁶ He chooses not to focus on the jurisdiction stripping provisions of the bill, which would take him back onto the well-beaten path of federal courts scholarship.

³⁷ The bill is obviously in response to a number of recent Supreme Court decisions that have discussed foreign law in their analysis, whether or not the Court ultimately relied on that law. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 321 n.21 (2002) (holding execution of the mentally retarded unconstitutional); *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (declaring Texas sodomy statute prohibiting consensual, adult, sexual activity amongst same-sex partners unconstitutional); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (prohibiting application of death penalty to those who were under eighteen at the time of the offense). The apparent reliance on foreign law has drawn criticism both from within the Court and without. *See, e.g., id.* at 608, 622-28 (Scalia, J., dissenting); Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57 (2004); Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding a Timely Proposal*, 90 MINN. L. REV. 1386, 1388 (2006) (proposing, with tongue only partly in cheek, reintroduction of circuit riding for Supreme Court justices during the summer “to rein in the Justices’ transatlantic legal dalliances”).

³⁸ 80 U.S. 128 (1871).

In response, Professor Ronald Kahn³⁹ asks why Professor Tushnet appears to think that enactment of the Constitution Restoration Act would have little consequence. Professor Kahn situates Tushnet's analysis within a larger body of Tushnet's work, his recent writing on "popular constitutionalism."⁴⁰ He criticizes, Tushnet's analysis of the Act, along with his theory of popular constitutionalism more generally as undervaluing the distinct role of courts and the Supreme Court and consequently in undervaluing judicial independence in favor of the political branches.

³⁹ Ronald Kahn, *The Constitution Restoration Act, Judicial Independence, and Popular Constitutionalism*, 56 CASE W. RES. L. REV. 1083 (2006).

⁴⁰ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

