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"No One Does That Anymore": On Tushnet, Constitutions, and Others

Penelope J. Pether
1567, pether@law.villanova.edu

"NO ONE DOES THAT ANYMORE": ON TUSHNET, CONSTITUTIONS, AND OTHERS

Penelope Pether[*]

The social learning process . . . couples learning about exaggerated reactions to perceived threats with a persistent creation of an Other—today, the non-citizen—who is outside the scope of our concern. Perhaps, indeed, we are able to discern exaggerated reactions, and learn to reduce their reach, only because we are able to displace our concerns on to that Other. The Whig version of social learning does identify a real process in which government policy in response to emergencies has a decreasingly small range, but a more pessimistic view would direct our attention to continued focus of the policy on the Other.[1]

A democracy can destroy itself no less than an autocracy.[2]

It is true . . . of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out in a case depends on where one goes in.[3]

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* Professor of Law, Villanova University School of Law. Thanks are due to Villanova University School of Law students Sarah Stevenson (J.D. 2007) and Jonathan Charnitski (J.D. 2008) for research assistance, and to Villanova University School of Law Dean Mark Sargent and Associate Dean for Faculty Research John Gotanda for research support.

1. Mark Tushnet, *Defending* Korematsu*?: Reflections on Civil Liberties in Wartime*, *in* THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 124, 136 (Mark Tushnet ed., 2005) [hereinafter Tushnet, *Defending* Korematsu*?*].

2. Paul Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2694 (2003).

3. United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J. dissenting) ("It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece or [sic] paper.").

Mark Tushnet is strongly identified as a scholar central to whatever Critical Legal Studies (C.L.S.) was. Here, I am differentiating U.S. C.L.S. from what I would argue is a living Critical Legal tradition, largely based outside the United States, and at least partially and loosely linked with the Critical Legal Conferences,[4] usually held in Great Britain, rather than the Conference on Critical Legal Studies.[5] Tushnet has made his considerable reputation as a scholar of U.S. constitutional law.[6] With increasing frequency, his constitutional law expertise—most evident in his profound understanding of the history of both U.S. constitutional hermeneutics[7] and Supreme Court judging,[8] and in his acute and extraordinarily well-informed reading of the scholarship of constitutional hermeneutics[9]—has been harnessed in exploring comparative constitutional thought.[10]

The title of this Essay was prompted by a remark made by my spouse, who, like me, is a scholar and teacher of law, and also a relative latecomer to, and/or fellow traveler, and/or intellectual inheritor, and/or

4. *See generally* Critical Legal Conference 2008, http://www.criticallegalconference.com/index.html (last visited Mar. 24, 2008).

5. *See generally* Cornell University Law School Legal Information Institute (Wex), Critical Legal Studies: An Overview, http://www.law.cornell.edu/wex/index.php/Critical_legal_theory (last visited Mar. 24, 2008).

6. *See, e.g.*, MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) [hereinafter TUSHNET, TAKING].

7. *See, e.g.*, MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003) [hereinafter TUSHNET, NEW].

8. *See, e.g.*, Mark Tushnet, *The Burger Court in Historical Perspective: The Triumph of Country-Club Republicanism*, *in* THE BURGER COURT: COUNTER-REVOLUTION OR REFORMATION? 203 (Bernard Schwartz ed., 1998); MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW (2005); THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE (Mark Tushnet ed., 1993).

9. *See, e.g.*, LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (1996); Mark Tushnet, *The United States: Eclecticism in the Service of Pragmatism*, *in* INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 7 (Jeffrey Goldsworthy ed., 2006); Mark Tushnet, *The Warren Court (1954-1968): Procedural Liberalism and Personal Freedom*, *in* THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 277 (Christopher Tomlins ed., 2005).

10. *See, e.g.*, DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW (Vicki C. Jackson & Mark Tushnet eds., 2002); Mark Tushnet, *Scepticism about Judicial Review: A Perspective from the United States*, *in* SCEPTICAL ESSAYS ON HUMAN RIGHTS 359 (Tom Campbell et al. eds., 2001) [hereinafter Tushnet, *Scepticism*]; Mark Tushnet, *The Evolution of Federalism in the United States: A Continuing Convention?*, *in* TOWARDS A EUROPEAN CONSTITUTION: A HISTORICAL AND POLITICAL COMPARISON WITH THE UNITED STATES 127 (Michael Gehler et al. eds., 2005).

historian of, the Crits.[11] After reading a draft law review article on which I had asked him to comment,[12] an invitation fraught for both offeror and offeree with potential snares and present tensions perhaps peculiar to academic marriages, he said, "It's C.L.S.; no one does that anymore." So, when I received an invitation to contribute to this Symposium shortly after that conversation, it made sense to take the opportunity to use the disciplined luxury of reading closely (some of) Mark Tushnet's prodigious body of work to explore whether his passage from C.L.S. to H.L.S., from moving Paul Carrington to announce the end of civilization as he knew it,[13] to becoming a member of legal institutional elites, including but not limited to his identity as an institutional player in the A.A.L.S.,[14] meant that he was one of those people who no longer "did" C.L.S.

I tentatively concluded that while Tushnet's early, strongly Marxist, work was unarguably C.L.S. in that it is both radical[15] and interested in making naturalized structures that reproduce hegemony visible, his scholarly stance and voice now have much more in common with the Realists. The likeness lies in this: while the Realists' search for a science that would satisfy their paradoxical and unacknowledged

11. *See generally* DAVID S. CAUDILL, DISCLOSING TILT: LAW, BELIEF, AND CRITICISM 37-69 (1989); RADICAL PHILOSOPHY OF LAW: CONTEMPORARY CHALLENGES TO MAINSTREAM LEGAL THEORY AND PRACTICE (David S. Caudill & Steven Jay Gold eds., 1995).

12. For the published version of that draft, see Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007).

13. *See* Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL. EDUC. 222, 227 (1984) (suggesting that the nihilism he attributed to C.L.S. threatened "the professionalism and intellectual courage" required by the legal profession). This is an achievement which Professor Carrington's recent work on lost opportunities for successful Western neocolonial adventures in the Middle East leads the writer to yearn to emulate. *See* Paul D. Carrington, *Could and Should America Have Made an Ottoman Republic in 1919?*, 49 WM. & MARY L. REV. 1071 (2008).

14. Tushnet served as President for the American Association of Law Schools (A.A.L.S.) in 2003. *Tushnet Brings a Scholarly Slant to Presidency of AALS*, GEORGETOWN LAW, Fall/Winter 2003, at 2.

15. I say radical, although this work is radical more often to my mind in the pure sense of that term, in that it is interested in origins; I have in mind here his revisionist legal historical work on chattel slavery. *See, e.g.*, MARK TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST 230 (1981) [hereinafter TUSHNET, SLAVERY] (advancing thinking about the radical egalitarian potential of common law analogical reasoning); Mark Tushnet, *Constructing Paternalist Hegemony: Gross, Johnson, and Hadden on Slaves and Masters*, 27 LAW & SOC. INQUIRY 169 (2002) (book reviews) (rehabilitating the authority of Genovese's account of (more or less benevolent) paternalist American slavery in the face of "postmodernist" revisionist histories).

yearning for truth led them, after they "proved" legal science fallible, to social science, Tushnet's always already failed search is for reason, or at least rationality, and for a type of modesty, at least as much as to justice claims as truth claims, in legal institutions, subjects, and discourses.[16] To recognize this, and to put it to one side, is to make visible the equally characteristic but less assertive orientation to "Others" that runs through Tushnet's work.[17]

My attempt to understand how the domestic constitutional law scholar and the radical jurisprude shaped the comparative constitutional law scholar informed my reading of Tushnet's work. "The place I reached" in that inquiry, roughly, is that even in his comparativist work, Mark Tushnet is either a profoundly American constitutional law thinker, or he has pioneered a "third way" of doing constitutionalist scholarship. Whichever position he occupies, he is not interested in harvesting practices and insights from "away" to deploy at "home," nor in making his own understanding of constitutionalism more profound by comparativist inquiry, but rather in using the American experience of judicial review to counsel against reliance on it to promote constitutionalism elsewhere. What I became much more interested in, however, was understanding Tushnet's evident sense of the failure of judicial review to contribute to "the possibility of Justice."[18]

Because I begin from, and argue that Tushnet has arrived at, a different judgment than this about the responsibility of constitutional court judges—and not just those serving on constitutional courts of final jurisdiction—for constitutionalism, I attempt both to map Tushnet's constitutionalist commitments, or politics, and to position myself in relation to them. Michael Seidman's contribution to this Symposium asked and offered an answer to a question related to the inquiry I have just framed. He explores whether one can be both leftist (as he described it, and what I would tentatively and provisionally call critical)[19] and a constitutionalist. Seidman suggests that one could

16. *See, e.g.*, Tushnet, *Scepticism*, *supra* note 10, at 359.

17. *See, e.g.*, MARK TUSHNET, SLAVE LAW IN THE AMERICAN SOUTH: STATE V. MANN IN HISTORY AND LITERATURE (2003); Tushnet, *Defending* Korematsu*?*, *supra* note 1; TUSHNET, SLAVERY, *supra* note 15.

18. *See generally* Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority," in* DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, 4 (Drucilla Cornell et al. eds., 1992).

19. To the extent that Tushnet's early work was explicitly Marxist, see generally, Mark Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSPECTIVES 96 (1978), and because his stance in relation to judicial review seems to me to be profoundly Marxian in

salvage Tushnet's school of constitutionalism for leftism by rendering it metaphorical, in that leftism could be constitutionalist if that constitutionalism was immanent in a dream of camaraderie and critical practice that might both expose and promise a space beyond the "corruption, evil, and obfuscation"[20] of the imperialists and oligarchs[21] who are "those now in power."[22] My suggestion is that close reading across Tushnet's *oeuvre* locates its leftism in its orientation to the Other, a commitment most clearly discernible in his early[23] and most recent[24] work.

My conclusion that Tushnet has become a distinctively neorealist scholar of constitutionalism emerged from trying to make sense of my own response to his characteristic scholarly-rhetorical stance and his textual identity. It marks a point of departure from the commitments I share with Tushnet: to the (or a) "thin Constitution,"[25] especially to its aspirational commitment to equality, and to "'the struggle to achieve [a]

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orientation, whereas my own is post-Foucauldian, it may be that the difference in terminology is useful and ought to be maintained.

20. Louis Michael Seidman, *Can Constitutionalism be Leftist?*, 26 QUINNIPIAC L. REV. 557, 577 (2008). Seidman calls these the "hallmarks of modern, mainstream constitutionalism." *Id.* I think he is mistaken here, because any serious account of constitutionalism as more than a bare practice for allocating political power in the nation-state necessarily implies some ethical engagement between subjects who govern and those who are governed. Paul Kahn makes a similar point when he writes of Hannah Arendt's lack of "faith in reason," and locates her "particular contribution" to understanding evil as identifying

> "the banality of evil" in the character of Eichman. He could manage the final solution, she claimed, because he had stopped thinking. Administrative rationality did not itself require thought. Thinking for Arendt has a special quality of recognizing and engaging the other: less pure reason, more dialogical engagement. Eichmann could not imagine the world from the point of view of another subject. Instead of thinking, he relied on clichés.

PAUL W. KAHN, OUT OF EDEN: ADAM AND EVE AND THE PROBLEM OF EVIL 7 (2007).

21. Seidman, *supra* note 20, at 575.

22. *Id.* at 577. This vision imbues conclusions in LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES (1996). It seems more characteristic of Seidman's own constitutionalist thought than Tushnet's, given what I will go on to say about his paradoxical commitment to reason.

23. *See* TUSHNET, SLAVERY, *supra* note 15; MARK TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987).

24. *See* Tushnet, *Defending* Korematsu*?*, *supra* note 1, at 136.

25. TUSHNET, TAKING, *supra* note 6, at 9-14. One could construct a rather different thin constitution if one focused on structural aspects, for example, Federalism, the separation of powers, representative government, republicanism, or democracy. Tushnet defines a thin constitution "as its fundamental guarantees of equality, freedom of expression and liberty. Note: Not 'the First Amendment' or 'the equal protection clause.'" *Id.* at 11.

justice'"[26] that Tushnet calls indeterminate,[27] and I would call determinable though endlessly deferred. We also share an understanding of law's indeterminacy as a kind of "precommitment" of scholarly positionality, although mine is, I think, a rather different one from Tushnet's, due to our differing normative judgments of the consequences of the flawed truth claims of legal reasoning.[28]

There are, however, places—ones that perhaps are most evident in our shared scholarly interest in comparative constitutional law—where my own commitments and Tushnet's diverge. Let me turn here to the third epigraph to this Essay, registering as I do the apparent incongruity of dropping the constitutional F-word, as in Frankfurter, in a symposium in honor of Mark Tushnet.

One of the hazards of having spent a part of one's professional life as a literary critic is that one has a tendency to over-read authorial subjects; nonetheless, it is hard to avoid identifying a distinct antipathy in Tushnet's writing for Felix Frankfurter—the man, not just the jurisprude—an antipathy that I would call visceral, were it not so cerebral. The antipathy to the man may stem from Frankfurter's attempted "white-anting"[29] of Thurgood Marshall's confirmation to the Second Circuit Court of Appeals.[30] The jurisprudential antipathy is also grounded in Frankfurter's acts, including both his undermining of

26. Mark Tushnet, *Defending the Indeterminacy Thesis*, *in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 223, 238 (Brian Bix ed., 1998) [hereinafter Tushnet, *Indeterminacy*].

27. *Id.*

28. *See id*. My own position on this shares something of Paul Kahn's understanding of law as a cultural practice, *see generally* PAUL W. KAHN, THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP (1999), although not his evident distaste for poststructuralist theory, *see, e.g.*, KAHN, *supra* note 20, at 1, and also of Robin West's insistence that an intellectual "precommitment" to the indeterminacy thesis can be consistent with a type of normative commitment (explicitly ethical rather than grounded in a commitment to reason), *see* Robin West, *Justice, Democracy, and Humanity: A Celebration of the Work of Mark Tushnet*, 90 GEO. L.J. 215, 219-220 (2001), that Tushnet seems extremely reticent to articulate. To that extent, it has much more in common with Tushnet's early account of common law reasoning, *see* TUSHNET, SLAVERY, *supra* note 15, at 230, than his more recent framing of the indeterminacy thesis as "informal political theory," Tushnet, *Indeterminacy*, *supra* note 26, at 224, and a condemnation of law's pretence to a method for producing truth, and thus to "democratic legitimacy," *id.* at 226.

29. Kel Richards, *White-ant*, ABC NEWSRADIO, http://www.abc.net.au/newsradio/txt/s1749419.htm (last visited Mar. 26, 2008) ("If someone undermines you at work you might say they were 'white-anting' you. The Macquarie Dictionary says the verb 'to white-ant' means 'to subvert or undermine from within.'").

30. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 296-97 (1998).

Marshall's insistence that the rights at stake in *Brown v. Board of Education*[31] were "personal and present," and his proximate authorship and sponsoring of the injunction that desegregation of schools proceed at "all deliberate speed."[32] The antipathy seems more strongly influenced, though, by Frankfurter's jurisprudential commitments, which stem from what I would call his judicial ontology.

Frankfurter was committed to "drawing the line between politics, [here identified by Tushnet as] the domain of interest group pluralism, and law, perhaps the domain of programmatic liberalism,"[33] and Tushnet clearly has doubts about Frankfurter's intellect[34] as well as his good faith.[35] In addition, Frankfurter believed both in stability and a democracy much more populist than Tushnet's (in the crudely majoritarian sense of presuming to speak "for us all," rather than in the neologistic sense Tushnet employs when he uses the term in *Taking the Constitution Away from the Courts*[36]). Frankfurter also believed in lawyers as agents for an egalitarian reconstitution of the nation: "[He] believed that leading Southern white lawyers, committed to the rule of

31. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

32. *See* WILLIAMS, *supra* note 30, at 238-39 (noting Justice Frankfurter's responsibility for the insertion into the *Brown* opinion the phrase "all deliberate speed," and his vigorous critique of Marshall's oral argument in *Brown*). *See also id.* at 216-17 (noting Marshall's perception of Frankfurter's paradoxical insensitivity "to the minority perspective," his obtuseness about the nature of racial discrimination against blacks in the U.S., and his lack of loyalty to the NAACP, which Frankfurter had advised while a member of the Harvard Law School faculty).

33. TUSHNET, NEW, *supra* note 7, at 116. *See also* MARK TUSHNET, BROWN V. BOARD OF EDUCATION: THE BATTLE FOR INTEGRATION 82-83 (1995) [hereinafter TUSHNET, BROWN] (characterizing Frankfurter as "devoted in an almost religious way to 'the law' and opposed to those who treated constitutional law as simply politics. . . . [, d]isdainful of those who treated law as politics, ... [and] so torn by his concerns about law and politics that he couldn't" initially sign on to the decision to declare school segregation unconstitutional).

34. MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 169, 176-77, 194, 203-04, 205, 208, 260, 261 (1994) [hereinafter TUSHNET, CIVIL RIGHTS]; TUSHNET, NEW, *supra* note 7, at 114.

35. TUSHNET, NEW, *supra* note 7, at 121 ("Frankfurter . . . made a *political* judgment about the best course to pursue and found a *principled* basis in the law to justify the rule embodying that judgment."). *See also* TUSHNET, BROWN, *supra* note 33, at 92 (casting doubt on both the Justice's intellect and his good faith); TUSHNET, CIVIL RIGHTS, *supra* note 34, at 165, 178-79, 180, 181, 183, 186, 187, 192-93, 195, 203, 205, 219, 220, 228, 229, 265-66, 276, 277-78, 286, 338 n.20.

36. TUSHNET, TAKING, *supra* note 6.

law, could—if the Court gave them time—bring the rest of the white South along. He was wrong."[37]

Frankfurter is of course something of a shifting signifier, as suggested by the aporia between the socially tone-deaf elitist dolt who emerges from the pages of *Making Civil Rights Law*,[38] and the sophisticated theorist of legal hermeneutics in *Rabinowitz*;[39] this is something Tushnet clearly registers: the white-anter of Marshall was also the mentor of Charles Hamilton Houston.[40] Frankfurter is at once an adherent of law, as distinct from politics, and an early practitioner of Realism, who instructed Houston in the ways of the social science that became so central to the theory advanced in *Brown*, yet drew the teeth that might have enabled the Court to do what Tushnet has repeatedly concluded that it did not do, and that it is dangerous folly for us to imagine it could do, if only the "right" people were on the bench: fundamentally change the racial inequality that has never ceased to constitute "us." It is possible too to find some ironic congruence between Frankfurter's professed commitment to "judicial deference to decisions taken by democratic majorities"[41]—a commitment that seems portentously sinister in the hindsight offered by a familiarity with Scalian Eighth Amendment and substantive due process jurisprudence—and Tushnet's own faith in a "popular constitution." Frankfurter and Tushnet, in other words, are committed to rather different forms of populism, which always risks communitarianism.

From an egalitarian perspective, Justice Frankfurter's record in the jurisprudential territory represented by this Essay's third epigraph, Fourth Amendment jurisprudence, invites rather different normative judgments from his position on civil rights. To that extent, he has something in common with his fellow "wrong judge"[42] on the Warren

37. TUSHNET, BROWN, *supra* note 33, at 108. *See also id.* at 75 (noting that during the oral arguments in *Brown*, "Justice Frankfurter brought up what he called 'certain facts of life,' by which he referred to states 'where there is a vast congregation of Negro population'").

38. TUSHNET, CIVIL RIGHTS, *supra* note 34.

39. United States v. Rabinowitz, 339 U.S. 56, 69 (1950). *See also supra* note 3.

40. Houston was the visionary civil rights lawyer who was Dean at Howard University Law School when Marshall was a student there; he became head of the N.A.A.C.P.'s legal office, where Marshall worked with and learned from him. Houston was the first African-American Editor-in-Chief of *Harvard Law Review*.

41. TUSHNET, NEW, *supra* note 7, at 114.

42. Mark Tushnet, *Response: A New Constitutionalism for Liberals?*, 28 N.Y.U. REV. L. & SOC. CHANGE 357, 357 (2003) [hereinafter Tushnet, *Liberals*] ("For liberal constitutional theorists the Warren Court, or Justice Brennan, basically got everything right . . . .") (footnote omitted).

Court, Justice Jackson, a pathbreaking international humanitarian lawyer whom Tushnet calls on his ambivalence about desegregation.[43] Jackson's position on the appropriateness of juridifying the "state of exception" that was the Third Reich differs from that which Mark Tushnet privileges in *The Constitution in Wartime*. I want to pick up on that difference as I go on to make a case for a position which I think is consistent with Tushnet's suggestive meditation on Others[44] in that book, a meditation that complicates his characteristic critique of constitutional juridification elsewhere in the text,[45] and also arguably in *Taking the Constitution Away from the Courts*,[46] which is, as Tushnet writes of Lincoln, subtle,[47] for all its overt anti-juridification commitments.

I differ from Tushnet in that seminal work in that I think it is time to give the courts back their share of responsibility for the Constitution. Judicial review has not always amounted, basically or otherwise, to "noise around zero."[48] Nor yet is there anything about it that makes it essentially or necessarily meaningless if one's commitments are to a genuinely egalitarian democracy. In cases that matter practically to structurally subordinated people, it may be critical. Thus, I think Tushnet is right, in his "post 9/11 Constitution" work,[49] to invite the suggestion that the "social learning" thesis underpinning much of his scholarship against constitutional juridification and for constitutional democratization,[50] including his comparative constitutional work,[51] depends on an optimistic Whig historical argument for social learning[52] about exceptionalist government power—that is, we learn from history to circumscribe our excesses.

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43. TUSHNET, CIVIL RIGHTS, *supra* note 34, at 188-91, 211-12.

44. Tushnet, *Defending* Korematsu*?*, *supra* note 1, at 136.

45. Mark Tushnet, *Emergencies and Constitutionalism*, *in* THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 39, 40 (Mark Tushnet ed., 2005) [hereinafter Tushnet, *Emergencies and Constitutionalism*].

46. TUSHNET, TAKING, *supra* note 6, at 163-64 (differentiating "constitutional" and "legal" controls on executive power, discussing the doctrine of *ultra vires*). Tushnet does not differentiate those from "abuse of process" or "natural justice," which might arguably provide for a "thin constitution" via judicial review that is, *pace* Tushnet, constitutional as well as legal, because of the multiple locations of constitutional authority in English law.

47. TUSHNET, TAKING, *supra* note 6, at 8-9.

48. *Id.* at 153.

49. *See generally*, Tushnet, *Defending* Korematsu*?*, *supra* note 1.

50. Tushnet calls this populism. *See* TUSHNET, TAKING, *supra* note 6, at ix, 9, 157, 181, 184, 194.

51. *See, e.g.*, Tushnet, *Scepticism*, *supra* note 10, at 359.

52. Tushnet, *Defending* Korematsu*?*, *supra* note 1, at 136.

There is much in recent Fourth Amendment incursions by the current government and in its innovations in executive lawlessness[53] which suggests that Whig historicism on social learning by members of the expanded Executive branch is misplaced. Similarly, manifestations of populist hysteria about the permeable and symbolic Southern border, as well as events including the atrocities at Abu Ghraib and Haditha suggest that "the people" can be as prone as their elected leaders and those of "us" who do their bidding—the Lewis Libbys and the Monica Goodlings and the Alberto Gonzaleses, lawyers and citizens all—not to learn from history about the perils of the state of exception. One could of course identify less exotic and more mundane examples of domestic exceptionalism, and suggest that the national foreign policy's "focus . . . on the Other"[54] is a species of return of the nation's constitutive repressed. This is discoverable, for example, in the blasted landscapes and blighted communities of West Philadelphia or East St. Louis, those jurisdictions of exception of different kinds "we" produce in "the homeland."

These "others" have their paradigms in the most desperate of indigenous communities constructed, especially in Australia's Eastern states, on the foundations of the apartheid-inspired Reserves or Missions. There, many indigenous Australians were confined after the colonizing English "settlers"' or "invaders"'[55] drive for land—the paradigmatic private property, the locus of what some[56] (I am not one) call the primary constitutional right, at once private and democratic[57]—denied them their traditional country.[58] They also have their paradigms

53. I refer here to the 2007 imbroglio over U.S. Attorney firings. *See, e.g.*, Dan Eggen & Paul Kane, *Judge Gives Immunity to Gonzales Aide*, WASH. POST, May 12, 2007, at A5; Dan Eggen & Paul Kane, *Goodling Says She 'Crossed the Line'; Ex-Justice Aide Criticizes Gonzales While Admitting to Basing Hires on Politics*, WASH. POST, May 24, 2007, at A1; David Johnston & Carl Hulse, *Aide to Attorney General Refuses to Testify About Dismissals*, N.Y. TIMES, Mar. 27, 2007, at A17; Eric Lipton, *Colleagues Cite Partisan Focus by Justice Official*, N.Y. TIMES, May 12, 2007, at A1.

54. Tushnet, *Defending* Korematsu*?*, *supra* note 1, at 136.

55. *See, e.g.*, HENRY REYNOLDS, DISPOSSESSION: BLACK AUSTRALIANS AND WHITE INVADERS (1989).

56. *See generally* Cass R. Sunstein, *On Property and Constitutionalism*, *in* CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 383 (Michel Rosenfeld ed., 1994).

57. *See id.* at 390.

58. *See, e.g.*, THE AUSTRALIAN PEOPLE: AN ENCYCLOPEDIA OF THE NATION, ITS PEOPLE, AND THEIR ORIGINS 144-45 (James Jupp ed., 2nd ed. 2001).

in Northern Australia, on the "desart and uncultiv[able]"[59] margins to where indigenous people, who had lived in an exploited symbiosis with cattle barons on what had been their traditional lands, were banished after they had the temerity to sue for award wages (rather than rations) in exchange for their labor, and the courts had ruled in their favor.[60]

My own considerable reservations about the reliability of "the people" or democracy to constitute the kind of nation to which Mark Tushnet is committed emerge in part from the insights gleaned from the incidents of my "accidental comparativism." A faith in electoral politics as the only or most reliable guarantor of egalitarian democracy is difficult to sustain when one has seen Pauline Hanson[61] elected to the Australian Federal legislature, and has seen mainstream conservative politics in Australia strategically remake itself in Hanson's image (to its enormous electoral good fortune).[62] A notable example of the successful

59. My reference here is to Blackstone's characterization of lands "desart and uncultivated," WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 107 (University of Chicago Press, 1979) (1765), as subject to settlement under British colonial law, and thus, unlike "occupied" colonial territories subject to conquest or cession, not containing any pre-existing law. In *Mabo v. Queensland II* (1992) 175 C.L.R. 1 (Austl.), the Australian High Court assimilated "Blackstone's concept of 'desart and uncultivated' land . . . to the concept of terra nullius in international law," while acknowledging the fact of the indigenous peoples' presence on the continent as historically inaccurate at the moment of "settlement," and rather than directly addressing the question as to the status of Australia's colonial occupation, assimilated "the rules for a 'settled' colony, *where there was an existing population*, . . . to the rules for a 'conquered' colony." TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW AND THEORY 183-84 (4th ed. 2006) (emphasis in original). Blackshield and Williams suggest that in doing so "the Court may have left its historical re-analysis incomplete." *Id.* at 184. The result of that historical re-analysis was the recognition by Australian law of a very limited (both in its scope and in the capacity of indigenous peoples to establish it) common law native title land right that has been narrowed still further by subsequent legislation and judge-made law. *Id.* at ch. 5. Those parts of the Northern Territory referred to above are often literally uncultivable because of their aridity, although they will support extremely large scale commercial cattle-grazing operations.

60. This outcome resonates with the aftermath of *Worcester v. Georgia*, 31 U.S. (6 Peters) 515 (1832), when President Andrew Jackson refused to enforce the Supreme Court's holding one of Georgia's Extension Acts, part of a strategy to take Cherokee land and drive the Cherokee west, "repugnant to the Constitution, laws, and treaties of the United States," *id.* at 521. The dispossession of the Cherokee followed.

61. For those of my readership unfamiliar with the history of Australia's One Nation party, I will describe Pauline Hanson as a much more dangerous, much more rhetorically astute, female antipodean David Duke. *See, e.g.*, Mike Steketee, *And the Beat Goes On*, AUSTRALIAN, Sept. 8, 2006, at 13 (discussing Pauline Hanson's rise to political power in Australia and noting her influence on John Howard's policies).

62. *See, e.g.*, *id.* *See also* DAVID MARR & MARIAN WILKINSON, DARK VICTORY 58, 120, 234, 375, 377, 381 (2003). The recent election of the Rudd Labor government in Australia, followed in rapid succession by the making of a long-overdue apology to Australia's indigenous peoples, which the successive Howard governments had steadfastly

electoral politics of excepting the Other from the jurisdiction of law can be found in the events chronicled in David Marr and Marian Wilkinson's *Dark Victory*.[63] These events essentially involved an electoral strategy of placing paradigmatic "post 9/11" refugees—predominantly from Afghanistan, Pakistan, and Iraq—beyond the jurisdiction of Australian courts through driving the figurative (and tragically eventually literal) death traps of boats in which they had been sold passage by people smugglers out of Australian waters.[64]

Thus, one might argue that there is little difference for the prospects of egalitarian democracy—or justice—between taking the position that things would be wonderful constitutionally if we could only get Justice Brennan back,[65] and hoping that "the people" might elect another constitutionalist as astute and subtle as Tushnet argues Lincoln was,[66] or thinking that encouraging populist constitutional literacy is likely to produce constitutionalism. This is, I think, registered in the cases of the first of two—perhaps unlikely—constitutionalists who might look like very odd reference points in a contribution to a symposium honoring Mark Tushnet: Jacques Chirac and Noel Pearson.

The former is, I suspect, more familiar to my present readership than the latter. I am invoking Chirac here because of his skeptical interrogation of what we mean when we speak and write of democracy, especially if our commitments are to egalitarian democracy. Before the invasion of Iraq, Chirac, who had fought a colonialist war, told a patronizing Tony Blair three things, one of which was that he (and by implication the U.S. government and its allies in the "Coalition of the Willing") should not confuse an Iraq governed by a Shi'ite majority with a democratically-governed Iraq.[67] This is to say that I have much less

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refused to do, might seem to make Tushnet's case. My point, however, is not that the "the people" sometimes "get it right" from the perspectives of those on the Left, but rather that egalitarian social justice has its best chances when legislature, executive, judiciary, and citizens all accept their responsibility for constitutionalism.

63. MARR & WILKINSON, *supra* note 62.

64. *See generally id.*

65. *See* Tushnet, *Liberals*, *supra* note 42, at 357 ("[L]iberal constitutional theory's vision of the future is nostalgia for the past. For liberal constitutional theorists the Warren Court, or Justice Brennan, basically got everything right . . . . [For liberal constitutional theorists] all that needs to be done today (or tomorrow, or after the next presidential election, or . . .) is to appoint justices in the mold of Warren, Brennan, or Thurgood Marshall.").

66. TUSHNET, TAKING, *supra* note 6, at 8-9.

67. *See* Geoffrey Wheatcroft, *The Calamity of Iraq Has Not Even Won Us Cheap Oil*, THE GUARDIAN, Nov. 2, 2007, at 37. Sir Stephen Wall described a meeting between Chirac and Tony Blair:

faith than Mark Tushnet in the safety of entrusting constitutionalism to "the people." Pierre Bourdieu argues that the invocation of "the people" is a preferred strategy for conservatism,[68] and certainly a reading of Scalian Eighth Amendment and substantive due process jurisprudence provides some evidence in support of this claim. My own rather different suggestion is that rhetorical gambits have in common with modes of critical inquiry their availability for deployment in a wide range of political projects.

What of the courts, and of Noel Pearson? Pearson is, like me, a University of Sydney-educated lawyer; like me, constitutional law is something on which he spends a fair amount of his time.[69] There, obvious similarities end: Pearson is an indigenous Australian man and a practitioner of both law and the politics of indigenous governance at once visionary and strategic. But other similarities begin: Pearson has passed scathing judgment of what the *Yorta Yorta* Court made in 2002 of the flawed but historic promise of *Mabo*. That decision of the High Court of Australia either, for all its fundamentally flawed gesturing towards justice, assumed responsibility for a role in "settl[ing] the outstanding question of indigenous land justice in Australia,"[70] or, as Elizabeth Povinelli has forcefully argued, amounted to nothing more

> [Chirac] reminded Blair that he and his friend Bush knew nothing of the reality of war but that he did: 50 years ago, the young Chirac served as a conscript in the awful French war in Algeria, which Iraq resembles in all too many ways. Then he said that the Anglo-Saxons seemed to think that they would be welcomed with open arms, but they shouldn't count on it. In a very percipient point, Chirac added that a Shia majority shouldn't be confused with what we understand as democracy.
>
> He ended by asking whether Blair realised that, by invading Iraq, he might yet precipitate a civil war there. As the British left, Blair turned to his colleagues and said . . . , "Poor old Jacques, he just doesn't get it."

Id.

68. PIERRE BOURDIEU, IN OTHER WORDS: ESSAYS TOWARDS A REFLEXIVE SOCIOLOGY 152-53 (Matthew Adamson trans., 1990).

69. He devotes time to constitutional law both as a matter of practice, as in his directorships of the Cape York Institute for Policy and Leadership and of the Cape York Partnerships, *see* CAPE YORK INSTITUTE FOR POLICY AND LEADERSHIP, http://www.cyi.org.au/ (last visited Mar. 24, 2008); CAPE YORK PARTNERSHIPS, http://www.capeyorkpartnerships.com/team/noelpearson/index.htm (last visited Mar. 24, 2008), and in his writing, *see generally* Noel Pearson, *The High Court's Abandonment of 'The Time-Honored Methodology of the Common Law' in its Interpretation of Native Title in* Mirriuwung Gajerrong *and* Yorta Yorta, 7 NEWCASTLE L. REV. 1-14 (2003).

70. Pearson, *supra* note 69, at 4.

than an attempt by the common law of Australia to rehabilitate itself for the nation's constitutive colonialist injustice.[71]

In the ominously precedential *Yorta Yorta* decision,[72] the High Court of Australia concluded, 5-2, that the Native Title Act recognized only those interests in land "rooted in . . . traditional law and traditional custom,"[73] that is, effectively frozen in time in 1788 at the point of the British "Crown's acquisition of sovereignty and radical title" to the lands that were made to constitute Australia.[74] The failure of the Yorta Yorta claim resulted from the insistence of Chief Justice Gleeson and Justices Gummow and Hayne (with whom Justice Callinan[75] and a grudging Justice McHugh[76] concurred) that only rights and interests in land deriving from traditional law and customs existing as at 1788 "that ha[ve] had a continuous existence and vitality"[77] until the present day are recognizable under the Act.[78] The alternative—which Justice McHugh reasoned[79] (and Noel Pearson agreed[80]) the Keating government had intended in passing the Native Title Act—would have enabled the incidents of Native Title to "be determined in accordance with the developing common law" of Australia,[81] something more than "noise around zero," if less than what justice might counsel. As Noel Pearson put it:

> [After *Yorta Yorta*, t]he three principles of native title law are not that the whitefellas get to keep all that they have accumulated, that the blackfellas get what is left over and they share some larger categories of land titles with the granted titles prevailing over the native title. Rather the three principles of native title are that the whitefellas do not only get to keep all that they have accumulated, but the blacks only get a fraction of what is left over and only get to share a coexisting and subservient title where they are able to surmount the most unreasonable and unyielding barriers of proof – and indeed only where

71. *See* ELIZABETH A. POVINELLI, THE CUNNING OF RECOGNITION: INDIGENOUS ALTERITIES AND THE MAKING OF AUSTRALIAN MULTICULTURALISM 35-69, 153-185 (2002).
72. Members of the Yorta Yorta Aboriginal Cmty. v. Victoria (2002) 214 C.L.R. 422 (Austl.).
73. *Id.* at 442.
74. *Id.* at 441-44.
75. *Id.* at 494.
76. *Yorta Yorta*, 214 C.L.R. at 468.
77. *Id.* at 444.
78. *Id.* at 456-58.
79. *Id.* at 467-68.
80. Pearson, *supra* note 69, at 4-5.
81. *Yorta Yorta*, 214 C.L.R. at 468 (McHugh, J., concurring).

> they prove that they meet white Australia's cultural and legal prejudices about what constitutes "real Aborigines."[82]

Pearson, then, has urged on the Australian High Court its responsibility for keeping the thin constitution—or constitutionalism—as a precept. Australia's High Court, in the years since the Native Title decision *Mabo v. Queensland (No. 2)*[83] and the populist backlash against it, has come to share with the U.S. Supreme Court much of what Paul Kahn calls a preference for sustaining its own legitimacy over development of expertise.[84] This is a phenomenon whose U.S. instantiation Mark Tushnet explores with his characteristic subtlety in *The New Constitutional Order*, describing justices who "present themselves not as theorists of constitutional law but as serious-minded adjudicators."[85] In the "post 9/11" Australian constitutional context, that tendency has been most evident in asylum seeker jurisprudence, where the Court's emerging jurisprudence on Chapter III judicial power brings *Korematsu*[86] to mind.

I will return to *Korematsu*, and to both Chapter III and Article III judicial power later in this Essay, but for my purposes here, I will make Pearson signify in the way that I read Mark Tushnet's rhetoric of opposition to juridification of the Constitution. Pearson has recently become a figure of controversy among those on the Left who might be expected to offer him nothing but praise. The controversy has arisen in relation to his careful,[87] if self-consciously provocative,[88] expressions of

82. Pearson, *supra* note 69, at 4.

83. Mabo v. Queensland II (1992) 175 C.L.R. 1 (Austl.).

84. Kahn, *supra* note 2, at 2696.

85. TUSHNET, NEW, *supra* note 7, at 123.

86. Korematsu v. United States, 323 U.S. 214 (1944) (holding constitutional an executive order excluding Americans of Japanese descent from areas of the West Coast and detaining them).

87. *See, e.g.*, Martin Flanagan, *Pearson's Crucial Role for Howard*, THE AGE, July 3, 2007, at 11 (noting that some aspects of the Howard Government's plan to intervene in remote indigenous communities had been described by Pearson as "clumsy and ideological"); Cosima Marriner et al., *Pearson Lashes Out at Critics of Howard Plan*, THE AGE, June 27, 2007, at 6 ("[Pearson was] not comfortable with all elements of the [Federal government's] plan, expressing particular concern that it would penalise responsible parents by docking their welfare payments.").

88. *See, e.g.*, Flanagan, *supra* note 87 ("In recent years, Pearson has taken most opportunities that have come his way to express his scorn—contempt, in fact, would not be too strong a word—for the sentimentality of white sympathizers with black Australia who deliver nothing in policy terms while the crisis in Aboriginal communities worsens.").

support[89] for recent initiatives by the Howard Government to take steps—including using the military to intervene in remote indigenous communities[90]—in ostensible order to change a culture in which children experience sexual assault at high levels.

A classic manifestation of the Howard government's at once tone-deaf and electorally astute politics of discriminating against Others can be found in its reactive and pre-emptive decision to ban the consumption of alcohol in these communities.[91] That ban is reminiscent of the legal strategies of White Australia's genocidal paternalism before the various moves—by governments, the electorate, and the courts in the period from the early 1960s to the election of the first Howard government in 1996—to clothe indigenous Australians with some civil rights.[92] High levels of sexual abuse of women and children (like high levels of alcohol and drug addiction) are frequent symptoms of what are often framed as, or blamed on, the pathologies of post-apartheid communities, but which are rather tragically predictable inheritances from the legalized dehumanization[93] characteristic of both apartheid and the enslavement that in some parts of Australia was its precursor. These are all things of which Pearson is aware.

I interpret some of Tushnet's positions, from an expression of sympathy for libertarianism to the anti-juridification and populist constitutional politics of *Taking the Constitution Away from the Courts*, to be akin to Pearson's positions on the Australian government takeover of indigenous communities as a response to the phenomenon of the apparently widespread sexual abuse of children. Those rhetorical positions are designed to shock liberal legalism—exemplified by the "leftist" academic lawyers, who are, after all, the primary audience of Tushnet's scholarly work—out of its "McCleskey problem."[94]

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89. *See, e.g.*, Marriner et al., *supra* note 87 ("Noel Pearson has launched a stinging attack on opponents of the radical plan to stop child sex abuse in remote Aboriginal communities, branding the hostility 'a form of madness'. . . . [Pearson stated,] 'The minute somebody suggests trying to do something decisive about it, you (the media) run all of them finding every excuse under the sun not to do anything.'").

90. *See, e.g.*, Marriner et al., *supra* note 87.

91. *See, e.g.*, Jo Chandler, *Attempting To Make Up for Decades of Neglect*, THE AGE, June 22, 2007, at 5.

92. *See, e.g.*, BLACKSHIELD & WILLIAMS, *supra* note 59, at ch. 5.

93. Lola McNaughton has labeled these symptoms of such treatment as part of a "socio-somatic illness." *See* Oliver Feltham, *Singularity Happening in Politics: The Aboriginal Tent Embassy, Canberra 1972*, 37 COMM. & COGNITION 225, 238 (2004).

94. Judith Resnik, *Singular and Aggregate Voices: Audiences and Authority in Law & Literature and in Law & Feminism*, *in* 2 LAW AND LITERATURE: CURRENT LEGAL ISSUES 687, 692 (Michael Freeman & Andrew D.E. Lewis eds., 1999) (describing the McCleskey

It is possible to discern, in the failure of the Supreme Court to discharge its "assumed responsibility" for righting the national constitutional flaw (which *Brown* and *McCleskey*[95] in their different ways signify), the grounds for a conclusion that imbues much of Mark Tushnet's comparative as well as domestic constitutional law scholarship: that judicial review by a nation's constitutional court of final jurisdiction is not a legal institutional structure for one committed to equality to place much faith in, and thus that the promise of constitutionalism lies in the domain of politics rather than that of law. It might be read differently, however, as Duncan Kennedy's suggestive conclusion to his testament of the failure of constitutional faith, *American Constitutionalism as Civil Religion: Notes of an Atheist*,[96] leads me to conclude. "[F]ascism and stalinism," he writes, both made "the realist impulse look positively obscene in Europe," and made C.L.S. possible.[97]

That seminal chapter in the history of the exception of the Other from law's responsibility might be said to be the most significant lesson that a scholar of comparative constitutional law can take from the origins of modern comparative constitutionalism, as Michael Kirby—like Noel Pearson, no stranger to the ontology of Otherness[98]—registered in his at once stinging and agonized 2004 dissent in *Fardon* (a case on Chapter III judicial power and on constitutional criminal procedure).[99] This is a site where, in Australia and the United States, post-9/11 circumscription by the state of civil liberties of the foreign "Other" shows signs of bleeding over into the treatment of those accused of domestic crimes. In arguing for the necessity of judicial review of incursions into constitutionalism by the State, Justice Kirby invoked the original Schmittian nightmare, that paradigmatic "state of exception"[100]

problem as "Legal Culture's self-regard and self-celebration," which make it "difficult to convince the unconvinced in law of a relationship between an individual instance and a larger social phenomenon, when both the individual instance and the larger social phenomenon are claimed to betray liberal democracy's legal commitments to fairness and inclusion").

95. McCleskey v. Kemp, 481 U.S. 279 (1987).

96. Duncan Kennedy, *American Constitutionalism as Civil Religion: Notes of an Atheist*, 19 NOVA L. REV. 909, 920-21 (1995).

97. *Id.* at 921.

98. *See, e.g.*, Michael Kirby, *Remembering Wolfenden*, MEANJIN, Sept. 2007, at 127 (vividly recalling the horror and shame of his closeted life as a homosexual law student in Australia).

99. Fardon v. Attorney-General (Queensland) (2004) 210 A.L.R. 50, 101 (Austl.).

100. CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 5 (George Schwab trans., MIT Press 1985) (1922) (famously theorizing, "[s]overeign is he who decides on the exception").

constituted by the governance of Germany from 1933 to 1945: a culture, *inter alia*, of jurisdiction-stripping.[101]

Michael Kirby's model of comparative constitutionalism in the Chapter III cases differs markedly from that of recently retired Justice Michael McHugh. Comparing the backlash against the Warren Court in the wake of *Brown* to that experienced by the High Court after the *Mabo* and *Wik* decisions, McHugh described *Wik* in *Western Australia v. Ward* as "one of the most controversial decisions given by [the] Court . . . . [which] subjected the Court to unprecedented criticism and abuse,"[102] and suggested that the persisting foundational constitutional injury to Australia's indigenous citizens is beyond the capacity of law to redress.[103] In one of the Chapter III decisions dealing with asylum-seekers, Justice McHugh concluded that, absent a written Bill of Rights, Ahmed Al-Kateb's indefinite detention by legislatively-authorized executive fiat was the business of the tragedian but not of the jurist.[104]

In the more assertive parts of *The Constitution in Wartime*,[105] Mark Tushnet suggests that Justice McHugh's brand of judicial exceptionalism, if not *Korematsu*, can be forcefully defended. In other words, at once arguing against and explicating the ambiguity of his own diffident conclusion in *Defending Korematsu?*, Tushnet contends that there may be a virtue in the exceptionalist judicial politics manifested in judges refusing to "make exercises of emergency powers compatible with constitutional norms as the judge[s] articulate them"[106] by "treat[ing] war as presenting the possibility of justifying a widespread suspension of legality."[107] It should be clear from what I have written that my own position on this question is much closer to that of Michael Kirby than that of Michael McHugh. That position is influenced by my own recent work on U.S. courts, which concludes that both the acquiescence of state appellate and federal courts in jurisdiction-stripping by other branches of government which limits judicial review of the state's exceptionalist treatment of "Others," and their own covert

101. *Fardon*, 210 A.L.R. at 101.

102. Western Australia v. Ward (Miriuwung-Gajerrong Case) (2002) 213 C.L.R. 1, 213 (Austl.).

103. *Id.* at 240-41.

104. Al-Kateb v. Godwin (2004) 219 C.L.R. 562, 581, 595 (Austl.).

105. *See* Tushnet, *Defending* Korematsu*?*, *supra* note 1, at 135-36; Tushnet, *Emergencies and Constitutionalism*, *supra* note 45, at 40, 49-50, 51.

106. Tushnet, *Defending* Korematsu*?*, *supra* note 1, at 136.

107. Tushnet, *Emergencies and Constitutionalism*, *supra* note 45, at 40. *See also id.* at 49-50.

abandonment of their responsibility to the least powerful among "us," constitute a massive national crisis of judicial ontology, of responsibility for constitutionalism that is practiced more pervasively by courts other than the U.S. Supreme Court.[108]

My current comparative work on Chapter III and Article III judging has convinced me of nothing more profoundly than of the need—one I think both a genuinely attentive reading of *The Constitution in Wartime*, and a rhetorically acute reading of *Taking the Constitution Away from the Courts*, show Tushnet is manifestly aware of—to confront the judges and the courts, the juridical institutions they staff, administer, constitute, and are constituted by, with their practical responsibility for maintaining constitutionalism.

The tone of Elizabeth Povinelli's work on the High Court of Australia has much in common with that of Tushnet's jeremiad against naively optimistic assessments of judicial review, and the critical legal scholarship of both produces astonishingly rich insights. But when, as in Mark Tushnet's suggestive orientation to "the Other" just before the end of *Defending Korematsu?*,[109] he sees the Other face to face, he extends an invitation to read in his most recent constitutional law scholarship a resurgence of the orientation to Others that was the ground of his scholarly work, and thus to conclude that one does not have to move from the realm of hermeneutics to that of metaphor to identify his commitment to constitutionalism.

That commitment is premised on a "thin constitution" that promises two things. First, that it might shield us and Others from at least the worst excesses of the violence of state tyranny. Second, it encodes what may be cynical rhetoric, aspirational constitutive national text, denial that is admission of the originary national pathology that eats out the nation's core, or all of these things. That is, a commitment to equality in a nation with a government "defective from the start,"[110] founded on chattel slavery and persistently unwilling to address that inheritance from the Founders, a pervasive structural subordination of Others that imbricates its fiber yet.

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108. *See generally* Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004); Pether, *supra* note 12; Penelope Pether, *Take a Letter, Your Honor: Outing the Judicial Epistemology of* Hart v. Massanari, 62 WASH. & LEE L. REV. 1553 (2005).

109. Tushnet, *Defending* Korematsu*?*, *supra* note 1.

110. TUSHNET, CIVIL RIGHTS, *supra* note 34, at 5 (citing Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987)).