

DELIBERATIVE DEMOCRACY AND WEAK COURTS: CONSTITUTIONAL DESIGN IN NASCENT DEMOCRACIES

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OVERVIEW

In this Article, I hope to show that a “weak” form of judicial review, as opposed to “strong” review, might well be taken to be the most congenial institutional apparatus for grassroots constitutional learning of civic responsibility, or civic-mindedness, under the Rule of Law. I have in mind as examples the present Canadian and U.K. models (the latter, in particular, in light of the innovations of the Human Rights Act). Following Choudhry and Howse,¹ and to some extent, Holmes and Sunstein,² I argue that weak courts, along with relatively loose requirements for constitutional amendment – but keeping an exceptionally deeply entrenched catalogue of core basic rights and institutions – encourage what might be termed as “dialogical” democratic

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¹ For a justification of the Canadian Court's resort to what might be called “constructive” or “principled ambiguity,” “judicial minimalism,” or “theoretical modesty,” see Sujit Choudhry & Robert Howse, *Constitutional Theory and The Quebec Secession Reference*, 13 *CAN. J.L. & JURIS.* 143 (2000). For a normative account of “dialogical” interpretative and comparative methodology, see Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819 (1999).

² For a normative argument that constitutions in Eastern Europe are relatively easier to amend, see Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed., 1995). See also VICKI JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 354 (2006) (commenting on the notion of constitutional entrenchment and amendment in light of recent scholarship).

practices. In turn I briefly demonstrate how dialogical constitutionalism might well describe a normative state of affairs in which discursive communicative activity takes place among the citizenry, in effect “transform[ing the] divided society into a political community capable of coping with its disunity in a civilized manner.”³ And, insofar as constitutional engineering and design are concerned, the goal of dialogical politics is the creation of a “citizen regime” by building a “constitution[al] framework for public debate between citizens about the burdens they consider reasonable to place upon each other and would foster the public dialogue that facilitates the peaceful resolution of disputes.”⁴ In transitional settings it is hard to exaggerate the importance, or relevance, of dialogical deliberative politics as *the* normative model for constitution-making, constitutional learning, and the cultivation of a widespread conviction for the Rule of Law – at the heart of this normative framework is the idea of political transformation and conciliation.

I divided my argument into four parts. In **Part I**, I give a brief account of the political and social conditions of young democracies. In particular, I point to the fact that democracies in transition stand to benefit from the grassroots constitutional learning of core precepts of liberal legality. In **Part II**, I suggest a normative model whose incorporation might accelerate this learning process: I describe and explain what might be taken to be the normative features of “dialogical” constitutionalism. If we can suppose that dialogical politics is as beneficial as political theorists claim it to be, and especially so for embryonic

³ Jorge I. Domínguez & Anthony Jones, *Building and Sustaining a Contemporary Democratic State*, in *THE CONSTRUCTION OF DEMOCRACY: LESSONS FROM PRACTICE AND RESEARCH* 10 (2007).

⁴ *Id.*

democracies, the next question should be, what can and should be the institutional vehicle that is most responsive, most congenial – or the most hospitable, if you will – engine through which dialogical deliberative practices can be realized? How should constitutional design enhance or encourage dialogical constitutionalism in corporeal form? I address these questions in **Part III**. In this Part, I argue that one institutional vehicle could be judicial review, but not just any sort of judicial review. Here, courts are weak, not strong. There is a relatively lower threshold for constitutional amendment. But there is a bill of rights nonetheless, and those rights must be shielded from too facile a constitutional amendment or revision. By opening up communicative channels of dialogue between and among the majoritarian branches of government, the courts, and society-at-large, weak review can provide greater opportunities for the constitutional learning of, and commitment to, the broad aspirations of the Rule of Law. Weak forms of judicial review, coupled with a flexible capacity for constitutional amendment (except for core rights), might then be regarded as the very normative features for constitutional design in young democracies with little or no experience in liberal traditions. I have in mind, among others, the transitional democracies in Central and Eastern Europe. In **Part IV**, I suggest that weak systems of review can accommodate a larger penumbra of ideological perspectives: there are strong incentives for weak courts to frame the parameters of political discourse as to capture the widest audience. By expanding the public sphere to include transnational dialogue, polities with weak courts can attain greater legitimacy within and beyond their boundaries. Strong courts on the other hand tend to ossify the metes and bounds

of public deliberation, in effect isolating themselves and the polities of which they form part from the benefits of future transnational cooperative dialogue among foreign and international actors. I conclude that while weak review might relapse into reform fatigue or even yet encourage legal skepticism, the irreducibly normative dimension of the dialogical strain of deliberative democracy, perhaps seen as a kind of shared cooperative activity, has so far provoked no better alternative in the field of constitutional design for young democracies.

I. TRANSITIONAL DEMOCRACIES AND THE RULE OF LAW

There is no doubt that the stakes in constitutional choice are always high. It takes no hard theorizing to see that constitutions, great and small, have so far turned out to be the most powerful transformative institutions known to humankind. A good constitution not only positively transforms the relations among contending groups within a divided society, it can alter the terms of one's engagement with her basic associations and with the rest of society as well.⁵ Through time powerful constitutions can even change the very cognitive awareness of whole peoples. Bad constitutions on the other hand can sever the bonds of society.

In young democracies, Holmes and Sunstein correctly observe that the standard dichotomy between ordinary and constitutional politics can be more

⁵ See *id.*

imaginary than real.⁶ The fusion of ordinary processes and constitutional processes shows that the polity's secondary rules, or the rules of recognition in the Hartian sense,⁷ have not yet crystallized. Borrowing from Waldron, in transitional settings there is a dearth of a clearly established "corps of specialized law-detectors who know the marks of legislation" endowed with social authority.⁸ Constitution-making and constitutional politics in transitional democracies occur at the margins of legality. How might we approach constitutional engineering in fragile states whose citizens aspire for liberal legality no less? Is there a repository from which we can whip out ready-made "model" constitutions?

Indeed in the history of the world there are at least as many constitutions as there have been nations. The human condition⁹ however puts us in no position to assert for all time that one can be better than the rest, given our intractable differences situated in time and place. Still, the need for comparative constitutional scholarship is certainly no less urgent.¹⁰ And along greater scholarship might surface a collective hope for a marginally better constitutional order no matter what circumstances we might find ourselves in.

⁶ See Holmes & Sunstein, *supra* note 2; see also JACKSON & TUSHNET, *supra* note 2, at 338-39.

⁷ See generally H.L.A. HART, *THE CONCEPT OF LAW* (1994) (discussing the "primary" and "secondary" rules of recognition).

⁸ JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 14 (1999).

⁹ For a philosophical existentialist angle on the "human condition," see, e.g., HANNAH ARENDT, *THE HUMAN CONDITION* (1971).

¹⁰ For an argument in favor of comparative constitutional analysis on the basis of shared principles of justice, see Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. OF PRACTICE & PROCEDURE 685 (1976). But see Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L. J. 411 (1985). For a more contextualized approach, see John Bell, *Comparing Public Law, in COMPARATIVE LAW IN THE 21ST CENTURY* 235-47 (2002).

Polities in transition to liberal democracies are thought to be unfamiliar with the basic tenets of “liberal legality,” “constitutionalism,” or the “Rule of Law.”¹¹ John Rawls might be read to suggest three inter-related tenets of the Rule of Law: i) *legal entitlement* – the normative status where citizens depend on the meaning of standing laws and not upon the grace of political elites; (ii) *legal justice* – that similar cases be treated similarly; and (iii) *legal rationality* – that decision-making is to be rationally constrained.¹² For young democracies afflicted with “legal nihilism” or “legal skepticism,” Katz rightly asserts that any normative litmus test for generic constitutionalism cannot be pegged to formal institutional arrangements alone.¹³ While Santiago-Nino argues that presidentialism, a *formal* arrangement, has defeated constitutionalism in South America,¹⁴ to Katz, however, the incidence of constitutionalism is better measured not by specified formal arrangements, but by the degree to which a certain *practice* – a political culture in which a government system in place,

¹¹ In this Article I use these terms loosely and interchangeably.

¹² I owe much of these formulations to Professor Lewis D. Sargentich. See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1996); JOHN RAWLS, *A THEORY OF JUSTICE* (1999); JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2001). For a plausible case for the failure of rational constraint in liberal theory, see Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 *REVIEW OF LAW & SOCIAL CHANGE* 369 (1982-83); Karl Klare, *Law-Making as Praxis*, 40 *TELOS* 123 (Summer 1979); Richard D. Parker, *The Past of Constitutional Theory – And its Future*, 42 *OHIO ST.L.J.* 223 (1981). For a plausible rejoinder, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L.REV.* 353 (1978); Laurence H. Tribe, *The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of Lawmaking*, 10 *CREIGHTON L.REV.* 433 (1977).

¹³ See Stanley N. Katz, *Constitutionalism in East Central Europe: Some Negative Lessons from the American Experience* (1993), in JACKSON & TUSHNET, *supra* note 2, at 322.

¹⁴ See Carlos Santiago Nino, *Transition to Democracy, Corporatism and Presidentialism with Special Reference to Latin America*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* (Greenberg et al. eds., 1993) [hereinafter *CONSTITUTIONALISM AND DEMOCRACY*].

however configured – would more closely resemble or sustain the normative ideals of the Rule of Law.¹⁵

Noteworthy are some examples: in transitional democracies such as the former Soviet satellite states, constitutionalism has been thought to be weak. There had been great social distrust in formal laws and institutions. Communist practices had brought about what one might write off as the “infantilization of society,” or a widespread feeling of dependence on socialist and centralist governments.¹⁶ In like manner, Okoth-Ogendo depicts sub-Saharan African politics as one brandishing paper constitutions without the ingrained habit of liberal constitutionalism.¹⁷

For divided, transitional, and other young democracies, one reform measure, broadly put, would be to promote the constitutional learning of the Rule of Law. How might constitutional engineers generate a critical mass of educated and responsible citizenry committed to the core precepts of liberal legality? What might be the institutional features that could best encourage, if not accelerate, this constitutional learning?

To be sure, the “Pinochet effect,” or the phenomenon that the burgeoning class of educated, liberal-minded citizens has reached a point where they may confidently revisit past wrongs can and has in fact been achieved in various parts of the globe.¹⁸ One way to replicate this effect is through the

¹⁵ See Katz, *supra* note 13.

¹⁶ See András Sajó & Vera Losonci, *Rule By Law in East Central Europe: Is the Emperor's New Suit a Straitjacket?*, in *CONSTITUTIONALISM AND DEMOCRACY*, *supra* note 14.

¹⁷ See H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in *CONSTITUTIONALISM AND DEMOCRACY*, *supra* note 14.

¹⁸ For an excellent discussion on how the Pinochet case affected related cases in foreign countries as well as influenced international law and the International Criminal Court, see

institutionalization of a “weak” form of judicial review. As intimated earlier, weak review, along with less deeply entrenched constitutional protocols perhaps exemplified by, but in no sense constrained to, British and Canadian constitutionalism, might be taken to be the very normatively powerful generators for the formation of a liberal-minded citizenry committed to Rule of Law ideals.¹⁹

II. DIALOGICAL DELIBERATIVE DEMOCRACY

By dialogical politics,²⁰ I refer to an institutionalized conception of deliberative politics²¹ as a “self-revisionary normative dialogue through which personal moral freedom is [best] achieved.”²² The basic idea is that political actors –

NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* (University of Pennsylvania Press 2006).

¹⁹ For an affirmative argument, see Mark V. Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT’L L. 435 (2002).

²⁰ The terms dialogic and dialogical can be traced to the literary works of the Russian philosopher Mikhail Bakhtin. See generally MIKHAIL M. BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS* (Caryl Emerson and Michael Holquist trans., 2004). Dialogic (or dialogical) literature is said to be in contrast with “monologic” literature. The basic idea, as the term suggests, is to engage in continual dialogue with previous and contemporary texts in the reading and writing of literature. The dialogical method looks upon past works by using the lens of the present, and considers transformative possibilities or shifting notions of prior ideas in light of present understanding. In this sense the dialogical method, which by no means is restricted to literary analysis, is reflexive and self-revising. Reflexive argument presupposes knowledge-formation as dynamic, as opposed to punctual; relational, as opposed to predetermined; and collective, and not individualistic. I discuss these more thoroughly in another work. See Edsel F. Tupaz, *Respect-worthy Constitutionalism in Divided Societies: Constitutional Dialogue in Northern Ireland, South Africa, and Southern Philippines* (May 16, 2008) (unpublished LL.M. thesis, Harvard Law School) (on file with Langdell Library, Harvard University).

²¹ Kenneth Baynes, *Deliberative Democracy and the Limits of Liberalism*, in *DISCOURSE AND DEMOCRACY: ESSAYS ON HABERMAS'S BETWEEN FACTS AND NORMS* 15-16 (René Von Schomberg & Kenneth Baynes eds., State University of New York 2002) [hereinafter *DISCOURSE AND DEMOCRACY*] (discussing Habermas’s notion of procedural democracy as a “public reasons” approach where democratic norms and procedures are said to be based on reasons that citizens can publicly affirm in view of a conception of themselves as free and equal persons).

²² Frank Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1495 (1988) (positing the dialogic-republican constitutional theory in light of *Bowers v. Hardwick*). For an interesting

whether they be duly constituted government authorities, private entities, or even social movements²³ – all engage in constitutional discourse. There is a tangible back-and-forth communicative discursive dynamic between and among political actors. Choudhry explains that this dialogical enterprise – whether in the form of constitutional interpretation, constitutional borrowing, or comparative methodology – furthers a polity’s self-understanding, because it draws one to compare the basic assumptions of the foreign legal culture in question against the assumptions that legal doctrine in her own system both reflects and constitutes.²⁴ What is more, the dialogical approach might set off a kind of a disruptive or destabilizing force²⁵ – it could implore one to imagine the road less traveled and explore counterfactual trajectories.²⁶ Through the medium of law “the task of an opinion-forming public sphere,” in the words of Unger, “[is] that of laying siege to the formally organized political system by encircling it with reasons without, however, attempting to overthrow or replace it.”²⁷ One might then become more critically reflexive whenever faced with a

application of Habermasian dialogical theory to post-conflict Eastern Europe, see Rory J. Conces, *The Role of the Hyper-intellectual in Civil Society Building and Democratization in the Balkans*, 59 *STUD. EAST. EUR. THOUGHT* 195 (2007).

²³ Cf. Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 *SUFFOLK U. L. REV.* 27 (2005).

²⁴ See Choudhry, *supra* note 1, at 837.

²⁵ Cf. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 15-16 (Harvard University Press 1986).

²⁶ See Choudhry, *supra* note 1, at 837-38.

²⁷ Baynes, in *DISCOURSE AND DEMOCRACY*, *supra* note 21, at 18. See Michelman, *supra* note 22, at 1531 (To Michelman, “[m]uch of the country’s normatively consequential dialogue occurs outside the major, formal channels of electoral and legislative politics, and that in modern society those formal channels cannot possibly provide for most citizens much direct experience of self-revisionary, dialogic engagement.”). In post-conflict settings the most obvious institutional structures are nominally symbolic of current power structures. To be sure, not all are bound to be problematic. The sources of conflict may lie outside them: how one perceives the contours of the public sphere might be outcome determinative. To the extent that the existing *corpus juris* is reflective of power structures, it may thus be regarded as critical starting points but no more. Clearly, dialogical constitutionalism embraces a

question of the propriety of direct legal transplanted of foreign constitutional experiences. This disruptive, self-revising and reflexive character of deliberative politics is said to work from within a rooted liberal tradition rather than appealing to transcendental insight of the good and the right.²⁸

One the whole, the dialogical conception is thought to be a “proceduralist” form of constitutional democracy²⁹ whose institutional features might indeed be shared by other legal systems as well. But here the emphasis is different. Dialogical constitutionalism involves the “ongoing revision of normative histories”³⁰ that is not tied to any “static,” “parochial,” or “coercive constitutionalism;”³¹ rather, through the dialogical enterprise it is hoped that political actors of incipient democracies may retain their normative collective identity – a shared ethos – even while undergoing transformation through a process of reflexive criticism.³²

“non-state centered notion” of democratic discourse and institutional design: it is not “exclusively and immediately tied to the coercive exercise of centralized majoritarian power” *Id.*

²⁸ *Cf.* UNGER, *supra* note 25, at 15-16.

²⁹ *See* JURGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* (Ciaran Cronin & Pablo De Greiff eds., 1998) (discussing “proceduralist” deliberative democracy).

³⁰ Michelman, *Law’s Republic*, *supra* note 22, at 1495.

³¹ *Id.*

³² *See id.* at 1494 n.2. (implying that not only do constitutional settlement and design by themselves tend to carve out the foundational zone of dialogue; the system itself borne of the prior accord is meant to sustain the dynamic and momentum of relative peace over time). *See* Rob Aitken, *Cementing Divisions? An Assessment of the Impact of International Interventions and Peace-Building Policies on Ethnic Identities and Divisions*, 28 *POLICY STUDIES* 247, 247-48 (2007) (discussing the entrenchment of discrete ethnic lines: “Peace processes and international interventions have too frequently accepted the claim that ethnic identities are relatively fixed and form the basis of stable political identities”); *see also*, JOSE MARQUES AND IAN BANNON, *Central America: Education Reform in a Post-Conflict Setting, Opportunities and Challenges*, April 2003, in *SOCIAL DEVELOPMENT PAPERS: CONFLICT PREVENTION & RECONSTRUCTION 2* (World Bank [no date]) (offering other plausible arguments in favor of transformative dialogical democracy and its application).

III. WEAK COURTS, STRONG RIGHTS³³

Taking cue from Choudhry and Howse,³⁴ proponents of weak judicial review might posit that this system better promotes constitutional dialogue and expands the public sphere. To exemplify, in many respects Canadian constitutionalism, both in institutional form and practice, is dialogical.³⁵ Citing the *Michigan* cases, Post observes that constitutional-legal doctrine is, in the final analysis, a product of an extended negotiation between the judiciary and the constitutional culture, where constitutional culture is defined as the “beliefs and values of nonjudicial actors” regarding “the substance of the Constitution.”³⁶ While one might find Jeffersonian constitutionalism³⁷ to resemble dialogical processes in many respects, still there are significant conceptual differences: what is normatively attractive about the dialogical form of deliberative democracy is its way of accommodating both the idea of limited government and the idea of democratic self-governance. It attempts to reconcile traditional British-style parliamentary supremacy with raw countermajoritarian politics. As Hogg and Bushell note, where judicial decision is more open to

³³ See generally MARK V. TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

³⁴ Cf. Choudhry & Howse, *supra* note 1 & Choudhry, *supra* note 1.

³⁵ See Choudhry & Howse, *supra* note 1.

³⁶ Robert C. Post, *The Supreme Court, 2002 Term: Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 7-8 (2003) (interpreting, *inter alia*, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003)).

³⁷ See Thomas Jefferson, *Letter to Samuel Kercheval, July 12, 1816*, in *THE PORTABLE THOMAS JEFFERSON* 557-58 (Merrill D. Peterson ed., 1975) (describing Jeffersonian constitutionalism such that the Constitution should be amended frequently to be in lockstep with the needs of the present generation).

legislative override, modification, or avoidance, then the relationship between the court and the legislative body is increasingly dialogical.³⁸

To illustrate, Section 33³⁹ of the Canadian Charter – the controversial “notwithstanding clause”⁴⁰ – in effect empowers the legislature to override an act of judicial review by suspending key constitutional provisions (theoretically, at least) *ad infinitum*. In contrast, strong courts like the Philippine and U.S. supreme courts might be more inclined to “shut up” majoritarian branches and thus stifle dialogue.⁴¹ (An interesting case, however, is Israel, where we have a perceptively active and strong court amidst an *ostensibly* weakly entrenched

³⁸ See Peter W. Hogg & Allison A. Bushnell, *The Charter Dialogue Between Courts and Legislatures: (Or Perhaps The Charter of Rights Isn't Such a Bad Thing After All)*, 85 OSGOOD HALL L.J. 75 (1997).

³⁹ See Part I of Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) Section 33:

- (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
- (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
- (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

⁴⁰ See Janet L. Hiebert, Symposium, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L. REV. 1963 (2004).

⁴¹ See Mark Tushnet, “*Shut Up He Explained*”, 95 NW. U.L. REV. 907 (2001) (discussing the authoritarian inclination of courts).

constitution.) It is observed that Section 33 provides a powerful incentive for a legislative response.

Plausibly, then, by lowering the threshold for legislative derogation, we might be able to speed up the dynamic: the greater the likelihood of continuing and open-ended revisionary constitutional discourse among key political actors, the more inclusive the public sphere becomes, and, theoretically in the long run, the more participants are accommodated. By opening up communicative political channels we empower the discrete and insular minorities depicted in *Carolene Products*.⁴² Through dialogical constitutionalism, citizens of young democracies can gain a stronger sense of ownership over the constitution, including the sundry legal products that might issue from constitutional norms. Might we see here a more fertile ground for “grassroots” constitutional learning?⁴³ Can weak forms of judicial review turn out to be more compelling normative devices for the growth of constitutionalism than other institutional arrangements?

A. Normative Analysis

⁴² In sum, footnote four proposes a more searching judicial inquiry whenever the courts are confronted with “discrete and insular minorities” who have little or no benefit of political representation in ordinary political processes. Footnote four has profoundly influenced the development of the Equal Protection doctrine. For a discussion on the “famous footnote four” of *United States v. Carolene Products Company*, 304 U.S. 144 (1938), see Jack M. Balkin, Symposium, *The Footnote*, 83 NW. U. L. REV. 275 (1988); Louis Lusky, *Footnote Redux: A “Carolene Products” Reminiscence*, 82 COLUM. L. REV. 1093 (1982).

⁴³ For a description of “grassroots constitutionalism” in Poland, see Grazyna Skapska, *Paradigm Lost? The Constitutional Process in Poland and the Hope of a ‘Grassroots Constitutionalism,’* in *THE RULE OF LAW AFTER COMMUNISM: PROBLEMS AND PROSPECTS IN EAST-CENTRAL EUROPE* 149, 167-68 (Martin Krygier & Adam Czarnota eds., Ashgate Publishing, Ltd. 1999); see also JACKSON & TUSHNET, *supra* note 2, at 289-90.

On the one hand, it is not too implausible a claim that strong courts with weak legislatures can better cultivate civic mindedness than weak courts and shallowly entrenched constitutional protocols (i.e., strong parliaments). One glaring example is the American constitutional experience. (But the extent to which the U.S. legal culture, at the time of its founding, had leapfrogged from an already developed common law system under British rule can be an overriding factor: is it correct to say that the Framers started with a clean slate?) Other counterexamples might include Germany as well. If proponents of strong courts coupled with weak legislatures are so far correct, it might thus be more prudent for one to focus instead on the *normative* and conceptual dimensions of weak (and strong) forms of review than to hopelessly pit up one *empirical* study against another. This way, one can steer clear of argumentation by mere example.

B. Judicial Review v. Entrenchment

It must be stressed that there is a distinction between the idea of entrenchment and the idea of judicial review. Entrenchment relates to the degree to which the constitution can be readily amended.⁴⁴ In countries with strong traditions of parliamentary supremacy, virtually any revision of ordinary statutes as well as constitutional provisions can be done through majority rule in one way or another. On the other hand, while judicial review has been closely associated with the notion of entrenchment, judicial review however more accurately refers to the power of the courts to declare the acts of the executive

⁴⁴ See JACKSON & TUSHNET, *supra* note 2, at 365, 412.

and legislature null and void, and, at times, with binding effect.⁴⁵ Weak judicial review means that legislators, administrative officials, and the public at large would enjoy a bigger domain in which to articulate constitutional norms and thus engage in more inclusive participatory constitutional discourse. (If weak review is coupled with proportionality analysis, the domain of articulation is said to be even greater.⁴⁶) In addition, weak judicial review might be seen as a more responsive measure to the problem of democratic debilitation or deadlock – it can be argued that the greater the need to sustain political activity becomes, it follows that the incentive to institutionalize open channels of communicative activity should as well be raised.

To be sure, the casual link between weak courts and constitutional learning has been subject to academic debate and dispute. On both normative and descriptive levels multicausality no doubt persists. As stated, at least as a statistical matter constitutional learning has occurred in many young democracies with strong courts and weak legislatures. But again, the question is, amidst the array of counterexamples can one more confidently associate dialogical deliberative democracy with constitutional learning than any other theoretical or normative apparatus? If so, is dialogical democracy, seen as a *normative* matter, *best* featured in systems with weak courts? Stated in the reverse, do weak courts, above all, tend to stimulate dialogue and enhance constitutional learning within the public sphere?

⁴⁵ For a discussion on constitutionalism without entrenchment, see *id.* at 412-51. It is certainly possible for judicial review to occur without a bill of rights. See *id.* at 451-63 (discussing Australian and Israeli jurisprudence).

⁴⁶ See Hogg & Bushell, *supra* note 37, at 82-91.

C. “Stained From the Beginning”⁴⁷

As a normative matter, we can argue that the commitment to ongoing discursive constitutional dialogue might be more preferable than any blind commitment to a technical legal document drafted by a group of experts long dead.⁴⁸ In this view, constitutionalism can be more important than the constitution itself.⁴⁹ Why should we adhere to a piece of paper called the “constitution” that happens to be stained from the beginning? South Africa might provide a clue: by spreading out the making of the constitution intergenerationally, we can avoid the “author-authoritarian syndrome” that pervades U.S.-style textualist originalism.⁵⁰ Post-apartheid South Africa had to

⁴⁷ I owe this phrase to Professor Frank I. Michelman.

⁴⁸ Cf. Michelman, *Law's Republic*, *supra* note 22. Michelman does not phrase the idea as irreverently as I do.

⁴⁹ Cf. Jacques Rupnik, *The Post-Totalitarian Blues*, in *THE GLOBAL RESURGENCE OF DEMOCRACY* 370 (Larry Diamond & Marc Plattner eds., 1996).

⁵⁰ Michelman, *Law's Republic*, *supra* note 22, at 1496.. I discuss more substantially Michelman's “author-authoritarian syndrome” elsewhere. See Edsel F. Tupaz, *Respect-worthy Constitutionalism in Divided Societies: Constitutional Dialogue in Northern Ireland, South Africa, and Southern Philippines* (May 16, 2008) (unpublished LL.M. thesis, Harvard Law School) (on file with Langdell Library, Harvard University). I reproduce some relevant passages: To contextualize, Issacharoff rightly observes that in post-conflict reconstruction “[t]oo often the holding of an election becomes the forum for the attempt to cement power in the hands of a dominant majority followed by a demoralizing descent into one-party rule and show elections” Samuel Issacharoff, *Constitutionalizing Democracy in Fractured Societies*, 82 *TEX. L. REV.* 1861, 1870 (2004). A too solidaristic or coercive notion of popular sovereignty would appeal to “[t]he myth of the Founder,” which “apparently describes an ideal history of the republic in which there was and will be only one act of political-moral originality; in which all the political freedom belongs for all time to a single heroic individual,” Michelman, *Law's Republic*, *supra* note 22, at 1515, and where the criterion of legitimacy rests on “the translation of directions uttered in the past by someone else. . . .” *Id.* at 1522. This punctualistic account of legitimacy, exemplified by enforcement politics, has been criticized as one afflicted with “authority-authorship syndrome” and thus is “sitting duck for critique.” Frank I. Michelman, *Constitutional Authorship by the People*, 74 *NOTRE DAME L. REV.* 1605, 1624-25 (1999). This “syndrome” is the

attribution of it to a specified someone's authorship. Lacking such attribution, you might think, one would lack all basis for referring questions of the Constitution's meaning-in-application to the motive, vision, purpose, aim, or understanding, at any level of generality or abstraction, as of any moment past or present, of anyone in particular –any “framer” or all of them, any “ratifier” or all of them, any past or contemporary court or member thereof, any

confront a constitutional regime brought about by undemocratic processes. But the fact that the 1993 Interim Constitution was the result of hard-fisted roundtable negotiations between the National Party and the ANC, to the exclusion of the rest, in no way precluded grassroots constitutional learning through time.⁵¹ If this is true, then an entrenched set of naked preferences in the form of an Interim Constitution – no matter how “democratic” its substance might later turn out to be – can neither solely be regarded as a necessary nor sufficient condition for the flourishing of the Rule of Law. The normative basis for robust constitutionalism should lie elsewhere. Otherwise, polities whose constitutions had been “imposed” as a *fait accompli* will always be illegitimate. There is no doubt however that Japan and Germany are among the stoutest democracies today, and yet both their constitutions had been inaugurated by a conquering power. As a matter of fact it can be well observed that German constitutionalism today reveres no idealized “Framer.” Rather, German constitutionalism is founded on a higher order normative conception –

past or contemporary electorate or citizenry or “generation.” And wouldn't a so-called text cut off from all such reference to authorship be strictly meaningless?

Id. at 1609-10.

By entombing the preferences of contemporary power relations in the upper strata of the legal order, the constitutional designer institutionalizes distrust against the very transformative normative possibilities that future generations might incite, and, precisely, the entrenchment of naked preferences of a shadow electorate situated in time and place might endow it with a kind of hegemonic appeal: it terrorizes the future by freezing the past. In depicting constitution-making as static and corporeal, one “uncritically equat[es] with either the formally enacted preferences of a recent legislative or past constitutional majority, or with the received teachings of an historically dominant, supposedly civic, orthodoxy.” Michelman, *Law's Republic*, *supra* note 22, at 1496. This backward-looking mock-up of the constitutional continuum has been called “*authoritarian* because it regards adjudicative actions as legitimate only insofar as dictated by the prior normative utterance, express or implied, of extra-judicial authority.” *Id.* (emphasis added).

⁵¹ See Heinz Klug, *Constitution-Making, Democracy and the “Civilizing” of Unreconcilable Conflict: What Might We Learn from the South African Miracle?* 25 WISCONSIN INT'L L. J. (Summer 2007).

preemptory basic norms⁵² – that did not magically come about; all in all the core ideal of human dignity that is said to permeate German, South African, and Canadian constitutionalism may have been the result of a kind of sustained constitutional learning and discursive practice. The following discussion on consociationalism might shed more light.

D. Consociationalism

Generally the entrenchment of power structures by a historically dominant individual or group (on whom many might perfunctorily impute the title “the Framers”), and the constitutionalization of asymmetrical ethnic identities in particular, has been thought to resist judicial attempts to synchronize apparently rigid resource allotments with changing ethnic demographics.

In brief, the entrenchment of ethnic divides for purposes of power-sharing and consensus-building is said to be “consociational.”⁵³ It is observed that the consociational aggrupation of ethnic identities in India,⁵⁴ as well as in Bosnia

⁵² See, e.g., *Southwest Case*, 1 BVerfGE 14 (1951) [Federal Constitutional Court of Germany] (holding that there may be fundamental constitutional principles that are so preemptory that they precede even the Constitution itself and also bind the framers).

⁵³ For a classic debate over the merits of consociational versus integrationist models of constitutional design, compare AREND LIJPHART, *PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES* 2 (1999), AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* (1984), and AREND LIJPHART, *POWER-SHARING IN SOUTH AFRICA* (1985), with DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 95 (1985).

⁵⁴ See MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* 562-67 (1984) (discussing the problems of selection over beneficiary groups in the process of remedial redistributions and Indian politics in general); see also MARC GALANTER, *LAW AND SOCIETY IN MODERN INDIA* 185-207 (1989) (criticizing that the very arbitrary allocation of resources and ethnic delineation produce social stigma).

and Herzegovina,⁵⁵ are too resilient for any judicial or even legislative override. While this sort of consociationalism is by no means inevitable in ethnically divided societies like India or Canada, or even yet in transitional democracies of Central and Eastern Europe, the fact of the matter is that governments *do* make mistakes and *do* end up entrenching their political blunders in some set of higher law. It takes no rich hindsight to say that the territorial boundaries in Bosnia,⁵⁶ public office allotments among Hindus and Muslims in India,⁵⁷ and the numbers and weights assigned to each, have all been so far too emotionally controversial. “Hindu majority,” to Parekh, is a plain misnomer,⁵⁸ since the heading falsely subsumes hundreds of disparate groups across India who bear no more allegiance to territory than faith. Again, through hindsight it has been observed that strong forms of judicial review coupled with weak parliaments can only “thicken” embedded raw arbitrary preferences that underlie resource allotments, and that these arbitrary allocations of political power have had the effect of unduly favoring one group by patronizing another. (Can we draw a parallelism with the legacy of the *Brown* Court?⁵⁹) In other words, even strong courts exercising strong powers of judicial review, backed up as they are by strong constitutional norms of rights and liberties, can find it difficult to countermand what might later turn out to be clearly wrong policy choices that were entrenched by prior generations.

⁵⁵ See Issacharoff, *supra* note 49, at 1883-91.

⁵⁶ *Id.*

⁵⁷ See *supra* note 53 and accompanying text.

⁵⁸ See Bhikku Parekh, *India's Diversity*, DISSENT 145-48 (Summer 1996), in JACKSON & TUSHNET, *supra* note 2, at 1305-09.

⁵⁹ See, e.g., Tomiko Brown-Nagin, *An Historical Note on the Significance of the Stigma Rationale for a Civil Rights Landmark*, 48 ST. LOUIS U. L.J. 991 (2004) (For a discussion on the stigmatic effect of *Brown v. Board of Education*).

What might then explain the robust constitutionalism of Japan, South Africa, and Canada? As intimated, one cannot trace their success stories to an irreducibly decisive, glorious moment in history – the enactment of a document called “the constitution” whether “rightly” or “wrongly” made. If the normative fixation with a punctual episode of political will-formation can neither be a sufficient nor necessary cause for robust constitutionalism, what then might explain apparently successful democratic practices in what were then young democracies? Is there a more principled normative basis?

We might conclude that the key to their success chiefly lies in *process*: to attain a critical mass of liberal-minded citizens constitution-making in young and transitional democracies would have to be a long and drawn out political act.⁶⁰ Constitutional choices must be worked out by trial and error, by consultation and debate, if it is to gain broad consensus. With more constitutional choices come greater dialogue. The constitutional education of the Rule of Law can be best achieved by vesting the legislature (and constitutive assemblies) with a flexible capacity for constitutional amendment as well as the power to override prior judicial decrees. Consociational practices which had ossified ethnic lines, and whose normative foundations might have been eroded through time, can be more readily revised through a drawn-out political dialogue between majoritarian institutions and weak courts.

E. Ongoing Revision

⁶⁰ Cf. Klug, *supra* note 50, at 20; Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

Conkle rightly observes that the Canadian Court in *Morgentaler v. The Queen*⁶¹ was able to avoid a “final” decision over the issue of abortion by opening up dialogue with parliament and by leaving it in the end for parliament to decide. In contrast, the U.S. Supreme Court had overreached its political capital in *Roe v. Wade* Court, effectively polarizing the debate by declaring a “final” answer – the Court thought it best to spell out a holding much like a lawmaker would meticulously draft a statute in the hope to shut out once and for all the abortion problem.⁶²

One could argue, however, that as the membership of the U.S. Court changed through time, the abortion issue was bound to be revisited anyway, and so, constitutional dialogue can take place even with strong courts. There is a lot of truth in this suggestion. But the fact of the matter is that the incidence of this “dialogue” pales in comparison with the “real-time” conversation generated by the Canadian model. Moreover, dialogical democracy reaches out to discrete and insular minorities in a way strong courts cannot.⁶³ As intimated, strong forms of review might tend to produce “thicker” decisions, squeezing legislative room for future alternatives and compromises. Had the European Court of Justice (ECJ) held strong review powers akin to that of the U.S. Supreme Court, its first ruling barring relief to gypsies petitioning for access to equal education would have been more difficult to overturn.⁶⁴ As it turns out, the first ruling

⁶¹ [1988] 1 S.C.R. 30 (Can.) (affirming the criminality of abortion save for few exceptions).

⁶² See Daniel O. Conkle, *Canada's Roe: The Canadian Abortion Decision and Its Implications for American Constitutional Law and Theory*, 6 *Constitutional Commentary* 299, 315-16 (1989), interpreted in JACKSON & TUSHNET, *supra* note 2, at 109-10.

⁶³ See *supra* note 41 and accompanying text.

⁶⁴ See *D.H. v. The Czech Republic*, App. No. 57325/00 Eur. Ct. H.R. (2006); *D.H. v. The Czech Republic*, App. No. 57325/00 Eur. Ct. H.R. (2007).

triggered much political dialogue between the Czech authorities and civil society, even prompting the Human Rights Watch to step in as *amici*.⁶⁵ In a year, the ECJ handed down a second ruling reversing itself, granting whole gypsy populations the right of access to quality education which the rest of the Czech people already enjoyed. In light of dialogical politics, we might say that this second decision had effectively expanded the political sphere to accommodate the Roma people, a significant yet marginalized group in Europe. Such interplay among the Czech authorities, the ECJ, human rights groups, civil society, and the gypsies themselves, would certainly be more difficult to simulate under a *Plessy-Brown* dynamic.⁶⁶ No doubt the ECJ is inclined to be more dialogical than its domestic counterparts which are armed with stronger review powers. In contrast to American courts, the ECJ's rapid jurisprudential development (which, in the case of the gypsies, just took around one year to rectify a "mistake") might well be associated with a characteristically weak form of judicial review.

What is more, in weak systems of review the mere filing and pendency of a sensational political case would more readily trigger any dialogical dynamic between and among opposing parties and society at large. Here, what we might see is a form of *pre-judicial* deliberation. While this phenomenon can certainly be present in systems of strong review, the process in the latter, however, is less drawn-out; the window of opportunity for constitutional education is shorter.

⁶⁵ D.H. v. The Czech Republic, App. No. Eur. Ct. H.R. (2007).

⁶⁶ One can argue that it took the U.S. Supreme Court (which, as intimated, has "strong" review powers) much conceptual acrobatics to wrangle itself out of a previous ruling that later turned out, in light of public opinion, to be bad policy. Cf. Daniel R. Gordon, *One Hundred Years After Plessy: The Failure of Democracy and the Potentials for Elitist and Neutral Anti-Democracy*, 40 N.Y.L. SCH. L. REV. 641 (1996).

Moreover, in weak review the momentum of deliberative politics caused by the filing of a highly sensitive case can be sustained even *after* the decision itself is handed down – there is still the prospect for legislative resistance or override. On the other hand, in strong review systems losing parties can only hope for administrative resistance, or perhaps a drastic constitutional amendment, to block the implementation of what would otherwise be too “thick” an adverse judgment.

IV. WIDER POLITICAL ACCOMMODATION

Nor do we find in systems of strong review the more conservative judgments that tend to accommodate a larger spectrum of political and ideological viewpoints. It is certainly not implausible to argue that a weak court would have stronger incentives to frame the debate in a way as to capture the widest appeal to society-at-large, actively seeking to create both internal and external pressure over the majoritarian branches in order to gain political capital, greater legitimacy, or, if you will, “binding virtue,” chiefly through persuasive reasoning alone. In seeking to attain widespread political legitimacy, weak courts can accommodate an even wider range of political interests and shifting lines of authority, thus creating a greater level of tolerance for constructive or principled *ambiguity* in the authority of the court and its decision-making.⁶⁷

⁶⁷ Cf. Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT’L L. 409, 451 (2003).

In contrast, a strong court might likely fall into the habit of perfunctorily appealing to historical authority, and would spend less time engaging in normative, critical, and justificatory reasoning. Under this “enforcement model,” such a court would be too “centered on local, independent, and final decision-making.”⁶⁸ Characteristically, a strong court under this view “establishes itself as an ultimate authority in its own self-defined realm.”⁶⁹ In other words, it privileges assertions of strong authoritative decisions, definitive finality, and certainty, over ongoing dialogue.⁷⁰

If our courts follow the enforcement model, whether unconscious or disavowed, it is likely that they see themselves not as mediators or partners in dialogue, but as “local law enforcers” policing the purported boundaries of majoritarian government.⁷¹

A. Horizontal and Transnational Dialogue

Another way to render more politically accommodating judgments would be to engage in a higher plane of dialogue with foreign and international actors. Here, courts go beyond dialogue with domestic legal institutions.⁷² This way, weak courts can build their legitimacy, both in the internal and the external

⁶⁸ *Id.* at 424.

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² *Cf.* Ulrich K. Preuss, *Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization*, 51 N.Y.L. SCH. L. REV. 466, 491-94 (2006-2007). In what might be called a “transnational cooperative order,” the traditional boundaries of international law and domestic law are blurred and lose their distinctions; direct international intervention in civil war, the domestication of inter-state conflicts, and the transnational effects of intra-state dispute resolution, have all been fused. *Id.*

sense,⁷³ through a reflexive critique of the practices of foreign nations.⁷⁴ To Habermas, the citizens of a nation often use dialogical constitutionalism as a means to clarify the way they want to understand themselves as citizens of a specific republic, as inhabitants of a specific region, as heirs to a specific culture, which traditions they want to perpetuate and which they want to discontinue, and, last, how they want to deal with their history.⁷⁵ In the *Liselotte Hauer* case,⁷⁶ the European Court of Justice stated that it should draw inspiration from constitutional traditions common to the Member States, so that measures which might turn out incompatible with the fundamental rights recognized by the constitutions of those States are said to be unacceptable in the Community.⁷⁷ As intimated, the ECJ is thought to have relatively weak review powers, perhaps because the European human rights regime provides structurally greater legal and political room for Member States to avoid judgment.⁷⁸ And yet we see more cases being filed, more instances of compliance among Member States, more principled and accommodative decisions, and even faster decision-making through time.⁷⁹

⁷³ For a distinction between internal and external legitimacy, see Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT'L L. & POL. 877 (2006).

⁷⁴ For a description of dialogical interpretation as a mode of comparative analysis, see Choudhry, *supra* note 1, at 835-38.

⁷⁵ *Id.* at 822-23 (citing Jurgen Habermas, *Struggles for Recognition in the Democratic Constitutional State*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 107, 125 (Amy Guttmann ed., 2d ed. 1994)).

⁷⁶ *Liselotte Hauer v. Land Rheinland-Pfalz*, Case 44/79, E.C.R. 3727 (Dec. 13, 1979) [E.C.J.].

⁷⁷ *See id.*

⁷⁸ For an argument that international tribunals characteristically possess weak review powers, see Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).

⁷⁹ For plausible support of this trend, see Laurence R. Helfer, *Overlegalizing Human Rights: International Relations theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

When confronted with large-scale human rights issues, do weak courts, whether supranational or domestic, engage in decision-making in a way that they become more receptive, through time, to consider human rights practices of other states? Do the decisions of weak courts, at least generally, show that they are influenced by – or even purposively try to influence – foreign courts and legislatures? International customs and norms? Is this not a form of dialogical democracy? Incidentally, in *Lawrence v. Texas*,⁸⁰ Justice Kennedy made references to Northern Ireland and the European Court of Human Rights to support the argument that western civilization has long since abandoned sodomy laws and hence the United States should do the same.⁸¹ While it has been claimed that the U.S. Supreme Court wields excessively strong review powers, *Lawrence* nonetheless can be regarded as an exemplary judicial attempt at reflexive and more accommodative reasoning.

Might we conclude that weak courts such as the ECJ and, perhaps, the Canadian Court, are more inclined to draw from more accommodative principles, and less on parochial beliefs, when they decide cases under fear of domestic or international backlash? Might weak courts faced with strong parliaments try harder to avoid indiscriminate borrowing from foreign sources in their application to local circumstances? Certainly the fact that a court or legislature has been given reasonable hope to win a debate in the next round will likely make one take another shot, to advance more compelling arguments, to field more tightly-built cases, and to engage in more principled normative

⁸⁰ 539 U.S. 558 (2003).

⁸¹ *Id.* (Kennedy, J.)

analysis. The strength of the dialogical approach might lie in the fact that it tends to unravel unconscious thought patterns through reflexive and comparative reasoning, thus forcing judges to think twice before choosing to overturn legislative action, as well as to encourage them to critically discriminate good foreign practices from bad ones. To exemplify, in the 1998 *National Coalition for Gay and Lesbian Equality* case,⁸² the South African Constitutional Court took care not to adopt in a wholesale, perfunctory manner affirmative action jurisprudence under American law: “We must [] exercise great caution not to import [] inapt foreign equality jurisprudence which may inflict on our nascent equality jurisprudence American notions of ‘suspect categories of State action’ and of ‘strict scrutiny.’”⁸³ To the Court, the Afrikaan notion of “remedial or restitutionary equality” would be more appropriate, in contrast to American concepts of “reverse discrimination” or “positive discrimination.”⁸⁴

CONCLUSION

To be sure, systems of weak review might be more prone to “reform fatigue.”⁸⁵ After all, any long, drawn-out, and open-ended discourse, whatever its substantive merits, can always dangerously relapse into a form of legal skepticism, even nihilism, thus defeating an important aspiration of the Rule of

⁸² *The National Coalition for Gay and Lesbian Equality v. Minister of Justice*, CCT 11/98 (1998)(S.Afr.).

⁸³ *Id.*

⁸⁴ *Id.* See also *Minister of Finance v. Van Heerden*, CCT 63/03 (2003) (S. Afr.) (per Moseneke, J.).

⁸⁵ For illustrations of reform fatigue, see, e.g., Randall Peerenboom, *Legal Implications of a Rising China: The Fire-Breathing Dragon and the Cute, Cuddly Panda: The Implication of China's Rise for Developing Countries, Human Rights, and Geopolitical Stability*, 7 CHI. J. INT'L L. 17 (2006); John W. Head, *Seven Deadly Sins: An Assessment of Criticisms Directed at the International Monetary Fund*, 52 KAN. L. REV. 521 (2004).

Law. The indefinite postponement of divisive political and moral issues might bring about the “infantilization” of society in yet a different form. After all, are we not better off with *any* solution than *no* solution? There is no doubt that protracted uncertainty in constitutional choice will very likely have a negative impact on matters of serious national interest, such as foreign investment, criminal deterrence, and consumer confidence.

Yet in light of all these, there is something irreducibly normative about the dialogical process. It cannot be denied that shared constitutional learning can take root in dialogue more so than in monologue. Coleman’s and Bratman’s idea of a “shared cooperative activity,” such as taking a walk in the park with a friend,⁸⁶ is clearly a kind of dialogical learning. If we can somehow incorporate the dialogical enterprise into practical form, might weak courts provide a key? Our combined constitutional histories are still unclear. Critical normative inquiry however has a better answer.

⁸⁶ See generally Jules Coleman, *Conventionality and Normativity*, June 31, 2001, at 12 (discussing Bratman’s notion of Shared Cooperative Activity as irreducibly normative). See also JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2003).