

Deliberative Democracy and Weak Courts: Constitutional Design in Nascent Democracies

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I. OVERVIEW

The present Canadian and United Kingdom models (the latter, in particular, in light of the innovations of the Human Rights Act) best demonstrate the main argument in this Article that a “weak” form of judicial review, as opposed to a “strong” review, might well be taken to be the most congenial institutional apparatus for grassroots constitutional learning of civic

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responsibility, or civic-mindedness, under the Rule of Law. Following Sujit Choudhry and Robert Howse,¹ and to some extent, Stephen Holmes and Cass R. Sunstein,² it is posited 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 practices.

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”⁴ 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.”⁵ In a deeply divided post-conflict world, it would be 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.

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1. See Sujit Choudhry & Robert Howse, *Constitutional Theory and the Quebec Secession Reference*, 13 CAN. J.L. & JURIS. 143 (2000), for a justification of the Canadian Court’s resort to what might be called “constructive” or “principled ambiguity,” “judicial minimalism,” or “theoretical modesty;” Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819 (1999), for a normative account of “dialogical” interpretative and comparative methodology.
 2. 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* 275 (Sanford Levinson ed., 1995), for a normative argument that constitutions in Eastern Europe are relatively easier to amend. See also VICKI JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 354 (2d ed. 2006) (commenting on the notion of constitutional entrenchment and amendment in light of recent scholarship).
 3. Jorge I. Dominguez & Anthony Jones, *Building and Sustaining a Contemporary Democratic State*, in *THE CONSTRUCTION OF DEMOCRACY: LESSONS FROM PRACTICE AND RESEARCH 10* (Jorge I. Dominguez & Anthony Jones eds., 2007).
 4. *Id.*
 5. *Id.*

The main argument is divided into four parts. Part II provides a brief account on the political and social conditions of young democracies, particularly the fact that democracies in transition can benefit most from grassroots constitutional learning of core precepts of liberal legality. In Part III, a normative model whose incorporation might accelerate this constitutional learning is presented, along with an explanation of what might be taken to be the normative features of “dialogical” constitutionalism. Assuming that dialogical politics is as beneficial as political theorists claim to be, and especially so for embryonic democracies, the next question should be, what could or would be the institutional vehicle that is most responsive, most congenial — or the most hospitable — engine through which dialogical deliberative practices can be realized? How should constitutional design enhance or encourage dialogical constitutionalism in corporeal form? These questions are addressed under Part IV where it is argued that one institutional vehicle could be judicial review, but not just any sort of judicial review. Where courts are weak, 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. This is strongly demonstrated by, among others, the transitional democracies in Central and Eastern Europe. In Part V, it is suggested 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 from the benefits of future transnational cooperative dialogue among foreign and international actors. In conclusion, while weak review might lead to 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.

II. 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 one's terms of engagement with her basic associations and with the rest of society as well.⁶ Through time, powerful constitutions can even change the very cognitive awareness of whole peoples. In contrast, bad constitutions can sever the bonds of society. In young democracies, Holmes and Sunstein observe that the standard dichotomy between ordinary and constitutional politics can be more imaginary than real.⁷ The fusion of ordinary processes and constitutional processes shows that the polity's secondary rules, or the rules of recognition in the Hartian sense,⁸ have not yet crystallized. Borrowing from Jeremy Waldron, in transitional settings, there is a dearth of a clearly established "corps of speciali[z]ed law-detectors who know the marks of legislation" endowed with social authority.⁹

Constitution-making and constitutional politics in transitional democracies occur at the margins of legality. How might constitutional engineering be approached in fragile states whose citizens aspire for liberal legality no less? Is there a repository from which ready-made "model" constitutions can be whipped out?

Indeed, in the history of the world there are at least as many constitutions as there have been nations. The human condition,¹⁰ however, hinders for all time the assertion that one can be better than the rest, given intractable differences situated in time and place. Still, the need for comparative constitutional scholarship is certainly no less urgent.¹¹ And

6. See Dominguez & Jones, *supra* note 3, at 10.

7. See HOLMES & SUNSTEIN, *supra* note 2, in JACKSON & TUSHNET, *supra* note 2, at 338-39.

8. See H.L.A. HART, ET AL., *THE CONCEPT OF LAW* (1994), for a groundbreaking discussion of "primary" and "secondary" rules of recognition.

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

10. See, e.g. HANNAH ARENDT, *THE HUMAN CONDITION* (2d ed. 1998) (philosophical existentialist angle on the "human condition").

11. See Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685 (1976) (arguing in favor of comparative constitutional analysis on the basis of shared principles of justice). *But see* Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L. J. 411 (1985). See also John Bell, *Comparing Public Law*, in *COMPARATIVE LAW IN THE 21ST CENTURY* 235-47 (Andrew Harding & Esin Öricü eds., 2002).

along greater scholarship might surface a collective hope for a marginally better constitutional order no matter the circumstance.

Polities in transition to liberal democracies are thought to be unfamiliar with the basic tenets of “liberal legality,” “constitutionalism,” or the “Rule of Law.”¹² John Rawls might be read to suggest three inter-related tenets of the Rule of Law: (a) *legal entitlement* — the normative status where citizens depend on the meaning of standing laws and not upon the grace of political elites; (b) *legal justice* — that similar cases be treated similarly; and (c) *legal rationality* — that decision-making is to be rationally constrained.¹³

For young democracies afflicted with “legal nihilism” or “legal skepticism,” Stanley Katz rightly asserts that any normative litmus test for generic constitutionalism cannot be pegged to formal institutional arrangements alone.¹⁴ While Carlos Santiago Nino argues that presidentialism, though a *formal* arrangement, has defeated constitutionalism in South America,¹⁵ 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, however configured — would more closely resemble or sustain the normative ideals of the Rule of Law.¹⁶

Noteworthy are some examples: in transitional democracies such as the former Soviet satellite states, constitutionalism is thought to be weak. There

12. These terms are used loosely and interchangeably in this Article.

13. The author owes 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). See, for example, Richard D. Parker, *The Past of Constitutional Theory — And its Future*, 42 OHIO ST. L.J. 223 (1981); Karl Klare, *Law-Making as Praxis*, 40 TELOS 123 (1979); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1982-83), for a plausible case for the failure of rational constraint in liberal theory. See also 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); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (plausible rejoinder).

14. 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.

15. 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].

16. See Katz, *supra* note 14.

is great social distrust in formal laws and institutions. Communist practices have brought about what might be regarded as the “infantilization of society,” or a widespread feeling of dependence on socialist and centralist governments.¹⁷ In like manner, Okoth-Ogendo depicts sub-Saharan African politics as one brandishing paper constitutions without the ingrained habit of liberal constitutionalism.¹⁸

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.¹⁹ One way to replicate this effect is through the 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.²⁰

III. DIALOGICAL DELIBERATIVE DEMOCRACY

Dialogical politics²¹ refers to an institutionalized conception of deliberative politics²² as a “self-revisionary normative dialogue through which personal

17. 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 15.

18. See H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY, *supra* note 15.

19. See generally NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* (2006) (discussing how the Pinochet case affected related cases in foreign countries as well as influenced international law and the International Criminal Court).

20. *Contra* Mark V. Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435 (2002).

21. The terms dialogic and dialogical can be traced to the literary works of the Russian philosopher Mikhail Bakhtin. See generally MIKHAIL M. BAKHTIN, *THE*

moral freedom is [best] achieved.”²³ The basic idea is that political actors — whether duly constituted government authorities, private entities, or even social movements²⁴ — 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.²⁵ What is more, the dialogical approach might set off a kind of a disruptive or destabilizing force²⁶ — it could implore one to imagine the road less traveled and explore counterfactual trajectories.²⁷ Through the medium of law, “the task of an

DIALOGIC IMAGINATION: FOUR ESSAYS (Caryl Emerson & 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; collective, and not individualistic. See generally Edsel F. Tupaz, *Respect-worthy Constitutionalism in Divided Societies: Constitutional Dialogue in Northern Ireland, South Africa, and Southern Philippines* (2008) (unpublished LL.M. thesis, Harvard Law School) (on file with Langdell Library, Harvard University).

22. See generally 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., 2002) [hereinafter *DISCOURSE AND DEMOCRACY*] (discussing Habermas’ 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).
23. Frank Michelman, *Law’s Republic*, 97 *YALE L.J.* 1493, 1495 (1988) [hereinafter Michelman, *Law’s Republic*] (positing the dialogic-republican constitutional theory in light of *Bowers v. Hardwick*). 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) (applying Habermasian dialogical theory to post-conflict Eastern Europe).
24. 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).
25. See Choudhry, *supra* note 1, at 837.
26. Cf. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 15-16 (1986).
27. See Choudhry, *supra* note 1, at 837-38.

opinion-forming public sphere,”²⁸ in the words of Roberto 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.”²⁹ One might then become more critically reflexive whenever faced with a question of the propriety of direct legal transplantation 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.³⁰

On the whole, the dialogical conception is thought to be a “proceduralist” form of constitutional democracy³¹ 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”³² that is not tied to any “static,” “parochial,” or “coercive constitutionalism.”³³ 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.³⁴

28. DISCOURSE AND DEMOCRACY, *supra* note 22, at 18.

29. *Id.* at 19. To Michelman, “much 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.” Michelman, *Law’s Republic*, *supra* note 23, at 1531. 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 “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 . . .” DISCOURSE AND DEMOCRACY, *supra* note 22.

30. *Cf.* UNGER, *supra* note 26, at 15-16.

31. *See generally* JÜRGEN HABERMAS, THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY (Ciaran Cronin & Pablo De Greiff eds., 1998), for a discussion of “proceduralist” deliberative democracy.

32. Michelman, *Law’s Republic*, *supra* note 23, at 1495.

33. *Id.*

34. *See* Michelman, *Law’s Republic*, *supra* note 23 (citing UNGER, *supra* note 26, at 15-16). This might normatively imply that not only do constitutional settlement

IV. WEAK COURTS, STRONG RIGHTS

Taking cue from Choudhry and Howse,³⁵ proponents of weak judicial review might posit that this system promotes better constitutional dialogue and expands the public sphere. Canadian constitutionalism (both in institutional form and practice), for example, is dialogical in many respects.³⁶ As Robert Post observes, 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 non-judicial actors” regarding “the substance of the Constitution.”³⁷ While Jeffersonian constitutionalism³⁸ might be said to resemble dialogical processes in many respects, still, these concepts differ. 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 Peter W. Hogg and Allison A. Bushell note, where judicial decision is more open to legislative override, modification, or

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, e.g. Jose Marques & Ian Bannon, *Central America: Education Reform in a Post-Conflict Setting, Opportunities and Challenges*, in SOCIAL DEVELOPMENT PAPERS: CONFLICT PREVENTION & RECONSTRUCTION (World Bank), April 1, 2003, available at <http://go.worldbank.org/4PM7VU9CNo> (last accessed Nov. 28, 2008) (other plausible arguments in favor of transformative dialogical democracy and its application). See also Rob Aitken, *Cementing Divisions? An Assessment of the Impact of International Interventions and Peace-Building Policies on Ethnic Identities and Divisions*, 28 POLICY STUDIES 247-48 (2007) (discussing the entrenchment of discrete ethnic lines); *Id.* at 248 (“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.”).

35. *Cf.* Choudhry & Howse, *supra* note 1; Choudhry, *supra* note 1.

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

37. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 7-8 (2003) (interpreting, among others, *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003)).

38. See generally Thomas Jefferson, *Letter to Samuel Kercheval, July 12, 1816*, in THE PORTABLE THOMAS JEFFERSON 557-58 (Merrill D. Peterson ed., 1977) (describing Jeffersonian constitutionalism, such that the constitution should be amended frequently to be in lockstep with the needs of the present generation).

avoidance, then the relationship between the court and the legislative body is increasingly dialogical.³⁹

To illustrate, Section 33⁴⁰ of the Canadian Charter — the controversial “notwithstanding clause”⁴¹ — effectively empowers the legislature to override an act of judicial review by suspending key constitutional provisions (theoretically, at least) *ad infinitum*. Thus, Section 33 provides a powerful incentive for a legislative response. In contrast, strong courts such as the United States Supreme Court might be more inclined to “shut up” majoritarian branches and thus stifle dialogue.⁴² (An interesting case, however, is Israel, where a perceptively active and strong court operates amidst an *ostensibly* weakly entrenched constitution.)

Plausibly, then, by lowering the threshold for legislative derogation, a better dynamic might result: the greater the likelihood of continuing an open-ended revisionary constitutional discourse among key political actors, the more inclusive the public sphere becomes, and, theoretically in the long

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

40. *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, § 33. Such section states that:

- (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.
- (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).

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

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

run, the more participants are accommodated. By opening up communicative political channels, the discrete and insular minorities depicted in *Carolene Products*⁴³ are empowered. 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 a more fertile ground for “grassroots” constitutional learning therefore be seen?⁴⁴ 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

On 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.⁴⁵ (But the extent to which the United States’ (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 counter-examples might include Germany as well.⁴⁶

If proponents of strong courts coupled with weak legislatures are so far correct, it might thus be more prudent to focus instead on the *normative* and conceptual dimensions of weak (and strong) forms of review than to

43. *United States v. Carolene Products Company*, 304 U.S. 144 (1938). 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. See generally Louis Lusky, *Footnote Redux: A “Carolene Products” Reminiscence*, 82 COLUMBIA L. REV. 1093 (1982); Jack M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1988) (extensively discussing the “famous footnote four”).

44. See Grażyna 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., 1999), for a description of “grassroots constitutionalism” in Poland. See also JACKSON & TUSHNET, *supra* note 2, at 289–90.

45. See generally FRANCES WHITNEY & NATHAN GLICK, *AN OUTLINE OF AMERICAN HISTORY* 82–95 (1994) (relating the constitutional history of the United States of America).

46. See generally MARGARET BARBER CROSBY, *THE MAKING OF A GERMAN CONSTITUTION: A SLOW REVOLUTION* (2008) (discussing the German constitution as a product of social transformation).

hopelessly pit up one *empirical* study against another. This way, argumentation by mere example is avoided.

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.⁴⁷ 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 and legislature null and void, and, at times, with binding effect.⁴⁸

Weak judicial review, therefore, 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.⁴⁹) 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 a political activity, then it should follow 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, multi-causality no doubt persists. As stated, constitutional learning has occurred in many young democracies with strong courts and weak legislatures. Well, at least statistically. But then, the question remains: amidst the array of counter-examples, 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

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

48. See JACKSON & TUSHNET, *supra* note 2, at 412-51 (discussing constitutionalism without entrenchment) & 451-63 (discussing Australian and Israeli jurisprudence). It is certainly possible for judicial review to occur without a bill of rights.

49. See Hogg & Bushell, *supra* note 39, at 82-91.

in the reverse, do weak courts, above all, tend to stimulate dialogue and enhance constitutional learning within the public sphere?

C. “*Stained From the Beginning*”⁵⁰

As a normative matter, it can be argued 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.⁵¹ In this view, constitutionalism can be more important than the constitution itself.⁵²

Why then adhere to a piece of paper called the “constitution” that is stained from the beginning? South Africa might provide a clue: by spreading out the making of the constitution inter-generationally, the “author-authoritarian syndrome” that pervades U.S. style textualist originalism may be avoided altogether.⁵³ Post-apartheid South Africa had to confront a

50. The author owes this phrase to Professor Frank I. Michelman.

51. Cf. Michelman, *Law's Republic*, *supra* note 23.

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

53. Michelman, *Law's Republic*, *supra* note 23, at 1496. See Edsel F. Tupaz, Respect-worthy Constitutionalism in Divided Societies: Constitutional Dialogue in Northern Ireland, South Africa, and Southern Philippines (2008) (unpublished LL.M. thesis, Harvard Law School) (on file with Langdell Library, Harvard University) (discussing more substantially Michelman’s “author-authoritarian syndrome”). To contextualize, Issacharoff 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 23, 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 –

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.⁵⁴ 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.⁵⁵ As a matter of fact, it can as well be

any “framer” or all of them, any “ratifier” or all of them, any past or contemporary court or member thereof, any 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?

Frank I. Michelman, *Constitutional Authorship by the People*, 74 NOTRE DAME L. REV. 1605, 1609-10 (1999).

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 23, 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 supplied).

54. 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), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987302 (last accessed Sep. 5, 2008).
55. See generally POLITICAL CULTURE AND CONSTITUTIONALISM: A COMPARATIVE APPROACH 79, 98 (Daniel P. Franklin & Michael J. Baun eds., 1994) (discussing the history and present state of constitutionalism in Japan and Germany).

said that German constitutionalism today reveres no idealized “Framer.” Rather, German constitutionalism is founded on a higher order normative conception — preemptory basic norms — that did not magically come about.⁵⁶

Thus, the core ideal of human dignity that is said to permeate German, South African, and Canadian constitutionalism might have been the result of a kind of sustained constitutional learning and discursive practice.

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 synchronization of apparently rigid resource allotments with changing ethnic demographics. In short, the entrenchment of ethnic divides for purposes of power-sharing and consensus-building is said to be “consociational.”⁵⁷

It is observed that the consociational aggrupation of ethnic identities in India,⁵⁸ as well as in Bosnia and Herzegovina,⁵⁹ 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

56. See, e.g. Southwest Case, Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court of Germany] 1951, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 14 (F.R.G.) (holding that there may be fundamental constitutional principles that are so preemptory that they precede even the constitution itself and also bind the framers).

57. 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); AREND LIJPHART, POWER-SHARING IN SOUTH AFRICA (1985), with DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 95 (1985).

58. 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); MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA 185-207 (1989) (arguing that the very arbitrary allocation of resources and ethnic delineation produce social stigma).

59. See Issacharoff, *supra* note 54, at 1883-91.

rich hindsight to say that the territorial boundaries in Bosnia,⁶⁰ public office allotments among Hindus and Muslims in India,⁶¹ and the numbers and weights assigned to each, have all been so far too emotionally controversial. “Hindu majority,” to Bhikku Parekh, is a plain misnomer,⁶² since the heading falsely subsumes hundreds of disparate groups across India who bear no more allegiance to territory than faith. Again, through hindsight, it may be 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 this be parallel with the legacy of the *Brown Court*?⁶³) 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.

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? The answer might simply lie in the *process* involved: to attain a critical mass of liberal-minded citizens, constitution-making in young or transitional democracies would have to be a long and drawn out political act.⁶⁴

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

60. *Id.*

61. See *supra* note 59 and accompanying text.

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

63. See Tomiko Brown-Nagin, *An Historical Note on the Significance of the Stigma Rationale for a Civil Rights Landmark*, 48 ST. LOUIS L.J. 791 (2004), for a discussion on the stigmatic effect of *Brown v. Board of Education*, 347 U.S. 483 (1954).

64. Cf. Klug, *supra* note 55, at 20; Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

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

Daniel O. Conkle observes that the Canadian Court in *Morgentaler v. The Queen*⁶⁵ 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*,⁶⁶ 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 order to shut out once and for all the abortion problem.⁶⁷

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.⁶⁸

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.⁶⁹ As it turns out, the first ruling triggered much political dialogue

65. *Morgentaler v. The Queen*, 1 S.C.R. 30 (1988) (Can.) (affirming the criminality of abortion save for few exceptions).

66. *Roe v. Wade*, 410 U.S. 113 (1973) (upholding abortion as a constitutional right).

67. 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), in JACKSON & TUSHNET, *supra* note 2, at 109-10.

68. See *supra* note 43 and accompanying text.

69. See *D.H. and Others v. The Czech Republic*, Application no. 57325/00, Eur. Ct. H.R. [GC] (Feb. 7, 2006), available at <http://www.echr.coe.int/echr> (last accessed Sep. 5, 2008); *D.H. and Others v. The Czech Republic*, Application

between the Czech authorities and civil society, even prompting the Human Rights Watch to step in as *amici*.⁷⁰ 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, it might be said 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.⁷¹ No doubt the ECJ is inclined to be more dialogical than its domestic counterparts that 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 might be seen 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. 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

no. 57325/00, Eur. Ct. H.R. [GC] (Nov. 13, 2007), *available at* <http://www.echr.coe.int/echr> (last accessed Sep. 11, 2008).

70. D.H. and Others v. The Czech Republic, Judgment Nov. 13, 2007, Eur. Ct. H.R. [GC], *available at* <http://www.echr.coe.int/echr> (last accessed Sep. 11, 2008).

71. *See generally* Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding the constitutionality of racial segregation even in public railroads under the doctrine of "separate but equal"); Brown v. Board of Education, 347 U.S. 483 (1954) (declaring that separate public schools for black and white students denied black children equal educational opportunities). 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).

resistance, or perhaps a drastic constitutional amendment, to block the implementation of what would otherwise be too “thick” an adverse judgment.

V. WIDER POLITICAL ACCOMMODATION

The more conservative judgments that tend to accommodate a larger spectrum of political and ideological viewpoints cannot be found in systems of strong review. 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, even “binding virtue,” chiefly through persuasive reasoning alone. In seeking to attain widespread political legitimacy, weak courts can introduce the possibility of 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.⁷²

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.”⁷³ Characteristically, a strong court under this view “establishes itself as an ultimate authority in its own self-defined realm.”⁷⁴ In other words, it favors assertions of strong authoritative decisions, with definitive finality, and certainty, over ongoing dialogue.⁷⁵

If 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.⁷⁶

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.⁷⁷ This

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

73. *Id.* at 424.

74. *Id.*

75. See Harding, *supra* note 72.

76. *Id.*

77. Cf. Ulrich K. Preuss, *Perspectives on Post-Conflict Constitutionalism: Reflections on Regime Change Through External Constitutionalization*, 51 N.Y.L. SCH. L. REV.

way, weak courts can build their legitimacy, both in the internal and the external sense,⁷⁸ through a reflexive critique of the practices of foreign nations.⁷⁹

To Jürgen 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.⁸⁰

In the *Liselotte Hauer* case,⁸¹ the ECJ 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.⁸²

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.⁸³ And yet more cases are being filed, more instances of compliance among Member

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.*

78. See Jean d’Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U. J. INT’L L. & POL. 877 (2006) (distinguishing between internal and external legitimacy).

79. See Choudhry, *supra* note 1, at 835-38 (describing dialogical interpretation as a mode of comparative analysis).

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

81. Case no. 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727.

82. See Case no. 44/79, *Liselotte Hauer v. Land Rheinland-Pfalz*, 1979 E.C.R. 3727.

83. See Kal Raustiala, *Form and Substance in International Agreements*, 99 Am. J. Int’l L. 581 (2005) (arguing that international tribunals characteristically possess weak review powers).

States, more principled and accommodative decisions, and even faster decision-making through time.⁸⁴

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*,⁸⁵ 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.⁸⁶ 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 it be concluded then 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 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 2004 case of *Minister of Finance v. Van Heerden*,⁸⁷ the South African Constitutional Court chose not to adopt in a wholesale, perfunctory manner the affirmative action jurisprudence under American law: “We must therefore exercise great caution not to import ... inapt foreign equality jurisprudence which may inflict on our nascent equality jurisprudence American notions of ‘suspect

84. See generally Laurence R. Helfer, *Overlegalizing Human Rights: International Relations theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

85. *Lawrence v. Texas*, 539 U.S. 558 (2003).

86. *Id.* (Kennedy, J.).

87. 2004 ZACC 3 (S. Afr.).

categories of State action’ and of ‘strict scrutiny.’”⁸⁸ 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.”⁸⁹

VI. CONCLUSION

To be sure, systems of weak review might be more prone to “reform fatigue.”⁹⁰ 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 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. Jules Coleman’s and Michael Bratman’s idea of a “shared cooperative activity,” such as taking a walk in the park with a friend,⁹¹ 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.

88. *Id.* at ¶ 29.

89. Minister of Finance and Other v. F.J. van Heerden 2004 (11) BCLR 1009 (CC); [2004] ZACC 3 (July 29, 2004) (S. Af.).

90. For illustrations of reform fatigue, see, e.g. Randall Peerenboom, *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 U. KAN. L. REV. 521 (2004).

91. See generally Jules Coleman, *Conventionality and Normativity*, in LEGAL AND POLITICAL PHILOSOPHY: 1 SOCIAL, POLITICAL, & LEGAL PHILOSOPHY 157 (Enrique Villanueva ed., 2002) (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).