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# THE CONSTITUTION OUTSIDE THE COURTS AND THE PURSUIT OF A GOOD SOCIETY

## THIN CONSTITUTIONS AND THE GOOD SOCIETY

Lawrence G. Sager\*

The theme of this conference, “The Constitution and the Good Society,” immediately draws one’s attention to how little the Constitution speaks to what makes a good society good—at least if we are thinking of the judicially-enforced Constitution. Even proponents of robust, wide-bodied judicial review do not regard most of the elements of a good society as something that is within the grasp of the judiciary.

What accounts for this truncation of constitutional concern? For me, an important element of what we could call the good society shortfall of constitutional law lies in the distinction between the scope of the Constitution itself, on the one hand, and the distinctly narrower scope of the judicially enforced Constitution, on the other. On this view, our constitutional tradition is best understood as reflecting a division of labor between the judiciary and other governmental actors, most notably, but not exclusively, Congress. And on this account, the Constitution is routinely and properly under-enforced by the judiciary.<sup>1</sup>

Affirmative social rights—like those sketched by Professor Robin West<sup>2</sup> and those which dominated the colloquy between Professors William Forbath and Frank Michelman in the earlier conference proceedings<sup>3</sup>—are prime examples of the sort of constitutional

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1. Lawrence Sager, *The Domain of Constitutional Justice*, in *Constitutionalism: Philosophical Foundations* 235 (Larry Alexander ed., 1998); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410 (1993) [hereinafter Sager, *Justice in Plain Clothes*]; Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978).

2. Robin West, *Rights, Capabilities, and the Good Society*, 69 Fordham L. Rev. 1901 (2001).

3. See transcript on file with Fordham Law Review; see also William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 Fordham L.

material that we would expect to elude judicial enforcement. This is because affirmative rights come wrapped with questions of judgment, strategy, and responsibility that seem well beyond the reach of courts in a democracy.

Consider the right to dependent care invoked by Professor West.<sup>4</sup> A society that took this right to heart would immediately face a plethora of choices. For example, ought the social obligation entailed by this right be satisfied by the payment of money or by services in kind? Should it be addressed by government directly or by employers under the compulsion of government? Which layer of government should be principally responsible? Who should finance this right? Should government involve itself in the training or regulation of caregivers? These are all serious questions that naturally give rise to Frank Michelman's concerns that the Constitution may take over too much of the terrain that belongs to democratic government, assuming rights of this sort came to be judicially recognized and enforced.

It does not follow from this observation, however, that the judiciary should have no role with regard to social rights. Two cases illustrate a secondary role that can be (and I believe already is in fact) played by the judiciary in the protection of such rights. In *Goldberg v. Kelly*,<sup>5</sup> the Supreme Court conferred procedural rights on applicants for basic welfare grants,<sup>6</sup> and thereby reduced the likelihood of arbitrary exclusions from what could well be seen as an important element of the right to minimum welfare. In *Plyler v. Doe*,<sup>7</sup> the Supreme Court held unconstitutional the state's attempt to deprive children of illegal aliens of the opportunity to attend public schools.<sup>8</sup> *Plyler* also can be understood as an instance of the Supreme Court protecting the right to minimum welfare, with the Court patrolling an important element of that right—education—against unjust categorical exclusions.

When other governmental actors have utterly failed to heed the mandate of affirmative social rights, it may be that courts are largely powerless to act. But, when—as may often be the case—the legislature has responded at least in part to the call of such rights, courts can play an important secondary role in policing these rights against arbitrary and unjust exclusions on an individual or group basis. Further, there may be a substantive, good-behavior-reinforcing backwash from such secondary judicial activity, especially if the courts

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Rev. 1821 (2001); Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 Fordham L. Rev. 1893 (2001).

4. West, *supra* note 2, at 1924-29.

5. 397 U.S. 254 (1970).

6. *Id.* at 269-71.

7. 457 U.S. 202 (1982).

8. *Id.* at 230.

become more self-conscious and articulate about the rights that prompt their involvement.

While these reflections are certainly apt to the theme of the conference, they also create at least a superficial problem for me. I have been asked and have agreed to address the connection between my long-standing ideas regarding judicial underenforcement of the Constitution<sup>9</sup> and Professor Mark Tushnet's provocative arguments in his recent book, *Taking the Constitution Away from the Courts*.<sup>10</sup> Professor Tushnet argues in essence that the entire Constitution should be outside the reach of the courts' enforcement power. In his view, the Constitution should be populist in a deep sense; its content should depend on the shape and degree of the popular support it enjoys.<sup>11</sup> The problem is this: While I strongly resist the idea that we would be better served if the judiciary were to abandon the enterprise of enforcing the Constitution, I do agree that some parts of the Constitution should be outside the reach of the judiciary. Prime among those candidates for judicial underenforcement are social rights of precisely the sort that are the natural focal points in a conference on "The Constitution and the Good Society." So it seems at first blush that Professor Tushnet and I have little to disagree about, at least in these precincts. But I think that there are rather deep divisions between us, even (and perhaps especially) with regard to social rights to material well-being. Much of my difficulty with the ideas in Professor Tushnet's book can be collected around his use of the metaphor, the "thin" Constitution.<sup>12</sup> Although Professor Tushnet and I have both made use of that metaphor, we have very different ideas in mind.

For my part, I think the judicially-enforced Constitution is surprisingly thin in the sense that it seems to fall so far short of addressing unduckable elements of fundamental political justice; and further, I think that the best way to understand the thinness of the judicially-enforced Constitution is to distinguish that particularly visible manifestation of our constitutional practice from the Constitution itself.

Professor Tushnet deploys the metaphor of the thin Constitution quite differently. He sets himself the project of describing a Constitution so limited in its reach that it becomes plausible to believe that popular political processes will by and large honor its precepts.<sup>13</sup> A Constitution that can satisfy this conceptual requirement actually has to be thin; for me, in contrast, the Constitution only looks that way.

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9. See *supra* note 1.

10. Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

11. *Id.* at 177-85.

12. See *id.* at 185.

13. *Id.* at 62-63.

I think that there is an element of ambiguity—perhaps it would be more accurate to call it an instability—in Professor Tushnet's version of the thin Constitution. In the remainder of these remarks, I want to explore this instability against the backdrop of the sorts of social rights that come to mind when we contemplate the good society.

The instability in Professor Tushnet's notion of a thin Constitution lies in the distinction between a constitutional premise being thin at its normative base and being thin (perhaps *short* would be better) in its substantive reach. Consider, for instance, how Professor Tushnet's thin Constitution sheds its girth. He says: Let's do away with the body of the Constitution; let's confine ourselves to the Declaration of Independence and the Preamble;<sup>14</sup> let's do away with things like the Emolument Clause, (which comes in for a singular amount of bashing);<sup>15</sup> and let's do away with a lot of judicial doctrine, like the tiers of scrutiny in equal protection.<sup>16</sup> What we have left are just a few basic values, such as equal citizenship, named in the Declaration of Independence and in the Preamble, which are values that we all salute.

But this is a deceptive and highly unstable picture. Although the basal principles that compose Professor Tushnet's thin Constitution are few, their substantive scope, if fully realized, would be quite large. The entailments of these principles are much broader than most Americans' view of the reach of the present Constitution. Fully realized, for example, the ideal of equal citizenship in the Preamble and in the Declaration of Independence surely would include the right to minimum welfare, entailing an obligation to arrange our economic affairs so that a person willing to work hard can be assured of the capacity to provide herself and her family with minimally decent food, shelter, medical care and education. At times, Professor Tushnet seems to recognize this.<sup>17</sup>

If Professor Tushnet's Constitution is thin in this way (e.g., thin at its normative base, but extensive in its reach), it is indeed an attractive Constitution. Under this version of Professor Tushnet's thin Constitution, however, there surely is no good reason to be confident that it will be widely accepted and well-served by popular politics.

Conversely, if the Constitution is thin not only in its normative foundation but drastically limited in its substantive results, there might in fact be relatively broad support for it among American citizens. It is far from clear, however, that it would be a satisfactory Constitution. Indeed, we might have reason to worry that on the basis of this reading the thin Constitution might just as well not be there at all. On this reading, a circularity sets in—those things that we can all

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14. *Id.* at 51.

15. *Id.* at 36.

16. *Id.* at 60-61.

17. *See id.* at 169-72.

readily agree on are what compose the Constitution; so of course we are not tempted to deviate from its checks on our behavior.

Consider the case study that Professor Tushnet puts on the table at the beginning and end of his book<sup>18</sup>—the enactment by popular initiative of Proposition 187 in California.<sup>19</sup> Among other things, the proposition denied children of illegal aliens the right to a public education. In *Plyler v. Doe*,<sup>20</sup> remember, the Supreme Court held that Texas could not deny children of illegal aliens the benefit of an ongoing program of free public education.<sup>21</sup> Proposition 187 set the people of California squarely against the Supreme Court under circumstances in which the Court could be understood to insist that it is fundamentally unjust for an element of minimum welfare, like education, to be withheld from children who are innocent of wrongdoing. Whatever one's views of the merits of *Plyler*, the enactment of Proposition 187 seems a good test of Professor Tushnet's thin Constitution.

Professor Tushnet's Constitution seems to wax and wane. Tushnet rather dramatically fattens his thin Constitution by suggesting that welfare rights are indeed within the scope of its concerns.<sup>22</sup> But when his Constitution encounters Proposition 187,<sup>23</sup> we suddenly see it in very thin profile indeed. For Professor Tushnet, the people of California are free to deprive children of illegal aliens from the benefits of education, and free to do so on the grounds that they are not as deserving as more complete members of our political community. All that the thin Constitution hopes for is that the people of California have the welfare of the remaining children in mind as opposed to acting out of pure "nativism," out of a deep animus to the "other."<sup>24</sup>

So Professor Tushnet's thin Constitution is broad only in the subtle and elusive sense that it includes questions of material welfare among its theoretical concerns, but extremely thin because it does not call for any particular outcome. What it calls for, at most, are generous restraints on the express terms of political discourse. It is surprisingly comfortable with mean-spirited, and quite possibly hypocritical or self-deceiving, outcomes.

Consider in this regard not just Proposition 187, but California's legislation that made newly-arrived welfare recipients, during their first year of residence, entitled to only the welfare benefits of the state

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18. *Id.* at 6-7, 193-94.

19. For the Amendments made by Proposition 187, see Cal. Gov't Code § 53069.65 (West 1997); Cal. Health & Safety Code § 130(c) (West Supp. 2001); Cal. Welf. & Inst. Code § 10001.5(c) (West Supp. 2001).

20. 457 U.S. 202 (1982).

21. *Id.* at 230.

22. Tushnet, *supra* note 10, at 169-72.

23. *Id.* at 193-94.

24. *Id.*

from which they had come.<sup>25</sup> The current Supreme Court—no overt fan of welfare rights—famously decided that this legislation violated the long-forgotten Privileges or Immunities Clause.<sup>26</sup> Professor Tushnet, in contrast, presumably would find California's treatment of newly-arrived welfare claimants constitutional, so long as the predicate discourse for the enactment of the legislation did not cross the line into state-centered "nativism" or reflect a general animus toward the indigent.

So Professor Tushnet's thin Constitution starts thin at the base, gestures at a broad substantive reach, but in the end, settles for restraints at the extreme margins of political debate. We should be clear that this waxing-and-waning, thin Constitution is merely a conceptual construct in Professor Tushnet's analysis. It is a palimpsest of what is so uncontroversial for the American people as to be reliably respected by them; it doesn't actually constrain or even inspire. The thin Constitution, essentially, is Professor Tushnet's assurance to us that we are capable of self-restraint over a narrow terrain.

Even in the realm of social rights, such as the affirmative rights to material well-being, my thin Constitution and Professor Tushnet's thin Constitution are very different in concept and consequence. My thin Constitution, based on underenforcement theory, preserves and justifies an important secondary judicial role in the enforcement of social rights. This secondary role is illustrated by the Supreme Court's decisions in *Goldberg*,<sup>27</sup> *Plyler*,<sup>28</sup> and for that matter, in *Saenz v. Roe*,<sup>29</sup> where the Court invalidated California's limits on the welfare benefits of new arrivals to the state.<sup>30</sup> Important and immediate procedural and substantive consequences can turn on these secondary enforcement cases. Such cases also offer the constitutional judiciary the opportunity to provoke dialogue and goad the conscience of the community with regard to the material welfare of those worst off.

Even when judicial enforcement of the Constitution is completely out of the picture, and the consequence of attributing a normative premise to the Constitution resides largely in political dialogue, my thin Constitution and Professor Tushnet's diverge. Consider two idealized forms of political conversation. In the first, it is possible to invoke social rights like the right to minimum welfare and insist that they are part of our constitutional tradition. In the second, no substantive rights to material outcomes can be invoked in the name of the Constitution; the Constitution can be understood only to exclude certain dark impulses—like the nativistic animus. Now, it may well be

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25. *Saenz v. Roe*, 526 U.S. 489, 492 (1999).

26. *Id.* at 503-04.

27. 397 U.S. 254 (1970).

28. 457 U.S. 202 (1982).

29. 526 U.S. 489 (1999).

30. *Id.* at 503-04.

that there is room for both forms of extra-judicial invocation of the Constitution. It may be that some normative claims properly assignable to the Constitution should be understood as giving on to what we could call the strong form of constitutional dialogue, in which substantive outcomes can be insisted upon, and others should be understood as giving on to the weak form of constitutional dialogue in which the Constitution intervenes only to bar certain kinds of conversation.<sup>31</sup>

The models even could converge under some circumstances. For example, if the rules of conversation were sufficiently demanding, and were actually observed, we might imagine that the idealized conversation would pick out exactly those fundamental normative premises that we would otherwise be drawn to as candidates for assignment to the Constitution. But, as Professor Tushnet's analysis of the enactment of Proposition 187 by California's voters makes clear, his thin Constitution requires far less of political dialogue than that. In sum, my point is this: We should understand the Constitution as containing some normative premises, albeit judicially unenforceable, that are categorical, non-negotiable, and demanding of priority.

I think, for example, that the proposition that we ought to arrange our economic affairs so that a person willing to work hard will be able to provide herself and her family with minimum food, shelter, education, and medical care, is such a premise. There is no space in Professor Tushnet's thin Constitution for any such view.

Professor Tushnet's claim that the Constitution should do its work without the benefit of judicial enforcement is perhaps most appealing when we consider the constitutional embrace of social rights to material well-being. But, even here, there are grounds to worry that his Constitution is far too thin. A good society deserves and requires a thicker Constitution—a better Constitution.

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#### PANEL DISCUSSION

Excerpts of discussion pertaining to Professor Sager.

I would like to respond to Mark Tushnet's very interesting question about how Constitution-talk differs from justice-talk. This is an issue for anyone who thinks of the Constitution outside the courts.

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31. This possibility was suggested to me by the colloquy earlier in the conference between Professors William Forbath and Frank Michelman. *See supra* note 3.

I cannot imagine a legislator saying she is not concerned with justice. So this is a very interesting inquiry, especially in light of Bob Nagel's searing skepticism about how the real world works.<sup>32</sup>

One point I want to make should be obvious: My interest in underenforcement is not only because of what it suggests about how events *outside* the courts should go, but also because of what it suggests about how events *inside* the courts should go. I remain, I'm afraid, unabashed in my conviction that we are going to do better with courts in the picture than without.

I have already mentioned one judicial consequence of underenforcement—some decisions which are not particularly easy to defend, such as *Plyler v. Doe*,<sup>33</sup> manifest at least a defensible structure if viewed in the light of underenforcement. Also, if one is attracted to the governing idea of underenforcement—that there should be a division of constitutional labor—then some recent decisions of the Supreme Court seem singularly ill-conceived. The Supreme Court in *Kimel v. Florida Board of Regents*<sup>34</sup> and *United States v. Morrison*,<sup>35</sup> for example, ignored the possibility that it ought to welcome, rather than eschew, a partnership with Congress in achieving the good society in the name of and under the warrant of the Constitution. As such, these cases attack the underenforcement theory where it lives. Conversely, they are distinctly vulnerable to criticism from the vantage of underenforcement.

Underenforcement does not imply that Congress's authority is unlimited. I have developed elsewhere the theme that Congress can only act as the Court's partner, not its adversary.<sup>36</sup> But in neither *Kimel* nor *Morrison* does it seem to me that Congress could plausibly be considered the Court's adversary. To the contrary, both are appealing instances of Congress acting as the Court's partner. From the vantage of underenforcement theory, Congress' Fourteenth Amendment, Section 5 enforcement authority is understood far differently than the Court would appear to understand it in these recent cases.

QUESTION FROM PROFESSOR FRANK MICHELMAN: Did you have in mind a constitutional norm which is non-negotiable? It does not just ask us to address our question from the standpoint of a general aspirational norm of social citizenship for everyone, but it is

32. See e.g., Robert F. Nagel, *Nationalized Political Discourse*, 69 Fordham L. Rev. 2057 (2001).

33. 457 U.S. 202 (1982).

34. 528 U.S. 62 (2000) (holding that the Age Discrimination in Employment Act did not abrogate the states' Eleventh Amendment immunity from suits by private individuals).

35. 529 U.S. 598 (2000) (holding that neither the Commerce Clause nor the Fourteen Amendment provided Congress with authority to enact the civil remedy provision of the Violence Against Women Act).

36. Sager, *Justice in Plain Clothes*, *supra* note 1, at 431.

actually non-negotiable. If you know how to articulate the norm in terms such that you can say that it is non-negotiable, why would you want to take it away from the courts.

PROFESSOR SAGER: Several points in passing on the idea of a democratic default favoring legislative outcomes. First, there are important aspects of the judicial process that may make it appealing to democracy in both form and result.

Second, the democratic default is that it presumes that, *ceteris paribus*, democracy is better off if every decision made by a polity is made by democratically accountable officials. That is never an intuition that has held a grip on me. I have never thought that if everything else was equal between England and us, and we did it with a court and they did it without, that somehow we would be worse off. That does not seem to get at what democratic values are like. Courts may be more democratic in some ways. There are thresholds operating here as to the nature of democratic demands, and not every instance of a non-accountable decision-maker accrues to the detriment of democracy.

The third point about the democratic default is that the world is voting with its feet. Constitutionalism is rapidly becoming the norm, not the exception in both aspiring democratic states, and settled states, such as England.

If an entitlement is understood as non-negotiable, in the way that I would like the right to minimum welfare to be understood, it has been asked why it is unsuitable for judicial enforcement in the first instance. The problem is not that the outcomes required by the right to minimum welfare cannot be suitably specified. The problem is the various ways of achieving those outcomes are wrapped with questions of strategy and responsibility that are not properly the courts' business in a democracy.

One answer might be that the courts could approach this like a civil rights remedy question. A court could announce that the right to minimum welfare was not being met, and then insist the various implicated governmental entities respond with a plan (e.g., "Come back and tell me whether you've got it right.").

Part of the problem, if you think about the variables here, is what the "it" is and who the defendant is. Can you hold any given level of government to be in default? Can you hold the society in default? There is a real problem here.

When you talk again about attractive claims, like Robin West's right to dependent assistance,<sup>37</sup> questions arise which are extremely hard to frame, even if you think that the bottom line is non-negotiable. The world might well be better off if somehow the courts could at least clearly pronounce the existence of such constitutional

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37. West, *supra* note 2, at 1924-29.

obligations, even by way of declaring society to have failed to fulfill them. I certainly do not mean to suggest that our present moral imagination and judicial practice marks the exact boundary of the courts' ideal state of involvement.