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CONSTITUTIONAL ASYMMETRY

Martin S. Flaherty*

INTRODUCTION

In one of their most underappreciated exchanges, Chico Marx challenges one of Groucho's schemes, torturing the English language in his heavy mock-Italian accent as he goes. After hearing enough, Groucho looks straight into the camera and declares, "There's my argument. Restrict immigration."¹ In a similar vein, *Bush v. Gore*² features all manner of tortured "constitution-talk."³ Over the next several weeks and months, more than a few critics will doubtless echo Groucho and proclaim, "There's my argument. Take the Constitution away from the courts."⁴

If the instant punditry⁵ is any guide, history will not treat the Supreme Court's recent actions kindly. The Court's already familiar missteps will keep law reviews well-stocked for some time to come. The Court involved itself in a presidential election dispute for the first time in history, relying on issues that quickly became peripheral.⁶

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1. *Monkey Business* (Paramount Pictures 1931).

2. 121 S. Ct. 525 (2000) (per curiam).

3. Mark Tushnet, *Constitution-Talk and Justice-Talk*, 69 *Fordham L. Rev.* 1999 (2001) [hereinafter Tushnet, *Constitution-Talk*].

4. Cf. Mark Tushnet, *Taking the Constitution Away From the Courts* (2000) [hereinafter Tushnet, *Taking the Constitution Away*] (arguing for a diminution of the judiciary's role in constitutional interpretation).

5. Nor was the present author above this sort of thing. See, e.g., Martin Flaherty, Editorial Letter, *The Long March to the Oval Office*, *N.Y. Times*, Dec. 7, 2000, at A38 (condemning the Supreme Court for not dismissing *Bush v. Palm Beach County Canvassing Bd.*, 121 S. Ct. 471 (2000) (per curiam)); Greg B. Smith, *Court's Split Edict Comes Under Fire*, *Daily News* (New York), Dec. 14, 2000, at 18 (quoting Martin Flaherty's criticism of the plethora of opinions in *Bush v. Gore*).

6. Compare *Bush v. Palm Beach County*, 121 S. Ct. 471, 475 (2000) (per curiam) (expressing concern about the extent to which the Florida Supreme Court interpreted the state constitution as "circumscribing the legislature's authority under Article II" of the U.S. Constitution), with *Bush v. Gore*, 121 S. Ct. 525, 529-34 (2000) (per curiam) (basing the decision on equal protection grounds rather than on Article II); compare also *Bush v. Gore*, 121 S. Ct. 525, 535 (Rehnquist, C.J., Scalia, J. & Thomas, J. concurring) (expressing concern that the Florida Supreme Court interpreted the election laws in violation of Article II), with *Bush v. Gore*, 121 S. Ct. 525, 540

Five Justices voted to stay the manual recounts ordered by the Florida Supreme Court even though any fair consideration of the equities clearly showed greater irreparable harm to Vice President Gore than Governor Bush.⁷ The same five Justices determined that the Florida Supreme Court had held that the state legislature had intended December 12 to be a firm deadline to complete all recounts.⁸ The opinion below, however, dealt with a different part of the statutory scheme, placed greater emphasis on validating the right to vote, and addressed the December 12 deadline only at the Supreme Court's urging.⁹ With no apparent basis in principle, the Court sought to limit the radically progressive implications of its equal protection analysis to the case at hand.¹⁰

All this lawyers, academics, and other constitutional professionals will urge with gusto. Defenses, no less zealously, will also appear to justify the Court's legal maneuvers. But either way, it is a safe bet that the legal community will devote much less attention to Florida's obviously incoherent election statutes, crazy quilt voting procedures, or the extent of these and related problems nationwide. From this perspective, the criticism of the Court that stands out is not that it went too far in interfering with the electoral process on dubious legal grounds, but that it did not go far enough by failing to secure an equal right to vote. As Justice Breyer pointed out, if the slight variations in manual recounts trigger equal protection concern, then so should the much greater discrepancies that result from different voting machines¹¹—or, he might have added, antiquated technology, lack of funding, or localized control. However apt, criticism of the Court's legal reasoning will not answer the more basic questions. Was judicial intervention, with all the warts lawyers are good at seeing, really worse than the electoral process it supplanted, with blots that are less evident, at least to those with law degrees? Once you take the Constitution away from the Courts, what are you giving it to?

I. THEORY OF CONSTITUTIONAL ASYMMETRY

Neither constitutional theory, discourse, nor scholarship is especially good at answering these kind of questions. The *Bush v. Gore* saga suggests why. Built into "constitution-talk," as currently

(Stevens, J., Ginsburg, J. & Breyer, J. dissenting) (stating that the Florida Supreme Court's decision was consistent with the grant of authority in Article II).

7. *Bush v. Gore*, 121 S. Ct. 512, 513 (2000) (stay application) (Stevens, J., dissenting).

8. *Bush v. Gore*, 121 S. Ct. 525, 533 (2000).

9. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1288-90 (Fla. 2000).

10. *Bush v. Gore*, 121 S. Ct. 525, 532 (2000).

11. *Id.* at 552 (Breyer, J., dissenting).

practiced, is a one-sidedness that can only be grasped from an outside perspective. Modern constitutional analysis excels at subjecting what courts do to withering critique, especially when what they do raises as many questions as *Bush v. Gore*. It provokes somewhat less awe, however, when applied to the democratic alternatives to judicial action. Call this phenomenon “constitutional asymmetry.”

Perhaps the best way to get the idea across is with exactly the type of court-centered jargon that makes lawyers feel at home. On one hand, constitutional professionals revel in applying “strict scrutiny” to any act or theory of constitutional interpretation. As any first-year student learns, under a strict scrutiny standard very little survives.¹² On the other hand, these same lawyers, scholars, even judges, accord no more than “rational relationship” review to the ostensibly democratic alternatives to judicial intervention. This happens even though a good many of the assumptions about democratic processes are romantic, even primitive. And as any student will also tell you, once the rational relationship test is applied, elected officials get to do pretty much what they want.¹³

A couple of examples should suffice to show this asymmetry at work. From the Right, consider Antonin Scalia. Justice Scalia has famously devoted much of his professional life to arguing for an extremely narrow judicial role in constitutional enforcement.¹⁴ He has, moreover, expounded half of his case for this position at length, almost always brilliantly. Applying strict scrutiny with devastating

12. See, e.g., *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 798-802 (1988) (holding that North Carolina's charitable-solicitation statute failed to withstand First Amendment strict scrutiny). For the notorious exception proving the rule, see *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of persons of Japanese ancestry notwithstanding application of strict scrutiny).

13. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483, 491 (1955) (upholding Oklahoma statute prohibiting opticians from plying their trade in retail stores and enforcing strict regulatory requirements under rational relationship scrutiny). *But see* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447-50 (1985) (upholding a zoning ordinance that required a special use permit to establish group homes for the mentally disabled as bearing a rational relation to government interests). The recent trend in the Rehnquist Court appears to be toward striking down certain measures despite rational relationship review, rather than recognizing categories of fundamental rights that would invalidate government action under a higher level of scrutiny. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (using rational relationship analysis to strike down an amendment to the Colorado Constitution that prevented the state from providing certain protections to gays and lesbians).

14. At least until recently. As is true of several of his colleagues, the same Justice Scalia who decries judicial activism has few problems invalidating statutes in the name of “states' rights,” notwithstanding a lack of textual, structural or (credible) historical support. See, e.g., *Printz v. United States*, 521 U.S. 898, 905-22 (1997) (invalidating a federal statute out of state sovereignty concerns and relying on various historical interpretations of federalism). For a critique of this decision, see Martin S. Flaherty, *Are We to be a Nation? Federal Power vs. “States' Rights” in Foreign Affairs*, 70 U. Colo. L. Rev. 1277, 1286-96 (1999).

effect, the Justice has gleefully exposed the weak points in nearly every school of constitutional interpretation worth considering. In *Michael H. v. Gerald D.*,¹⁵ for example, he zeroed in on the critical problem of determining the relevant tradition as a basis for determining fundamental rights.¹⁶ In *Planned Parenthood v. Casey*,¹⁷ he lambasted reliance on “reasoned judgment” as an empty concept that enables judges to “rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.”¹⁸ Since these and other interpretive approaches are so flawed, malleable, and ultimately unprincipled, the Justice concludes that they cannot serve as a principled basis for constitutional law. So sharp is his critical scalpel that he has even conceded basic flaws in originalism—the one interpretive stance he believes enjoys legitimacy, going so far as to say he would abandon it in certain cases.¹⁹ Agree or disagree, these are not trivial challenges.

Nonetheless, they still only account for half of his case. The other half rests on the proposition that the alternative to unprincipled judicial activism is democracy. And here the analysis looks very different. What in the realm of interpretation was thick critique in the context of self-government, largely amounts to paper-thin assumptions. Pretty much all the *Casey* dissent says about the alternative to the flawed judicial reasoning it has just exposed is that there exists a superior “democratic outlet for the deep passions, . . . [a] political forum that gives *all participants, even the losers, the satisfaction of a fair hearing and an honest fight.*”²⁰ Slightly more striking, but no less representative, is the essentially one-sentence treatment democracy receives in a book about the judicial role that otherwise sharply criticizes expansive statutory and constitutional interpretation.²¹ Absent is even a passing consideration of whether the political forum is really—or even sufficiently—open to all those who would participate, to what extent the process allows for a fair hearing and an honest fight, and just how much losers do feel satisfied. Instead, the working premise running through much of Justice Scalia’s jurisprudence is that legislative majorities in Harrisburg, Albany, Tallahassee, or the District of Columbia fairly embody the considered

15. 491 U.S. 110 (1989).

16. *Id.* at 127-28 n.6.

17. 505 U.S. 833 (1992).

18. *Id.* at 983 (Scalia, J., dissenting).

19. Perhaps ironically, he says he would do so based upon considerations resembling reasoned judgment. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 864 (1989).

20. *Casey*, 505 U.S. at 1002 (Scalia, J., dissenting) (emphasis added).

21. The one sentence reads, “All of this [common law adjudication] would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy.” Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 9 (1997).

will of the people of the states or of the nation. Yet it should not take a political science degree to suspect that however flawed the per curiam opinion in *Bush v. Gore* may be, legislative processes in Florida may have a few problems of their own.

Yet such asymmetry is hardly a conservative monopoly. Here, consider Akhil Amar from the Left. For all the considerable differences between Justice Scalia and Professor Amar, in this regard their differences turn out to be less extensive than expected. Perhaps to his credit, Amar has not garnered the type of slash-and-burn reputation associated with the Justice. That said, Amar can flex his critical faculties with the best of them. In a recent analysis of the Fourteenth Amendment, he employs close textual and structural readings to show how objections to Justice Black's famous total incorporation thesis made by Louis Henkin undermined other objections put forward by Raoul Berger and John Hart Ely, who in turn undermine Henkin.²² Likewise, Amar earlier employed similar analytic techniques to challenge the ostensibly well-settled notion that Article V represented the exclusive method for amending the Constitution.²³

As with Scalia, the net result of the rigorous legal analysis privileges not legal solutions, but democratic ones. In Amar's case, the alternative to Article V could scarcely be more democratic—a simple, national, majoritarian referendum.²⁴ And as with Scalia, consideration of the democratic alternative is as wan as the interpretive exploration is robust. Nowhere does Amar comparably grapple with such questions as the likely outcomes of such referenda, the implications of advertising costs and special interest money, the de facto under-enfranchisement of racial minorities and recent immigrants, or a host of other considerations about plebiscitarian constitutionalism. He does, more than the Justice, deal with related issues, such as the potential for less deliberation in a referendum than in the formal amendment process.²⁵ But even here, the response mainly consists of a hopeful speculation about technology-enhancing debate that contrasts with the rigorous constitutional examination that had gone before.²⁶ Events would underscore these problems when the next referendum to achieve national notoriety was the infamous amendment to the Colorado Constitution prohibiting local measures outlawing discrimination against homosexuals.²⁷ Likewise telling was

22. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 170-74 (1998).

23. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 *Colum. L. Rev.* 457 (1994).

24. *Id.* at 487-94.

25. *Id.* at 501-03.

26. *Id.* at 502-03.

27. *See Romer v. Evans*, 517 U.S. 620 (1996).

not just that it took legal analysis from the Supreme Court to cure this result,²⁸ but that Professor Amar's alternative solution was no less legal than democratic.²⁹

Constitutional asymmetry is one of those tendencies that is as unremarked as it is obvious. Yet once it is noted, neither its causes nor effects remain mysterious for long. Perhaps the most salient reason for imbalanced constitutional discourse has to do with the borders of constitutional law itself. Law schools, courts, journals, conferences, symposia—all put a premium on sharpening a fairly narrow set of tools to critique legal claims. Analogical reasoning, close analysis of text and structure, and an adversarial stance toward affirmative claims are just a few examples. Constitutional law may more readily tolerate approaches from such associated disciplines as history, political science, and philosophy, but the point is mainly comparative. Notwithstanding legal realism and critical legal studies, legal analysis remains sufficiently insular that it almost inevitably does an inadequate job when considering matters that typically fall outside the usual run of legal discourse, but which are nonetheless linked to issues such discourse hopes to resolve. If the examples of Scalia and Amar are at all representative, the workings of democratic self-government provide just such an example in constitutional discourse. This is not to say that there are not many constitutional scholars who do attempt to challenge easy assumptions about representation,³⁰ or political parties,³¹ or the merits of federalism.³² It is to say that they remain exceptional.

Paradoxically, the primary effect of constitutional asymmetry may well be precisely to move the Constitution beyond the courts. As lawyers, judges, and constitutional scholars propose—then cannibalize

28. *See id.*

29. Specifically, Amar argued that the Colorado amendment was inconsistent with the values underlying the Bill of Attainder Clause. Akhil Reed Amar, *Attainment and Amendment 2: Romer's Rightness*, 95 Mich. L. Rev. 203, 208-21 (1996).

30. *See, e.g.*, Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 Tex. L. Rev. 1589 (1993); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich. L. Rev. 1077 (1991); Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 Vand. L. Rev. 291 (1997); Pamela S. Karlan & Daryl J. Levinson, *Why Voting is Different*, 84 Cal. L. Rev. 1201 (1996).

31. *See, e.g.*, Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215 (2000).

32. *See, e.g.*, Barry Friedman, *Federalism's Future in the Global Village*, 47 Vand. L. Rev. 1441 (1994); Barry Friedman, *Valuing Federalism*, 82 Minn. L. Rev. 317 (1997); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials From State Legislatures' Control*, 97 Mich. L. Rev. 1201 (1999); Edward Rubin, *Rational States?*, 83 Va. L. Rev. 1433 (1997); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903 (1994).

one another's justifications for judicial action (whether broad or narrow)—it follows that the resolution of conflict previously assigned to the courts should default to the democratic process. This, at least, would appear to be the principal alternative for a democracy. The catch, however, is that the same imbalanced analysis that points to the democratic alternative usually has almost nothing to say about the alternative itself. Concede for a moment that neither text, structure, history, tradition, nor reasoned judgment can sustain the claims to individual rights in *Griswold v. Connecticut*³³ and *Roe v. Wade*³⁴ on the one hand, or to "states' rights" in *Printz v. United States*³⁵ and *Alden v. Maine*³⁶ on the other. The question remains as to whether the proposition that the politicians who annually convene in Albany actually represent the people of New York can survive the same degree of withering scrutiny.

II. ANALYSIS FROM THE ASYMMETRICAL PERSPECTIVE

All of which brings matters to the four panelists' contributions at hand. In addressing "The Constitution Outside the Courts," each of the thoughtful and provocative articles under consideration of necessity grapple with constitutional theory's asymmetrical bent. Each one responds in a different way, which together makes them an especially fruitful collection. Broadly speaking, they fall into two distinct camps. On one side, Robert Nagel and Lawrence Sager not only resist the usual consequence of asymmetrical analysis, they seek to turn the tables. Despite various differences between them, both scholars adhere to constitutional principles that they believe are sufficiently defensible to control democratic processes, rather than the other way around. Conversely, Mary Becker and Mark Tushnet cast their lot with greater democracy, though from opposite tacks. Becker for her part defends her position with an in-depth consideration of how institutional design affects democratic legitimacy, in short, a more symmetrical analysis. Tushnet's work, by contrast, seeks to employ constitutional critique so thorough that it compels the conclusion that existing representative arrangements, however flawed, must be superior to what passes as constitutional reasoning in the courts.

A. Robert Nagel

First, consider Professor Nagel's lively *Nationalized Political Discourse*.³⁷ Nagel's response to the implications of asymmetry might

33. 381 U.S. 479 (1965).

34. 410 U.S. 113 (1973).

35. 521 U.S. 898 (1997).

36. 527 U.S. 706 (1999).

37. Robert F. Nagel, *Nationalized Political Discourse*, 69 *Fordham L. Rev.* 2057

be termed “counter-attack.” At its most general level, counter-attack rests on the premise that certain constitutional norms are sufficiently clear and legitimate that they not only sustain the exercise of judicial review, but judicial review in ways that shape the democratic alternative itself. Probably the most powerful examples of this instinct are the representation reinforcement—process-based theories running from Cass Sunstein³⁸ through John Hart Ely³⁹ back to footnote 4 in *United States v. Carolene Products Co.*⁴⁰ Uniting these theories is the conviction that whatever else the Constitution mandates, it is robust self-government. So strong is this conviction that it paradoxically authorizes the courts to aggressively police the institutions of self-government and thus reinvigorate the democratic process. The nagging asymmetrical problem, however, is that the same lawyers who can plausibly justify these constitutional commitments likely lack the parallel expertise about the democratic process itself to cash out workable solutions. Where, for example, Justice Harlan sees “discrete and insular minorities”⁴¹ as the paradigm for democratic process breakdown, Bruce Ackerman counters that these are just the groups that ordinarily thrive.⁴²

Professor Nagel’s counter-offensive proceeds in this same general direction, even if it does not follow precisely the same route. Where, for example, process-theorists privilege representation reinforcement,⁴³ *Nationalized Political Discourse* effectively treats the quality of political discussion as a constitutional value worthy of similar respect. Nagel does not attempt to ground this value in text, structure, or other sources of constitutional meaning in the way that, say, Justice Harlan does in *Carolene Products*.⁴⁴ That is not the focus of this article. But Nagel certainly could, especially given the more than passing family resemblance between the elevated discourse he extols and the requirement of adequate “deliberation” championed by an array of scholars.⁴⁵ The constitutional commitment in hand, Nagel suggests that one doctrinal device that could elevate our political discourse is a more state-oriented federalism.⁴⁶ Once again, this piece does not attempt to demonstrate how the courts could implement this

(2001).

38. Cass R. Sunstein, *The Partial Constitution* (1993).

39. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

40. 304 U.S. 144, 152 n.4 (1938).

41. *Id.* at 153 n.4.

42. Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 *passim* (1985).

43. Ely, *supra* note 39, at 73-104.

44. Nagel, *supra* note 37; *Carolene Products*, 304 U.S. at 152 n.4.

45. Bruce Ackerman, *We the People 1: Foundations* 197-98 (1991) [hereinafter *Ackerman, We the People*]; Sunstein, *supra* note 38, at 133-45; James E. Fleming, *Securing Deliberative Autonomy*, 48 Stan. L. Rev. 1 (1995).

46. Nagel, *supra* note 37, at 2072.

mechanism. Yet once more, it could do so, especially given the Supreme Court's recent excursions into "states' rights."⁴⁷

What Nagel does concentrate on is the entertaining, yet depressing, evidence that points him toward his proposed solution. As his many anecdotes show, there is more than a little evidence to suggest that political dialogue at the state level is "bland, insubstantial, derivative," while discourse at the national level tends to be "spectacular, extreme, dishonest, personalized, polarized, and staged."⁴⁸ In concentrating on the actual workings of self-government rather than the nuances of interpretation, the article goes a considerable distance to avoid making easy, asymmetrical assumptions. This is exactly the right inquiry.

Whether the inquiry has led to the correct diagnosis is another matter. At least from a vantage point in the heart of New York City, nearly the opposite intuitions about the nature of current political discourse obtain. As a thought experiment, think of such national politicians as Al Gore and George W. Bush on one hand, and favorite sons Rudolph Giuliani and Al Sharpton on the other. Then ask which pair conjures up images of bland and insubstantial versus spectacular, polarized, and staged.⁴⁹ Nagel may well be right that this anomaly only goes to show that the nation's largest city more closely resembles more typical national politics than does a more representative locality.⁵⁰ Still, further answers are likely needed to Nagel's correct questions.

B. Lawrence Sager

Lawrence Sager's work⁵¹ also proposes a counter-offensive, one that appears more modest but winds up as more aggressive. In the context of constitutional asymmetry, his approach might usefully be thought of as "expansionist." Employing tried-and-true lawyerly methods of constitutional interpretation, Sager remains one of the leading

47. See, e.g., *Reno v. Condon*, 528 U.S. 141 (2000) (holding that by regulating the sale of motor vehicle information, Congress is not impinging upon state sovereignty); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Article I power does not include the power to subject an unconsenting state to private suit in state court); *Printz v. United States*, 521 U.S. 898 (1997) (holding that state officials cannot be compelled to participate in the administration of a federal program).

48. Nagel, *supra* note 37, at 2068.

49. See, e.g., 'Yo Mama' Rips Rudy, Daily News (New York), Feb. 16, 2001, at 1 ("Photog-model in museum flap [about photograph of the "Last Supper" with nude African-American women posing as Christ] blasts mayor as he calls for 'decency' panel to approve art.").

50. Colloquy, The Constitution Outside the Courts and the Pursuit of a Good Society, A Conference on the Constitution and the Good Society at Fordham Law School 357-58 (Sept. 23, 2000) (transcript on file with Fordham Law Review).

51. See e.g., Lawrence G. Sager, *Thin Constitutions and the Good Society*, 69 Fordham L. Rev. 1989 (2001).

proponents of a "justice-seeking" Constitution.⁵² In a great many instances, moreover, justice under the Constitution may appropriately and effectively be sought through the courts.⁵³

Sager's pioneering—and expansionist—twist was to argue that constitutional norms remained norms even in those instances in which it was inadvisable, impractical, or unlikely for courts to implement them.⁵⁴ Conventionally, such "positive" rights as social welfare, education, and health—which call upon the government to enforce affirmative steps—constitute the usual suspects. As fully constitutional principles, these and others nonetheless remain binding on government officials who should be held accountable both by each other and the public when such "underenforced norms" are ignored. Despite the name, the idea of "underenforced norms" actually seeks to expand the relevance of constitutional principles in the democratic process. As such, Sager's expansionist approach is especially attractive.

Just at this point, however, the specter of asymmetry reintrudes. How plausible is it that legislators, executive officers, and government officials will internalize constitutional norms? As I have argued, lawyers, judges, and law professors are ordinarily not the best placed professionals to answer this sort of question. That said, comparative law does suggest a hopeful conclusion, though it also points to a caveat. On the plus side, international human rights law often expressly articulates positive norms that are considered binding but not conventionally enforceable. For example, the International Covenant on Economic, Social and Cultural Rights, as an international treaty, compels participating governments to take progressive steps to provide adequate education, social welfare, and health services.⁵⁵ Reports on how well particular governments adhere to these standards clearly provide incentives for governments to take

52. Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410, 416 (1993); Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 Fordham L. Rev. 1611, 1615-16 (1997).

53. Professors Sager and Tushnet thus differ in at least two crucial respects. As Tushnet points out, they both extol the "thin" Constitution in the sense of core constitutional commitments to justice, dignity, and equality, as opposed to "thick," detailed provisions establishing government. Tushnet, *Constitution-Talk*, *supra* note 3, at 1999-2000. They nonetheless differ for two reasons. First, Tushnet derives these principles from the Declaration of Independence and the Preamble while Sager finds them in more orthodox constitutional sources. Second, Sager retains faith in judicial review, while Tushnet proposes making the Constitution non-justiciable. Tushnet, *Taking the Constitution Away*, *supra* note 4, at 175.

54. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1220-22 (1978).

55. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1996, 999 U.N.T.S. 3, arts. 11-13 (entered into force Jan. 3, 1976).

them seriously.⁵⁶ Conversely, the international experience also indicates a way in which the concept of underenforcement can boomerang. It may be that reliance on underenforcement leads to a diminution of rights that can be enforced in a stronger sense. Many in the international human rights movement aspire to build upon reporting systems to create stronger, court-like mechanisms for implementing positive rights. Would we in the United States give up the prospect of employing the courts we already have to enforce such rights if the serious, yet (arguably) weaker, alternative of non-judicial enforcement were in place?

C. Mary Becker

With Mary Becker's *Towards a Progressive Politics and a Progressive Constitution*,⁵⁷ we reverse field. Even more than Tushnet, she seeks not to work within our modern, court-centered constitutional order, but instead would reform it root and branch. Her ambitious program exemplifies the kind of constitutional aspirations Bruce Ackerman has called, "transformative,"⁵⁸—in this case a self-consciously transformative progressivism. And like more classical progressives before her, Becker bases her proposals on thorough empirical and comparative studies, as opposed to deduction from current constitutional doctrine. So thorough is her approach in this regard that the method is almost a mirror image of the asymmetry previously seen. In particular, she derives her desired norms from the social needs she documents rather than interpretive theory.⁵⁹ When, moreover, she does invoke legal materials to support her call for equality and caring, they are international human rights standards, which among other things demonstrate the possibility of fashioning the commitments she seeks.⁶⁰ If this is asymmetry, it is also a tonic given the usual imbalance in constitutional analysis.

Not surprisingly, Becker's method makes for exceptionally rich reading when it comes to her own discussion of democratic processes. No American should be able to look at the article's several tables showing the comparative absence of women in legislative positions

56. See, e.g., *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social, and Cultural Rights, Nigeria*, U.N. Comm. on Econ. Soc. and Cultural Rts., U.N. Doc. E/C.12/1/Add.23 (1998); Myron Weiner, *The Child and the State in India: Child Labor and Education Policy in Comparative Perspective* 3 (1991), reprinted in Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals* 287-89 (1996).

57. Mary Becker, *Towards a Progressive Politics and a Progressive Constitution*, 69 *Fordham L. Rev.* 2007 (2001).

58. Ackerman, *We the People*, *supra* note 45, at 19, 30-31.

59. Becker, *supra* note 57, at Part I.A., I.B.

60. *Id.* at Part I.A.4.

without embarrassment bordering on shame.⁶¹ Moreover, the article's analysis of such solutions as cumulative and proportional voting schemes—to overhaul what Tushnet calls the “thick” Constitution—represents precisely the type of discussion that constitutional asymmetry usually precludes.⁶²

Also not surprisingly, the rare instances in which Becker's treatment does fall prey to the more usual type of imbalanced analysis produce its more debatable claims. As one of its concluding recommendations, the article proposes a more limited version of judicial review based on the supposition that courts will more often than not select the more socially regressive option among the available constitutional choices. That may be. Becker cites the anti-democratic *Buckley v. Valeo*⁶³ and the retrograde *United States v. Morrison*⁶⁴ as recent examples, and with the current Supreme Court, she could certainly cite many more. But this general proposition may not be as well. The same Court that produced *Buckley* and *Morrison* was also capable of *Craig v. Boren*⁶⁵ and *Romer v. Evans*.⁶⁶ It remains unclear—and highly contested—how judicial review cuts as a general matter. The baby might be worth throwing out, but we should think twice before we do.

D. Mark Tushnet

Which brings us to Mark Tushnet. Tushnet's present article, *Constitution-Talk and Justice-Talk*⁶⁷ follows up on his recent book, *Taking the Constitution Away From The Courts*,⁶⁸ a “populist” manifesto that cements his reputation as the nation's most brilliantly provocative constitutional scholar. Tushnet's populism also seeks to reduce, indeed eliminate, the role of the courts in constitutional law. In doubly provocative fashion, he gets there not by detailed analysis of democratic process, but through legal critique—in short, by suggesting the power of constitutional asymmetry.

That power derives from the law's ability to demonstrate how little the law does or ought to matter. *Constitution-Talk and Justice-Talk* does this by arguing how little constitutional discourse contributes to the pursuit of justice. On this view, much (though not all) justice-seeking constitutional theory is derivative of philosophical justice-seeking; the “thick” Constitution of governmental structure does not

61. *Id.* at Part I.B.4.

62. *Id.* at Part I.B.4, IV.A.

63. 424 U.S. 1 (1976).

64. 529 U.S. 598 (2000).

65. 429 U.S. 190 (1976).

66. 517 U.S. 620 (1996).

67. Tushnet, *Constitution-Talk*, *supra* note 3.

68. Tushnet, *Taking the Constitution Away*, *supra* note 4.

speak to justice; and even the “thin” Constitution of the Declaration and Preamble fails to prescribe outcomes precisely because it is “thin.” These points, in turn, build upon Tushnet’s larger populist project. There among his key claims is that judicial review has done little to constrain dominant political coalitions, has reduced what should be popular discourse to lawyerly jargon, and has never consistently stood for anything more precise than the “thin” Constitution in any event.⁶⁹ These insights in turn follow from Tushnet’s earlier work which famously argues that the constitutional theory does not provide bases to constrain judicial decision-making so much as furnish grounds to critique the courts for decisions based on political factors.⁷⁰

And yet. Powerful as critique is in Tushnet’s hands, the question remains whether similar scrutiny of the democratic alternative would lead to similar dissatisfaction. *Taking the Constitution Away From the Courts* does draw upon case law, history, and political science literature to support the propositions that the Supreme Court has largely been irrelevant and that an attractive, self-enforcing Constitution is possible.⁷¹ Tushnet does, however, admit that some of his evidence about democratic process is not uncontroversial.⁷² More importantly, the thesis that populist constitutionalism would be superior to the court-centered brand must in critical respects remain counter-factual (at least until attempted). We cannot know with any confidence whether the judiciary makes a positive difference unless we have a go without it.⁷³

In this regard, one fruitful way forward is through comparative law. How similarly situated nations perform with or without court-centered constitutionalism probably comes as close as we are likely to get to controlled experiments testing the populist, counter-factual notion. Tushnet, moreover, would not disagree, as his own comparisons with Ireland, Israel, and India show.⁷⁴ Yet Becker’s article demonstrates that such comparative work is no small task. Once undertaken, however, such work may indeed show that the

69. See *id. passim*.

70. See Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law 4* (1988).

71. Tushnet, *Taking the Constitution Away*, *supra* note 4, at 95-153.

72. *Id.* at 127.

73. A similar problem confronts the exemplary and provocative works of Michael Klarman, who argues that judicial review simply has not greatly mattered in the course of American history. See, e.g., Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 Va. L. Rev. 1881 (1995); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 Vand. L. Rev. 881 (1998); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1 (1996).

74. See Tushnet, *Taking the Constitution Away*, *supra* note 4, at 159, 169-70; Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* 641-50 (1999).

premises underlying Tushnet's reform are sufficiently plausible that it merits taking the plunge.

For the moment, however, the United Kingdom perhaps provides a cautionary tale. Not only is Britain similar to the United States in most relevant respects, it all but embodies the type of populist constitutionalism Tushnet extols. Yet as bad as the United States criminal justice system may be, the United Kingdom's is in specific respects demonstrably worse, from the possibility of seven-day incarceration before seeing a magistrate, to denial of access to counsel during interrogation, to a significantly reduced right to silence.⁷⁵ In each key respect, the difference would seem to turn on judicial intervention in the United States and the lack of that option in the United Kingdom. Significantly, Britain has recently moved *toward* judge-centered constitutionalism by incorporating the European Convention for Human Rights into domestic law.⁷⁶

CONCLUSION

Then again, Britain took this step before *Bush v. Gore*.⁷⁷ If, in the end, constitutional asymmetry does continue to push the Constitution toward the democratic process, the Supreme Court may have no one to blame but itself. The nagging problem is that the facts underlying the case suggest that assigning the Constitution to the democratic process is not necessarily the same thing as giving it back to the people.

75. See Martin S. Flaherty, *Interrogation, Legal Advice, and Human Rights in Northern Ireland*, 27 Colum. Hum. Rts. L. Rev. 1, 3-5 (1995); Martin Flaherty, *Human Rights Violations Against Defense Lawyers: The Case of Northern Ireland*, 7 Harv. Hum. Rts. J. 87, 111-12 (1994); Molly R. Murphy, *Northern Ireland Policing Reform and the Intimidation of Defense Lawyers*, 68 Fordham L. Rev. 1877, 1886-89 (2000).

76. Human Rights Act of 1998, entered into force Oct. 2, 2000 (Eng.); see also David Pannick, *What Could Be More British?*, The Times (London), Oct. 3, 2000 (describing the Human Rights Act of 1998 that came into force on Oct. 2, 2000).

77. 121 S. Ct. 525 (2000).