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A BRIEF HISTORY OF THE NEW CONSTITUTIONALISM,
OR “HOW WE CHANGED EVERYTHING SO THAT
EVERYTHING WOULD REMAIN THE SAME”

*Michael Mandel**

Introduction: Il gattopardo

The Italians have a word for what I want to say about modern constitutionalism: “*gattopardesco*,” that is “leopardesque”, not as in the animal but as in the novel *The Leopard* by Tomasi di Lampedusa. The novel is about a noble Sicilian family at the time of the unification of Italy in the mid-nineteenth century. Italian unification was mainly a matter of the northern Savoy monarchy of Piemonte conquering the peninsula and vanquishing the various other monarchs, princes, etc., including the Bourbon rulers of Sicily and Naples. But there were other elements about and stirring up trouble, anti-monarchist and even socialist elements. In a scene early in the novel, the Sicilian Prince of Salina, the main character, is shocked to learn that his favourite nephew, Tancredi Falconeri, is off to join the invading northerners. He remonstrates with the boy:

You're crazy, my son. To go and put yourself with those people ... a Falconeri must be with us, for the King.

To which the nephew answers:

For the King, certainly, but which King? If we're not there with them, that bunch is going to make a republic on us. *If we want everything to remain the same, then everything is going to have to change.* Have I explained myself?¹

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1 “*Se vogliamo che tutto rimanga com'è, bisogna che tutto cambi*” Giuseppe Tomasi di Lampedusa, *Il Gattopardo*, (Feltrinelli, 1994), 41.

It seems to me that the new constitutionalism can best be understood as one of those changes of everything so that everything would remain the same.

What defines modern constitutionalism — what makes it “modern” — is the transformation in the relations between courts and representative institutions. The courts have been promoted from mere faithful executors of the legislative will to the high status of more or less equal protagonists. Representative institutions have been demoted from the sovereign entities with legally unlimited power of the nineteenth century and much of the twentieth to institutions hemmed in by legally enforceable constitutional limitations, most characteristically found in “rigid” Charters and Bills of Rights. These are enforced by judicial or quasi-judicial bodies of every imaginable shape and size, national and international tribunals that do not only enforce the law but actually determine it. Montesquieu’s fundamental distinction between legislatures *making* and judges *applying* the law has become not only obsolete but actually unintelligible.² The result has been a “legalization of politics” which increasingly moves the locus of political activity out of the parliaments and into the courts. Look at the “World Map of Constitutional Justice” so accommodatingly maintained on the Internet by the Republic of Slovenia (of all places),³ and you will see a world almost entirely populated by constitutional courts. Open any newspaper in the industrialized world and you will see with almost depressing regularity the same debates about whether these courts are doing law or politics,

2 “Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator ... But though the tribunals ought not to be fixed, the judgments ought; and to such a degree as to be ever conformable to the letter of the law ... But as we have already observed, the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor”.

Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, trans. by Thomas Nugent (Hafner, 1949), Book XI.6, pp. 152, 153, 159.

3 <http://www.sigov.si/us/eus.map.html>.

with the losers inevitably crying "politics" and the courts inevitably replying that they are just doing their legal duty.⁴

We have come to regard this as a logical, almost necessary, feature of "democratic" constitutions and, in a way, it is, because the more democratic a constitution, in the sense that its representative institutions are really representative and effective, the more likely we are to find this modern form of constitutionalism. How far this identification has gone can be gauged from the claim of Justice Aharon Barak, President of the Supreme Court of Israel, that judicial review is the "very essence of democracy".⁵

I want to argue that judicial review is not the essence but the *opposite* of democracy, and not just in the familiar, definitional sense of unelected judges overruling elected legislatures. In my view this is only a symptom, though an important one, of the problem. I want to argue that the new constitutionalism was intended to operate and does operate as an *antidote* to democracy, that it was meant to preserve the oligarchy of private property from the mortal danger posed by representative institutions elected by people without property, a.k.a. the *demos*. As long as representative institutions were kept the personal possessions of the rich, through limitations on suffrage and other devices, their constitutional theorists sang the praises of parliamentary sovereignty. But the moment the propertied classes lost control of these institutions, usually as result of having to concede a broader suffrage, which meant handing them over to their class enemies, these same constitutional theorists started to worry about the "tyranny of the majority" the way they never worried about the tyranny of the minority. They went to the drawing

- 4 For two recent examples: when the challenge to the introduction of the "Euro" before the German Constitutional Court failed, the losing law professor claimed that the decision was "highly political and opportunistic" and that "Germany is no longer a law-based state": *International Herald Tribune*, April 3, 1998: 1, 12; and in a widely reported speech to new judges, the President of the Supreme Court of Israel responded to critics by saying: "Those who argue that we should not hand down rulings on issues with political implications don't understand what a court is", reiterating his claim in *United Mizrahi Bank (infra n. 5, at 162)* that though "a constitutional determination has political ramifications ... it is not made out of political considerations" but rather considerations that are "legal-constitutional". *Ha'aretz* (English edition), June 3, 1998: 3.
- 5 *United Mizrahi Bank Ltd., et al. v. Migdal Cooperative Village, et al.*, (1995) 49(iv) P.D. 221, opinion of the President of the Court, Justice Aharon Barak (in English translation, at 121. All future references to this case cite the English translation).

board and came back with judicial review. They changed everything (namely constitutional theory) so that everything (namely the oligarchy of the wealthy) would remain the same. They placed boundaries around government action and called on the legal profession to police the boundaries.

“Democracy” is clearly a contested term and I do not want anything to turn on particular definitions of it. Indeed, the important thing is to understand how radically the definition of democracy has *changed* as part of modern constitutionalism. In my view, modern constitutionalism was meant as an antidote to certain *aspects* of democracy which once formed its conceptual core and still constitute its central appeal, but which have been assigned to the distant periphery precisely as part of this change to keep things the same.

In its original Greek sense, democracy meant “rule by the poor”⁶ or “the mass of people who earn their own living”.⁷ In C.B. MacPherson’s terms, democracy was “very much a class affair”.⁸ Thus, while property suffrage was the natural expression of oligarchy, democracy came to be epitomized in the slogan “one person, one vote”, to signify that the right to full and equal participation was a condition, not of property, but of sheer humanity.

The implications of this for property were enormous and the theorists of the wealthy opposed democracy tooth and nail. For Aristotle, democracy was a “perversion” because it had in view only the interests of “the needy”.⁹ Plato gave it this unflattering description:

6 Aristotle, *Politica*, Book III, Chapter 8 in R. McKeon, ed., *Introduction to Aristotle* (Random House, 1947) 592-593:

“Oligarchy is when men of property have the government in their hands; democracy, the opposite, when the indigent, and not the men of property, are the rulers ... For the real difference between democracy and oligarchy is poverty and wealth. Wherever men rule by reason of their wealth, whether they be few or many, that is an oligarchy, and where the poor rule, that is a democracy. But as a fact the rich are few and the poor many ... and wealth and freedom are the grounds on which the oligarchical and democratical parties respectively claim power in the state”.

7 Plato, *The Republic*, Book VIII, H.D.P. Lee, trans. and ed. (Penguin Books, 1955) 338. A very narrow notion of citizenship allowed Athenian “democracy” to exclude women and slaves, constituting more than two-thirds of the adult population. See “Translator’s Introduction” *ibid.*, at 23. However, this evidently left enough room for class conflict so as to horrify the property holders.

8 C.B. MacPherson, *The Real World of Democracy* (Clarendon Press, 1966) 5.

9 *Supra*, n. 6, Book III: 7, 592.

Democracy originates when the poor win, kill or exile their opponents, and give the rest equal rights and opportunities of office ... [it] treats all men as equal, whether they are equal or not ... The mass of people, who earn their own living, take little interest in politics, and aren't very well off ... are the largest class in a democracy, and once assembled are supreme.¹⁰

From these high-born Greeks in the employ of kings and tyrants, through to the Philadelphia Convention of America's wealthiest, to very near the end of the nineteenth century, democracy remained a dirty word among respectable people. Only communists confidently called themselves democrats.¹¹ To reconcile democracy with inequality, its theory and practice had to be radically transformed. If democracy was to be admitted, yet property saved, then democracy had to be emptied of its class content. The political and the economic had to be surgically separated at the hip. Democracy could be allowed to play in the fields of government so long as these were carefully delimited and government did not overstep its bounds and interfere with the prerogatives of property.

This is where modern constitutionalism came in, to draw a sharp line between the political and the economic, to declare the economic a "private sphere", despite the enormous social power wielded there, a realm of "freedom", even though the only thing that was free was the exercise of powerful and massively unequal market forces, and where, far from being "free", each vote had to be bought in hard currency according to the principle of "one dollar, one vote". The dismantling of the public sector and the enormous concentration of completely unaccountable economic power that characterizes our own era have made this clearer than ever. If, according to the new vogue, all the important social decisions are to be taken in the marketplace according to one-dollar-one-vote logic, and all the dollars are in so few hands, how could we call ourselves "democratic" in any but the most creative sense of the word?¹²

10 *Supra*, n. 7, at 329, 331, 338.

11 E.g., Karl Marx and Friedrich Engels, *The Communist Manifesto*, 1848 (Appleton-Century-Crofts, 1955) 31: "... the first step on the revolution by the working class is to raise the proletariat to the position of ruling class, to establish democracy".

12 This is not the place to parade the latest statistics on the vertiginous growth in inequality of economic power, which nobody disputes anymore. Here is just one from the United States as reported in the *International Herald Tribune* of March 2, 1998, at p. 3: "The top 1% of Americans have more wealth than the bottom 90 percent, the

So modern constitutionalism, I want to argue, is one of those changes of everything to keep everything the same: in order to protect the oligarchy of power in the face of the democratic transformation of representative institutions, these institutions had to be constitutionally restructured and forced to take on partners in the form of constitutional courts that would make sure that they did not get carried away by democracy.

In this paper, I am going to try and sketch a proof of this position by confronting what seem to be typical modern defences of the democratic character of judicial review. These defences have historical, empirical and philosophical elements to them and I agree that a satisfactory discussion has to cover all three points. Unfortunately, I cannot address here in any serious way the very interesting and somewhat unusual case of Israel itself, which is a shame, because this is the *Israel Law Review*, after all; however, I discuss the case of Israel in detail in a companion paper being prepared for delivery at a parallel conference in Jerusalem, and perhaps the editors will see fit to publish it, if it is worthy, in a future issue of the *Review*.

The "Lessons of History"

Cappelletti has called it "the mighty question of judicial review" and Chief Justice Barak put it this way in his landmark decision *United Mizrahi Bank Ltd., et al. v. Migdal Cooperative Village, et al* (1995):

Is it democratic that the court — whose judges are not elected by the people and do not represent a social and political platform — be empowered to invalidate a law enacted by elected officials?¹³

Though in my view this is an altogether too narrow definition of the democratic question, it has nevertheless served as the starting point for a spirited defence of modern constitutionalism that has taken on several classic features. One is the re-definition of democracy itself so as not to

report [of the Milton S. Eisenhower Foundation] says, placing the United States first among industrialized nations when it comes to wealth inequality". For some Canadian figures, see my *The Charter of Rights and the Legalization of Politics in Canada* (Thompson Educational Publishers, 2d ed., 1994) 337-340.

13 *Supra* n. 5, at 120.

include deference to the majority. Ronald Dworkin is the champion proponent of this point of view and we will confront him head on later. But Dworkin himself says that, ultimately, the democratic character of judicial review is an empirical question:

I see no alternative but to use a result-driven rather than a procedural driven standard for deciding [the institutional questions]. The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions are, and to secure stable compliance with those conditions.¹⁴

I could not agree more. I also agree with Justice Barak's invocation of Holmes' famous dictum that "a page of history is worth a volume of logic".¹⁵

What does history tell us?

History tells us that there is a strong connection between democracy and judicial review. Just looking at our own half of this century, the post-World War II era, judicial review appears always to be associated in time with democratic developments. When Italy and the Federal Republic of Germany went from Fascism and Nazism to government by representative institutions elected by universal suffrage, they also incorporated "rigid" (legally binding, judicially enforced) constitutions with Bills of Rights and judicial review. The same goes for Spain in the 1970s emerging from Fascism after the death of Franco. In the past decade, the post-Soviet states moving out of the bureaucratic rule of the *nomenklatura* all adopted judicial review, and when the Republic of South Africa went from white minority rule to universal adult suffrage, it did so under the auspices of a rigid constitution policed by a Constitutional Court.

But it is clear that these facts cannot resolve the question of whether judicial review is democratic, because they speak only of contemporaneity. They say nothing about *why* these phenomena have appeared together in time. If, every time they hold Israeli-Palestinian peace discussions in Washington, Prime Minister Netanyahu goes, this says nothing about whether he goes to help or to hurt the peace process. The

14 Ronald Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (Harvard University Press, 1996) 34.

15 *Supra* n. 5, at 137, quoting *New York Trust Co. v. Fisher* 256 US 345 (1921), 349.

question is whether in these historical situations, the phenomenon was intended to operate and did operate as a part of or in opposition to the tendencies underway. In other words we need to know the explanation of the temporal relationship between judicial review and democracy.

The defenders of judicial review argue that it was added to representative government to *help* democracy, to defend it against its enemies, to ensure its survival. Mauro Cappelletti advances this thesis in "Repudiating Montesquieu? The Expansion and Legitimacy of 'Constitutional Justice'":

The constitutional revolution ... occurred in Europe only with the suffered acquisition of the awareness that a constitution and a constitutional bill of rights need judicial machinery to be made effective. The United States certainly provided an influential precedent. But the most compelling lesson came from domestic experience, the experience of tyranny and oppression by a political power unchecked by machinery both *accessible* to the victims of government abuse, and *capable* of restraining such abuse. The lesson was eventually learned: constitutional courts have been created, and constitutional processes have been designed to make them work. ... Indeed, it seems that no country in Europe, emerging from some form of undemocratic regime or serious domestic strife, could find a better answer to the exigency of reacting against, and possibly preventing the return of, past evils, than to introduce constitutional justice into its new system of government.¹⁶

When Justice Aharon Barak staked out the claim for judicial review in Israel, these same "lessons of history" figured prominently:

Israel is a constitutional democracy. We have now joined the community of democratic countries (among them the United States, Canada, Germany, Italy and South Africa) with constitutional bills of rights. We have become part of the human rights revolution that characterizes the second half of the twentieth century. The lessons of the Second World War, and at their center the holocaust of the Jewish

16 Mauro Cappelletti, "Repudiating Montesquieu? The Expansion and Legitimacy of 'Constitutional Justice'", in Paul J. Kollmer and Joanne M. Olson, eds., *The Judicial Process in Comparative Perspective* (Clarendon Press, 1989) 186-187, emphasis in original.

people, as well as the suppression of human rights in totalitarian states, have raised the issue of human rights to the top of the world agenda.¹⁷

And again:

The fundamental values and basic human rights are so deep and so important that the courts of various countries are prepared — without any constitutional text — to negate parliamentary power to impair those values. Indeed, in a number of nations with accepted legal systems the recognition is slowly developing that certain fundamental values cannot be impaired by the legislature, even without a written constitution. The bitter experience of Nazi Germany, *inter alia*, has contributed to the understanding of this issue.¹⁸

And finally, citing Cappelletti:

One of the lessons of the Second World War was that constitutional supremacy and judicial review of constitutionality are potent weapons against the enemies of democracy.¹⁹

How could the Second World War teach us such a lesson about judicial review and democracy? What could have happened to show us that judicial review would have been a “potent weapon”? There seem to be two logical conditions: first, that judicial review was lacking where the enemies of democracy triumphed and second, that this had something to do with their triumph. The standard claim for Germany goes like this: the Hitlerites exploited the “flexibility” of the Weimar constitution, which provided for unlimited governmental power, and they were thus able to carry out their inhuman programme using strictly legal and constitutional means. Lacking appropriate constitutional safeguards and imprisoned in a positivist legal philosophy that required unflinching obedience to the law as enacted, there was nothing the German judiciary could do but obey the legal government, no matter how evil. When Nazism was finally defeated, to guard against anything like such an eventuality recurring, the framers of the post-war consti-

17 *United Mizrahi Bank Ltd., et al. v. Migdal Cooperative Village, et al.*, *supra* n. 5, at 1.

18 *Ibid.*, at 80.

19 *Ibid.*, at 111.

tutions decided to shore up democracy by placing limitations on parliaments through the enactment of rigid constitutions guaranteeing fundamental rights enforceable by judicial review.

Now I have read many more than one page of history on the Weimar Republic and Hitler's Germany, and I cannot imagine how anyone who has done the same could come to this conclusion.²⁰ It simply bears no relation to historical reality. If anything, the problem with the Weimar Republic was an excess of judicial review, hindering the democratic forces and helping the Nazis. Furthermore, apart altogether from judicial review, the legal system had all the tools necessary to stop the Nazis in their tracks, if only there had been the will on the part of its operatives.

It is true that the German imperial judiciary, famous for its refusal to admit any form of judicial discretion, much less judicial review, survived the republican revolution of 1918 almost intact. But it was not its "positivism" that was the problem, it was its arch political conservatism, its antipathy not only for the reformism of the Social Democrats, but for the Republic itself, whose governments were, for the first time in German history, elected by universal adult suffrage.²¹ In fact, the Weimar judges very quickly changed judicial philosophies to discover judicial review powers that they had formerly denied themselves, using the provisions of the Weimar Constitution (which said nothing either way about the matter) to assiduously protect private property and business interests, broadly interpreting rights against expropriation and narrowly interpreting the right to strike, while ignoring the copious social rights for which the constitution was famous.²² A major turning point occurred during the great inflation of 1923-24 when, having reversed its jurisprudence to assist wealthy creditors, the Supreme Court officially warned the government that it would not tolerate any attempts to adjust debts in favour of debtors:

The strikingly revolutionary character of this declaration must have been apparent to everyone familiar with the traditions of the German

20 Justice Barak cites no historians for his claims in *United Mizrahi Bank* on the lessons of the Second World War, only the lawyers McWhinney, Cappelletti and Brewer-Carías, *ibid.*, at 111.

21 Henry W. Ehrmann, "Judicial Activism in a Divided Society: The Rule of Law in the Weimar Republic", in John R. Schmidhauser, ed., *Comparative Judicial Systems: Changing Frontiers in Conceptual and Empirical Analysis* (Butterworth, 1987).

22 *Ibid.*, at 83-85.

bench. For more than a century German judges had been trained to honor unconditionally "the positive law". ... This sort of thing had never occurred so long as Germany was a monarchy; the revolt of an association of judges against the government of the King of Prussia would have struck every German justice or professor as utterly inconceivable. But against the Republic they dared to do so. Nor were they restrained by the consideration that at this juncture the government already had superhuman obstacles to contend with, the willful increase of which should have given every German patriot good cause to stop and think. So little could the German Republic trust its own institutions of government!²³

But supporters of the Court realized that things had to be changed if they were to remain the same:

... it is exactly in our democratic state, with an all-powerful parliament, that the pressing need is found for the existence of an authority that will serve as a barrier against a transgression of the boundaries for legislatures established in the constitution.²⁴

The German judiciary's died-in-the-wool political conservatism also found expression in its handling of criminal cases. The courts were notoriously easy on Nazi crimes and severe with the Left.²⁵ Hitler himself received an illegally light sentence at the Beer Hall Putsch trial, and despite the fact that the defendants called the government a "Jew government", the court lauded their "purely patriotic spirit and the noblest of selfless intentions". Hitler served only six months for an offence that carried a minimum five-year sentence. Though the law required that, as an Austrian, he be deported, the court held: "in the case of a man whose thoughts and feelings are as German as Hitler's, the court is of the opinion that the intent and purpose of the law have no

23 Erich Eyck, *A History of the Weimar Republic*, Harlan P. Hanson and Robert G.L. Waite, trans. (John Wiley & Sons, Inc., Vol. I, 1970) 287-288.

24 Quoted in F.F. Blachly and Miriam E. Oatman, "Judicial Review of Legislative Acts in Germany", (1927), 21 Am. Pol. Science R. 113, at 117.

25 The bias gave rise to jokes such as the following:

There was shock when the Berlin judge sentenced the two Communists to only 5 years in prison for the crime of beating up an SA man. But the judge explained that, though the crime was very grave, he had to take into account, as a mitigating factor, *that there was absolutely no evidence connecting the accused to the crime!*

application".²⁶ The painful truth is that a simple application of the law might have consigned Hitler to the dustbin of history. And when the Nazis came to power, was it the judiciary's positivist scruples and dedication to the faithful application of the law that allowed them to get away with murder? Absolutely not. Jews were cheated like Shylock and the law was overridden by the Nazi ideology. We were sentenced to death for trumped-up love affairs with "Aryan" women under laws that only punished habitual violent offenders with death. We lost all civil rights to sue in contract and under labour and tenant protection legislation, not because of the wording of the laws but *against* the wording of the laws. As one judge said:

The question is not one which can be resolved through an interpretation of the Tenant Protection Law, but is rather a question of ideology. ... Terminating the leases of Jewish tenants is ... made difficult by the Tenant Protection Law and in certain cases impossible. This stands in opposition to the necessity for ending all associations with Jews in the community as quickly as possible.²⁷

According to Müller, in his invaluable study, *Hitler's Justice: The Courts of the Third Reich*:

Placing the judiciary under a strict obligation to follow the letter of the law would have been an impediment to the "legal order" of the Nazi regime and would have limited its power; for this reason, judges were required to declare their loyalty to the Führer rather than to the law itself. Any appeal to the letter of the law was dismissed as "moral and legal thinking typical of Jewish liberals".²⁸

Müller argues that the myth of Weimar's "positivism" was actually a post-war concoction of jurists anxious to absolve themselves of responsibility for Nazi crimes:

Although it was clear to every jurist during the Nazi era, and especially afterward, that National Socialist legal doctrines were the

26 Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, trans. by Deborah Lucas Schneider (Harvard University Press, 1991) 15-16.

27 *Ibid.*, at 118.

28 *Ibid.*, at 220.

exact opposite of legal positivism, the claim that judges and prosecutors were merely following the laws and that, after all, this was how they had been trained by their democratic professors during the Weimar Republic became a blanket excuse ... Since the fairy tale of positivism whitewashed the entire profession, it was seized upon most gladly by those who should have been held responsible for the crimes they had committed during the Nazi era, and the courts readily accepted their self-justification.²⁹

Finally, what are we to make of the classic claim of the "constitutionality" of the means by which Hitler came to power?

To say that Hitler came to power legally is to beg the question. It is safer to say that Hitler did not come to power unconstitutionally. The means by which he became Chancellor of Germany, and by which the National Socialist Party established itself as the only party in Germany was strictly constitutional.³⁰

This position relies on the undisputed fact that, in taking power in Germany, the Nazis observed the formalities of the Weimar constitution. On January 30, 1933, Hitler, as the leader of the largest party in the Reichstag, was called to form a government by the President, who also immediately gave him the authority to dissolve Parliament and call new elections. These were set for March 5. On February 28, the day after the Reichstag fire, Hitler used Article 48 of the constitution to have the President declare a state of emergency and suspend civil rights. Under the authority of the emergency decree, Hitler's political opponents were arrested and their campaigning made impossible. After the election, Hitler used the same decree to arrest the Communist opposition members of the legislature. On the first re-convening of the Reichstag, Hitler's proposal to amend the constitution and grant himself the plenary powers with which he ruled thereafter was passed by the required two-thirds vote of the required two-thirds quorum.

29 *Ibid.*, at 220-222.

30 Ian Ward, *Law, Philosophy & National Socialism* (1992). The same claim is made in H.W. Koch, *A Constitutional History of Germany in the 19th and 20th Century*, (Longman, 1984), in which one can also find an unusually sympathetic treatment of the German judiciary.

Now it is clear that it is *not* to “beg the question” to say that all this was illegal, because, whatever the terms of the decrees and the constitution, the Nazis had no scruples about disregarding them. Their movement had been based on criminal violence from the very start and this did not cease with the taking of power. In fact, the SA storm-troopers increased their terror under the protection of the government. Violent attacks against the Left and even the Centre opposition (and the Jews, of course) were central features of the election months of early 1933. Concentration camps and prisons were filled to overflowing with political opponents, whether or not their arrests came within the terms of the decrees. The Enabling Act was passed with the 89 elected Communists arrested and their seats empty. In his speech on the Bill, Hitler made explicit threats to the deputies still not in concentration camps that he would consider disapproval of the law “a declaration of resistance ... war”. And, of course, these were not the only acts of illegal violence by the Nazi regime. The Gestapo arrested, imprisoned, tortured and murdered opponents without any legal authorization and completely contrary to the laws on the books. Nor was there any legal authorization for the *Kristallnacht* pogrom: not the 100 murders, not the destruction of 200 synagogues and 1,000 stores, and not the arrest of 25,000 Jews — all of this constituted violations of the criminal law for which the entire leadership of the Third Reich could have been imprisoned for life under the most flexible of constitutions, and certainly under the Weimar constitution. “Nazism meant a regime of gangster government, of viciousness and violence”.³¹

Whether the clearly illegal violence, intimidation and unlawful arrests undermined the “constitutionality” of the transfer of power is perhaps slightly less clear, because it is uncertain whether the intimidation is what caused the required majority of deputies to pass the Enabling Act. But surely it would have been child’s play for any judge to declare at least the elections void on the basis of the brutal treatment of the opposition. The Reichstag fire was obviously a fraudulent pretext. Since “public security and order” were only “seriously disturbed or endangered” by the government itself, the measures decreed were not “necessary for their restoration”, as required by Article 48. The decree was not, therefore, permitted by the constitution. Not only that, the

31 Whitney R. Harris, *Tyranny on Trial: The Evidence at Nuremberg* (1954) 57; Jost Dülffer, *Nazi Germany 1933-1945. Faith and Annihilation* (Arnold, 1992) 142.

terms of the Hitler decree, which basically suspended all legal rights, went far beyond the terms of what Article 48 provided for. Finally, the provisions on "equality" and "freedom of elections" (Articles 109 and 125) necessarily remained in force because they were exempt from the operation of Article 48. So the constitution was violated by the Nazis' discriminatory brutality against opposition parties, both in itself and also because it was aimed precisely at destroying the freedom of the elections of March 5 that were the basis of the Enabling Act.

In fact, it was only the "dangerous and unconvincing" interpretation of Article 48 given by the Supreme Court during the Von Papen coup against the Social Democratic government of Prussia in 1932, that gave any constitutional plausibility at all to Hitler's decree of 1933.³² Nor did the Court disavow adjudication in 1932; indeed, it declared part of the decree (the least important part) unconstitutional.³³ And this is the main point: it was the exaltation of the constitution *above* the ordinary law, a feature of rigid, not flexible constitutions, that allowed Hitler even a veneer of legality, more importantly that allowed "the question" of legality to be "begged", that is to be *obscured*, by arguments about constitutionality.³⁴

More or less the same lessons can be learned from the constitutional experience with Fascism in Italy, where judicial review came in and out of fashion with the political fortunes of the monarchy and the bourgeoisie until Mussolini's accession to power. Only after the "March on Rome" did the courts discover that they lacked the power to interfere, except of course to interpret the law in accordance with the Duce's speeches. Once again, Mussolini's resistible rise to power was criminal from start to finish.³⁵ If the judges were inclined to stop him, they had all the legal tools they needed in the ordinary criminal law. Constitutional judicial

32 "The verdict has been found 'worthy of Solomon'. Yet such a comparison would have been valid only if the wise monarch had really let the executioner hack the disputed child in half". Eric Eyck, *supra* n. 23, Vol. II, at 421.

33 *Ibid.*, at 410-425.

34 Of the many accounts of these events besides those already cited, see the discussions in Richard Bessel, *Political Violence and the Rise of Nazism: The Storm Troopers in Eastern Germany 1925-1934* (Yale University Press, 1984); Klaus P. Fischer, *Nazi Germany: A New History* (Constable, 1995); and the classic William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (Pan Books, 1964).

35 Alan Cassels, *Fascist Italy* (Thomas Y. Crowell, 1968); Dennis Mack Smith, *Italy. A Modern History*, rev. ed. (University of Michigan Press, 1969).

review would not have made, because it *could* not have made, the slightest difference to the outcome.³⁶

The Austrian case was slightly different, but the lessons are the same. Thanks to the device of "concentrated" judicial review associated with the Social Democrats' constitutional expert Hans Kelsen, the young republic was able, for a time, to neutralize the reactionary judiciary by reserving constitutional adjudication to a specialized tribunal and forbidding judicial review of constitutionality to the ordinary courts.³⁷ Furthermore, the court's constitutional jurisdiction was limited to actions brought by government³⁸ and judges were elected to the court by the legislative assemblies.³⁹ Still, it must be said that even the original constitution represented a defeat for the Social Democrats. According to Kelsen himself, the Social Democrats were forced to abandon their plan for a Weimar-type bill of social rights that would have separated Church and State (in 1920 no one in Austria could foresee what the German judiciary would do with the Weimar constitution), and to abandon as well their stand against federalism (which was based on a well-founded fear of the reactionary nature of the country-side):

... in 1920 it was the Christian-Socials and not the Social Democrats who had to take greater account of the possibility of going into opposition. The danger of a marked socialist regime was considered then much greater than it is today. Therefore, that constitutional provision which, in particular, benefits the opposition and which, for changing the constitution, provides a majority of two-thirds, would certainly have been claimed on the part of the bourgeoisie with the greatest energy even though the Social-Democrats considered natural such an enhanced procedure as typical of every written constitution. This then signalled clearly that a simple socialist majority in parliament would not have been able to abolish the constitutionally

36 See, in Italian, Guido Neppi Modona, *Sciopero, potere politico e magistratura 1870-1922*, (Bari, 1969) and "La magistratura e il fascismo", in AA.VV. *Fascismo e società italiana* (Torino, 1972). Some key decisions of the Cassazione are *Lucernare c. Ministero Lavori Pubblici*, *Giur. it.*, 1918, I, 654; *Curreri c. Abate*, *Giur. it.*, 1922, I, 1, 65; *Nisco e Banco Di Napoli c. Enrietti*, *Giur. it.*, 1922, I, 1, 929 and *Intaglietta ricorrente*, *Giur. it.*, 1924, II, 1, 122.

37 Federal Constitutional Law of the Republic of Austria, 1920, Art. 89.

38 *Ibid.*, Art. 140.

39 *Ibid.*, Art. 147.

guaranteed principle of *private property* and that a bourgeois minority of more than a third of the votes would have been enough to defend the private capitalist system.⁴⁰

Though the court, with Kelsen's presence was able to exercise a moderating influence on the notoriously reactionary ordinary courts, this situation lasted only until 1929.⁴¹ At that time access to the court was expanded. Ordinary courts now had the right to refer individual cases to the constitutional court on grounds of unconstitutionality of the laws and "direct infringement of personal rights".⁴² These changes have been celebrated as an advance in constitutional justice;⁴³ but, in fact, they were seen at the time and indeed operated as part of what Kelsen called "the attempt of the bourgeois groups ... to restrain or even to eliminate the parliamentary system".⁴⁴ This is because the expansion of the court's jurisdiction came at the same time as an authoritarian turn in Austrian politics⁴⁵ and was part of a package of constitutional amendments that included the direct election of the President, who now had emergency powers and the power of himself appointing the judges of the Constitutional Court:

The reform of the Austrian constitution of 1929 was, not in the least, directed against the Constitutional Court because of a conflict between the latter and the administration ... The old Court was, in fact, dissolved and replaced by a new one almost all the members of which were party followers of the Administration. This was the beginning of a political evolution which inevitably had to lead to Fascism and was responsible for the fact that the annexation of Austria by the Nazis did not encounter any resistance.⁴⁶

40 Hans Kelsen, "The Forces for Reform" *Neue Freie Presse*, October 6, 1929 (translation).

41 Charles A. Gulick, *Austria from Hapsburg to Hitler* (University of California Press, 1948).

42 Federal Constitution Law of the Republic of Austria, 1929, Arts. 89.2, 140 and 140.1.

43 E.g., Allan R. Brewer-Carias, *Judicial Review in Comparative Law* (Cambridge University Press, 1989) 195-196.

44 *Supra* n. 40.

45 In Austria, too, the judicial lenience on right-wing violence played an important part. See Malbone R. Graham, Jr., "The Constitutional Crisis in Austria", (1930) 24 *Am. Pol. Science R.* 144.

46 Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution", (1942), 4 *Journal of Politics* 184, at 188; Federal Constitutional Law of the Republic of Austria, 1929 Art. 147.

The new constitutional court actively used its jurisdiction to help the national government and its supporters harass "Red Vienna", but, of course, this "effective" institution of judicial review was no "anathema" to the tyrant and no more prevented the Dolfuss coup in Austria than it did the Hitler coup in Germany.⁴⁷

Nor does it seem that there are any positive lessons to be learned about judicial review from the experience of the Spanish Republic, the third and final example of constitutional judging in Europe between the wars. Once again, it appears that judicial review came at the insistence of the conservative forces as a way of restraining the democratic, leftist and anti-clerical thrust of the republic.⁴⁸ While the Tribunal of Constitutional Guarantees was made elective to minimize its interference with republican reform, by the time elections came around the country had already swung to the right. The Tribunal was therefore a conservative force in pre-Civil War politics. It is written of its 1934 decision against Catalonian land reform:

... the court's decision was bound to be political rather than legal. On June 8, by a 13 to 10 vote, without an absolute majority of the court having heard the case, the Tribunal affirmed the objections of the landlords. It was a vote in favour of centralism and conservative vested interests against regionalism and land reform.⁴⁹

Obviously the presence of such "effective" judicial review did not protect Spain from the Civil War and the Fascism that followed it and endured for forty years.

To add to the "lessons of history" from pre-war Europe, we could point to the cases where there was neither judicial review nor an authoritarian takeover. France came dangerously close, but it was a popular mobilization that saved the day, not a constitutional court.⁵⁰ In Czechoslovakia, the failure to activate the constitutional court that was written

47 Gulick, *supra* n. 41. "This fact, that judicial review is anathema to the tyrant, is confirmed by developments in many countries in several continents ..." Cappelletti, *supra* n. 16, at 189.

48 Richard A.H. Robinson, *The Origins of Franco's Spain: The Right, the Republic and the Revolution*, (David & Charles, 1970) 118.

49 Gabriel Jackson, *The Spanish Republic and the Civil War 1931-1939*, (Princeton University Press, 1965).

50 David Thomas, *Democracy in France Since 1870* (Oxford University Press, 1969).

into the constitution did not prevent it from surviving (unlike Germany, Austria and Spain) with its representative institutions intact until the German takeover in 1938.

So what are the lessons of the inter-war period?

First, that the lack of judicial review had nothing to do with the rise of these dictatorships and their overthrow of democratic representative institutions. In fact there was plenty of constitutional judicial activism and it was employed by the enemies of democracy, first to thwart the social reformism of the parliaments and then to help the anti-democrats by interpreting the law according to higher law principles that merely mirrored their authoritarianism.

Second, that it was not the jurisprudential theories of the judges but their political sympathies which determined the results, as they adopted doctrines of convenience (activism, deference, etc.) to further their political causes, showing tolerance to right-wing violence and subversion, intolerance for parliamentary reformism, and enthusiastic activism in the defence of property. Inter-war constitutionalism changed everything (constitutional theory and jurisprudence) so that everything (the oligarchical rule of private property) would remain the same. From this historical record, it could only be predicted that judges, if given the chance, would act the same way (that is, according to their political sympathies) whatever the constitutional documents that they might be called upon to "interpret" or the jurisprudential theories they might claim to subscribe to.

Third, that constitutional "flexibility" (its inability to override ordinary legislation) could have played no role whatever in the failure of the judiciary to oppose authoritarianism, because from start to finish the authoritarians used criminal violence to pursue their ends. A simple application of the ordinary criminal law would have done the trick. Where judicial authorities were unwilling or unable to do that, what possible difference could the availability of rigid constitutional guarantees have made?

Fourth, that the Kelsen-type concentrated system of judicial review by a special, politically responsive tribunal was the least likely to hinder democracy (because it was the least court-like and the least "independent"); but that, since it was such a direct emanation of the representative institutions, it could be only as democratic as they were. When these institutions were occupied by authoritarian forces, the special tribunals naturally followed suit.

The true lessons of the inter-war period, that constitutional judicial review is not only useless and unnecessary in the defence of democracy but is actually a weapon in the hands of its enemies, were familiar to all who lived through the period and survived to participate in the post-war constitutional debates. It is these true lessons that best explain the post-war developments and this is also the way it was understood by the participants.

Take the example of Italy. In the period right after World War I, the reformist movement, aided by the spread of the suffrage, made great advances but was overthrown by the violent anti-democrats who were then rewarded by the propertied classes by having the government handed over to them. For the entire period from the unification of Italy to the takeover of the Fascists, the doctrines of flexibility and rigidity had gone in and out of fashion. But after the Fascist takeover, all the conservative jurists chimed in with the self-serving doctrine that the constitution provided no obstacle to what was being done. When, after twenty-three years of dictatorship, the monster was overthrown and universal suffrage finally triumphed, it was the conservative jurists who now insisted on judicial review. The Left, adamant in its opposition, knew how to read this, as these excerpts from the speeches of Pietro Nenni (Secretary of the Socialist Party) and Palmiro Togliatti (Secretary of the Communist Party) in the Constituent Assembly of 1947 show:

NENNI: One could say that the secret vice of this constitution is the same one that can be found at every stage in our history, from the Risorgimento on: distrust of the people, fear of the people and sometimes, terror of the people; the need to place between the expression of the popular will and its execution as many obstacles, as many diaphragms, as possible.⁵¹

TOGLIATTI: All these provisions are inspired by fear: it is feared that tomorrow there could be a majority that is the free and direct expression of those working classes who want to change profoundly the political, economic and social structure of the country; and for that eventuality it is desired to have guarantees, to place impediments: from here the heaviness and the slowness of the legislative process and all the rest; and from here that bizarre creature the Constitutional Court, an organ that nobody understands and thanks to the institution of which some illustrious citizens will be placed

51 *Assemblea Costituente*, March 10, 1947, at 324 (my translation).

above all the assemblies and the whole system of Parliament and of democracy, to be its judges.⁵²

Of course, to the post-war generation of Europe it was not only the model of their own experience with judicial politics that made them wary of judicial review, but above all the stable and enduring model of the United States, in whose "camp" those countries adopting judicial review after World War II were invariably to be found. Despite the reputation for liberalism that the United States Supreme Court carved out for itself in the twenty years from *Brown v. Board of Education* in 1954⁵³ to *Roe v. Wade* in 1973,⁵⁴ to the constitution-drafters of the immediate post-war period it was an example of pure conservatism. Everyone knew about Roosevelt's confrontation over the judicial attacks on the New Deal; but this was only the death rattle of a court that had been laying waste to social reform since the turn of the century.⁵⁵ Edouard Lambert's famous *The Government of Judges and the Struggle against Social Legislation* of 1921 used the American experience to warn against the attempts of right-wing French jurists to introduce judicial review to fight the workers' movement.⁵⁶ American judicial conservatism was also the model for the German judges in the 1920s when they decided to stand up for property against democracy.⁵⁷

But the anti-democratic character of American constitutional judicial review stretched back before the *Lochner* era through *Plessy v. Ferguson*⁵⁸ (the case establishing the "separate but equal" doctrine that lasted sixty years before being overturned by *Brown*) and *Dred Scott v. John F. A. Sandford*⁵⁹ (establishing that slaves were property subject to the protec-

52 *Ibid.*, at 330 (my translation).

53 *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

54 *Roe v. Wade* 410 U.S. 113 (1973).

55 *Lochner v. New York* 198 U.S. 45 (1905); *Hammer v. Dagenhart* 247 U.S. 251 (1918); *Bailey v. Drexel Furniture* 259 U.S. 20 (1922) discussed in Stephen M. Griffin, *American Constitutionalism: From Theory to Politics*, (Princeton University Press, 1996) 88-90. See also Russell Galloway, *Justice For All? Rich and Poor in Supreme Court History 1790-1990* (Carolina Academic Press, 1991).

56 Alec Stone, *The Birth of Judicial Politics in France: the Constitutional Council in Comparative Perspective*, (Oxford University Press, 1992).

57 W. Simons, "Relation of the German Judiciary to Executive and Legislative Branches of the Government Compared with that of the United States" (1929) 15 A B A Journal 762-67, 779; 54 A B A 226-42.

58 163 U.S. 537 (1896).

59 15 S. Ct. L. Ed. 691 (1857).

tion of the Fifth Amendment), all the way to the very origins of the constitution, which, when all the myths of history are stripped away, amounted to a defence not of liberty but of property. This included the fundamental right to property in slaves, which, in addition to the implications of the guarantee of property rights, was explicitly entrenched by Art. I, sec. 9, which forbade Congress from abolishing the import of slaves for a generation, and Art. IV, sec. 2 which obliged free states to hand back fugitive slaves to their owners. So Cappelletti's claim about judicial review being "anathema to the tyrant" was dead wrong right out of the starting gate.⁶⁰ And slavery was just the most egregious form of property that the constitution aimed to protect. The framers of Philadelphia, fifty-five of America's richest men, drafted a constitution aimed squarely at the "levelling" tendencies of state legislatures which, because of the demographics of American society (which had similar suffrage restrictions to those in Europe but a different class structure) were under the influence of a debt-ridden small-holding class of farmers.⁶¹ The state measures most hated were the various debt-relief schemes which infringed the "private rights" of the wealthy creditors. So, in the new American constitution, the states were deprived of the power to "make any Thing but gold and silver Coin a tender in Payment of Debts" or to "pass any.... Law impairing the Obligation of Contracts (Art. I, sec. 10). Alexander Hamilton could thus count for the success of the constitution on "the good will of most men of property in the several states who wish a government of the union able to protect them against domestic violence and the depredations which the democratic spirit is apt to make on property".⁶² James Madison argued for

the necessity of providing more effectually for the security of private rights, and the steady dispensation of Justice. Interferences with these evils which had more perhaps than anything else, produced this convention. ... In all cases where a majority are united by a common interest or passion the rights of the minority are in danger.⁶³

60 Cappelletti, *supra* n. 16, at 189.

61 Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution*, (West Publishing Company, 1990) 16-17; Walter B. Mead, *The United States Constitution: Personalities, Principles and Issues*, (University of South Carolina Press, 1987) 65.

62 *Documentary History of the Constitution of the United States of America 1786-1870* (United States of America Department of State, Vol. IV, 1905) 288.

63 Kermit L. Hall, ed., *Major Problems in American Constitutional History* (Vol. I) 131.

And though among his list of "sects, factions, & interests" he included "inhabitants of this district or that district and the disciples of this religious sect or that religious sect", the list was topped by "rich & poor, debtors and creditors".⁶⁴ For the framers of the American Constitution, the positions of dangerous majority and endangered minority were held respectively by the same classes who held them in Aristotle's day and in our own. The Amendments forming the famous Bill of Rights merely ensured that the powers denied to the states to interfere with property rights were also denied to the federal government.

So, while modern American scholarship tries hard to *explain* and *defend* the anti-democratic sentiments of the framers of the American constitution and their overwhelming concern for property rights, and while it tries, as we shall see, to persuade us that these anti-democrats somehow left us a fundamentally, indeed "essentially" democratic institution, it is no longer possible to deny that, *as they saw it themselves*, these men aimed to devise a mechanism that would, while admitting it in "form", provide a substantive "defence" against the threat democracy posed to property.⁶⁵

If we return to the constitutions of our era, we can see that the inspiration for the move from parliamentary sovereignty to judicial review pretty much always bears these hallmarks of an attempt to protect property from democracy. For reasons of both time and space,⁶⁶ I will have to limit myself to a few examples.

The European experience tends to confirm the *gattopardesco* thesis. We have already discussed the Italian story which is a very clear case. In West Germany, the situation is somewhat less clear because the Social Democrats (though not the Communists) supported the establishment of a Court. The Basic Law was drafted in the height of Cold War hysteria, under the actual supervision of the American occupiers and the tutelage of the virulently anti-communist Konrad Adenauer. The

64 *Ibid.*

65 Hence Madison's formulation of the need for a "defence agst. the inconveniences of democracy consistent with the democratic form of Govt". *ibid.* See also Joyce Appleby, "Capitalism, Liberalism, and the United States Constitution" in A.E. Dick Howard, ed., *The United States Constitution: Roots, Rights, and Responsibilities* (Smithsonian Institution Press, 1992) 61; Thornton Anderson, *Creating the Constitution: The Convention of 1787 and the First Congress*, (Pennsylvania State University Press, 1993) 166ff.

66 Nobody's fault but my own!

parliamentary commission that drafted the Basic Law in 1949 was weighted in favour of the conservative parties. The Social Democrats support for a Kelsen-type Court seems to have been as the lesser of several evils, not unlike the attitude in Italy. And their fear of the conservative majority's dominance meshed with the conservative parties' desire to entrench property and federalism:

Christian Democrats would have at their disposal a powerful weapon for protecting basic rights, particularly those of property and personality. Social Democrats, traditionally distrustful of judicial review and the regular judiciary, saw the Court as an equally powerful tool in the protection of minority rights, especially the rights of minority parliamentary parties. Finally, the states represented in the Bundesrat envisioned the Court ... as a bulwark of German federalism.⁶⁷

The outnumbered Social Democrats were critical of the result and, many did not regard it as "their" constitution.⁶⁸ In fact, immediately after the war, "higher law" principles became a fixture of conservative German judicial thinking, both for the absolution this provided former Nazis (who could claim the problem was really the legal philosophy of "positivism" which, therefore, had to be replaced), but also for the defence it provided against democratic change:

Merely by switching labels, large segments of the conservative world view, formerly classed as part of the "way of life of the Volk", could now be presented as "Christian natural law". Common to both was a view of society as something static, an attitude that aimed at preserving traditional values from democratic developments through appeals to a status quo preordained in nature.⁶⁹

In France, on the other hand, nothing could be clearer than the anti-democratic character of the *Conseil constitutionnel*, enacted with De Gaulle's 1958 constitution as just one more device to strengthen the

67 Donald P. Kommers, "The Federal Constitutional Court in the German Political System", (1994) 26 *Comp. Pol. Studies* 470, at 472.

68 Dennis L. Bark and David R. Gress, *A History of West Germany. Volume I: From Shadow to Substance 1945-1963*, (Basil Blackwell, 1989) 221.

69 Müller, *supra* n. 26, at 224.

presidency at the expense of parliament, where the Left, though a minority, was strong enough to make matters difficult for French capitalism. Intended for the first generation as a "watchdog on behalf of executive supremacy" and a "cannon aimed at parliament" that concerned itself only with jurisdictional questions and that could only be invoked by the Presidents of the Republic, Assembly and Senate, its jurisdiction was expanded in the nineteen-seventies to allow opposition politicians to challenge legislation as an explicit precaution against the eventuality of the Left coming to power.⁷⁰

In Canada, the Parliament that got out of hand was not a national one but a provincial one. The Charter of Rights of 1982 was introduced primarily to thwart the national aspirations of the French majority of Quebec. When the Quebec provincial government started to exercise its considerable sovereign legislative authority under the constitution of 1867 in a way that challenged English hegemony, the rest of Canada decided it was time to change everything so that everything would remain the same. The constitution was declared, for the first time in history, to be amendable without Quebec's consent and sweeping constitutional changes were introduced to overrule Quebec's language legislation.⁷¹

An extreme case of a changing everything so that everything would remain the same was the Chilean constitution of 1980. This replaced the liberal constitution of 1925 with a document that guaranteed that Chile would only return from the bloody dictatorship of General Augusto Pinochet to democratic forms of government under a rigid constitutional straightjacket. It guaranteed the presidency of Pinochet until 1990 and his control of the armed forces until 1997. The authoritarian values he wrote into the constitution, the rigid property and business rights and the limitations on union activities were safeguarded by supreme and constitutional courts nominated by him or by institutions controlled by him (e.g., the National Security Council) and an extremely difficult amending process which left his hand-picked senators for life — a position he himself took up he occupied his own life-seat in March 1998 — with enormous influence.⁷² In this context the constitutional court was just one of many "authoritarian enclaves".⁷³

70 Stone, *supra* n. 56, "Constitutional Politics as Oppositional Politics".

71 Michael Mandel, *supra* n. 12, chaps. 1 and 2.

72 The Political Constitution of the Republic of Chile, 1980.

73 "Removing the Old Regime's 'Enclaves'", *Latin American Weekly Report*, 11 March 1997, at 129.

The constitutional revolutions of the 1990s in Eastern Europe provide striking examples of the relationship between democracy, property and constitutionalism. Constitutional judicial review did not exist in the Soviet period and neither did open elections or private property in the means of production. Then, all of sudden, all three were introduced together. The most interesting example is that of Russia itself.

The introduction of a constitutional court was hailed as a democratic development and its independence from the government that appointed it was cautiously praised.⁷⁴ But then the 1993 showdown came. During a confrontation between President Yeltsin and Parliament over economic shock therapy (Yeltsin in favour and Parliament, like most of the people, opposed), Yeltsin ordered Parliament's dissolution, admittedly violating the constitution.⁷⁵ Surprisingly (given the historical record of constitutional courts), the Constitutional Court sided with Parliament. Yeltsin's response was to suspend the Constitutional Court and send in the tanks. When the smoke had cleared and the funerals had been held, Yeltsin unveiled a made-to-measure constitution, which reduced the powers of Parliament and the regions and increased those of the President, granting himself broad and almost unlimited powers of decree and of veto.⁷⁶ The Constitutional Court was to be continued, but the number of members was increased from 13 to 19⁷⁷ to ensure a majority favourable to Yeltsin.⁷⁸ In drafting the constitution, Yeltsin paid as close attention to the American *constitutional* Right as he did to the American *economic* Right in designing his economic programme. The constitution provided very strong guarantees for business ("freedom of economic activity"⁷⁹) and protections for private property not unlike those in Pinochet's 1980 constitution for Chile.⁸⁰ Since the dissolution of the

74 Herman Schwartz, "The New East European Constitutional Courts", (1992) 13 Mich. J. Int'l L. 741; Matthias Hartwig, "The Institutionalization of the Rule of Law: The Establishment of Constitutional Courts in the Eastern European Countries", (1992) 7 Am. U. J. Int'l L. & Pol'y 449; Herbert Hausmaninger, "From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court", (1992) 25 Cornell Int'l L.J. 305.

75 Boris Yeltsin, *The Struggle for Russia*, trans. by Catherine A. Fitzpatrick, (Random House Inc., 1994) 242, 255.

76 The Constitution of the Russian Federation, 1993, Arts. 90 and 107.

77 *Ibid.*, Art. 125.

78 Robert Sharlet, "Russian Constitutional Crisis: Law and Politics Under Yel'tsin", (1993) 9 Post-Soviet Affairs 314, at 332.

79 *Supra* n. 76, Art. 8.

80 The Political Constitution of the Republic of Chile 1980, Art. 19(24).

Soviet Union, American constitutionalists had been insisting that the ex-socialist countries needed especially strong protection for private property, just to get their folks into the habit.⁸¹ But there was much disappointment at early drafts of constitutional protection for private property. A 1992 draft provision dared to provide that "The exercise of the right to property shall not contradict the common good". American legal experts helpfully pointed out:

To improve these provisions, and to alleviate some of the fears of potential foreign investors, the drafters will need to strengthen the property owner's rights. This can be achieved by requiring "market value" or "just" compensation in the event of the exercise of eminent domain or other legal mechanisms aimed at the deprivation of private property.⁸²

Here is what Yeltsin's constitution of 1993 provided:

- 35 (1) The right to private property is protected by law.
 (2) Everyone has the right to own property and to possess, use and dispose of it either individually or in conjunction with other persons.
 (3) No one may be deprived of his or her property except by a court decision. Property may be expropriated for state needs only if equal-value compensation is provided in advance.
 (4) The right of inheritance is guaranteed.

Though the constitution provided that it could be adopted by a bare majority vote of a bare majority quorum, it would require two-thirds of the legislators (and in some case three-fifths) or a referendum to amend.⁸³ In a campaign whose rules guaranteed success, the constitution was declared ratified even though the scholarly consensus is that the 50% quorum was not achieved.⁸⁴

81 Cass Sunstein, "Constitutionalism, Prosperity, Democracy: Transition in Eastern Europe", (1991) 2 *Constitutional Political Economy* 371.

82 Mark Ellis, "Drafting Constitutions: Property Rights in Central and Eastern Europe", in "Symposium: Constitutionalism in the Post-Cold War Era", (1994) 19 *Yale J. Int'l L.* 197-199.

83 *Supra* n. 76, Arts. 135 and 136.

84 *The Toronto Star*, May 29, 1994; Daniel Singer, "Yeltsin, the Lame-Duck Czar", *The Nation*, May 2, 1994, at 588; Robert Sharlet, "Transitional Constitutionalism: Politics and Law in the Second Russian Republic", (1996) 14 *Wisconsin Int'l L.J.* 495, at 496.

One amazing aspect about the whole episode was the ease with which the international community was able to discredit the constitution and the court and to applaud Yeltsin's unconstitutional behaviour, just because it advanced the cause of "economic reform", that is the restoration of the brutalities of the "free" market. The parliament was discredited as a bunch of Communist Party holdovers, even though their pasts were no more tainted than that of Yeltsin himself and their electoral pedigree was at least as strong as his;⁸⁵ the court was condemned as "political" even though its reasoning was impeccable, and "divided" even though the dissenters were few; the constitution was described as a relic of the Communist past by Americans whose constitution is a relic of the slave past.⁸⁶ Though Yeltsin trampled underfoot both representative institutions and constitutions (the old one and the new one), democracy was once again redefined, this time as "market reform", that is as capitalist economics pure and simple, so that the world press could trumpet: "Democracy has triumphed in Russia".⁸⁷

As our last example, the recent birth of modern constitutionalism in South Africa also provides very strong support for the anti-democratic thesis. As with the Europe of the 19th century, the South Africa of the 20th (up until April 1994) excluded over 80% of the population from the suffrage. But parliamentary sovereignty was strictly, indeed religiously, adhered to (turn-of-the-century President Paul Kruger called judicial review "a principle of the devil"⁸⁸). When the narrow suffrage of apartheid was replaced in April 1994 with universal suffrage, it was under a new, "rigid" constitution, that is to say one not amendable by simple majority, that included the institution of judicial review under a Bill of Rights.⁸⁹

85 Stephen White, Ian McAllister and Olga Kryshchanovskaya, "El'tsin and his Voters: Popular Support in the 1991 Russian Presidential Elections and After", (1994) 46 *Europe-Asia Studies* 285.

86 Richard Pipes, "The Last Gasp of Russia's Communists", *New York Times*, October 5, 1993, at A27; Owen M. Fiss, "Judiciary Panel: Introductory Remarks", in "Symposium: Constitutionalism in the Post-Cold War Era", *supra* n. 82, at 1.

87 *The Globe and Mail*, December 13, 1993, at A2.

88 Charles Villa-Vilencio, "Whither South Africa?: Constitutionalism and Law-Making", (1991), 40 *Emory L.J.* 141, at 150.

89 The amending formula requires a two-thirds vote in the National Assembly, and in some cases seventy-five percent, as well as the support of six provinces: The Constitution of the Republic of South Africa, sec. 74. The African National Congress polled 62.6% of the votes in the April 1994 elections: *The Globe and Mail*, May 7, 1994, p. A16.

There are a number of reasons to consider this yet more confirmation of the anti-democratic thesis. In the first place, the idea for the Bill of Rights came from the white minority who held on to a racist suffrage, until the writing was on the wall, with every violent means at hand.⁹⁰ Nor was the struggle against the Apartheid regime only about voting and legal segregation: it was about concrete economic and social inequality. South Africa was not only legally racist; it had one of the world's worst situations of income inequality, with the white minority earning on average about eight times the income of the black majority⁹¹ — roughly the difference between the richest 20% and the poorest 20% of Canadians, only in South Africa it was the richest 13% and the poorest 75%. Not only a monopoly of legal power, but a monopoly of private property: 87% of the land and 95% of the productive capital, with 80% of the shares quoted on the Johannesburg Stock Exchange being held by four white conglomerates. This is what the whites tried to keep the same while changing everything. They tried, in the words of Albie Sachs (a white hero of the anti-apartheid movement who was maimed in a murderous attack by South African authorities), to “privatize apartheid” by making redistribution impossible through a classic property-protecting Bill of Rights. According to Sachs:

The attack on majoritarianism, which underlies many arguments in favour of a bill of rights, is manifestly racist, since South Africa has been governed without a bill of rights and in accordance with the principles of majority rule (for the minority!) since the Union of South Africa was created in 1910. It is only now that the majority promises to be black, that constitutional doubts and the need for checks and balances suddenly become allegedly self-evident.⁹²

90 Johan van der Walt, “The Human Rights Debate in South Africa: A Historical and Historicist Perspective”, in Roel de Lange, Gerritt van Maanen and van der Walt, eds., *Human Rights and Property: A Bill of Rights in a Constitution for a New South Africa* (Ars Aequi Libri, 1993); Steven Mufson, “South Africa 1990”, (1991) 70 *Foreign Affairs* 121; Laurence Harris, “South Africa’s Economic and Social Transformation: From ‘No Middle Road’ to ‘No Alternative’”, (1993) 57 *S. African Pol. Econ.* 91, at 100.

91 Leo Katzen, “South Africa: Economy” in *Africa South of the Sahara*, (Europa Publications Ltd., 23rd ed., 1994).

92 Albie Sachs, “Towards a Bill of Rights for a Democratic South Africa”, (1989) 12 *Hastings Int’l & Comp. L.R.* 289, at 294.

In the Lampedusa-like words of one former security functionary: "What we are trying to do is make sure that no future government has the power we did".⁹³ A bill of rights administered by the all-white South African judiciary could be expected to protect the substance of the racist power structure even while changing its form to a nominally democratic one.

It is true that by the time Nelson Mandela was released from prison the ANC had declared itself converted to the idea of constitutional limitations on sovereignty; indeed, a constitutional bill of rights administered by an independent judiciary became the centrepiece of the transfer of power to blacks through universal suffrage. While, in 1989, Sachs eschewed judicial review and argued for a "democratic" Bill of Rights to be administered by a non-judicial body under the model of the human rights commission, in other words accountable to the majority, his views underwent a radical change in a very short time. Two years later he saw nothing wrong with a judicial bill of rights:

We must acknowledge, too, that although for our part we on the anti-apartheid side have long stood almost alone in supporting the idea of a democratic constitution based on universal franchise, only now are many of us beginning to understand the full implications of constitutionalism, and especially of an entrenched bill of rights. Suddenly we are realizing that constitutionalism, far from being a brake on democracy, offers the best chance of realizing the non-racial ideals set out in the Freedom Charter.⁹⁴

However, the resulting constitution, really a work in progress since 1994, is a far cry from the socialist action programme of the Freedom Charter.⁹⁵ In its 1997 version, the South African constitution is full of vague and contradictory declarations of rights that at the same time

93 Steven Mufson, *supra* n. 90, at 137.

94 Albie Sachs, *Advancing Human Rights in South Africa* (Capetown, Oxford University Press, 1992).

95 E.g., the Freedom Charter contained such proclamations as:

"The national wealth of our country, the heritage of all South Africans, shall be restored to the people.

The mineral wealth beneath the soil, the banks and monopoly industry shall be transferred to the ownership of the people as a whole. ..." in de Lange, van Maanen and van der Walt, eds., *supra* n. 90, at 96.

prevent, allow and enjoin the redistribution of economic power.⁹⁶ The concrete meaning of these rights are left to be determined by a combination of the ordinary courts and a new Constitutional Court. Whites are entirely in control of the ordinary courts.⁹⁷ Even the Constitutional Court retains a lopsided white, albeit liberal white, majority.⁹⁸ The legal profession has an important, constitutionally designated nomination role in the "Judicial Service Commission" where eight of twenty-three members have to be lawyers, and government-linked appointees have only a slight majority (perhaps twelve of twenty-three). Almost all nominations for important judicial posts must come from this body.⁹⁹ As the legal profession evolves, the courts may change their colour but they are unlikely to change their class composition. In the meantime, international economic pressure can be expected to be sufficient to keep the ANC respectful of the guarantees of white economic power, the way even isolated Zimbabwe has respected white minority guarantees many years after their constitutional protection has expired.¹⁰⁰ In fact, at the same time Nelson Mandela announced to the world's business leaders in Davos Switzerland that there would be a judicially-enforced Bill of Rights in the new South African constitution, he also announced that

96 See, for example, the complicated property section, Art. 25 which guarantees property rights and "just and equitable" compensation "approved by a court", in the limited circumstances permitted for expropriation, which, however, include "the nation's commitment to land reform". The same provision commits the state to "take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis".

97 Ziyad Motala, "Independence of the Judiciary, Prospects and Limitations of Judicial Review in Terms of the United States Model in a New South African Legal Order: Towards an Alternative Judicial Structure", (1991) 55 Albany L.R. 367, at 383, n. 117, 384-386.

98 See the Court's website <<http://sunsite.wits.ac.za/law/court/conjuris.html>> for biographies of the judges. Albie Sachs is one of them. The tenure is a relatively long 12 years: Constitution of the Republic of South Africa, 1996, Art. 176.

99 *Ibid.*, Art. 174.

100 Clement Ng'ong'ola, "The Post-Colonial Era in Relation to Land Expropriation Laws in Botswana, Malawi, Zambia and Zimbabwe", (1992) 41 Int'l Comp. L.Q. 117, at 134; Ali A. Mazrui, "Planned Governance and the Liberal Revival in Africa: The Paradox of Anticipation", (1992) 25 Cornell Int'l L.J. 541, at 548-549. Seven years after the constitutional guarantees had expired, Zimbabwe had yet to act on its legal right to redistribute land from the 4,000 white farmers who own half of the arable land to the 8 million black farmers who live on the other half. *International Herald Tribune*, January 24-25, 1998; February 16, 1998.

no new investments after the suspension of sanctions would be nationalized and that South Africa would have a mixed economy with a public sector no bigger than Western Europe.¹⁰¹ The new constitution of South Africa, then, seems to have been part of a programme to re-assure the economic powers of the world that, despite all of the big changes, the essentials would remain the same.

So, without pretending to have dealt with all the important constitutional developments of this century, and leaving Israel apart for now, a pretty strong case can be made for the anti-democratic thesis, to put it mildly.

The Proof of the Pudding is in the Eating

But even if we take it as established that modern constitutionalism was inspired by a desire to change everything, constitutionally speaking, so that everything, oligarchically speaking, would remain the same, that does not mean that it actually did so. The best laid plans of jurists and conservative politicians can *gang* just as *agley* as those of mice and men. What has been the real effect of these anti-democratic constitutions and the judicial review that stands guard over them? Taking Dworkin's "result-driven" approach on its own terms, has constitutional judicial review shown itself to be the "institutional structure ... best calculated to produce the best answers to the ... question of what the democratic conditions are, and to secure stable compliance with these conditions?" What does the constitutional jurisprudence reveal?

Let us begin with the example familiar to everyone, the United States of America. If the Supreme Court of the United States had a well-deserved reputation for conservatism in the first half of the twentieth century, it gained a new one for liberalism in the third quarter. After a conservative post-war start with decisions upholding the McCarthy period's fanatical persecution of the Left,¹⁰² by the mid-fifties the Court seemed to have turned over a completely new leaf. Under the leadership of Earl Warren (a famous back-fire according to the President who nominated him) the Supreme Court started on a path of liberalism

101 *The Globe and Mail*, 3 February 1992, p. A1.

102 *American Communications Association v. Douds* 339 U.S. 382 (1950); *Dennis v. United States* 341 U.S. 494 (1951).

unmatched in its history. In 1954 it ordered de-segregation of the Southern schools;¹⁰³ in the 1960s it vastly expanded the rights of those accused of crime with its broad interpretation of the "due process" clause.¹⁰⁴ In 1973, a further expansive reading of the due process clause decriminalized abortion, then a crime in almost every state of the nation.¹⁰⁵

Taken by themselves, the decisions of this period had strong democratizing elements to them. The desegregation cases tended to enhance the educational opportunities for black children and equalize them with those of white children. The criminal procedure rights tended to give resources to persons accused of crime, overwhelmingly poor and disproportionately black. The abortion decisions tended to give women, especially poor women and, once again, disproportionately black women, control over their child-bearing, which allowed them to delay parenthood and to increase their earning power and hence their autonomy.

However, these initiatives of the Supreme Court were all severely limited in ways characteristic of modern constitutional politics. Because this "democratization" ignored discrimination on the basis of class, it could have no effect on the major impediment to real, everyday equality of power faced by most blacks and most women.¹⁰⁶

Public schools had to desegregate, but neighbourhoods and private schools could still segregate by wealth, and this was far more important, it turns out, than the colour barrier. Whites were able to avoid the impact of the limited rulings of the Court by abandoning the new integrated public schools in favour of private and suburban schools.¹⁰⁷ Those left in public schools were condemned to "drugs, gangs and crime, while their scores on standardized achievement tests decline[d]".¹⁰⁸ The economic barrier had replaced the colour barrier.

103 *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954).

104 *Mapp v. Ohio*, 367 U.S. 643 (1961); *Miranda v. Arizona*, 384 U.S. 436 (1966).

105 *Roe v. Wade*, 410 U.S. 113 (1973).

106 A 1998 report of the Milton S. Eisenhower Foundation says that despite gains by black elites, the mass of black people in the U.S. suffer from its increasing class inequality: "The rich are getting richer and the poor are getting poorer and minorities are suffering disproportionately" (*International Herald Tribune*, March 2, 1998, p. 3).

107 Raina Brubaker, "Missouri v. Jenkins: Widening the Mistakes of *Milliken v. Bradley*", (1996) 46 Case Western Reserve L.R. 579.

108 ArLynn Lieber Presser, "Broken Dreams", (May, 1991) Am. Bar Association J. 60. According to the report of the Eisenhower Foundation, *supra* n. 106: "40 percent of minority children attend urban schools, where more than half of the students are poor and fail to reach even 'basic achievement levels'".

For the same reason, the provision of due process rights in criminal procedure made absolutely no difference to the rate of punishment in the United States, as imprisonment rates skyrocketed and the racial nature of punishment remained unchanged. Because it was poverty that was the major factor in crime and punishment, not the fairness or unfair trials.¹⁰⁹ The only ones able to take advantage of the due process rules were the powerful criminals: the corporate criminals, the racists and the O.J. Simpsons.¹¹⁰ As for the rest, by the beginning of this decade the United States had the highest per capita prison population in the world and imprisoned more black people per capita than apartheid South Africa.¹¹¹

The radical exclusion of questions of poverty from the constitutional equation became explicit in the abortion jurisprudence when the Supreme Court, having forbidden the states from making abortion a crime, approved of the denial of medicare for the now-legal procedure.¹¹² In doing so, the Court was merely affirming the radical distinction between political equality and economic inequality, between "public" and "private". The state could not put up its own obstacles to women's equality, but it was under no duty to intervene when economic power did. Adherence to this distinction reached its absurd zenith when the Supreme Court held that a state could deny all public facilities to women seeking abortions without violating the constitution.¹¹³ In 1992, *Roe v. Wade* was more or less overruled altogether.¹¹⁴

In fact, not very long after *Roe v. Wade* was originally decided, the Supreme Court returned to its historic position on the right of the very right-skewed spectrum of American politics. In 1976 it put its stamp of approval on the death penalty, after calling it into question a few years previous.¹¹⁵ The United States now has the distinction of being the only

109 Mandel, *supra* n. 12, at 185-91.

110 *Ibid.*, at 229-240.

111 Marc Mauer, "Americans Behind Bars — A Comparison of International Rates of Incarceration", in Ward Churchill and J.J. Vander Wall, eds., *Cages of Steel: The Politics of Imprisonment in the United States*, (Maisonneuve Press, 1992). "With 1.5 million prisoners, the United States incarcerates more people than any nation in the world, and one young African-American man in three is in prison, on parole or on probation". *International Herald Tribune*, March 2, 1998, p. 3.

112 *Beal v. Doe*, 432 U.S. 438 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

113 *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989).

114 *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992).

115 *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

country in the West to execute criminals. Blacks are about four times over-represented on the various death rows, which now dispatch one victim every five days, usually by lethal injection.¹¹⁶ Naturally, they have almost all had the fairest trials that judicial review can provide, but what can be the role of due process in this context but *legitimation*, that is to make us feel better about a system that in its violence and inequality is getting worse all the time?¹¹⁷ In fact, it has been argued that the main point of the otherwise ineffective desegregation decisions of the 1950s was to legitimate the United States in the eyes of the world of the Cold War on its most vulnerable point.¹¹⁸ Certainly the purveyance on television of a violent and racist criminal justice system as essentially humane on account of its “constitutional rights” is one of America’s most staple cultural exports.

But the jurisprudence of the Supreme Court of the United States has not only ignored and legitimated inequality; it has entrenched and enforced it. Probably the most important development came in 1976 when in the case of *Buckley v. Valeo* it struck down limits on election campaign spending as a violation of the First Amendment guarantee of “freedom of speech”.¹¹⁹ The court equated “freedom” with the freedom of the wealthy few to throw their economic weight around, “free” of any democratic restraint. In other words it used “freedom” to protect the freedom of “one dollar, one vote” from the threat of “one person, one vote”. The impact?

The electoral system in the United States is in severe crisis, a crisis typified by low voter turnout, a narrow range of debate where substantive issues are studiously ignored, a degree of depoliticization that makes perfect sense for such a vapid political culture. The current system elevates people with no credentials, but vast inherited fortunes, to almost automatic political prominence — like Steve Forbes, Michael Huffington and U.S. Senator Herb Kohl to mention

116 *McCleskey v. Kemp*, 481 U.S. 279 (1987). Blacks account for 1,349 of the 3,219 prisoners on death row. Of the 358 executions between 1977 and November 30, 1997, 200 were of black prisoners. In the first 11 months of 1997 there were 70 executions: U.S. Department of Justice, “Prisoner Executions Rise Significantly”, Press Release of December 14, 1997. <<http://www.ojp.usdoj.gov/bjs/pub/press/cp96.pr>>

117 Mandel, *supra* n. 12, at 220-228.

118 Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (University of Chicago Press, 1991) at 156, 159.

119 *Buckley v. Valeo*, 424 U.S. 1 (1976).

just a few — while marginalizing dedicated citizens with lifetimes of public service (but who refuse large contributions on principle) like Ralph Nader. The cash-driven electoral system is not the only factor that explains the decrepit state of U.S. politics, but it is among the prime culprits.

...

In the hands of the wealthy, the advertisers and the corporate media, the new-fangled First Amendment takes on an almost Orwellian caste. It defends the right of the wealthy few to effectively control our electoral system, thereby taking the risk out of democracy for the rich, and making a farce of it for most everyone else.¹²⁰

Buckley remains an unquestioned fixture of American constitutional jurisprudence,¹²¹ but it is far from alone in its defence of inequality of power against democracy. Another important contribution is the assault on affirmative action that started with *Bakke* in 1978¹²² and continues to this day.¹²³ Here the court came to the defence of the accumulated privileges of class, race and gender, which give enormous advantages in the competition for scarce higher education and job opportunities, and which thus tend to perpetuate themselves if left alone. Various legislatures, responding to the logic of “one person, one vote” had intervened “affirmatively” in the marketplace to break the vicious circle and share out the available positions on a more equal basis. Candidates from under-represented groups were preferred in order to help them reach a proportion that reflected their demographic representation. This was “reverse discrimination” because it was in favour of those who had typically been discriminated *against*, most notably non-whites and women.

120 Robert W. McChesney, “The New Theology of the First Amendment: Class Privilege Over Democracy” (1998) 49 *Monthly Review*, No. 10, 17 at 19, 32.

121 *Federal Election Commission v. National Conservative Political Action Committee (NCPAC)*, 470 U.S. 480 (1985); Geoffrey M. Wardle, “Time to Develop a Post-*Buckley* Approach to Regulating the Contributions and Expenditures of Political Parties: *Federal Election Commission v. Colorado Republican Federal Campaign Committee*”, (1996) 46 *Case Western Reserve L.R.* 603.

122 *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

123 *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors Inc. v. Federico Pena, Secretary of Transportation et al.* 115 S.Ct. 2097 (1995); Sionaidh Douglas-Scott, “Affirmative Action in the U.S. Supreme Court: The *Adarand* Case — The Final Chapter?”, (1997) *Public Law* 43.

But the court put its foot down: if the state could (no longer) intervene against, it could not intervene in favour. The only permissible case was where the intervention was to redress proven prior forbidden discrimination by the specific institution in question. According to the Court, the pure discrimination of the marketplace was sacred. Here, as elsewhere, the “tyranny of the majority” compared very favourably with what the court served up:

The contemporary debate over judicial review is at a loss with respect to consistent legislative protection of individual rights. The debate accepts the simplistic view that majorities are always interested in violating the rights of minorities. This makes it difficult to explain why Congress is able to produce consistent majorities in favour of civil rights and liberties legislation.¹²⁴

So the United States Supreme Court, pretty much throughout its history, has done its best to protect private power from the dangers of democracy. It has not only respected the lines between public and private, it has *policed* them. It has made democracy safe for the oligarchy of wealth. Its modest but much celebrated actions against official discrimination should be seen merely as the logical expression of the free market: all the sexual and racial equality you can buy. As for the rest, a desperate attempt at the legitimation of inequality: due process in a savage criminal justice system and equal access to a deteriorating public sphere.

What about the constitutional jurisprudence of the rest of the world? Is it possible to say anything meaningful about such a vast field, with courts and lawyers producing jurisprudence in so many different languages at such a hair-raising pace? It turns out that the new prominence of constitutional courts in scholarship and in the media, and even the oppressive uniformity imposed by globalization, have made it possible to go beyond one's own linguistic limitations (especially if English is one of one's languages!) and, I believe, to make some broad judgments about the democratic question in global constitutional politics.

Post-war constitutional jurisprudence has shown an unmistakable predilection for the defence of economic power against the threat of democracy, mainly through the protection of private property rights and the prerogatives of business. In Italy, for example, the Constitutional

124 Stephen M. Griffin, *supra* n. 55, at 116.

Court weighed in almost immediately against the obligations imposed on landowners with respect to employment that was a product of the post-war involvement of the Communists in government. Its emphasis on property and entrepreneurial rights also thwarted urban planning and environmental regulation in the nineteen-sixties and seventies. The Italian Constitutional Court also bears responsibility for the privatization of public television and the growth of the unregulated mass media empires of the nineteen-eighties (which inevitably became political empires), even if the judges did try to lock the barn door well after the horses had escaped with some totally ineffectual *obiter* statements in the 1990s.¹²⁵ The French Constitutional Council, after sleepily shoring up the status quo during the Gaullist years, came to life against the first Socialist government of the Fifth Republic. Composed mainly of judges appointed by the previous rightist regime, it was very successful in weighting down Mitterand's Socialist nationalization programme so heavily with compensation payments that it ultimately had to be abandoned.¹²⁶ The German Court, in similar circumstances successfully fought the reformist programs of the first post-war Social Democratic governments under Brandt and Schmidt.¹²⁷ In Canada, the Supreme Court of Canada followed the lead of the Supreme Court of the United States and used "freedom of expression" to entrench the fundamental human right of tobacco companies to advertise their lethal products.¹²⁸ And, though the Supreme Court found "freedom of association" robust enough to include the right of companies to merge,¹²⁹ it looked and looked but could not find any room for the right to collective bargaining, much less the right to strike.¹³⁰ Canadian courts have also ensured that through four federal elections and one national referendum there have been no controls on campaign spending because, following the inexorable one-dollar-one-vote logic of *Buckley*, they struck them down as an interfer-

125 Michael Mandel, "Legal Politics Italian Style", in C. Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power* (New York University Press, 1995) 261, at 268-272.

126 Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford University Press, 1992) Chapter 3; Alistair Cole, *François Mitterand. A Study in Political Leadership* (Routledge, 2nd ed., 1997) 34.

127 Alec Stone, "Judging Socialist Reform: The Politics of Coordinate Construction in France and Germany", (1994) 26 *Comp. Political Studies* 443.

128 *RJR-MacDonald Inc. v. Canada (Attorney General)*, (1995), 127 D.L.R. (4th) 1.

129 *Black v. Law Society of Alberta* (1989), 58 D.L.R. (4th) 317.

130 Michael Mandel, *supra* n. 12, at 264-288.

ence with "freedom of expression". The war between various Congress governments and the Supreme Court of India over land reform is very well documented.¹³¹ In Chile, the war was shorter but the outcome more tragic as the Supreme Court systematically thwarted President Salvatore Allende's attempts to socialize the economy.¹³² In Mexico, despite an abundance of "social rights" and a commitment to redistribute land in the revolutionary constitution of 1917, the Supreme Court was able to reverse the gains of the Cardenas era by extending *amparo* to large landowners. A study of the Supreme Court's *amparo* decisions between 1917 and 1960 concluded that "Mexican judicial independence has benefited primarily the old landholding class and the new bourgeois interests ... corporate employers, financial institutions, and businessmen of urban Mexico".¹³³ Thus, despite a radical constitution and an independent court, social and economic inequality in Mexico remains huge and growing.¹³⁴ Cuba, one of the very few countries without judicial review in Latin America — the Constitution assigns enforcement of the many rights in the constitution to the National Assembly¹³⁵ — fares much better on social equality measures than any of its neighbours (and its political rights record is at least no worse).¹³⁶

This much-debated question of "social rights" in constitutions provides yet another taste of the pudding of modern constitutionalism. These rights may seem at first sight to contradict the idea of constitutions as being against democracy, because they seem to require the state to act against the inequality of the marketplace. For instance, Article 3 of the Italian Constitution of 1948 provides in its second paragraph:

131 H.C.L. Merillat, *Land and the Constitution of India* (Columbia University Press, 1970); W.H. Morris-Jones, "The Politics of the Indian Constitution (1950)", in Vernon Bogdanor, ed., *Constitutions in Democratic Politics* (Gower, 1988).

132 Neal P. Panish, "Chile Under Allende: The Decline of the Judiciary and the Rise of a State of Necessity", (1987) 9 *Loy. L. A. Int'l & Comp. L.J.* 693.

133 Carl Schwarz, "Judges Under the Shadow: Judicial Independence in the United States and Mexico", (1973) 3 *Calif. W. Int'l L.J.* 260.

134 Michael C. Meyer and William L. Sherman, *The Course of Mexican History* (Oxford University Press, 1991); James W. Russell, "Mexico's Rising Inequality", (1997) 49 *Monthly Review*, No. 7, at 28.

135 Constitution of the Republic of Cuba 1976 (as amended), Art. 75(c).

136 Benjamin Keen, ed., *Latin American Civilization: History and Society, 1492 to the Present*, (Westview Press, 6th ed., 1996) 392; "Women's Equality in Cuba: What Difference Does a Revolution Make?", (1986) 4 *Law and Inequality* 295; *International Herald Tribune*, April 22, 1998, p. 1.

It is the duty of the Republic to remove those obstacles of an economic or social nature that, limiting in fact the freedom and equality of citizens, impede the full development of the human person and the effective participation of all of the workers in the political, economic and social organization of the nation.

This radical text and others like it were included thanks to the strong presence of the Left in the Italian Constituent Assembly, and they were written in terms as exigent as the classic rights against the state found in liberal constitutions like that of the U.S.A. However, despite the text, the Italian Constitutional Court quickly and permanently degraded them to second class “programmatic” (i.e. unenforceable) status.¹³⁷ The Japanese Court used the same designation to demote the much milder provisions in 1947 Constitution,¹³⁸ and the South African Court seems to be on the same path, both against and in line with the wording of the constitution.¹³⁹ The European Court of Justice did likewise, systematically reducing social rights against market power to “soft law” status. Even worse, with very little textual support, it transformed the Treaty of Rome into a free-trade constitution for Europe and created “a transnational capitalist society”.¹⁴⁰ The demotion of social rights in the European Community has also become explicit, for example in the

137 Mandel, *supra* n. 24, at 272-276.

138 Akira Osuka, “Welfare Rights” in Percy R. Luney, Jr., and Kazuyuki Takahashi, eds., *Japanese Constitutional Law*, (University of Tokyo Press, 1993) 269. The general passivity of the court, punctuated by the occasional defence of property rights, is usually attributed to its seeing eye-to-eye with the conservative LDP governments that have ruled Japan since the war. See Yasuhiro Okudaira, “Forty Years of the Constitution and Its Various Influences: Japanese, American and European”, *ibid.*, at 24 and Mutsuo Nakamura, “Freedom of Economic Activities and the Right to Property”, *ibid.*, at 255.

139 *Soobramoney v. Minister of Health (KwaZulu-Natal)*, CCT 32/97 (Constitutional Court, 26 November 1997), where the textually unqualified “right to life” was held to be subject to available resources in a kidney dialysis case. The constitution also explicitly makes many of the social rights subject to “reasonable legislative and other measures, within ... available resources, to achieve the progressive realisation of this right”. The Constitution of the Republic of South Africa 1996, (sec. 27 — Health care, food, water and social security).

140 Carlos A. Ball, “The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy, and Individual Rights Under the European Community’s Legal Order”, (1996) 37 *Harv. Int’l L.J.* 307; Stephen Weatherill and Paul Beaumont, *EC Law* (Penguin Books, 1993) 432.

explicitly unenforceable "Solemn Declaration" of 1989 and the Social Protocol to the Maastricht Treaty of 1992. A similar demotion can be found when comparing the judicial enforcement mechanism for the European Convention on Human Rights with the reporting system of the European Social Charter.¹⁴¹

What can we make of these social rights and their uniformly second-class status? In the first place, it cannot be repeated too often that there is no technical reason why positive social rights in a constitution cannot be judicially enforceable. An example is section 23 of the *Canadian Charter of Rights and Freedoms* which, in great detail, imposes obligations on governments to provide minority language education facilities at public expense, enforceable and enforced against Quebec's attempts to make immigrants to the province enter the French educational system.¹⁴² Naturally, this was part of the Canadian federal government's constitutional war against the independentist government of Quebec, but that only shows what magic can be worked on constitutional law when there is sufficient backing by powerful interests.

The Italian jurist Piero Calamandrei argued in 1950 that unenforceable constitutional social rights were essentially intended to deceive, that the Left proposed them out of weakness and the Right accepted them because it knew that they were harmless:

Thus to compensate the forces of the Left for the missed revolution, the forces of the Right did not oppose the gathering up in the constitution of a *promised* revolution ... well knowing that, once the moment of crisis had passed, the reforming impulses would lose their urgency, and, once they had ceased to boil, could remain in waiting for another century (emphasis in original).¹⁴³

141 Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) and *European Social Charter* (1950); David Harris, *The European Social Charter*, (University Press of Virginia, 1988). Neither the *International Covenant on Civil and Political Rights* nor the *International Covenant on Economic and Social Rights*, administered by the United Nations, rises above unenforceable soft law. See Benedetto Conforti, *The Law and Practice of the United Nations* (Kluwer, 1996) at 137-140.

142 *Attorney General of Québec v. Québec Protestant School Boards*, (1984), 10 D.L.R. (4th) 321 (Supreme Court of Canada).

143 Piero Calamandrei, "Cenni introduttivi sulla costituente e sui suoi lavori", in Norberto Bobbio, ed., *Piero Calamandrei, Scritti e discorsi politici*, (La Nuova Italia, Vol. 2, 1966), 461-462 (my translation).

The same explanation has been given for the "Solemn Declaration" on Workers Rights of 1989 of the European Community, namely as a costless way to appear to compensate the workers for the very concrete and pro-business market integration of the European Single Act of 1987.¹⁴⁴ In Canada, a generation of claims for the material wherewithal to enable aboriginal communities to pull themselves out of their imposed poverty have been met with soft-law promises of every imaginable sort from constitutions, courts and constitutional reform processes.¹⁴⁵ In Mexico, the indigenous peoples asked "that the lands that were always ours be given back to us" and demanded "electricity, roads, drinking water" and "modern technologies indigenous peoples require to initiate their economic and social development". Both before and even after the discontent boiled over in the Chiapas rebellion, the Mexican government was willing to offer only unenforceable constitutional recognitions of the "pluricultural composition" of Mexico "originally based on its indigenous peoples" and unacted-upon constitutional promises that "the law shall protect and promote the development of their languages, cultures, uses, customs, resources and specific forms of social organization, and shall guarantee their members effective access to the jurisdiction of the State".¹⁴⁶

Modern social democratic governments seem to have embraced soft constitutional social rights as a way of deradicalizing their programmes and legitimizing their failures to achieve anything concrete for their supporters. The New Democratic Party government of Bob Rae in Ontario abandoned its mildly socialist election platform under withering business opposition and instead jumped on a bandwagon of unenforceable social rights, with business' enthusiastic approval.¹⁴⁷ In Britain, Tony Blair's Labour government seems to have made its great fanfare of adhering to the unenforceable Social Chapter of the Maastricht Treaty for the same reason.¹⁴⁸ This might also be a way of understanding British Labour's largely symbolic incorporation of the European Con-

144 Stephen J. Silvia, "The Social Charter of the European Community: A Defeat for European Labour", (1991) 44 *Industrial and Labor Relations R.* 626.

145 Mandel, *supra* n. 12, at 354-369.

146 Jorge A. Vargas, "Mexico's Legal Revolution: An Appraisal of Its Recent Constitutional Changes, 1988-1995", (1996) 25 *Ga. Int'l & Comp. L.* 497, at 546-548. "Mexico Gets Chiapas Bill," *International Herald Tribune*, March 17, 1998, p. 3.

147 Mandel, *supra* n. 12, at 109-112, 124-125.

148 Ewen MacAskill and Ian Black, "Cook Sets New Tone on Europe", *The Guardian*, May 5, 1997.

vention on Human Rights into English Law.¹⁴⁹ Indeed, from Britain to Canada to Mexico to South Africa to Italy,¹⁵⁰ the world seems to be seized by the disease of what Peter Russell has called "mega-constitutionalism",¹⁵¹ where constitutional reform becomes a way of life and every aspiration for dignity and equality that is denied in concrete, everyday practice by free-trading, globalizing governments is solemnly packed into constitutional proposals "to remain in waiting for another century".

The motto of the modern constitutional reformers might well be "Say the right thing!"

But let us return to the jurisprudence of the world. In the field of politics, there has been a persistent tendency of constitutional courts to protect the status quo of social power in crude and subtle ways: the banning of the Communist party by the German Constitutional Court in the 50s that was the start of a general war on the Left,¹⁵² the Mexican Court's *amparo* decisions against radical labour leaders and student protesters in the 60s,¹⁵³ and the Chilean Supreme Court's stamp of approval of the bloody Pinochet coup as a legal act to remove a "flagrantly illegitimate" government, followed by the refusal to entertain appeals against the human rights abuses of the dictatorship—¹⁵⁴ the President of the Chilean Court, Enrique Urratia Manzano, wasn't kidding when he placed the band of office on Pinochet and declared "I put the judiciary in your hands".¹⁵⁵ For a generation now, the Canadian Supreme Court has been battling the Quebec independence movement with fair means and foul on behalf of English Canada and the federal government that appoints it, changing its jurisprudence at will, from hard-line when the independentists are in power in the province to soft-line when federalists are in power.¹⁵⁶

149 See the Human Rights Bill [H.L.] 1998.

150 Commissione Bicamerale, *Testo approvato il 4 novembre 1997: Progetto di Legge Costituzionale*.

151 Peter H. Russell, *Constitutional Odyssey* (University of Toronto Press, 1992).

152 Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, (Duke University Press, 2nd ed., 1997), at 222-224.

153 Schwarz, *supra* n. 32.

154 Watson W. Galleher, "State Repression's Facade of Legality: The Military Courts in Chile", (1988) 2 Temp. Int'l & Comp. L.J. 183.

155 Owen M. Fiss, "The Limits of Judicial Independence", (1993) 25 Inter-American L.R. 1, at 75.

156 Mandel, *supra* n. 12, at 127-176.

But, really, have they done nothing right? Is this not altogether too one-sided? It is true that, as in the United States, the world's constitutional courts have been fairly good on the question of legal discrimination, especially against women. In the late 1960s the Italian Constitutional Court started to dismantle the subordinate position of women in Italian family law, although this was about a generation after equality had been written into the constitution. The Italian Court also led the way in abortion rights.¹⁵⁷ On the other hand, the German Constitutional Court notoriously dragged its feet on abortion and set back reform in both 1975 and 1993.¹⁵⁸ And, though the German Court set its face against discrimination against women in nocturnal employment, it must be said that this was at the instance of the employer who was charged with the offence of hiring them.¹⁵⁹ In Canada, women's equality rights in sports, labour relations and taxation have divided women themselves, often pitting individual women, not against men, but against most other women.¹⁶⁰ In the same way, the pension and welfare equalization undertaken by some courts, especially the Italian Constitutional Court, has had a tendency to benefit one class of recipient only at the expense of another, because the judgments never require a bigger portion of the budget to be allocated to welfare than is hammered out in political bargaining and Euro calculations.¹⁶¹

Several constitutional courts have, like the United States Supreme Court, even set up obstacles against affirmative action in favour of women.¹⁶² Both the Italian Constitutional Court and the French Constitutional Council have opposed legislated quota for women candidates in

157 Mandel, *supra* n. 125, at 273.

158 Kommers, *supra* n. 152, at 335-356.

159 *Ibid.*, at 291-295.

160 Mandel, *supra* n. 12, at 399-405, 443-452.

161 Mandel, *supra* n. 125, at 273. A recent decision of the Italian Constitutional Court struck down as "unreasonable" the exclusion of new couples *with* children from the special list for access to public housing, which was formerly restricted to new couples *without* children. The decision no doubt expanded the special list, but it did nothing to increase "the limited availability of residential public housing which renders very difficult, in concrete terms, its assignment to those who are only on the general list". The gain of these couples would have to be at the expense of others similarly situated. Sentenza 18 febbraio 1998, No. 17 *Gazzetta Ufficiale della Repubblica italiana*, Anno 139 — Numero 8 at 18 (my translation).

162 The Indian Supreme Court opposed affirmative action in education as early as 1962: W.H. Morris-Jones, *supra* n. 131, at 135.

elections.¹⁶³ And the Canadian Court struck down the extra protection given to women in rape trials as an interference with the rights of the accused.¹⁶⁴ It was regarded as a *victory* recently when the European Court of Justice *permitted* affirmative action in Europe, reversing its prior jurisprudence of just two years previous.¹⁶⁵ It seems to have been forgotten that one does not need a Bill of Rights or a constitutional court to uphold legislative action.

One did not need the German Constitutional Court or the European Court of Human Rights to sustain the banning of Holocaust denier David Irving¹⁶⁶ or to uphold the conviction of his colleague Robert Faurisson,¹⁶⁷ but only a constitutional Bill of Rights could have allowed the Supreme Court of Canada to free Ernst Zundel, one of the world's great purveyors of Holocaust denial literature. In overturning his conviction by two juries, the court compared Zundel to Salman Rushdie and said that, in Canada, freedom of expression guaranteed the right to tell deliberate Nazi lies.¹⁶⁸

The world's courts have also been excellent defenders of the procedural rights of criminal accused and refugee applicants. But this has not prevented prison populations from skyrocketing and the rich countries from closing their borders.¹⁶⁹ The flimsiness of "rigid" constitutions has especially been demonstrated in refugee law. After the constitutional courts of Germany and France had found their summary measures for expelling refugee applicants unconstitutional, their governments, with the help of the Socialist opposition parties, easily found enough votes to overcome the special majorities necessary to amend their constitutions and reverse the holdings. The excuse was the rise in racist and even neo-Nazi violence against immigrants — oh, the lessons of World War II!¹⁷⁰

163 *Corte costituzionale*, Sentenza 12 settembre 1995, n. 422; *Conseil constitutionnel*, decision no. 82-146, 18 November 1982 (reproduced in John Bell, *French Constitutional Law*, (Oxford University Press, 1992) 349-352.

164 Mandel, *supra* n. 12, at 383-389.

165 "Women Win Job Ruling", *Guardian Weekly*, November 23, 1997.

166 Kommers, *supra* n. 152, at 382-387.

167 *Faurisson v. France*, (1996) 17 Human Rights L.J. 253.

168 Mandel, *supra* n. 12, at 369-376.

169 Mandel, *supra* n. 12, at 240-257; *supra* n. 125, at 276-279.

170 Kay Heilbronner, "The Concept of "Safe Country" and the Expedient Asylum Procedures: A Western European Perspective", (1993) 5 *International Journal of Refugee Law* 46-48; Susan Soltesz, "Implications of the Conseil Constitutionnel's Immigration and Asylum Decision of August 1993", (1995) 18 *Boston College Int. & Comp. L.R.* 265; "Germany Turns Back Would-Be Refugees", *The Globe and Mail*, July 2, 1993, p. 1.

*Democracy and Judicial Review in Theory:
Ronald Dworkin Tells a Lawyer's Joke*

No doubt the account in the previous sections has been greatly oversimplified. Because of time constraints, I have been unable to deal as subtly as I would have liked with some of the more difficult questions, to even address some questions at all, or to give potential counterexamples the attention they deserve. But I think we can fairly proceed on the assumption that the total historical and empirical picture of the new constitutionalism is consistent with what has been described.

Now, given this historical and empirical reality, how could anyone maintain that judicial review is "the essence of democracy"? Or, more modestly, neither democratic nor undemocratic in itself? It seems that there are only two logical possibilities: either one has to ignore historical and empirical reality, or one has to re-define democracy to exclude questions of economic power.

Ronald Dworkin does both. Despite his argument that the proof of the pudding is in the eating, you will never find anything remotely resembling an empirical investigation in his work. He seems far more interested in establishing a theoretical space where he can argue, in lawyer's terms, about the correctness or incorrectness of constitutional cases without having to worry about apologizing all the time for judicial review as intrinsically undemocratic. His argument is, therefore, devoted to showing that it is not *necessarily* undemocratic just because it overrules majority will. This seems like a modest objective, but, in carrying it out, Dworkin takes on the monumental task of detaching democracy from majority will altogether, once and for all. His failure is equally monumental, however, and very clearly reveals precisely what is wrong with the defence of judicial review as "not necessarily undemocratic", not to mention "the essence of democracy".

Dworkin's position can be very briefly stated. Democracy, he argues, is fundamentally about treating people as equals. If courts can do that just as well as representative institutions elected by universal suffrage, then it is irrelevant to their democratic character that, in doing so, they overrule majority will. That is why the proof of the pudding is in the eating.

But, wait just a minute! Why is it not a requirement of treating people as equals that their opinions about equality are given equal weight, as in "one person, one vote" (a.k.a. majority will)? When we want to treat people as equals in any context you care to name, at home

or on the Supreme Court of the United States, Canada or Israel, assuming we can't reach a consensus, don't we put matters to a vote?¹⁷¹ And, besides, what would be the grounds for supposing — *all* the evidence to the exact opposite apart — that a majority of judges could judge what is required to treat people as equals better than a majority of the people themselves?

Let's leave these questions for a moment and approach the question the way Dworkin does. His conclusion that majoritarianism is not a necessary ingredient of democracy is based on an argument as to what democracy is fundamentally "about". He examines a number of hypotheses, but the one that reveals the hole in his argument is *equality of political power*. Remember how central this was in the debate about democracy from Aristotle to the last century? Well, according to Dworkin, the reason democracy has no necessary connection to majority rule (the practical equivalent of "one person, one vote") is that it has no practical value in equalizing political power. Why is that? Because it is *economic* power that really counts:

... impact [Dworkin's proxy for power at this point in the argument] is insensitive to what is the most important source of unequal political power in modern democracies, which is the inequality of wealth that allows some people vast opportunity to influence public opinion. Ross Perot and I have only one vote each, but he can buy massive television time to persuade others to his opinion, and I cannot buy any.¹⁷²

Who can deny that, in modern America, a wildly unequal economic power rules over politics like a despot? But can this be an argument against the value of majority rule? Or is it merely the observation that

171 I remember well watching a clip from a Senate debate on Italian television shortly after Giovanni Agnelli, the hereditary owner of FIAT, had been made Senator for Life. Because of his enormous economic power, Agnelli has for the longest time been a powerful force in Italian politics, to be courted by politicians at every opportunity. But, at this moment in the Senate, when Senators were scrambling around in various grouplets before an important vote, I remember being amazed (and, I confess, delighted) to see how poor and forlorn Agnelli looked as he was virtually ignored by the experienced politicians. He had been effectively cut down to size in this forum of one-person-one-vote, where his economic power was, for the time being, irrelevant.

172 Dworkin, *supra* n. 14, at 27.

majority rule does not exist in the United States, that it has been destroyed by economic power? In other words, can such inequality of power really be a *premise* of democratic theory? Is it so inevitable? But Dworkin has not given us the slightest reason why we should give up the fight against economic inequality, why we should not try to turn things around and re-assert the supremacy of “one person, one vote”. In fact, this is a throw-in-the-towel premise, none other than an example of the phenomenon C.B. MacPherson identified of the re-definition of democracy to make it safe for the economic oligarchs. It is not even that far from the definition of democracy given by the supporters of Yeltsin’s “democratic coup”: democracy = capitalist economics.

So Dworkin’s conception of democracy seems to have made the classic error of mistaking the “is” for the “ought”, or at least for the possible. He has mistaken the disease for health. He has taken the pathological case of American democracy and treated it not only as the central case, but the only possible case, leaving nothing for democracy but judicial pronouncements. But, wait another minute! If we look under the rock of judicial review, and return to the last section, we find that judicial review is itself heavily implicated in this pathology of American democracy. It was the Supreme of the United States, as a model for the other constitutional courts around the world, that ruled it to be the essence of democracy and freedom for the wealthy to be free to exercise their economic power no matter what the rest of us voted. It was the Supreme Court of the United States that struck down laws enacted by the “tyrannical majority” to prevent the rich from bending representative government to the will of one dollar, one vote. It was judicial review that forbade controls on campaign spending as a violation of the Bill of Rights and got us in this fix in the first place. Remember:

In the hands of the wealthy, the advertisers and the corporate media, the new-fangled First Amendment takes on an almost Orwellian caste. It defends the right of the wealthy few to effectively control our electoral system, thereby taking the risk out of democracy for the rich, and making a farce of it for most everyone else.¹⁷³

Or to put it in *gattopardesco* terms:

Extending the franchise increased democratization in the United States; the escalating requirements of electoral finance ... have reversed this trend.¹⁷⁴

Question: What is the definition of *chutzpa*? Answer: The lawyer acting for a person charged with murdering his parents who asks for mercy on the ground that his client is an orphan. Next question: How is this different from Dworkin's defence of judicial review on the ground that majority rule is irrelevant because it is impotent against economic power — when it is judicial review that made it so?

Dworkin thinks that *Buckley* was “unfortunate” and he laments “the degeneration of democracy that has been so vivid in recent elections”; however, he thinks the solution is a matter of “develop[ing] a more sophisticated view of what democracy means” for the judges to apply.¹⁷⁵ In fact the only “view” of democracy that would help us out of this mess is the back-to-basics one of majority rule; at least this would have spared us *Buckley*.

However, sometimes it seems that Dworkin's left hand doesn't know what his right hand is doing, because not eight pages before telling us *Buckley* was “unfortunate”, he was demonstrating why it was pretty well inevitable:

... constitutional interpretation is disciplined, under the moral reading, by the requirement of constitutional *integrity* ... Judges may not read their own convictions into the constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges. ... Even a judge who believes that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth, or collective ownership of productive resources, a constitutional re-

174 Edward S. Herman and Robert W. McChesney, *The Global Media: The New Missionaries of Corporate Capitalism* (Cassell, 1997) 147.

175 Dworkin, *supra* n. 14, at 18.

quirement, because that interpretation simply does not fit American history or practice, or the rest of the Constitution...The moral reading asks them to find the best conception of constitutional moral principles—the best understanding of what equal moral status for men and women really requires for example — that fits the broad story of America’s historical record.¹⁷⁶

This is a rich text. In it Dworkin shows how the deck of judicial review is stacked in favour of economic power: *Even a judge who believes that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth, or collective ownership of productive resources, a constitutional requirement.* Even if all the judges believed it, even if it were demonstrably true that equality of wealth and collective ownership were the best, the most just, the most democratic of arrangements, the courts (not the legislatures) would be unable to deliver it — according to their rules, they would have to go on upholding the inequality of economic power, and the protection of that power from majority will, because if there is one thing that fits the “broad story of America’s historical record” that’s it. And notice that this is not because of what is in the puny text of the constitution itself. The text is only the tiniest fraction of the story. The main thing is a regurgitation of America’s history and practice of inequality *whatever the constitution says.* And here we have one of the major techniques of constitutional democracy, another element of its *anti-democracy*, namely its lack of *transparency*. Judges claim to be interpreting texts but they are just giving us the status quo. Their “interpretation” of terms like “equality” and “freedom” starts from hidden premises that take for granted the unequal status quo of social power. Even if Dworkin unrepentantly denies what everybody else affirms, that the constitution is what individual judges say it is, he does not dispute that it is what the judiciary *as a whole* says it is. And who is better suited to “interpret” the constitution and democracy in a way congenial to oligarchy than the judiciary, aided by the legal profession, together forming an elite body that would be able to vote under the most property-restricted franchise imaginable? A body, as Pashukanis pointed out many years ago, that is

176 Dworkin, *supra* n. 14, at 10-11.

independent of the state but not independent of the propertied classes.¹⁷⁷ Here, perhaps, we have the theoretical basis of the old maxim "Revolutions are not fought in the court room!"¹⁷⁸

So judicial review's record of anti-democratic behaviour is no accident and those who chose judicial review as an antidote to democracy chose well. This is one place where history, practice and theory fit each other like a glove.

177 Evgeny B. Pashukanis, *Law and Marxism: A General Theory*, (Pluto Press, 1989) 149, n. 21.

178 Attributed to Maximilien Harden (1861-1927) by Eyck, *supra* n. 23, Vol. II at 416.