THE RELATIVE AUTONOMY of the UNITED STATES SUPREME COURT

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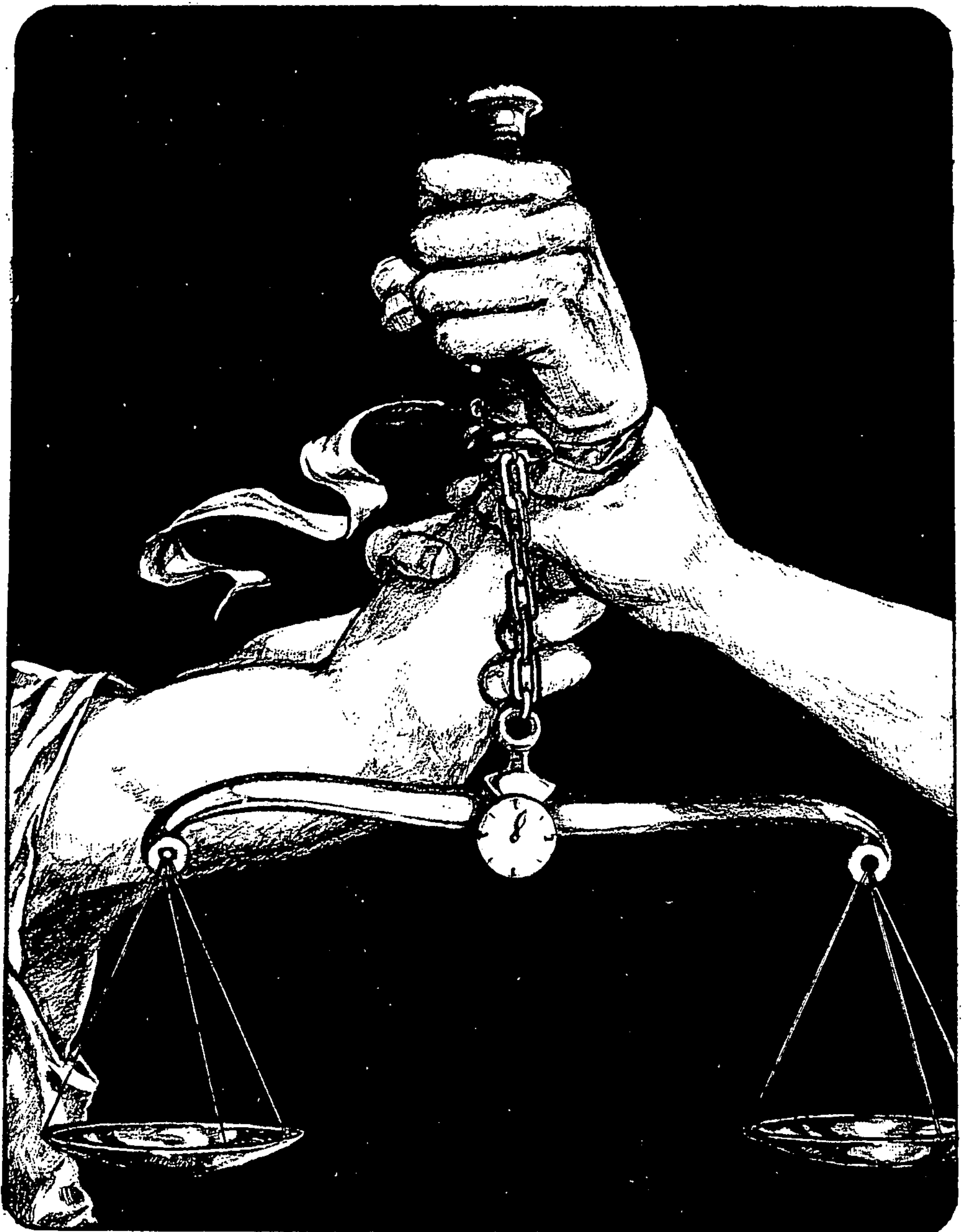

by *Leonard Bailey*

The thesis of this article is that in performing the function of judicial review, the Supreme Court of the United States of America acts as a relatively autonomous institution. While generally promoting the interests of United States-style democratic capitalism[1] and its power elite[2], the Court remains susceptible and responsive to other influences, including the personal ideologies of individual members of the Court and the demands of the relatively powerless. This article rejects an instrumental

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1. By the term "United States-style democratic capitalism," I mean to imply two features of the system being discussed. First, a similarity exists between the United States and other democratic capitalist societies in that all are private-market oriented to one degree or another and democratically governed in one form or another. Second, there is a degree of uniqueness in the institutional forms and historical development of democratic capitalism in the United States. For instance, as an institution the Supreme Court possesses more power than do the judiciaries in most other societies, perhaps because this society has unique problems requiring a more powerful judiciary for their resolution, or perhaps because other capitalist societies address similar problems through other institutions.

2. See C.W. Mills, THE POWER ELITE (1959). By the term "power elite" I refer to that class or group of people who, by virtue of wealth, ownership or control of the means of production, access to knowledge and social position, wield predominant political, economic and social power in the United States. I do

view of the Supreme Court as an agent of a monolithic capitalist class in the narrow sense of acting directly under the control and strictly at the behest of that class. It also rejects a formalist view of the Supreme Court as a predominantly independent body having a life and logic entirely of its own, and seeking either its own aggrandizement or the advancement of some well-defined or neutrally-determined principles of liberal justice.[3] Rather I will argue that the Supreme Court's relative autonomy serves to legitimize and stabilize the system by enabling the Court to mediate disputes which might otherwise threaten its viability.[4] From this vantage point the results of particular cases are largely irrelevant in terms of their doctrinal correctness; what counts is whether the process as a whole helps to contain the system's internal stresses and strains and thereby to maintain the dominance of the power elite.[5]

The Role of the Supreme Court

THE TENSION IN LIBERAL SOCIETY

Liberalism's vision of United States-style democratic capitalism is one of self-determination. This entails a public sphere in which people have the right to participate on equal terms in collective decision-making, for the most part by elected representatives who are accountable and therefore responsive to the people through the political process. It also entails a private sphere in which individuals have the right to reserve for themselves decisions which are claimed to be exclusively or dominantly personal and which are thus of no legitimate collective concern (e.g., free exercise of religion). The notion of the private sphere also implies the right to prevent the public from mistreating or imposing on individuals in certain ways (e.g., cruel and unusual punishment).[6] Accordingly,

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not mean to imply that the power elite is a monolithic, homogeneous, all-powerful class with a well-defined and agreed upon agenda. There is much infighting and disagreement among the power elite; some elites are more powerful than others; there is a degree of mobility both into and out of elite status; and those who are not elites also possess some power. I do mean to imply that power in the United States is hierarchically and unevenly distributed; that the more powerful are able to use their power to dominate and exploit the less powerful; that this situation is endemic to United States-style democratic capitalism; and that the power elite have a common interest, which they act on in ways both organized and spontaneous, in preserving the system and their privileged status within it.

3. On the concepts of instrumentalism and formalism, see Balbus, Commodity Form and Legal Form: An Essay on the Relative Autonomy of the Law, 11 L. & SOC. REV. 571, 572-73 (1977). For a recent defense of legal formalism, postulating "that law is intelligible as an internally coherent phenomenon," see Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 YALE L.J. 949, 951 (1988).

4. The concept of relative autonomy fits into either a structural/functional or post-structural critical approach to law. In response to instrumentalism, which views law in terms of its content and attempts to explain how given laws further the interests of the capitalist power structure, structuralism/ functionalism views law-making more as a process which in general serves to maintain the system even when particular laws seem counter to the interests of the capitalist power structure. Thus, the relative autonomy of law is related to the need to resolve conflicts in a social system in which the capitalist power structure predominates but is neither totally unified nor all powerful. What instrumentalism, structuralism and functionalism all have in common, in the orthodox Marxist tradition, is a deterministic or materialistic view of law as emanating from the economic base of or the productive forces at play in society. See Burris, Introduction: The Structuralist Influence in Marxist Theory and Research, 9 THE INSURGENT SOCIOLOGIST at 4-17 (No. 1 Summer 1979); Grau, Whatever Happened to Politics? A Critique of Structuralist Marxist Accounts of State and Law, MARXISM AND LAW at 196-209 (1982). Critical thinking, on the other hand, views all explanations as essentially indeterminate, in that competing explanations are always possible and are always subject to deconstruction by exposing their unstated and unprovable assumptions about human nature or social reality. This view, which in the extreme leads to a total denial of any possible objectivity, everything being subjectively created in the mind of the beholder, rejects any definitive explanation of law. See Boyle, The Politics of Reason: Critical Legal Theory and Local Social Thought, 133 U. PA. L. REV. 685, 691-735 (1985); Heller, Structuralism and Critique, 36 STAN. L. REV. 127 (1984). More dialectically, my view is that both the structural/functional and critical approaches are aspects of a broader materialist approach which views all aspects of existence — the environmental and biological, the social and cultural, the economic and political and ideological, the objective and the subjective — as determining and contributing to an understanding of life and law. See Holt, Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law, 1986 WIS. L. REV. 677, 706-25. This is a view of the law-making process as "both constituted by and constituting the world" in which it exists, Peller, The Metaphysics of American Law, 73 CAL. L. REV. 1151, 1269 (1985); and as part of an "indeterminate historical process . . . which remains subject to determinate pressures." E.P. Thompson, THE POVERTY OF THEORY AND OTHER ESSAYS at 84 (1978). From this critical vantage point relative autonomy helps account for the fact that law-making, and in particular Supreme Court decision-making, seems sometimes supportive of the system and sometimes not, sometimes responsive to economic and productive forces and sometimes not, sometimes explicable and sometimes not. I would assert, though, that economic factors have historically been predominant, especially in the capitalist era.

5. For other treatments of the relative autonomy of law in capitalist societies, all of which have greatly influenced this essay, see Balbus, 11 L. & SOC. REV. 571 (cited in note 3); H. Collins, MARXISM AND LAW (1982); Klare, Law-Making as Praxis, 40 TELOS 123 (1979); E.P. Thompson, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT at 258-269 (1975); Trubek, Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law, 11 L. & SOC. REV. 529 (1977); Tushnet, A Marxist Analysis of American Law, 1 MARXIST PERSPECTIVES 96 (1978). The debate among the adherents of relative autonomy is whether law is a total illusion — an intellectual sleight of hand which perpetuates the dominance of the capitalist ruling class by creating a false conscious belief in a mythical ideology of justice which masks the reality of inequality and exploitation — or whether law can, to a limited extent at least, ameliorate some of the injustices of capitalist society. Balbus seems inclined to the former view; Collins, Klare, Thompson and Trubek to the latter; while Tushnet seems skeptical. My view of law generally is close to Klare's assessment of the National Labor Relations Act as "a prospect or aspiration for democratic and, to some degree, anti-capitalist social change, as well as a buttress to the institutional system for state administration and containment of the class struggle." Klare, 40 TELOS at 131.

6. On the public/private distinction, see Symposium on the Public/Private Distinction, 130 U. PA. L. REV. 1289 (1982).

liberal society has a built-in tension between the collective and the personal — the public and the private — a tension whose resolution requires carving out a domain within which the individual is largely sovereign.[7] In addition, the premise of self-determination that all human beings are worthy, as in "all men are created equal," gives rise to the claim that individuals not only have the negative right to a sovereign domain and freedom from domination, but also the positive right at times to have the society provide certain goods, services or conditions. These might include equality of opportunity or a minimum standard of living, without which their humanity would be denied. This claim also gives rise to a built-in tension in liberal society between that aspect of the ideology which emphasizes individual worth and that which emphasizes individual responsibility for success or failure in life.[8]

This paper focuses on the Supreme Court's role in resolving conflicts and thereby helping to mediate these tensions in liberal society.[9] One approach to the tensions would be to leave their resolution entirely to the political process. This has not been the approach in the United States where dispute resolution has been a joint venture of the political process and the judiciary. The political process mediates disputes through compromise and consensus, and legitimizes the resulting bargains through the ideology of democracy.[10] This method of dispute resolution often works well but also has its weaknesses, particularly regarding issues about which people have passionate feelings. Those on the losing side tend to examine the fairness of the political process more closely and thus to recognize that the system is stacked against them, that some have far more influence than others, and that the resulting compromises smack more of overreaching than of equal bargaining.

Such recognitions threaten the legitimacy of the system. Even if the fairness of the process is not questioned, strong feelings may impel the losers to seek reconsideration of issues, an option always available in the political process. Frequent reconsideration of passionate issues is destabilizing, however, in part because it is time consuming and thus interferes with the capacity of the process to deal with other matters. More importantly, publicly rehashing passionate disagreements may produce implacable enemies and generally undermine the willingness to compromise on which the process depends. And most of all, while liberal ideology advocates it in theory, free and open public debate is problematical in a capitalist society because it risks exposing the society's contradictions, such as the myth that truly free and open debate is possible in an inegalitarian society. Hence, liberal societies require ways to constrain debate while simultaneously championing the democratic myth.

The political process mediates disputes through compromise and consensus, and legitimizes the resulting bargains through the ideology of democracy.

In moments like these the Supreme Court fulfills a crucial function: to help stabilize the system by offering an alternative forum for the resolution of disputes which, due to their passionate or contradictory nature, threaten to undermine United States-style democratic capitalism.[11] In mediating disputes and legitimizing the system,

7. Compare, Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063, 1096-1109 (1981); F. Hayek, LAW, LEGISLATION, AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE at 128-52 (1973) and THE CONSTITUTION OF LIBERTY at 103-17, 205-19 (1960); Kennedy, The Structure of Blackstone's Commentaries, 28 BUFF. L. REV. 205, 351-82 (1979). Self-determination also includes the right, when operating within one's sovereign domain, to be free from domination and exploitation by others acting within their sovereign domains. Thus democratic capitalism's individualistic ideology, coupled with its privatization of economic (and other) relationships, produces conflicts among individuals requiring resolution through the articulation and enforcement of standards of individual behavior toward one another.

8. Compare, B. Ackerman, SOCIAL JUSTICE IN THE LIBERAL STATE (1980); Baker, Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection, 131 U. PA. L. REV. 933 (1983); J. Rawls, A THEORY OF JUSTICE (1971). For a critique of the mythology of equality of opportunity, see Freeman, Racism, Rights, and the Quest for Equality of Opportunity, 23 HARV. C.R.-C.L.L. REV. 295, 362-85 (1988).

9. An examination of Supreme Court decisions readily discloses the Court's greater willingness to address individual claims of the negative type, i.e., to be left alone by the government, than of the positive type, i.e., to be provided goods by the government. The government must provide indigent criminal defendants with certain services for free, and must accord certain procedural safeguards to the recipients of government largesse; but for the most part the Court has left welfare state issues to the political process. See notes 96-101 and accompanying text. The reason for this is not the absence of applicable constitutional provisions; for instance the Court could easily interpret the equal protection clause to require the government to ensure everyone a judicially determined minimum standard of living. See note 98. Rather, I suggest, the Court has chosen not to deal with such claims for a set of reasons including the following: to do so might undermine the capitalist system; the constraining impact of the political process on the Court would make it difficult to implement such rulings, since it is far easier to strike down or to refuse to enforce the actions of another unit of government than to order it to take affirmative action, particularly action which would entail massive redistribution of wealth (see note 99); and, finally, such issues have been mediated passably well through the political process.

10. The recent republican revival posits an alternative way of looking at the political process: rather than a bargaining/mediation process among diverse groups in pursuit of competing self-interests, republicanism touts civic virtue and the public good. See, for example, Symposium: The Civic Republican Tradition, 97 YALE L.J. 1493 (1988). In light of the predominance in the political process of an economic and political power elite which uses its power to its own advantage, this is more an aspiration than a reality, as its proponents recognize. This aspiration for civic virtue and the common good is quite compatible with the Marxist perspective taken here; but it is realizable, I would argue, only in a radically egalitarian society.

11. This does not mean that every case or even most cases coming before the Court involve monumental disputes which in

the Court relies not on bargaining and the ideology of democracy as the political process does, but instead on the ideology of neutrality and of the rule of law.[12] By appearing to be disinterested, and by appearing to decide cases pursuant to objectively determined higher-order principles of justice emanating from the Constitution, the Court often succeeds in gaining public respect for itself as an institution and for its decisions.

THE STRUCTURE OF THE SUPREME COURT

In attempting to account for the Supreme Court's mediating/legitimizing role, an analytical starting point is to recognize that the Court has been designed as a relatively independent institution. This independence derives principally from the fact that appointments to the bench are for life, subject to removal only by impeachment for cause;[13] that the Court has the power to overturn the actions of other units of government as violative of the Constitution;[14] and that the political process can directly override Court decisions only by amending the Constitution, a cumbersome process which has rarely been used to counter the Court.[15]

At the same time there are structural constraints undercutting the Supreme Court's independence. First, the appointment process allows both the President and the Senate to consider ideology in selecting and confirming Supreme Court justices. To the extent it is possible to predict future judicial behavior, the appointment process is a means of controlling Supreme Court decision-making. Thus nominees to the Court, typically but not necessarily members of or sympathetic to the dominant class, must demonstrate by their training, experience and careers that they are mainstream thinkers. Should an occasional maverick slip through, the fact that there are nine justices would minimize that person's influence anyway. Consequently, radical thinking is rarely found on the Supreme Court and revolutionary thinking, in the sense of undercutting the foundations of United States-style democratic capitalism, is unknown.

Second, lacking such tools as the power to tax or force of arms, the Supreme Court must rely on the cooperation of other public officials and of the public itself to effectuate its decisions. While the mythology of Supreme Court impartiality and of the rule of law may deter outright refusals to obey judicial orders, there are many

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their own right seriously threaten the system, although many do. A series of seemingly mundane cases in a given area, however, might well involve a common dispute which if unresolved might pose a threat. The issue of separation of church and state, to pick an area not covered herein, seems a good example. The thesis is that by shifting the arena of debate on this issue, at least somewhat from the political process to the judiciary, the Court may have helped deter a potentially more divisive public debate.

12. Compare, for example, Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 1-20 (1971); R. Unger, LAW IN MODERN SOCIETY at 52-54, 66-70, 176-78 (1977); Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959). For critiques of the concepts of neutral principles and of the rule of law, see Kleven, The Constitutional Philosophy of Justice William H. Rehnquist, 8 VT. L. REV. 1, 9-12 (1983) (ideology inevitably impacts the derivation and application of purportedly neutral principles); R. Unger, LAW IN MODERN SOCIETY at 178-80 (judges must establish priorities among competing sets of beliefs); Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781, 804-24 (1983) (neutral principles are inconsistent with liberalism's premise of autonomous individuals having independent choices and values, all principles consequently being value-laden and therefore non-neutral).

13. The only attempted removal by impeachment of a Supreme Court justice was that of Samuel Chase in 1805. Chase was acquitted by the Senate in what has been characterized as an obviously incorrect and partisan judgment. R. Berger, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS at 224-51 (1973). In more recent times impeachment movements were unsuccessfully broached against Earl Warren and William O. Douglas, and Abe Fortas resigned in the face of charges of impropriety in office. On the uncertainty of the "good behavior" standard and whether Congress could provide for the removal of federal judges by means other than impeachment, see R. Berger, IMPEACHMENT; Kurland, The Constitution and the Tenure of Federal Judges, 36 U. CHI. L. REV. 665 (1969); Stolz, Disciplining Federal Judges: Is Impeachment Hopeless? 57 CAL. L. REV. 659 (1969). Today, impeachment would probably require rather convincing evidence that a justice has acted lawlessly or immorally in an official capacity. Certainly more would be required than mere disgruntlement with a justice's decisions, although once such evidence was offered, ideological considerations might well be the telling factor sub rosa in a decision to impeach or not to impeach. Yet, while the requisites of impeachment may protect the Court's independence, the possibility of impeachment, though historically remote, may still have a constraining impact on Supreme Court decision-making. Likewise the fact that the impeachment of a Supreme Court justice has rarely even been broached may be both a testament to the Court's independence, as well as a sign of its perspicacity in exercising that independence.

14. Deriving, of course, from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (federal action) and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (state action). The issue of whether the power to override was usurped by the Court or intended by the Constitution's framers has been well ventilated. See, for example, R. Berger, GOVERNMENT BY JUDICIARY at 351-62, 373-96 (1977); A. Bickel, THE LEAST DANGEROUS BRANCH at 1-34 (1962). This is a moot point, though, as regards the Court's role as mediator. It is unnecessary to contend that either the framers or the Court envisioned the Court's acting as a mediator in the sense argued in this paper, although they may well have and obviously saw the Court as a dispute resolver of some type. It is enough for my purposes to show that the Court has come to and does function as a system-sustaining mediator whether the players are fully aware of it or not. Indeed, the Marxist notion of false consciousness posits that by virtue of cultural conditioning a system's insiders frequently if not usually view matters from the perspective of the system's supportive ideologies rather than as they really are or are viewed by those with differing perspectives. See Kennedy, 28 BUFF. L. REV. 205 (cited in notes 7 & 19); G. Lukacs, HISTORY AND CLASS CONSCIOUSNESS at 46-82 (1971).

15. Although this paper's focus is on the Supreme Court's mediating role in constitutional cases, it plays a similar and as significant a role in cases of statutory interpretation. See, for example, the articles cited note 33. In statutory interpretation cases the political process can more readily and frequently does directly override Court decisions by amending the statute. As discussed in the next two paragraphs of the text, however, there is also a give-and-take between the political process and the judiciary as to constitutional cases. Thus in both types of cases the mediating roles of the Court and the political process interrelate, sometimes in competing and sometimes in complementary ways depending on the context.

ways to thwart Supreme Court decisions without violating the law. If the Court outlaws enforced racial segregation in public schools, then school officials may devise ostensibly color-blind methods which achieve the same result. Or whites not wanting their children in integrated settings may use their superior economic power to segregate themselves in locales or their children in private schools beyond the means of most minorities. Other ways to thwart Court decisions include the ability of those in power to use their greater access to the media to turn public opinion against the Court, the myth of impartiality demanding that the Court confine its lobbying mostly to its opinions. Also, those who control the appointment process can wait for justices with whom they disagree to die or retire in order to appoint replacements committed to reversing earlier rulings. Finally, the mythology of impartiality and the rule of law serves not only to legitimize the Court and secure compliance but also to constrain it; since the Court relies so heavily for its power on the mythology, it must behave or appear to behave in an impartial manner lest it lose the very respect on which it depends.

RELATIVE AUTONOMY: THE LIBERAL VIEW

The liberal view of the role of the Supreme Court in individual rights cases regards the Court as a protector of fundamental personal rights against the tyranny of the majority.[16] Since individual rights are by definition supposed to override collective concerns, or at least to have a higher priority in public debate, it is logical under the liberal view to assign responsibility for their protection to a body which is to some degree removed from the political process.[17]

Liberal theory also accounts for the theoretical and practical constraints against total Supreme Court independence. Under any liberal theory, the Court should not impose its collective view of what is best for society, but should base its decisions on the framers' intent, natural rights or evolving moral principles. But since the corresponding specifics are usually debatable, too much independence might allow the Court to impose its views while rationalizing its decisions in terms of the intent of the framers, natural rights or evolving moral principles. Therefore, there is a need to confine the Court within acceptable limits in the only way seemingly possible: by making the Court somewhat responsive to the contemporary political process while at the same time preserving enough Court independence from that process to enable it to perform the function of judicial review.

Notably absent from contemporary liberal views of the Court is an explicitly articulated pro-capitalist position or even a position regarding the proper functioning of the economic system. Liberal views share the premise

16. This paper will focus largely on individual rights cases; although as allusions to separation of powers and federalism cases will show, a similar analysis should also apply to them. See cases cited in notes 35-41 and accompanying text, and note 89.

17. This general view is accepted by both ends of the liberal political spectrum. The debate is over how wide ranging the Supreme Court should be in protecting individual rights. The so-called interpretivist view is that the Court should construe the Constitution in accordance with the intent of the framers. Where the language of the Constitution is broad and general, interpretivists would confine its reach to the types of concerns which seem to have prompted the adoption of the provision in question. The asserted rationale for the interpretivist position is that lawmaking is acceptable in this society only if democratic, that the Supreme Court's structural insulation makes it an inherently undemocratic body, and that the Court is justified in overriding the political and thus more democratic branches of government only when protecting those higher and enduring values democratically constitutionalized by earlier generations. Sophisticated interpretivists acknowledge, of course, the difficulty of precisely determining the meaning of broad constitutional provisions; thus they counsel a narrow construction of such provisions in order to avoid what they view as nondemocratic policy making by the Supreme Court. On interpretivism, see R. Berger, GOVERNMENT BY JUDICIARY (cited in note 14); Bork, 47 IND. L.J. 1 (cited in note 12); Rehnquist, The Notion of a Living Constitution, 54 TEX. L. REV. 693 (1976). For critiques arguing that the framers' intent is impossible to discern, see J. Ely, DEMOCRACY AND DISTRUST at 1-41 (1980); Brest, The Misconceived Quest for Original Understanding, 60 B.U.L. REV. 204 (1980); Tushnet, 96 HARV. L. REV. 781 (cited in note 12).

The so-called non-interpretivist view allows for a more expansive reading by the Supreme Court of the broad individual rights provisions of the Constitution. Here there are several competing schools of thought, all of which basically agree, however, that broad language invites expansive interpretation. The process-oriented school believes the Court should intervene, through the use of such provisions as the due process and equal protection clauses, when the democratic process breaks down — in particular when those adversely affected by democratic decision-making lack access to the process or are consistently singled out for unfavorable treatment. Compare, J. Ely, DEMOCRACY AND DISTRUST; Sandalow, Judicial Protection of Minorities, 75 MICH. L. REV. 1162 (1977). For critiques, see Brest, The Substance of Process, 42 OHIO ST. L.J. 131 (1981) (substantive rights cannot be separated from process since fair process assumes or necessitates substantive rights); Parker, The Past of Constitutional Theory - and its Future, 42 OHIO ST. L.J. 223 (1981) (process approach assumes, without empirical support and probably falsely so, that the political process is basically sound). As to substantive rights this school agrees with interpretivists that the Court should protect only those rights specifically articulated in the Constitution or fairly inferrable from articulated rights. The disagreement evidently is over how well the democratic process functions, or how possible it is to develop or apply criteria for identifying breakdowns in the democratic process. Other non-interpretivists, on the other hand, believe the Supreme Court justified in articulating substantive individual rights beyond those specified in the Constitution or contemplated by the framers. Their rationale is that it is possible in addition to identify inherent natural rights or evolving principles of justice implicit in culture in the United States, and that with its relative independence the Court is well suited to discover them or at least to aid in their discovery. Compare, for example, Baker, Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection, 58 TEX. L. REV. 1029 (1980); R. Dworkin, TAKING RIGHTS SERIOUSLY (1978); Grey, Do We Have an Unwritten Constitution? 27 STAN. L. REV. 703 (1975); M. Perry, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982); L. Tribe, AMERICAN CONSTITUTIONAL LAW at 886-990 (1978); Wellington, Common Law Rules and Constitutional Double Standards, 83 YALE L.J. 221 (1973). For a critique, see Brest, The Essential Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063 (1981) (arguing that no defensible criteria exist for determining substantive rights).

that economic issues fall within the purview of democratic decisions-making, subject only to such constitutional limitations as the prohibitions against deprivation of property without due process of law and against uncompensated takings; the political process and not the judiciary should regulate commerce and industry and determine which goods and services to furnish publicly. The Supreme Court, as an adjudicator of constitutional issues, should be concerned rather with the proper functioning of the political system as it relates to non-economic individual rights claims. The explanation for this, I suggest, is twofold. Most importantly, the political predominance of the capitalist power elite obviates the need for direct judicial protection of its economic interests. Moreover, through judicial forays into the economic sphere, the Court would risk either undercutting its legitimacy by taking too obvious a pro-capitalist stance or undermining the power elite by impinging too much on the economic system.[18]

RELATIVE AUTONOMY: A MARXIST PERSPECTIVE

The Marxist critique of the liberal view of the Supreme Court challenges its basic premises. The first liberal premise, the ideology of democracy, regards the political process, albeit falling short of the ideal of being perfectly just or responsive to the will of the people, as working passably well, as serving the interests of most of the people most of the time, and as containing within itself the means of rectifying injustice. The Marxist perspective, on the other hand, maintains that the purpose of liberal democracy is to help sustain the capitalist system and the dominance of its power structure.[19] The second liberal premise is the ideology of the rule of law, which views the Supreme Court as assisting society to rectify injustice through the enforcement of impartially and objectively determined higher-order principles of law. The Marxist perspective advanced here denies the attainability of impartiality and objectivity in the law and views the Supreme Court's role as helping to legitimize and stabilize the system by mediating disputes arising out of the internal contradictions of United States-style democratic capitalism. According to the Marxist perspective, it is the Supreme Court's relative autonomy which enables it to play this role effectively.[20]

At first blush, the notion of even a partially independent judiciary might seem incongruous in a capitalist society, particularly to those with a crude instrumental perspective of the state as a tool of capitalist domination. In such a society one would expect to find the judiciary operating hand in glove with the ruling class. Instrumental relations of this type have existed at times not only in capitalist but also in other societies where power has been heavily concentrated in the hands of a few. In such societies law serves not its usual legitimating function, since raw force need not be legitimized where power is absolute, but rather as a mechanism of control, a means of instilling fear, a signal that certain behavior will not be tolerated and that certain consequences will follow. In

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18. See note 9 and notes 34-42 and accompanying text.

19. See generally, L. Althusser, LENIN AND PHILOSOPHY at 127-86 (1971); A. Gramsci, SELECTIONS FROM THE PRISON NOTEBOOKS (1971); N. Poulantzas, STATE, POWER, SOCIALISM (1978). In pursuing this end, the liberal state has several interrelated subfunctions: establishing capitalist institutions and promoting the development of capitalism; legitimizing the use of force to repress challenges to the system; producing a wide degree of consent to the system among the dominated classes by advancing through its various institutions a supportive ideology of democracy and individualism which masks the reality of exploitation; and providing an arena for resolving disputes within the dominant class and between the dominant and subordinate classes. On the mediating and legitimizing function of law in liberal society, see Kennedy, 28 BUFF. L. REV. at 210 (cited in note 7)(law as "an instrument of apology— an attempt to mystify both dominators and dominated by convincing them of the 'naturalness,' the 'freedom' and the 'rationality' of a condition of bondage"). Hyde criticizes the notion that law, particularly court-made law, creates legitimacy, which is defined as the "belief that an order is obligatory or exemplary" accompanied by conforming action. Hyde argues that this notion is not supported and is even contradicted by such empirical evidence as low public awareness of legal institutions, low opinion of courts, and substantial behavioral nonconformity with judicial decisions. To the extent that people do conform with law, he suggests as possible alternative explanations habit and rational calculation — for example, avoidance of punishment. Hyde, The Concept of Legitimation in the Sociology of Law, 1983 WIS. L. REV. 379. To be sure, there is an empirical side to the legitimacy notion. I suggest, however, two caveats to Hyde's analysis. First, it is not my contention that the Supreme Court operates perfectly as a legitimizing institution, but that it and many other institutions serve that purpose in overlapping and subtle ways which are difficult to test empirically. I hope that the analysis in the next section will support, although I do not claim that it is empirically refined enough to conclusively prove, the thesis that the Supreme Court often plays a successful legitimizing role. For example, thirty-five years after the ***Brown*** case, most people in the South view enforced segregation as unjust; and it seems inescapable that the Supreme Court, along with national public disapproval and federal legislation, played some role in causing an attitudinal change and thus in legitimizing the abolition of official apartheid. Second, that there are many people who question the legitimacy of Supreme Court decisions or of the system should not surprise us, both because this system is fraught with injustice and contradiction and because the Court always operates within the broad range of mainstream thinking. My assertion is that by mediating the resulting conflicts and ameliorating injustices to some degree, the Supreme Court enhances the system's legitimacy to a greater degree than would be the case if the Court or some substitute institution did not exist. Since the impact of a counterfactual social state-of-affairs cannot be empirically tested, it is not possible to fully validate this assertion. That does not necessarily make the assertion fallacious, however; it does mean that its validity depends less on rigorous testing than on historical interpretation and contextual analysis, and must therefore always remain somewhat uncertain.

20. Compare works cited in note 5 and note 33.

such societies there is little need for even the pretense of fair procedures or judicial impartiality, as, for example, in the case of political trials in Nazi Germany.

Power, however, is rarely absolute and in most societies its exercise must be somehow legitimized. While the theology of the divine right of kings operated as a legitimizing device in medieval Europe, in the contemporary United States the democratic political process serves that purpose.[21] The ideology of democracy is one of self-governance; of government of, by, and for the people. Thus law is legitimized as "self-made" and as enjoying the consent of the governed. Even when one is on the losing end of a political issue, the ideology of self-governance holds true in that everyone has an equal right to participate, that elected officials have the duty to represent all their constituents and not just those who voted for them, and that sometimes you win and sometimes you lose but in the long run everyone's interests are served.

Some analysts view democracy in capitalist societies as a sham which disguises the total domination of society by a monolithic capitalist class.[22] This seems doubtful. Capitalists frequently disagree vehemently among themselves. Moreover, there is power in numbers, and the very purpose of liberal democracy is to accommodate demands for power-sharing more than do autocratic regimes. While the vote in this country was initially limited largely to propertied white males, thus giving rise to a symbiotic relationship between late eighteenth century democracy and the competitive capitalism of that era, it is significant that the franchise has become essentially universal since then. In part this phenomenon should also be seen as serving the interests of capital, and particularly of monopoly capital.[23] If the franchise had remained limited to the propertied, the growth of monopoly capital, which depends on the active promotion of its development by the state, might have been inhibited by the domination of the political process by smaller entrepreneurs more disposed to a laissez-faire economic system. Though great in wealth and economic power, monopoly capitalists are few in number compared with smaller entrepeneurs. Thus extending the franchise to the workers and other dependents of monopoly capitalists favors the latter politically to the extent that their workers and dependents perceive a community of interest with them or can be influenced by them. It is no accident that the domination of the economy by big business and the increased democratization of the political process have gone hand in hand.

The democratization of the United States derives in part from people's demands to participate in controlling their destinies — a demand emanating perhaps from an innate desire to be free or perhaps fueled by the enhanced possibilities for material well-being and the increased knowledge which have accompanied the development of capitalism. The interests of such people are not likely to coincide entirely with those of the capitalist class. Moreover, the interests of monopoly capitalists and their workers/dependents, while they may not be entirely antagonistic, particularly in prosperous times, do not entirely conincide either, particularly in hard times. So whatever the explanation, once the political process expands it represents, at least in theory, a potential source of power to the masses in their struggle against domination and inequality. And the masses have arguably achieved some successes through the political process, such as the right to unionize, anti-discrimination laws, and the various components of the modern welfare state.

While apparent victories are often illusory or less significant than they may appear, it seems unlikely that a totally empty political process could deceive a sufficient proportion of the people for a sufficient proportion of the time to sustain its legitimacy. Too many measures opposed by capitalists have been generated by the political process to dismiss the process as a total sham. Hence, the modern Marxist view of the relative autonomy of the

21. See, for example, R. Dahl, A PREFACE TO DEMOCRATIC THEORY (1956); M. Edelman, THE SYMBOLIC USES OF POLITICS (1964); A. de Tocqueville, DEMOCRACY IN AMERICA at 51-53, 159, 181-226 (1966).

22. Compare, for example, B. Avakian, DEMOCRACY: CAN'T WE DO BETTER THAN THAT? (1986). Despite allusions in his works supportive of such an instrumental view of the state in capitalist society, it is doubtful that Marx himself adhered strictly to this view. Marx did refer to the state as "an engine of class despotism," K. Marx, THE CIVIL WAR IN FRANCE, excerpted in L. Feuer, ed., MARX AND ENGELS, BASIC WRITINGS ON POLITICS AND PHILOSOPHY 363 (1959), and as "ruled by capitalist and landlord," K. Marx, CAPITAL: A CRITICAL ANALYSIS OF CAPITALIST PRODUCTION at 239 (1967 trans. ed.); and he did detail the use of state power to establish the capitalist mode of production. Marx, CAPITAL at 270-72, 717-41, 750-60. Yet Marx also detailed the at least partially successful struggle of the working class and its allies to secure legislation establishing a "normal working day" over the objection of industrial capitalists, Id. at 278-302, 470-503; while at the same time noting, in accord with a thesis of this essay, that the enactment of the Factory Acts was facilitated by the fact that they actually served the interests of capital by deterring the premature spoliation of labor power through overwork, Id. at 239, 266, 269-270. Their enactment also contributed to the concentration of capital in fewer hands by forcing out of business smaller entrepreneurs unable to comply. Id. at 474-75, 482. Likewise Engels, while characterizing the "modern representative state [as] an instrument of exploitation of wage labor by capital," also noted "periods . . . in which the warring classes balance each other so nearly that the state power, as ostensible mediator, acquires, for the moment, a certain degree of independence of both." F. Engels, THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE at 160 (1972).

23. By monopoly capital(ism) I mean an economy dominated by large-scale enterprises which have sufficient market power to operate monopolistically or oligopolistically and whose economic dominance and continued growth are both self-created and supported by government. The government, in turn, is dominated though not completely controlled by monopoly capital's beneficiaries/ dependents and particularly its power elite. This view of the way advanced capitalism works is supported by scholars from a variety of schools of thought. Their differences relate to such issues as the level of well-being monopoly capitalism provides, the deep-seatedness of class conflicts, and the possibility of internal reform. See P. Baran & P. Sweezy, MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER (1966); J.K. Galbraith, ECONOMICS AND THE PUBLIC PURPOSE (1973); G. Kolko, MAIN CURRENTS IN MODERN AMERICAN HISTORY (1976); C. Lindblom, POLITICS AND MARKETS at 144-233 (1977).

state portrays a state in which the power of capital predominates but does not completely control, a state which largely serves the interests of capital, particularly monopoly capital, but which also mediates the internecine disputes and class (and quasi-class)[24] struggles arising under capitalism.[25]

This excursion into the democratic political process has been necessary in order to put the Supreme Court in context. The question, simply put, is why a relatively autonomous judiciary in a relatively autonomous state? One arguable purpose for an independent judiciary, not applicable to the United States Supreme Court, would view the judiciary as an agent of the power elite designed to prevent a relatively autonomous political process from infringing overly on its prerogatives — a House of Lords with teeth. Both the Supreme Court's structural ties to the relatively autonomous political process, as well as its actual decisions, belie such an instrumental view. I would argue, instead, that an independent Supreme Court buttresses the mediating and legitimating function of the political process by providing an alternative forum for the resolution of disputes which might otherwise disrupt the political process and threaten the system's stability.

In this regard, the Court's relative independence from the political process serves it well by adding credence to the aura of impartiality and objectivity. A Court too closely tied to and too much like the political process would merely replicate its weaknesses as a dispute resolution mechanism. These weaknesses, as noted, are the actual imbalance of the political process which more highly charged issues may expose, and the lack of finality of political decisions. The Supreme Court's relative independence from the political process helps it avoid charges of imbalance. And its reliance on higher-order principles of justice, which by definition are supposed to be more durable than the more short-term policy considerations characterizing many political decisions, together with its ability to avoid reconsideration of issues by invoking stare decisis or exercising its discretion to refuse to hear cases, adds a finality to Supreme Court decisions missing from the political process.

When carefully scrutinized, however, the Supreme Court's aura of impartiality and objectivity proves more apparent than real or, better perhaps, only partly real. Critical legal scholars, like the legal realists of an earlier era, have been quite successful in exposing the Court's contradictions. First, as discussed above the Court's ties to the political process ensure that only mainstream thinkers will sit on the bench. While I have no doubt that many, perhaps most, Supreme Court justices think of themselves as impartial, and to a degree act as such, their impartiality operates within the limits of mainstream thinking. Moreover, many justices receive their appointments because they have already staked out a particular constitutional philosophy, which is to say a bias, acceptable to those in power.

In addition, there is no such thing as an objectively correct interpretation of the Constitution. Rather, the provisions of the Constitution are sufficiently open-ended, and the proper approach to interpreting it sufficiently debatable, as to lend support to a variety of readings and results. This means, however well reasoned Supreme Court opinions may appear, that all constitutional issues are essentially indeterminate and that their resolution therefore reflects the subjectivity and ideology of the decision-makers.[26] This is not to say that justices decide cases by asking themselves how they would vote on issues in the same way that legislators do or what results would best serve their own selfish interests. It is to say, rather, that the ideology of the rule of law is based on a false premise of objectivity, and that justices' decisions inevitably and unavoidably represent not logically or rationally deduced correct answers but their culturally and politically conditioned opinions as to what the law should be.[27]

Consequently, too much public scrutiny of the Su-

24. By "quasi-class" struggles I refer to struggles against domination and oppression which do not directly involve, although they may be related to, capitalist relations of production. Racial and sexual oppression, for example, two issues which have frequently come before the Supreme Court, are not peculiar to capitalist societies and may arise at least in part from non-economic factors such as xenophobia and religion. Both, however, also have economic underpinnings in that they involve the exploitation of others' labor in one way or another (see text at notes 58-68, 84-85, 90-103, and 118-23); and both are ultimately materialist in origin in that they arise out of historical circumstance.

25. See L. Althusser, LENIN AND PHILOSOPHY at 127-86, A. Gramsci, SELECTIONS FROM THE PRISON NOTEBOOKS, N. Poulantzas, STATE, POWER, SOCIALISM (cited in note 19). The debate among theorists focuses on the extent to which the relative autonomy of the state permits the dominated classes to achieve real victories in the class struggle or only creates the illusion of victory on an ideological level. Poulantzas adheres within limits to the former view, while Althusser and Gramsci seem to lean more toward the latter. My view is closer to Poulantzas'.

26. See Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 YALE L.J. 1063 (1981); Symposium, A Critique of Rights, 62 TEX. L. REV. 1363 (1984); Tushnet, Critical Legal Studies and Constitutional Law: An Essay in Deconstruction, 36 STAN. L. REV. 623 (1984); Tushnet, The Dilemmas of Liberal Constitutionalism, 42 OHIO ST. L.J. 411 (1981); R. Unger, KNOWLEDGE AND POLITICS at 88-100 (1975); Yablon, The Indeterminacy of Law: Critical Legal Studies and the Problem of Legal Explanation, 6 CARDOZO L. REV. 917 (1985). To say that Supreme Court decisions are indeterminate is not to say that they are unpredictable, since knowledge of justices' ideological leanings may well enable one to predict outcomes. Indeterminacy refers instead to the inability to justify decisions as based on anything other than debatable ideology.

27. The modern critical view is that the meaning of any text is indeterminate. This means that a text is always open to competing interpretations and that there is no objective test for determining which is the correct interpretation. Consequently interpretation is an essentially subjective process on the part of the observer. Thus the Constitution is always amenable to a variety of incompatible interpretations, whose resolution is ultimately politically and ideologically based. Furthermore, any intersubjective meaningfulness (if such is possible at all) depends on consensus and shared understandings rather than on anything inherent in the text. Shared understandings could relate either to substantive meaning or to a decision-making process; for example, the understanding could be to defer to the interpretation of a third party such as the Supreme Court. But to be legitimate or just, a shared understanding must flow from an

preme Court risks undercutting its aura of impartiality and objectivity, thereby subverting its role as a mediator/legitimator. This insight suggests the importance of the Supreme Court's operating in such a manner as to deflect close public scrutiny. In the first place, this implies that the Court must decide some cases against the government and in favor of the relatively powerless. If all its decisions rubber-stamped government action, or if it only intervened on behalf of the rich and powerful, the Court would soon lose all credibility. The Court's relative independence is thus necessary to enable it to withstand political pressure and overrule other units of government, thereby demonstrating that it does not act simply at the behest of other power elites.[28]

When it is exercised, particularly to the benefit of the relatively powerless and the disadvantaged, the authority to overrule has a coopting and pacifying effect.[29] Not only does it at least partially redress their grievances, and thereby undercut their willingness to resort to more disruptive and personally riskier tactics, it also helps convince other aggrieved parties that redress is available within the system and helps justify the use of force against those who elect more disruptive options. Even when the authority to overrule is not exercised, it coopts and sustains. What matters is that it could have been exercised, and that it appears that the Court has independently and impartially determined that the actions of other units of government are fair and in accord with the rule of law. This determination puts a stamp of approval on those actions which transcends the partisanship of the political process. Moreover, the Court's reliance on constitutional doctrine as the basis of its opinions contributes significantly to the appearance of impartiality and fairness. For the sanctity of Supreme Court decisions depends on their being viewed as based not on the personal opinions or biases of the justices, but on higher principles of law neutrally and objectively derived either directly or by implication from the Constitution.[30]

Additionally, while Supreme Court decisions naturally tend to be controversial, the Court must be careful not to so offend the power elite or public opinion as to subject itself to scrutiny and undermine its credibility. This constraint implies proceeding cautiously, avoiding issues entirely until the time is ripe, dealing first with their less controversial aspects before addressing the more highly charged, testing out and preparing public opinion, backing off when the reaction is too adverse, and always deciding cases within the broad framework of mainstream ideology.[31] In short, the Court must perform as do all effective mediators.

In its mediating role the Court must be somewhat autonomous so as to be free from undue influence by the contending parties. Autonomy enables the Court both to detach itself sufficiently from disputes to devise workable settlements, and to maintain the aura of impartiality and objectivity which is necessary to gain the parties' respect and their willingness to abide by results which may be partly but not entirely favorable. But to be a successful mediator the Court cannot be too autonomous, nor too detached, not only to guard against its running rampant, for in truth its power is limited by the power structure's willingness to abide, but also to keep it sufficiently in touch with the temper of the times to grasp the solutions which will be acceptable. Thus those aspects of the Supreme Court which keep it in check also aid its mediating function while ensuring that it always remains basically supportive of Unites States-style democratic capitalism. Finally, to be successful the Court cannot be too one-sided in its solutions, the essence of mediation being to give something to both sides. This explains why the Court frequently stakes out a middle-of-the-road position, either in a given case or over time.[32]

The Supreme Court in Context

All constitutional disputes before the Supreme Court arise from the contradictions of United States-style democratic capitalism. This does not mean that all such disputes directly raise issues of class struggle; racial, sexual and religious issues, for example, may have cultural or moral overtones as well. Left unresolved, these disputes

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intersubjective process free of hierarchy and domination, or in Habermas' words from "an ideal situation of discourse," lest the understanding perpetuate the underlying hierarchy from whence it arises. To me this implies that a society structured along egalitarian socialist lines is a prerequisite to enlightened discourse. On these points, see Balkin, Deconstructive Practice and Legal Theory, 96 YALE L.J. 743 (1987); J. Habermas, THEORY AND PRACTICE at 1-40 (1973); Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1 (1984); Stick, Can Nihilism Be Pragmatic? 100 HARV. L. REV. 332 (1986); R. Unger, LAW IN MODERN SOCIETY at 100-03, 236-89 (1976); Yablon, Book Review: Law and Metaphysics, 96 YALE L.J. 613 (1987).

28. But compare Galanter, Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & SOC'Y REV. 95 (1974) (on the general structural bias of the litigation process in favor of the privileged) and Heydebrand & Seron, The Double Bind of the Capitalist Judicial System, 9 INT'L J. OF THE SOC. OF L. 407, 408 (1982) (advanced capitalism's fiscal crisis produces "structural contradictions between the promise of due process and the diminishing organizational capacity of the judicial branch to make good on this promise").

29. Compare Abel's and Santos' evaluation of recent innovations in informal and community justice. Abel, Conservative Conflict and the Reproduction of Capitalism: The Role of Informal Justice, 9 INT'L J. OF THE SOC. OF L. 245 (1981) (informal justice as "conservative conflict" which preserves capitalist society's structures of domination by distracting attention from potentially "liberating conflict"); Santos, Law and Community: The Changing Nature of State Power in Late Capitalism, 8 INT'L J. OF THE SOC. OF L. 379 (1980) (disarming and neutralizing function of informal and community justice reforms by appeal to popular participation and self-government).

30. The intense media exposure in recent years regarding Supreme Court appointments may have begun to undercut the myth. The view that judges have axes to grind seems rather widely held these days. It will be interesting to examine the long-run effect of this on the Supreme Court's role as a mediator.

31. Compare Bickel's advocacy of the Supreme Court's passive virtues. A. Bickel, THE LEAST DANGEROUS BRANCH at 111-98 (cited in note 14).

32. Western European societies, despite recent conservative

risk exposing the system's contradictions and undermining the consensus on which its legitimacy depends.

In illustrating the Supreme Court's relatively autonomous role in helping to resolve constitutional disputes, this section will examine three major trends in constitutional law during this century. The first centers on the anti-government approach of the Lochner era early in the century; the second focuses on the pro-individual-rights approach of the Warren Court and the early Burger Court during the mid-century civil rights era; and the third analyzes the individual rights pullback during the modern era of the Burger and Rehnquist Courts. The thesis is that these trends are best understood not as abstract debates over constitutional doctrine, but as the Court's attempt to mediate disputes precipitating at those moments in the history of United States-style democratic capitalism; and that an evaluation of Supreme Court decision-making is less a question of the doctrinal correctness of the results than of the Court's contribution to a successful resolution of the disputes.[33]

The Lochner Era

During the Lochner era, from the early 1900's to the mid-1930's, now largely discredited among mainstream constitutional scholars,[34] the Supreme Court used a variety of constitutional provisions to strike down federal and state laws regulating private enterprise and establishing social welfare programs. The Court invalidated statutes regulating wages,[35] working conditions,[36] prices,[37] and child labor,[38] as well as laws prohibiting discrimination against union members,[39] providing subsidies to farmers to curtail production,[40] and instituting compulsory retirement and pension programs.[41] In the mid-1930's, the Court abruptly switched gears in response both to public pressure associated with President Roosevelt's "court packing" plan and to the presence of Roosevelt appointees on the Court.[42] Since then the Court has rarely invalidated such economic legislation.

The central theme of the Lochner era cases is a Court bent on protecting the private market from government intervention by relying on the individualistic and laissez-faire ideology of competitive capitalism.[43] To illustrate, the *Lochner* Court based its invalidation of a New York statute limiting employment in bakeries to sixty hours a week and ten hours a day on the theory that such regulation amounts to a deprivation of liberty without due process of law:

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trends, are still generally more socialized economically and more advanced welfare-state-wise than the United States. The usual explanation for this is that the United States has a more conservative electorate or national character, resulting perhaps from a more frontier-like spirit or less paternalistic tradition. I suggest as well that perhaps the Supreme Court may have something to do with this phenomenon — both by cutting short political challenges when it rules against the dominated classes, thereby interposing the Constitution or its authority between them and the political process; and by providing the dominated classes some victories outside the political process, thereby reducing their opportunities to realize their potential political power.

33. For other similar treatments of the Supreme Court, see Freeman, Anti-Discrimination Law: A Critical Review, in D. Kairys, ed., THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE at 96-116 (1982); Freeman, Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978); Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 62 MINN. L. REV. 265 (1978).

34. Compare, for example, J. Ely, DEMOCRACY AND DISTRUST at 14-21 (cited in note 17); Sunstein, Naked Preferences and the Constitution, 84 COL. L. REV. 1689, 1697, 1718 (1984); L. Tribe, AMERICAN CONSTITUTIONAL LAW at 453-55 (cited in note 17).

35. *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (minimum wage for women violates due process); *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (National Industrial Recovery Act is beyond scope of Commerce Clause and improperly delegates Congress' law-making power).

36. *Lochner v. New York*, 198 U.S. 45 (1905) (regulation of working hours in bakeries violates due process); *Schechter Poultry Corp.*, 295 U.S. 495 (invalidating 40 hour work week).

37. *Chicago, Milwaukee, & St. Paul Railway v. Minnesota*, 134 U.S. 418 (1890) (railroad rate regulation unreasonable deprivation of property without due process of law); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (gasoline price regulation violates due process); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (federal Bituminous Coal Conservation Act is beyond scope of Commerce Clause).

38. *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (an act which prohibits interstate transportation of goods manufactured in violation of child labor regulations exceeds the power of Congress under the Commerce Clause and invades states' rights under the Tenth Amendment); *Child Labor Tax Case*, 259 U.S. 20 (1922) (Child Labor Tax Act unconstitutional).

39. *Adair v. United States*, 208 U.S. 161 (1908) (violation of due process clause of the Fifth Amendment); *Coppage v. Kansas*, 236 U.S. 1 (1915) (violation of due process clause of the Fourteenth Amendment).

40. *United States v. Butler*, 297 U.S. 1 (1936) (Agricultural Adjustment Act authorizing subsidies held unconstitutional because it invaded the reserved powers of the states).

41. *Railroad Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935) (Railroad Retirement Act violates Commerce Clause and due process).

42. For a history of the turnaround and a survey of the cases, see L. Tribe, AMERICAN CONSTITUTIONAL LAW at 232-36, 247-50, 442-55 (cited in note 17). One area of periodic Court activism since the Lochner era has been in striking down state economic regulation as preempted by federal law or as overly impinging on interstate commerce. Id. at 319-69, 376-404. In addition, the Court has at times, and perhaps for reasons similar to those motivating the Lochner era majority, construed federal economic regulation narrowly. See, for example, Klare, 62 MINN. L. REV. 265 (cited in note 33).

43. Compare Strong, The Economic Philosophy of *Lochner*: Emergence, Embrasure and Emasculation, 15 ARIZ. L. REV. 419 (1973) (argues that Lochner era cases were attempts to protect competitive capitalism through constitutional sanctions). Not all Lochner era decisions struck down restrictive business regulations. In fact, an almost equal number of regulations were upheld, though some of these cases expose the Court's other biases. See, for example, *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding limits on working hours for women based on their need for special protection). See also *Bunting v. Oregon*, 243 U.S. 426 (1917) (upholding maximum working hours); *New York Central Railroad v. White*, 243 U.S. 188 (1916) (upholding workman's compensation law); *Houston, East & West Texas Railway v. United States*, 234 U.S. 342 (1914) (upholding intrastate railroad rate regulation); *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding minimum milk price regulation). This hodgepodge of rulings, which lends support to the notion of the indeterminancy of constitutional doctrine, was the result perhaps of the ability of the government to present

> The question of whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men [sic] in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State interfering with their independence of judgment and of action.[44]

The viability of the Court's argument in *Lochner* depends on two empirical/ideological biases. First, the Court assumed that employer and employee were of relatively equal bargaining power. This assumption crumbles, however, given the contrast between an employer who as the owner of capital can sustain itself during a time of economic hardship and who has a pool of surplus labor on which to call, and an employee who relies totally on the next paycheck for survival and can ill afford even a short period of unemployment. Rather than a fair exchange, a contract reached under such conditions exemplifies domination and exploitation. Moreover, while it is possible to read *Lochner* in isolation as holding only that the government failed to prove a lack of comparable bargaining power in that case, it seems unlikely that any amount of evidence would have sufficed.[45] Empirical facts, like texts, are subject to varying interpretations; what to one person is an arms length transaction is overreaching to another. The Supreme Court's anti-statist/pro-laissez-faire bias at the time of *Lochner* predisposed it to view the employment relationship in a far different light than would a Marxist looking at the same facts.[46]

Second, the Supreme Court's anti-statist/pro-laissez-faire bias in *Lochner* also predisposed it to view the employment relationship as a purely private affair rather than as a collective concern.[47] If one views an individual employment contract, however, as connected with an overall employment process which affects everyone, and if one views all society's members as interdependent, then the employment relationship becomes a matter of great public moment. Since it is possible in a culture which distinguishes between the private and the public to argue that any nominally private activity has some public impact, the carving out of a private sphere entails a judgment about which concerns of the public are legitimate and which are not. Underlying *Lochner* and its progeny, therefore, is an ideologically based policy decision that the employment relationship and other economic matters should fall on the private side of the public-private boundary. But that the Constitution is susceptible to being interpreted both ways on this point is evidenced by the great deference the Supreme Court has accorded economic regulation since that time.[48]

In context, the Supreme Court's anti-statist stance during the Lochner era is one chapter in the history of the struggle for economic dominance between competitive and monopoly capital. In large part this was an internecine struggle, with capitalist pitted against capitalist. The proponents of competitive capital, mostly smaller and medium size entrepreneurs, tended toward a laissez-faire economic system with government intervention confined to rules which facilitate exchange and preserve competition. Monopoly capital, on the other hand, has demanded a partnership with big government both in order to stabilize the economy in times of crisis and, in particular, to promote growth through such measures as the sanctioning of monopolistic or oligopolistic practices,[49] the imposition of regulatory restrictions on entry into the market, imperialistic ventures to secure foreign markets and exploit foreign labor and resources, and direct government subsidies. All of these measures may hurt smaller firms either by giving monopoly capital a market advantage or draining from the economy money which might otherwise

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more convincing arguments in some cases than others; or perhaps of the Court's desire, given the public support for much of the legislation it struck down, not to be so one-sided in its decisions as to undermine its ability to perform its mediating function.

44. 198 U.S. at 57. This decision spurred Justice Holmes to his famous dissent, which is now the prevailing scholarly and judicial view: "[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*." Id. at 75.

45. In *Coppage v. Kansas*, 236 U.S. 1, 17 (1915) the Court inferred that the government has no right to interfere with freedom of contract even in the face of unequal bargaining power, again emphasizing the ideology of individualism:

> [I]t is said . . . to be a matter of common knowledge that 'employees, as a rule, are not financially able to be as independent in making contracts for the sale of their labor as are employers in making contracts for the purchase thereof.'. . Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each man [sic] may gain something that he [sic] needs or desires more urgently than that which he [sic] proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

46. Compare, H. Braverman, LABOR AND MONOPOLY CAPITAL (1974).

47. Compare, Mensch, The History of Mainstream Legal Thought, in THE POLITICS OF LAW at 18, 23-26 (cited in note 33).

48. For a scholarly view advocating renewed judicial activism in support of economic liberties, see B. Siegan, ECONOMIC LIBERTIES AND THE CONSTITUTION (1980).

49. The Sherman Anti-Trust Act might be cited to the contrary as an example of the political process' support of competitive capitalism. As a practical matter, though, the Sherman Act has done little to stop the growth of monopoly capital, illustrating the ability of the dominant economic forces to overcome seeming legal constraints.

be spent on their goods.[50]

This analysis does not imply that the Lochner era cases themselves involved disputes between competitive and monopoly capitalists. For the emergence of monopoly capital, by enhancing the dominance of capital over labor and by reducing people's opportunities for independent means of support, also gave rise to mass political demands culminating in the modern welfare state. While capitalists of all stripes may have opposed it, the welfare state seems an indispensable concomitant of the era of monopoly capital representing the mediation through the relatively autonomous political process of a conflict threatening the stability of the system. For this reason, in the eyes of many analysts, the New Deal was the savior of United States-style democratic capitalism at a time when radical thinking and the potential for revolutionary change were at their height.[51]

In retrospect it seems that the Supreme Court's anti-statist stance during the Lochner era was a futile attempt to block the development of big government and the welfare state accompanying the emergence of monopoly capital. Rather than helping to mediate the conflicts arising out of the emergence of monopoly capital, the Court, depending on one's perspective, either stood in the way of the compromises and adjustments worked out through the political process, or lacked the power to withstand the growing dominance of monopoly capital and the welfare state. Consequently, the political process was able to constrain the Court, both through the appointment of justices more favorable to government intervention and by generating unfavorable public opinion against the Court. The bitter defeat suffered by the Court during the Lochner era — signifying the new economic, political, and ideological hegemony of the proponents of monopoly capital and the welfare state — explains the Court's reluctance since then to intervene in economic matters far better than does the notion that the Court committed any error in doctrinal analysis.

The Civil Rights Era

In contrast to the Supreme Court's reluctance to intervene in economic issues since the Lochner era, it has been highly active in other areas of constitutional law. During the civil rights era between the early 1950's and the early 1970's, the Warren Court and the early Burger Court vigorously championed a variety of civil rights claims. The explanation for this divergent treatment of economic and civil rights claims lies not in any inherent doctrinal differences between them, but in the fact that the hegemony of monopoly-capital and the welfare-state had largely been achieved by this time and that civil rights issues were then in need of mediation.

Moreover, the Supreme Court seems to have been a more successful mediator in the civil rights era than in the Lochner era. To illustrate, I shall discuss three areas of individual rights activism by the Warren and early Burger Courts: the protection of ethnic minorities, the reformation of the political process, and the establishment of a right of sexual liberty. The Court's doctrinal analysis in all of these cases was mainstream liberal revolving around either of two issues; the limits of government intervention into people's private spheres; and the benefits the government must affirmatively accord people in order to ensure their human dignity.

In the Court's answers to these questions, the ideology of individualism and the rhetoric of rights abound just as in the Lochner era. And as in the Lochner era, the Court's civil rights era decisions entail policy judgments not compelled by constitutional doctrine. This comment is not intended to denigrate in any way the Supreme Court's achievements in the civil rights era; while its decisions leave intact many of the injustices of United States-style democratic capitalism, they still represent real, if limited, advances from a humanistic perspective. Rather, I would argue that the Court's civil rights era decisions are best understood in historical context and in terms of the Court's mediating role.

The protection of ethnic minorities — The greatest achievement of the Warren Court was the invalidation of government mandated racial segregation, i.e., United States apartheid. In *Brown v. Board of Education*,[52] the

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50. Compare, P. Baran & P. Sweezy, MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER at 52-217 (1966); J.K. Galbraith, ECONOMICS AND THE PUBLIC PURPOSE at 155-63, 179-97 (1973). Baran's and Sweezy's position is that government spending is necessary under monopoly capitalism because of the need to create demand to utilize the unused surplus produced by monopoly capital's rampant growth and the constant effort to increase profits. In a sense government spending is of general benefit in that without it there would be more unemployment and less funds available for the goods and services of smaller entrepreneurs. But since this spending predominately benefits monopoly capital, defense spending and highway programs being the best examples, it also enhances monopoly capital's economic dominance. The orthodox socialist response to monopoly capital has been to advocate the socialization of the means of production, and particularly of the giant corporations, in order to make the economy more responsive to the public good. Galbraith, on the other hand, argues for socializing some of the more competitive sectors of the economy, such as housing and health care, in order to put them on a more equal footing with monopoly capital. J.K. Galbraith, ECONOMICS AND THE PUBLIC PURPOSE at 275-85.

51. Compare, for example, G. Dumhoff, THE HIGHER CIRCLES: THE GOVERNING CLASS IN AMERICA at 233-49 (1970); J. Greenstone, LABOR IN AMERICAN POLITICS at 46 (1977). The contradiction between capitalist and power elite opposition to the mediation of the political and judicial processes and the notion that those processes help to preserve capitalist and power elite domination is more apparent than real. The self-interest or narrower perspective of individual elites might well lead them to oppose particular reforms which collective or more detached decision-making processes might view as needed pacification. For example, it is in the interest of individual capitalists to oppose the unionization of their plants lest they lose profits or be put at a competitive disadvantage. Yet legislation or court rulings protecting the right to unionize might make it more palatable to capitalists as a whole by ensuring that all competitors will be unionized; and it also may be to their long run advantage if it mollifies workers, perhaps even without undercutting profits if the added labor costs can be passed on to consumers. Compare note 22 and note 61.

52. 347 U.S. 483 (1954).

leading case in this area, the Court struck down enforced segregation in public schools. Once again, the Court employed mainstream liberal rhetoric emphasizing the values of democracy and equality of opportunity:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him [sic] for later professional training, and in helping him [sic] to adjust normally to his [sic] environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he [sic] is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[53]

Mandatory segregation is undemocratic and unequal, according to the Court, because such discrimination pins a badge of inferiority on Blacks, thereby denying their equal worthiness as human beings. By contemporary moral standards, this insight seems difficult to refute. In retrospect, it is hard to believe that the Court was forthright in its assertion of the opposite point of view when in *Plessy v. Ferguson*[54] it upheld mandatory segregation a half century earlier.[55] The divergent results in *Brown* and *Plessy* illustrate the value-laden judgments underlying both cases; the *Brown* Court's interpretation of the meaning of equal protection differs markedly from that of the *Plessy* Court. Moreover, implicit in *Brown* is a relatively non-interpretivist approach to construing the Constitution, particularly given substantial evidence that the original intent of the Fourteenth Amendment was not to ban enforced segregation.[56] Thus, the very choice to follow either the *Brown* or *Plessy* approach entails a debatable policy judgment not mandated by the Constitution.[57]

However laudable the result, on a doctrinal level the issue in *Brown* was no more determined by the Constitution than were the issues in the Lochner era cases. Thus *Brown*'s significance, and *Plessy*'s as well, must be understood in historical context. *Plessy* grew out of the political compromise following the Civil War which restored control of the South to its former and emerging power elite.[58] Enforced segregation was an aspect of a revised social structure which enabled the power elite to continue exploiting Blacks much as under slavery.[59] By appealing to the myth of Black inferiority, this social structure thwarted the possibility of populist alliances between Blacks and other oppressed southerners, isolated Blacks from the political process, and rendered them powerless.[60] *Plessy* represented an attempt to enlist the judiciary to undercut this oppressive social structure. While the Court's decision to uphold segregation is reprehensible, one may nevertheless view it as a successful mediation from an elite perspective in the sense that it contributed to the legitimacy and stability of the United States-style democratic capitalism of that era.[61] By putting the Supreme Court's stamp of approval on the post-Civil War compromise, the *Plessy* decision, although perpetuating opppression, both abetted the nation's reunification and enabled it to avoid addressing the evils of racism for some fifty years.

While moral revulsion to slavery as well as social and political factors contributed significantly to the Civil War, economic factors were overriding. The dispute over the continuation and extension of slavery, the lifeblood of the southern agrarian economy, was central to the struggle for economic dominance between southern agrarianism and northern industrial capitalism.[62] It is possible, in

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53. 347 U.S. at 493.
54. 163 U.S. 537 (1896).
55. Justice Harlan's lone dissent in *Plessy* sets forth even more eloquently than *Brown* the liberal value of equality before the law with which enforced segregation conflicts:

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. 163 U.S. at 559.

56. Compare, R. Berger, GOVERNMENT BY JUDICIARY at 117-33 (cited in note 14).
57. See note 17.
58. Compare, Billings, Class Origins of the New South: Planter Persistence and Industry in North Carolina, in MARXIST INQUIRIES at 52-83 (1982); J. Mandle, THE ROOTS OF BLACK POVERTY: SOUTHERN PLANTATION ECONOMY AFTER THE CIVIL WAR (1978); M. Wayne, THE RESHAPING OF PLANTATION SOCIETY (1983); C.V. Woodward, THE ORIGINS OF THE NEW SOUTH, 1877-1913 (1951); C.V. Woodward, REUNION AND REACTION (1966). There has been a scholarly debate in the above works, which is unnecessary to resolve here, over the extent to which power in the New South resided more in the old planter class or the emerging industrial elite. The truth probably lies somewhere in between and is a question of degree depending on the time and locale.
59. Compare, J. Mandle, THE ROOTS OF BLACK POVERTY; Weiner, Class Structure and Economic Development in the American South, 1865-1955, 84 AM. HIST. REV. 970 (Oct. 1979).
60. See C.V. Woodward, THE STRANGE CAREER OF JIM CROW (1957).
61. In this regard *Plessy* stands in sharp contrast to *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), the Supreme Court's infamous pre-Civil War race case. In *Dred Scott* the Court struck down the Missouri Compromise, which attempted to mediate the slavery issue politically by permitting it in part and banning it in part of the western territories. If it did not make the Civil War inevitable, *Dred Scott* most certainly speeded it up. Although a victory for one slave owner, *Dred Scott* was thus a disaster to the power elite on both sides because it stood in the way of at least a temporary political mediation of a dispute which threatened to tear the system asunder.
62. See C. Beard & M. Beard, 2 THE RISE OF AMERICAN CIVILIZATION at 3-121 (1928); L. Hacker, THE TRIUMPH OF AMERICAN CAPITALISM at 199-373 (1940).

fact, to interpret the Civil War as an early battle in the conflict between competitive capitalists represented by the agrarian South and emerging monopoly capitalists represented by the industrialized North.[63] The North's victory in the Civil War greatly contributed to the growing dominance of monopoly capital over the succeeding century. In the interim the South suffered economic stagnation —a consequence in large part of the North's hands-off approach to the South embodied in the post Civil War compromise sanctioned by the Supreme Court in *Plessy*.[64]

By the middle of the twentieth century, though, the time had arrived to bring the South into the fold of modern-day United States-style democratic capitalism. The Supreme Court's undermining of enforced segregation represented, in great part, a response to the need to promote the integration of the South into the modern economic order. As with the Civil War, moral revulsion to racism and other noneconomic factors played a part in the desegregation movement. Yet at least as significant is the economic explanation that ending United States apartheid served the interests of United States-style democratic capitalism both domestically and internationally.

Domestically, several factors suggest that the time was at hand to desegregate the South: time had healed to a degree the wounds opened by the Civil War; the growing class consciousness within the Black community threatened social instability; and the underdeveloped South offered an inviting pool of cheap labor.[65] Yet enforced segregation stood in the way of the South's economic development by creating economic inefficiency and engendering social conflict, which greatly inhibited industrial movement to the region. Segregated workplaces were cumbersome to maintain; the risk of racial upheaval could not be ignored; and the reservation of the better jobs for whites, while Blacks were confined to more menial tasks, prevented employers from assigning workers so as to maximize their skills and productivity. It is not coincidental that the economic development of the South has been accompanied by the Court-prompted elimination of enforced segregation.

Internationally, the extension of capital into developing countries depends to a great degree on promoting amicable relations with the ruling elites, not to minimize the centrality of military force and power politics. Fundamental here is a nation's standing in the international community. As the example of South Africa shows, it would have been difficult for the United States, while still practicing apartheid, to establish good relations with developing countries (particularly those with a colonial past), or to maintain its international standing. Thus, the Supreme Court's repudiation of enforced segregation directly served the interests of United States-based international capitalists and the United States capitalist system.[66]

The contrast between the Supreme Court's role in dismantling apartheid and its role in the Lochner era is striking. In the latter instance, having initially acted to deter the political process from making adjustments needed to sustain United States-style democratic capitalism, the Court was forced in the end to back down to political pressure. In the former instance, on the other hand, the Court was instrumental in fostering needed adjustments which the political process was unable to accomplish itself and which consequently have stood the test of time. Reform was not possible in the South since Blacks were deprived of the vote and segregationists controlled the political process. Reform was also difficult on a national level in light of the unity of southern states on this issue and their power as a voting bloc in Congress. Nevertheless, national public opinion, if not yet generally opposed to segregation, was ready to be swayed by the Supreme Court's liberal rhetoric against racial segregation. There were even those among the southern power elite who were prepared to accept the end of segregation, but feared addressing the issue due to the strength of the prevailing racist sentiments.[67]

Does this mean that the South would continue to practice apartheid had the Supreme Court not stepped into the breach in the political process? Given the interest of the country as a whole to be rid of enforced segregation, civil rights legislation may eventually have found its way through Congress despite southern opposition and without judicial prodding. It is also possible that southern segregationists would have ultimately realized that enforced segregation was contrary to their interests, and

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63. While acknowledging this as one possible interpretation of the Civil War, Geneovese has argued that the War's roots lay in the fact that southern plantation slavery was a precapitalist, prebourgeois, seigneurial or serf-like system with a world view and a way of life fundamentally incompatible with the capitalistic hegemony being achieved in the outside world (i.e., the rest of the country and Europe) with which the South was so intimately tied. See E. D. Genovese, THE POLITICAL ECONOMY OF SLAVERY (1965) and THE WORLD THE SLAVEHOLDERS MADE (1969). Either way, the North's victory in the Civil War can be seen as contributing to the emergence of monopoly capital.

64. Weiner, 84 AMER. HIST. REV. 970, (cited in note 59), focusing more on agriculture, attributes the South's economic stagnation to its reliance on quasi-feudal bound labor and debt peonage, coupled with governmental limitations on free movement, as against the wage labor and more capital intensive approach of northern capitalism. Wood, focusing more on the textile industry, argues rather that southern social and material development stagnated, despite high rates of capital accumulation, due to a large, unskilled, impoverished labor force, restricted labor market competition, and the absence of unions or laws protective of labor, thus enabling southern capital to extract relatively greater surplus value, P. Wood, SOUTHERN CAPITALISM (1986). Goldfield, has characterized the South until recently as quasi-feudal and quasi-colonial, D. Goldfield, COTTON FIELDS AND SKYSCRAPERS (1982)

65. See P. Wood, SOUTHERN CAPITALISM.

66. On the convergence of interests between the Black community and the power elite, see Bell, *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518 (1980).

67. Compare E. Jacoway & D. Colburn, eds., SOUTHERN BUSINESSMEN AND DESEGREGATION (1982).

would have voluntarily dismantled it. This possibility may explain the fairly rapid acceptance of desegregation in the South despite early virulent opposition,[68] as well as anti-apartheid sentiments in some sectors of the South African business community. In any event, the Supreme Court certainly contributed to the demise of enforced apartheid, just as in an earlier era it had sanctioned it. In so doing, the Court served the interests of United States-style democratic capitalism at least as much as those of the black community.

No doubt this society remains highly racist. And that the government continues to be involved in racism, if less overtly than in the past, illustrates the limitations of the judiciary's ability to change the system. Nevertheless, credit must be accorded the Supreme Court for initiating meaningful reform. Today, though, as it becomes more and more apparent that the reforms of the civil rights era have not led to equality, particularly of economic opportunity, a growing resentment is mounting within the black community. In the not too distant future, this renewed class consciousness may well erupt in social upheaval reminiscent of the civil rights era. Thus, while the Supreme Court may have successfully mediated the conflict for a time, the Court did not solve, and is probably incapable of solving, the underlying contradictions which have produced it.

The reformation of the political process — The most notable of the Warren Court's efforts in this area is represented by the one-person-one-vote rule which dramatically altered the structures of the House of Representatives and state houses across the land.[69] Prior to the rule, the House and many state legislatures were composed of districts of greatly disparate population. Now, as the result of Supreme Court intervention, district lines must periodically be redrawn on an equal population basis. Just as in *Brown*, the Court's rhetoric emphasizes the ideology of democracy and equal opportunity, as most cogently expressed in *Reynolds v. Sims*:

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his [sic] State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his [sic] state legislature. Modern and viable state government needs, and the Constitution demands, no less.[70]

Despite the rhetoric, the connection between one-person-one-vote and "full and effective participation" in government or "an equally effective voice" in elections is highly debatable. In the first place, it is difficult to define effective participation and an equally effective voice. Clearly, these concepts do not mean winning on every issue. But could one be a loser on every issue and still be said to have an effective voice? Or does effectiveness depend on one's being victorious at least sometimes, and if so how often? Does it depend on the nature of the issue? If the substantive outcome matters, then a departure from one-person-one-vote may at times be necessary to assure full and equal effectiveness.[71] For instance, where a cohesive majority controls the political process and consistently disregards the interests of the minority, there may be a case for according somewhat greater weight to minority votes in order to counteract majority tyranny. There is also an argument for differential voting strength as to issues which may have greater impact on some than others. The super-majority requirement to amend the Constitution, whose justification is in part to protect minority rights, is an example functionally equivalent to unequal population districts of counting minority votes more heavily.

One-person-one-vote, however, is a per se rule which does not allow for such variations in the elections to which it applies.[72] It is therefore not concerned with substantive outcomes, but is rather a rule of formal equality. Everyone's vote must count the same and carry the same weight. In that way, whether on the winning or losing side, everyone theoretically has comparable influence on the outcome. But that is an obvious fallacy in light of existing disparities in the distribution of power and wealth. Those in positions of power and those with money, who are already members of the power elite or

68. Much of this acceptance is attributable to the moderating influence of "enlightened" segments of the southern power elite. Whether this moderation was the result of a change of heart regarding race relations, economic self-interest, or a reluctant yielding to some reform in order to preserve as much as possible of the status quo, has been the subject of scholarly debate. Compare E. Jacoway & D. Colburn, SOUTHERN BUSINESSMEN, with N. Bartley, THE RISE OF MASSIVE RESISTANCE: RACE AND POLITICS IN THE SOUTH DURING THE 1950'S (1977). Either way, in terms of the thesis of this paper, southern acceptance of desegregation is an example of the Supreme Court's ability to mediate a highly divisive dispute in a way which legitimized a reformed social order still consonant with the dominance of the power elite.

69. *Wesberry v. Sanders*, 376 U.S. 1 (1964) (applying the one-person-one-vote rule to election of members of the House of Representatives); *Reynolds v. Sims*, 377 U.S. 533 (1964) (applying same to state legislatures); *Avery v. Midland County*, 390 U.S. 474 (1968) (applying same to subunits of state government).

70. 377 U.S. at 565.

71. Compare R. Dixon, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS (1968); M. Shapiro, LAW AND POLITICS IN THE SUPREME COURT at 227-32 (1964).

72. It has been argued that while the Court may have recognized that one-person-one-vote did not assure equally effective participation, it adopted the rule, in order to correct an obviously irrational situation, because of the inappropriateness or administrative difficulty of the Court's inquiring into the workings of the political process. See J. Ely, DEMOCRACY AND DISTRUST at 120-24 (cited in note 17). I would stress instead the symbolic value of a rule which treats everyone as formally equal in helping to create the myth of substantive equality in practice.

are the beneficiaries of United States-style democratic capitalism, have far greater influence on elections and law-making than those whose influence is limited largely to their votes. In short, while the one-person-one-vote rule may or may not have some equalizing impact on people's political power, the underlying rhetoric of equal participation is a myth which masks the fact that in the political process the influence of the power elite predominates.

In addition, the reapportionment cases' rhetorical focus on public electoral politics as the essence of democracy masks the fact that true democracy, in the sense of full and effective participation, demands an effective voice not only in electoral politics but in other nominally private areas of life as well. The most notable area is the workplace, where the power elite's predominance is greater even than in the political process.[73] Likewise the one-person-one-vote rule, in line with United States-style democratic capitalism's ideology of individualism, masks the fact that political power is more a group than an individual phenomenon; and that what matters in achieving electoral power is not only that one's vote counts as much as everyone else's, but that like-minded people are able to pool their voting strength in effective ways. In this regard the winner-take-all/two-party system in this country enhances the power elite's domination of the political process by enabling it to stifle the effective voice of those with divergent views. Imagine the power, for example, of the Rainbow Coalition if there were proportional representation in Congress. Proportional representation would do far more than the one-person-one-vote rule to ensure the effective political participation of the relatively powerless. However, the Supreme Court will likely never mandate proportional representation due to the various factors constraining the Court from initiating reform detrimental to the power structure.

Indeed, as with the Court's invalidation of apartheid, the one-person-one-vote rule affirmatively serves the interests of capital and particularly of monopoly capitalists. Prior to the reapportionment cases, both the House of Representatives and many state legislatures were seriously malapportioned in favor of rural areas. The effect of the one-person-one-vote rule has been to transfer political power to urban areas, where the influence of industrial and international capital is greater since that is where its beneficiaries live. True, reapportionment has also enhanced the political power of poor and minority central city dwellers, a potential anti-capitalist force. This is undercut, however, by the fact that the greatest power shift has been to the more conservative suburban areas which tend to dominate United States politics[74] and that the political power of the poor and minorities is limited by a lack of funds and their submergence in the two-party system. As with desegregation, moreover, the Supreme Court's intervention in the reapportionment cases initiated a reform which the political process itself could not accomplish because state legislatures, the very bodies responsible for creating electoral districts, were themselves malapportioned.

The one-person-one-vote rule is thus another example of successful Supreme Court mediation. It affirmed the ideology of democracy and of the equal worth of every person as a political being, thereby promoting the legitimacy of the system and diverting attention from more serious inequities in power in both the public and private spheres. And it did so without interfering with, and in fact buttressing, the power elite's political hegemony. It remains to be seen, though, whether the illusion of equal political participation will persist, given this society's widening wealth disparities and the political process' decreasing responsiveness to the poor. Widespread expressions of mistrust for politicians and the widespread failure of many United States citizens to vote is some indication that people do not fully buy the myth.

Sexual liberty — The leading cases here are those protecting sexually explicit speech,[75] private sexual activities,[76] and particularly the right to an abortion recognized early on by the Burger Court.[77] While the abortion decision, *Roe v. Wade*, is the most controversial of these rulings, the most eloquent expression of the underlying liberal ideology of a private sphere beyond the purview of government is contained in the Warren Court's decision in *Griswold v. Connecticut*.[78] There the Court struck down as applied to married people a law prohibiting the use of and the dispensing of information regarding contraceptives:

> Overtones of some arguments suggest that *Lochner v. New York* . . . should be our guide. But we decline that invitation . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation . . .
>
> We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is

73. See H. Braverman, LABOR AND MONOPOLY CAPITAL (cited in note 46).

74. Compare, R. Dixon, DEMOCRATIC REPRESENTATION at 586-87 (cited in note 71); Hanson & Crew, The Policy Impact of Reapportionment, 8 L. & SOC. REV. 69 (1973).

75. *Roth v. United States*, 354 U.S. 476 (1957) (articulating test for obscenity as speech which appeals to prurient interest according to the average person and contemporary community standards); *Miller v. California*, 413 U.S. 15 (1973) (defining speech appealing to prurient interest as that which is patently offensive and lacks serious value as a whole).

76. *Stanley v. Georgia*, 394 U.S. 557 (1969) (holding private possession of obscene material as constitutionally protected).

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

78. 381 U.S. 479 (1965).

an association for as noble a purpose as any involved in our prior decisions.[79]

Here, despite its protestations to the contrary, the Court comes full circle to *Lochner*. Only now it is not the economic sphere of life which the Court regards as beyond the purview of government, a premise which the Warren Court fully rejects, but one's sexual life both in and out of wedlock.[80] But what is it that makes sex more private than economics? Economic activity certainly has a public side to it in that what happens in one sector of the economy has a ripple effect throughout. But nominally private sexual activity also has potential public impact. One's sexual practices reflect one's sexual values which cannot be kept totally hidden but will inevitably find public expression in one way or another. These values thereby impact society's sexual mores, which in turn are interrelated with society's mores generally.

This does not mean that sexual activity should be regulated. It does mean that the Supreme Court's decision to cordon off sexuality (or at least heterosexuality[81]) from government intervention is ultimately a debatable value judgment about the type of society one favors. For example, those who favor the right to abortion feel it contributes to women's liberation, while those opposed believe it constitutes murder and leads to the breakdown of the family.[82] A similiar debate revolves around the legalization of pornography, with one side arguing that legalization enhances people's freedom of choice and the other side arguing that it has unleashed an essentially exploitive industry.[83]

If liberal ideology cannot make a principled distinction on a doctrinal level between economics and sexuality, then the distinction must lie in the context. As noted above, the Lochner era context was the struggle between monopoly and competitive capital, and the related issue of the modern welfare state; and the Supreme Court's intervention was unsuccessful either because of the inevitability of the monopoly-capitalist/welfare-state victory, or because those forces were simply too strong to be countered. The Court's sexual liberty decisions, on the other hand, seem a more successful effort at mediation.

Sexual liberty in context is related largely to the class-like struggle of women against male domination. While not peculiar to capitalist societies, female subjugation has thrived under United States-style democratic capitalism and generally in capitalist societies.[84] While also having cultural and religious overtones, male supremacy is largely based on the exploitation of women's labor. This can be seen in both the contraception and abortion controversies. The absence of contraception and restrictions on abortion mean larger families, which historically have forced women into the roles of caretaker and homemaker; and by having children they do not desire and cannot support, women become dependent on men and are precluded from competing in the employment market on equal terms, particularly in a society lacking adequate day care provisions.[85]

Supreme Court mediation of this conflict has been successful because freeing women from the rigors of child rearing serves the interests of advanced capitalism by enabling women to enter the labor force and be more productive workers — the staying power of advanced capitalism being its ability to create ever increasing material demands, which in turn requires more workers to produce the desired goods. Thus, although the Supreme Court's sexual liberty rulings may pacify women by alleviating male domination, the rulings may result in the substitution of capitalist exploitation in its place. Also contributing to the success of the Supreme Court's mediation is the widespread popular support of its sexual liberty rulings, albeit in the face of vehement opposition within segments of the public and of academia[86]. Moreover, as with the desegregation and voting rights controversies, the political process was unable to effect a resolution. In part this is because men still predominate among elected officials; and in part because the opposition, particularly the religious right, is well organized and determined. By removing such heated conflicts from the political process the Supreme Court can assist in stabilizing the system —as long, that is, as the Court is successful in its mediation efforts and retains its legitimacy in the public's eye.[87]

The Modern Era

During the modern era the Burger/Rehnquist Court

79. *Griswold*, 381 U.S. at 481-82, 486.

80. *Griswold* was extended to unmarried people in *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

81. See note 124.

82. Compare, K. Luker, ABORTION AND THE POLITICS OF MOTHERHOOD (1984); Glen, Understanding the Abortion Debate: A Legal, Constitutional and Political Framework, 89 SOCIALIST REV. 51 (1986).

83. Compare, MacKinnon, Not a Moral Issue, 2 YALE L. & POL. REV. 321 (1984); A. Dworkin, PORNOGRAPHY: MEN POSSESSING WOMEN (1981); A. Soble, PORNOGRAPHY: MARXISM, FEMINISM, AND THE FUTURE OF SEXUALITY (1986); M. Valverde, SEX, POWER AND PLEASURE (1985).

84. Compare, MacKinnon, Feminism, Marxism, Method, and the State: An Agenda for Theory, 7 SIGNS 515 (Spring, 1982); Polan, Toward a Theory of Law and Patriarchy, THE POLITICS OF LAW at 294-303 (cited in note 33); Rifkin, Toward a Theory of Law and Patriarchy, MARXISM AND LAW at 295-301 (cited in note 4); Thomas, Citizenship and Gender in Work Organization: Some Considerations for Theories of the Labor Process, MARXIST INQUIRIES at 86-112 (1982).

85. Compare, Frug, Securing Job Equality for Women: Labor Market Hostility to Working Mothers, 59 B.U.L. REV. 55 (1979).

86. Compare, for example, Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, Substantive Due Process by Any Other Name — The Abortion Cases, 1973 SUP. CT. REV. 159. The academic critique speaks mostly to the argued inappropriateness of the Supreme Court's overriding the political process with regard to abortion, on the ground that such a right cannot legitimately be found in the Constitution. For a counter proposal, see L. Tribe, AMERICAN CONSTITUTIONAL LAW at 929-33 (cited in note 17).

87. During the decade prior to *Roe*, approximately one third of all states had liberalized their abortion laws without

has not developed as consistent a philosophy as the Lochner era and Warren Courts appear to have done.[88] In large part this is due to the Court's having been fairly evenly divided along liberal, conservative, and moderate lines — although all within the confines of mainstream thinking. Nonetheless, the Burger/Rehnquist Court has been noticeably less active than the Warren Court on behalf of individual rights as against the government. None of the major Warren Court rulings has been reversed, but in most instances there has been a narrowing of their scope and a reluctance to extend them further.[89]

It would therefore not be fair to say that the Burger/Rehnquist Court has been anti-individual rights, although there may be particular justices who lean in that direction. Rather this has been a period of accommodation, of giving something to both sides, of sometimes ruling in favor of the individual and sometimes of the government, and of attempting to balance competing individual rights claims. In so doing the Court has drawn fine lines in distinguishing and rationalizing the diverse outcomes. These fine lines reflect neither the logical nor objective development of the underlying doctrine, but the Court's collective judgment on which of the competing liberal values at stake in most of these cases should take precedence. The result has been a hodgepodge of rulings hard to reconcile with each other on any basis other than an on-going policy debate within the Court which mirrors the debate in society at large.

This is not to say that the Court's balancing act has been deliberately planned. This is simply the way the Court has come to function as the result of numerous historical factors—some explicable and some fortuitous—and even irrational. In context it may be that the Court's wavering approach, by pacifying both sides, successfully mediates or contributes to the mediation of the conflicts arising in this era. In my view it is too early to tell, since the outcome of the forces currently at play is still in doubt. What can be said is that despite the fact that this society is undergoing a period of economic instability, it is nevertheless experiencing relative social stability, compared with, for example, the civil rights, Vietnam War, and Watergate eras. And it may be that the Supreme Court's middle-of-the-road approach, although leaving the injustices of United States-style democratic capitalism intact, has contributed to that stability at least for the time being.

Ethnic minorities — With respect to the protection of ethnic minorities, while still condemning governmentally promoted segregation, the Court has set some limits on the remedial front.[90] After an early Burger Court decision (attributable in part to the Warren Court holdovers) sanctioning forced busing as a school desegregation measure,[91] the Court ruled against cross-district busing into suburbia, thus enabling more affluent whites to escape integration.[92] The Court also held that new desegregation

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much fanfare, mostly along the lines of the American Law Institute's model statute authorizing abortion where necessary to protect the life or health (including the mental health) of the mother. In California at least, the practical effect was to make abortion available on demand. K. Luker, ABORTION AND THE POLITICS OF MOTHERHOOD at 41, 92-94 (cited in note 82). Whether the liberalization process would have continued is uncertain. If so, then it might be argued that the Supreme Court expended its prestige unwisely and needlessly put its legitimacy on the line. It certainly seems fair to say that *Roe* has politicized the Court, and has exposed the ideological nature of Court decision-making, more than any other case in recent years. In other instances when the Court has put itself on the line, such as in the *Brown* case, its decisions have stood the test of time. Whether the same will be true of *Roe* only time will tell.

88. For evaluations of the Burger Court's work, see H. Schwartz, ed., THE BURGER YEARS (1987); V. Blasi, THE BURGER COURT (1983).

89. The Burger and Rehnquist Courts also display a burgeoning states' rights thrust somewhat reminiscent of the Lochner era. The states' rights position often loses and was dealt a severe blow in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985). Nevertheless, the states' rights advocates, notably Chief Justice Rehnquist, number several of the Court's younger members and are likely to increase if conservative presidents are in office much longer. See Kleven, 8 VT. L. REV. 1 (cited in note 12). The rhetoric of many of the opinions advancing states' rights speaks to democratic principles. For example, in his dissenting opinion in *Garcia* Justice Powell based his argument for constitutional limitations on federal power to regulate state and local governments on "the far more effective role of self-government at the state and local levels." 469 U.S. at 576. This highly debatable policy judgment is based less, I would argue, on a genuine commitment of the judicial conservatives to democracy than on their desire to contribute to the deregulation movement of the modern era. See Blum, Greaney, Hanifin & Sousa, Cases that Shake the Conscience: Reflections on Criticism of the Burger Court, 15 HARV. C.R.-C.L.L. REV. 713, 715 (1980) (characterizing the Burger Court's performance as "judicial deregulation of persons and entities wielding power in American society"); Greer, Deregulation Fever Hits the Supreme Court, THE NATION 666 (Dec. 20, 1980). While the federal government positively supports monopoly capital and the power elite in many ways, the capitalist power structure views much federal regulation as interfering with their major objectives, namely pursuing profits and economic dominance. Hence the deregulation movement is designed not to reduce the federal government to the minimalism of the nineteenth century, but to cut back on overintrusive regulation while still retaining federal support for monopoly capital. Since state governments tend to be less powerful, more easily dominated by monied interests, less likely to interfere with business, and less supportive of the disadvantaged than the federal government, it serves these justices' conservative ideology to advance states' rights whenever possible. Decentralized decision-making does hold a prominent place in egalitarian socialist theory as a way to foster grass-roots democracy, Albert & Hahnel, Socialist Economics, 96 SOCIALIST REV. 87 (1987); Frug, The City as a Legal Concept, 93 HARV. L. REV. 1059 (1980). Nonetheless, the states' rights movement is not comparable in the context of United States-style democratic capitalism. The success of socialist decentralization depends on a society generally structured along egalitarian lines. Decentralized decision-making in this society, by contrast, given its great disparities in wealth and power, is likely to further enhance the position of the power elite and to further isolate the disadvantaged.

90. *Keyes v. School District No. 1*, 413 U.S. 189 (1973); *Dayton Board of Education v. Brinkman*, 443 U.S. 529 (1979); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

91. *Swann v. Charlotte-Mechlenburg Board of Education*, 402 U.S. 1 (1971).

92. *Milliken v. Bradley*, 418 U.S. 717 (1974) (cross district remedy requires proof of governmental discrimination causing interdistrict segregation). Interdistrict relief based on such proof was affirmed by the Court in *Evans v. Buchanan*, 393 F. Supp. (D. Del. 1975), affirmed, 423 U.S. 963 (1975).

measures are not required if resegregation results from private rather than government action (i.e., from white flight, either to suburbia or to private schools).[93] At the same time, perhaps as an effort to pacify, the Court upheld court-ordered state funding of remedial and special education programs as part of a desegregation plan when integration is unachievable due to white flight.[94]

Here again we see the public-private distinction used, not as in the Lochner and civil rights eras to prevent government regulation of business and of sexual activity, but to relieve the government of responsibility for rectifying so-called private acts of racism. (In fact, there is no substantive difference between collective discrimination through the government and discrimination resulting from the tacit collective action involved in massive white flight.[95]) On a doctrinal level there is a conflict here between two liberal values: the individual right to be treated as an equal, and the individual right to freedom of choice. Since liberal theory, while revering individual choice, morally disapproves of racially biased private choices, there has been an attempt to white-wash white flight. It is not racism which motivates white flight, but the desire to live in a nicer neighborhood, to advance, to better one's self and one's family -- all of which flows from the liberal value of individual initiative. But this only exposes the underlying economics of white flight. For it is the great wealth disparity between the white and minority communities which makes white flight possible, and it is the institutionalized racism of United States-style democratic capitalism which causes the wealth disparity. In short, the public and the private are so inextricably intertwined that the distinction is meaningless, at least in the context of mass private action and race.

The consequence of the Burger Court's desegregation rulings is the new separate and unequal: white flight to suburbia and private schools leaving minorities and some disadvantaged whites trapped in central cities where education is inferior both because of segregation and of the cities' declining tax bases caused by white flight. The positive side of this has been community control — more minority elected officials and minorities running minority institutions. And given the institutional racism which infects the system, perhaps community control is preferable to continuing to push for integration. But it is a no-win situation, since due to institutionalized racism neither continued efforts to integrate nor community control will yield equality for Blacks and other disadvantaged minorities. Only fundamental changes in the political, bureaucratic, and economic institutions of United States-style democratic capitalism could bring that about. This implies that egalitarian socialism is a necessary if not sufficient condition for a racist-free society.

Fundamental economic restructuring, however, is a move the Supreme Court has assiduously avoided, and could probably not accomplish anyway beyond a limited degree due to the various factors constraining it from initiating such changes. Several Burger Court decisions are on point. For example, after an early ruling (attributable really to the Warren Court) requiring procedural safeguards before terminating welfare benefits,[96] the Burger Court has steadfastly refused to address the underlying economics of institutionalized racism and the related economics of poverty. The Court's unwillingness to address the adequacy of welfare benefits,[97] unequal school financing,[98] and exclusionary zoning[99] amply demonstrates this

93. *Pasadena Board of Education v. Spangler*, 427 U.S. 424 (1976).

94. *Milliken v. Bradley*, 433 U.S. 267 (1977).

95. Compare *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (ruling that there was no state action violative of equal protection in granting liquor license to private organization engaging in racial discrimination). Whatever the merits of *Moose Lodge* may be, the government is much more heavily involved in facilitating white flight, as in housing and highway programs, than the relatively small scale practices involved in *Moose Lodge*. For critiques of the state action doctrine, see Brest, State Action and Liberal Theory: A Critique of *Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982); Casebeer, Toward a Critical Jurisprudence — A First Step by Way of the Public-Private Distinction in Constitutional Law, 37 U. MIAMI L. REV. 379 (1983).

96. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring a prior due process hearing). See also *Shapiro v. Thompson*, 394 U.S. 618 (1969), a Warren Court decision overthrowing durational residency requirements for welfare benefits as wealth discrimination violative of the fundamental right to travel. The Court was at its most interventionist in the economics of poverty in *Goldberg* and *Shapiro*. Yet it is noteworthy that the Warren Court's unanimity in dismantling enforced segregation broke down over issues of wealth discrimination. Even such liberal justices as Warren and Black dissented in *Shapiro*, presaging the Burger Court's hands-off attitude. On the Court's greater willingness to address racial issues rather than wealth issues, see Kleven, The Supreme Court, Race, and the Class Struggle, 9 HOFSTRA L. REV. 795 (1981).

97. *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding AFDC grant limitation for large families at less than standard of need); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (upholding provision of lower percentage of need to AFDC than to other welfare recipients). That *Dandridge* is also attributable largely to the Warren Court, only Warren himself having yet departed, indicates that even a more liberal Court than the Burger or Rehnquist Courts might be reluctant to address issues involving fundamental economic restructuring.

98. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) (holding that there was no equal protection violation in state-designed system of public school financing dependent on wealth of local districts). In *Rodriguez* the Court came within one vote of declaring education to be a fundamental right. The consequence would have been to require states to equalize the funding of public elementary and secondary education rather than to continue their widespread reliance on local financing, which due to the wealth differentials between local districts has produced great disparities in funding to the disadvantage of minority and lower income students. If education had been declared a fundamental right, then a minimum standard of living for everyone, and particularly the young, is but a short step on an intellectual level. See Michelman, Forward: On Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7 (1969). Yet even if it had intervened in *Rodriguez*, the Supreme Court would likely never take that step because of the dramatic impact on the economic system.

99. *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977) (ruling that proof of racially discriminatory purpose is necessary, racially disparate impact being insufficient, to make out equal protection violation); *Warth*

refusal. On the other hand, perhaps again in an effort to pacify both sides, it has given qualified approval to affirmative action measures; more readily accepting them when legislatively sanctioned or voluntary or in remediation of purposeful discrimination,[100] but being more reluctant when discrimination is effectual or when nominally innocent whites stand to lose existing positions (as against their losing the opportunity to obtain a vacant slot).[101] Thus the Burger Court has been less willing to order the government to act affirmatively to rectify injustice than to accede to the compromises emanating from the political and economic arenas. This is in contrast, and perhaps in reaction, to the Lochner era when the Court attempted unsuccessfully and to its detriment to block the political process' mediation of the conflicts surrounding the rise of monopoly capital.

The conservative drift of the Burger Court was largely the result of the conservative political drift in the United States following the civil rights era — a drift resulting in part from white backlash to the reforms of that era and fueled as well by the economic downturn since that time. This stage of United States-style democratic capitalism is characterized by high unemployment, increasing poverty, and widening wealth disparities; in short, a time in a society in which the ideology of competition and individualism prevails for protecting one's own. In such a society institutionalized racism ensures that the brunt of hard times will be borne by others than the white majority.[102] And the election of conservative presidents who appoint conservative justices ensures that the Supreme Court will not do much to remedy institutionalized racism.[103]

One might hope for more activism from the Court, and one day we may see it. And like the Warren Court's activism against enforced segregation during the civil rights era, future Court activism may again help stabilize the system if, as it seems likely, a future racial-class struggle should threaten its legitimacy. Realistically, though, while it might make modest in-roads, even an activist Court could not bring about the kind of affirmative action necessary to eliminate institutionalized racism from the fabric of United States-style democratic capitalism. This analysis, if correct, illustrates the ultimate limitations on the Supreme Court's ability to function as an

v. Scian, 422 U.S. 490 (1975) (requiring a particular excluded housing project to gain standing to challenge exclusionary zoning); *James v. Valtierra*, 402 U.S. 137 (1971) (holding that more rigorous approval requirements for public than for other housing does not violate equal protection). Even if the Supreme Court were willing to tackle the economics of poverty, it seems likely that remedial constraints such as governmental and public recalcitrance and avoidance tactics would greatly inhibit the Court's ability to bring about the massive redistribution of wealth and the economic restructuring necessary to solve the problem. See A. Cox, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976). Thus, for example, if the Court had intervened in *Rodriguez* and ordered equalized state financing of public education, the legislature might simply have refused to do so. If so, how could the Court realistically have responded? In the alternative, the legislature might have provided equalized but drastically reduced funding for public education, leaving the public schools to the disadvantaged while middle and upper income people fled to private schools; or it might have brought the poorer school districts up to the level of the richer by cutting back on welfare programs benefiting the same people, resulting in more education but less of other necessities. And if the Court were to attack that problem by requiring a minimum standard of living, then the result might be an inflationary spiral leaving the poor right where they were before. (A few state courts have addressed the school financing and exclusionary zoning issues, although I would argue with only modest success due to the institutionalized nature of the politics of poverty. See Kleven, 9 HOFSTRA L. REV. at 847-57 (cited in note 96).)

100. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (holding that a graduate school may take ethnicity into account in admission process in the interest of achieving diversity, although it may not set aside slots for particular ethnic groups); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (upholding collective bargaining agreement reserving half of openings in in-plant craft-training programs for Blacks until percentage of Black craft workers commensurate with percentage in local labor force); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding set aside of ten percent of Public Works Employment Act funds for minority businesses); *Local 28 of Sheet Metal Workers v. E.E.O.C.*, 106 S. Ct. 3019 (1986) (upholding court-ordered race-based affirmative action hiring plan containing numerical goals and not limited to actual victims as remedy for past discrimination); *Local No. 93, International Assoc. of Firefighters v. City of Cleveland*, 106 S. Ct. 3063 (1986) (upholding consent decree containing race-based promotion plan to remedy alleged past discrimination). But compare, *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989) (ruling requirement that 30 percent of work under city construction contracts be subcontracted to minority businesses violates equal protection absent showing of past city or prime contractor discrimination).

101. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (holding that enjoinment of seniority-based layoffs, in order to prevent firing of minorities hired after whites pursuant to consent decree requiring race-conscious hiring to remedy alleged though denied past race discrimination, violates Title VII); *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986) (ruling that collective bargaining agreement extending preferential protection against layoffs to minority teachers with less seniority than whites in order to maintain ethnic balance, but without a finding of convincing evidence of prior Board discrimination, violates equal protection).

102. On the relationship between monopoly capitalism and racism, see P. Baran & P. Sweezy, MONOPOLOY CAPITAL at 249-80 (cited in note 23).

103. Compare Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331 (1988) ("the relatively subordinate status of Blacks serves a stabilizing function in this society," at 1362; "race consciousness seems to be at least as important as legal consciousness in supporting the dominant order," at 1381). While acknowledging the legitimizing and coopting aspect of liberal reform in that "liberal ideology absorbs, redefines, and limits the language of protest," Crenshaw nevertheless argues that "African-Americans cannot ignore the power of legal ideology to counter some of the most repressive aspects of racial domination." Id. at 1370. The gains of the Civil Rights era certainly support this view. The question is whether and what additional gains are achievable through the "skillful use of the liberating potential of dominant ideology." Id. at 1387. To the extent that racial and poverty issues have become merged, as in welfare rights, school financing, and exclusionary zoning, the thesis here is that we are not likely to see much reform from the Supreme Court, at least for the time being.

effective mediator.

The political process — In the area of voting rights, while the "one-person-one-vote" rule is still intact, the Burger Court did chip away at it by allowing some deviation from equal population districts in furtherance of competing values[104] and by allowing several exemptions from the rule.[105] Beyond that, despite a few activist rulings, the Burger/Rehnquist Court has by and large been reluctant to address the issue of effective political participation.

One leading area of litigation has concerned multi-member electoral districts, the impact of which can dilute the voting strength of minority groups. This is particularly true when the majority votes as a bloc, has divergent interests from the minority, and refuses to respond to minority interests. After an early ruling dissolving multi-member state legislative districts which diluted the vote of Blacks and Mexican-Americans (but without clearly articulating a standard of proof)[106], the Burger Court upheld a city council multi-member district scheme which effectively diluted Black voting strength on the ground that both the Constitution and the Voting Rights Act require proof of purposeful discrimination.[107] This is a very difficult burden to carry when government practices are on their face ethnically neutral, since it is easy to advance benign purposes in support of practices actually prompted by racial animus. In so doing the Court expressly rejected proportional representation as a constitutional imperative, emphasizing the right to vote as an individual and not a group right.[108] Only when Congress subsequently amended the Voting Rights Act to make clear its intent did the Court shift to the effects test in vote dilution cases,[109] and only then with the reluctant concurrence of the Court's conservative wing which still favors a rigorous burden of proof even under the effects test.[110]

Two other voting rights areas in which the Burger Court was unwilling to intervene concern politically biased gerrymandering of electoral districts[111] and laws inhibiting access to the ballot by minor parties.[112] As to the latter the Warren Court had initiated some reform.[113] The pattern in the Burger Court's voting rights cases, then, displays a definite reluctance to break new ground, but a willingness, if somewhat tentative, to sanction political compromises. As with the protection of ethnic minorities, this pattern is largely a holding action, though with some moderation of earlier judicial reforms. One major exception to this analysis was the Court's invalidation on First Amendment grounds of all or part of laws regulating campaign financing[114] and other political expenditures.[115] At issue here again is a conflict between two competing liberal values: on the one side the right, founded in the ideology of individual worth, to an effective voice in the political process, and on the other side the right, founded in the ideology of meritocracy and private choice, to spend one's money on political causes as one sees fit. The Voting Rights Act and campaign finance cases illustrate the overlapping roles of the Supreme Court and the political process as conflict mediators. While the Supreme Court's hesitancy to vigorously enforce the Voting Rights Act and its overriding of

104. *Mahan v. Howell*, 410 U.S. 315 (1973) (holding 16.4 percent deviation regarding state legislature justified by "policy of maintaining the integrity of political subdivision lines"); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (same with 9.9 percent deviation); *White v. Regester*, 412 U.S. 755 (1973) (same with 7.8 percent deviation); *Brown v. Thompson*, 462 U.S. 835 (1983) (ruling deviations under 10 percent are minor).

105. *Gordon v. Lance*, 403 U.S. 1 (1971) (60 percent voter approval requirement for bond issues); *Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977) (separate majority voter approval requirement with respect to adoption of new county charter); *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) (water storage district elections limited to property owners with votes apportioned to assessed valuation); *Ball v. James*, 451 U.S. 355 (1981) (one-acre-one-vote regarding water reclamation district serving several hundred thousand residents).

106. *White v. Regester*, 412 U.S. 755 (1973).

107. *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Purposeful discrimination was found regarding an at-large system in *Rogers v. Lodge*, 458 U.S. 613 (1982).

108. 446 U.S. at 75-80.

109. *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986).

110. Under another section of the Voting Rights Act that prohibits changes in voting procedures which abridge the right to vote on account of ethnicity pursuant to a clearly expressed effects test, the Burger Court allowed the annexation by a city of a largely white outlying area. The effect was to substantially dilute Black voting strength. In order to prevent this result, the Court required that the city shift from an at-large to single-member district city council assuring Blacks seats roughly equivalent to their post-annexation share of the population. *City of Richmond v. United States*, 422 U.S. 358 (1975).

111. *Davis v. Bandemeer*, 106 S. Ct. 2797 (1986) (rejecting challenge to state legislative redistricting plan diluting Democratic voting strength); *Gaffney v. Cummings*, 412 U.S. 735 (1973) (upholding redistricting of state legislature to achieve rough approximation of statewide political strength of Democratic and Republican parties).

112. *American Party of Texas v. White*, 415 U.S. 767 (1974) (upholding against equal protection challenge the requirement that minor parties hold nominating conventions and obtain 10 percent voter signatures while major parties need only have primary election); *Jenness v. Fortson*, 403 U.S. 431 (1971) (upholding special ballot access requirements applicable to parties whose candidates received less than 20 percent of vote in prior gubenatorial or presidential election). For a contrasting opinion, see *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979) (invalidating requirement of more signatures to qualify for ballot in Chicago than in statewide elections).

113. *Williams v. Rhodes*, 393 U.S. 23 (1968) (invalidating restrictive requirements for parties receiving less than 10 percent of vote in prior presidential election, which made it "virtually impossible" for new party to be placed on ballot).

114. *Buckley v. Valeo*, 424 U.S. 1 (1976) (upholding Federal Election Campaign Act limits on individual and political committee contributions to federal candidates, but prohibiting limits on expenditures by candidates and campaigns); *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480 (1985) (invalidating expenditure limits by independent political committees on behalf of presidential candidates opting to receive public financing).

115. *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290 (1981) (invalidating contribution limits to committees supporting or opposing ballot measures); *First National Bank v. Bellotti*, 435 U.S. 765 (1978) (invalidating prohibition of corporate contributions or expenditures regarding referenda).

portions of the campaign finance laws undermine political settlements and benefit the already politically dominant, these statutes represent modest reforms at best. The Voting Rights Act does enhance somewhat minority political power on the state and local levels, thus pacifying the minority community. It does not, however, alter the overall political dominance of white voters nor of the power elite.

The campaign finance laws were designed in part to combat the erosion of public confidence in the political process resulting from the Watergate scandal. If upheld in their entirety they would have significantly inhibited the monied elite's ability to directly impact the electoral process, thus demonstrating a degree of autonomy of the political process. But while the campaign finance laws may have helped preserve the legitimacy of the system, they would not have fundamentally altered the political power of the monied elite, who have many other ways to exercise their power. These methods include lobbying, inducing employees to contribute, and providing non-campaign contributions to political parties. Indeed, one of the purposes of the campaign finance laws, as evidenced by the public financing of presidential elections to the disadvantage of minor parties,[116] was to strengthen the political dominance of the two major parties and therefore of the power elite to whom the major parties are so intimately tied. Only a fundamental restructuring of United States-style democratic capitalism, so as to prevent the amassing of great wealth and economic power in the hands of an elite few, could truly democratize the political process. That again is a move the Supreme Court would likely never make and could not accomplish anyway.[117]

Sexual liberty — Of the areas in which the Warren Court advanced individual rights, this is the one in which the Burger Court remained most activist. The leading case, of course, was *Roe v. Wade*, decided early on by the Burger Court and subsequently buttressed by rulings striking down a variety of legislative attempts to undermine it.[118] Furthermore, the Court assured women control over their bodies and undercut male domination with decisions invalidating laws and regulations discriminating against nonmarital children,[119] disallowing pregnant teachers to work,[120] and treating women employees less favorably than men under various welfare state programs.[121] At the same time, the Burger Court was cer-

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116. Major party presidential candidates receive $20 million (adjusted for inflation); minor parties (5% to 25% of the vote in the prior election) receive an amount proportional to their share of the vote in the prior or current election, whichever is higher; and other parties qualify for proportional subsidies only retroactively if they receive more than 5% of the vote in the current election. Minor parties must be on the ballot in at least ten states to qualify. These provisions seriously disadvantage minor party candidates. Candidates seeking presidential nomination in party primary elections are entitled to matching funds provided they raise $5,000 in each of twenty states. This disadvantages parties not in a position to run primary elections, which serve as a crucial means of gaining exposure to the electorate; it also disadvantages lesser known candidates in the major parties. The Court upheld this scheme against an equal protection challenge. *Buckley*, 424 U.S. at 93-108 (cited in note 114).

117. It might be good to summarize at this point some of the reasons why the power elite is able to predominate in the political process despite the universalization of the franchise. One basic reason is that money and economic power talk. In this era of mass media access to money is more important politically than ever. Money buys votes and facilitates lobbying. By pooling their resources those with money can organize themselves for effective political action, while those without money remain atomized and lack comparable means of coordination. Since everyone's well-being depends on the economy, the domination of monopoly capitalists, gives credence to the notion that what's good for General Motors is good for the United States.

A second reason is that the system is structured so as to minimize the political power of the masses. The two party system, which is bolstered by districting and winner-take-all elections, fosters mainstream thinking, inhibits the expression of divergent and destabilizing views within the political process, and delegitimizes those views (even to the point of justifying their suppression) when they are put forth outside the political process. Moreover, the fruits of political power, i.e., control of the government, are undercut through federalism and checks-and-balances which disperse power and thereby weaken government. In addition, the privatization of the economy depoliticizes economic issues to a great degree by delegitimizing government intervention except in the case of demonstrable market failures. And when government does intervene to manage the economy, usually for the benefit of monopoly capital, issues are depoliticized by assigning their handling to a bureaucracy which is somewhat insulated from the political process.

Third, the masses are also depoliticized by the hegemony of monopoly capital's supportive individualistic ideology (e.g., the natural right to private property, personal responsibility for success or failure in life), and by the fostered illusion that contemporary politics involves complex technical issues beyond the competence of the masses. The weak link in all this is the threat to the system's legitimacy which results when economic and other crises demonstrate that both the private market and the political process institutionalize inequality, hierarchy, domination and exploitation. On depoliticization under and threats to the legitimacy of advanced capitalism, see J. Habermas, TOWARD A RATIONAL SOCIETY AT 50-82 (1968) and LEGITIMATION CRISIS (1973).

118. Compare, for example, *Doe v. Bolton*, 410 U.S. 179 (1973) (performance of first trimester abortions may not be limited to hospital); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (invalidating required consent of spouse and parental consent if under eighteen years old); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (invalidating limitation on performance of second trimester abortions to hospital, required counseling by attending physician, and 24 hour waiting period).

119. *Gomez v. Perez*, 409 U.S. 535 (1973) (state's failure to require support for nonmarital children while requiring natural father to support legitimate children violates equal protection); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973) (state welfare program effectively denying to nonmarital children benefits extended to legitimate children violates equal protection); *Trimble v. Gordon*, 430 U.S. 762 (1977) (invalidating exclusion of nonmarital children from intestate succession to father's estate). For a contrasting opinion see, *Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding nonmarital child's right to intestate succession from natural father only upon court determined paternity during father's lifetime).

120. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974).

121. *Frontierro v. Richardson*, 411 U.S. 677 (1973) (military benefits for dependents); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (Social Security Act benefits to surviving spouse).

tainly not an unabashed supporter of women's rights, and issued several rulings which help perpetuate women's subordination. An example is the decision upholding the denial of public funding for abortions,[122] thereby seriously interfering with the practical ability of a disfavored and powerless class of women, i.e., indigents, to exercise their rights under *Roe*. Another such ruling upheld the exclusion of pregnancy from a state administered disability insurance program,[123] thereby forcing mothers to compromise family and employment values more so than fathers.

These variations are due less to doctrinal differences than to the Court's attempt to mediate this on-going and controversial dispute by accommodating the interests of the competing sides sufficiently to defuse potential upheaval. Thus, the opponents of abortion may receive some solace from the knowledge that their tax dollars will not fund what they regard as murder, while those Supreme Court decisions favorable to women may help convince feminists that some progress is being made despite the defeat of the Equal Rights Amendment and the continuing second-class status of women in the United States.

From the vantage point of defusing disputes which threaten the system's legitimacy, the Burger Court's handling of the sexual liberty issue as it relates to women's rights seems to have been fairly successful. It is premature, though, to draw final conclusions. For not only is male domination still a fact of life in the United States, but new appointments to the Supreme Court may soon produce a reversal of *Roe* and perhaps of other pro feminist rulings, thereby ending Supreme Court accommodation.[124] Moreover, like racism and classism, sexism is so tightly woven into the fabric of United States-style democratic capitalism that even a highly activist pro women's rights Supreme Court could not produce full equality for women. In a society fraught with and based on inequality, it serves men's interests to keep women in a subordinate position. A prerequisite to full equality for women is a more fundamental restructuring of society along egalitarian lines than the Supreme Court could ever bring about.

Summary — Although the contradictions of United States-style democratic capitalism are as apparent as ever, the individual rights pullback of the Burger/Rehnquist Court has come at a time when the level of conflict arising from these contradictions has moderated, particularly as compared with the civil rights era. This moderation is the result in part perhaps of the Warren and early Burger Court reforms, and of the political reforms induced at least in part by an era of judicial activism on behalf of individual rights. Also there may be a cyclical dynamic to periods of intense conflict and moderation, similar to economic up-swings and down-swings. In any event, during periods of moderation the stability and legitimacy of the system are not as threatened as in periods of intense conflict. There is less of a need then for the Supreme Court to be actively reformist in its role as mediator.[125] Indeed, reformist activism at such times risks causing instability. Thus the Burger/Rehnquist Court's relative passivity to individual rights claims, though objectionable from a humanistic perspective, may at least temporarily serve its overriding purpose of helping to sustain the system. In the long run, however, if, as appears likely, the Court's conservative drift continues, this may well prove self-defeating by contributing to the widening wealth disparities and class polarization which characterize this neo-conservative era. These social conditions seem likely to explode in the not too distant future into social upheaval. As humanists we must abhor this suffering. As radicals we must seize the opportunity it provides to expose the system's contradictions and work for fundamental social change.

Conclusion

While the Supreme Court was obviously intended to be a dispute resolver of some type, this does not necessarily mean that it was consciously designed as a relatively autonomous mediator in the form set forth here. Nor does it mean that the Supreme Court justices view their role as such or that they do not really believe the doctrine they espouse. For institutions and ideas often have historical implications not fully contemplated by their creators. Nor does the Court always resolve disputes in ways which help sustain United States-style democratic capitalism. For apart from the fallibility of the justices and the other factors influencing their decisions, the system has its built-in contradictions which may at some point prove irreconcilable without more fundamental change than the Supreme Court with its limited power is capable

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122. *Harris v. McRae*, 448 U.S. 297 (1980) (Medicaid); *Maher v. Roe*, 432 U.S. 464 (1977) (same).

123. *Geduldig v Aiello*, 417 U.S. 484 (1974). See also *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) (exclusion of pregnancy from non-occupational sickness and accident benefits plan does not violate Title VII). Compare *California Federal Savings and Loan Assoc. v. Guerra*, 107 S.Ct. 683 (1987) (state statute requiring employers to provide leave to and reinstatement of employees disabled by pregnancy is not preempted by Title VII).

124. 124 As for the rights of gays, the Burger Court has taken a hard-line non-accommodationist position, holding in *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) that sodomy laws do not violate gays' fundamental right to privacy. Since few people care what others do behind closed doors, this would have been an easy case for the Court to take a stand against the widespread official harassment of gays in the United States. Having declined to do so the Court is now in the position of having to say either that the common sexual practices of heterosexual couples in this country are also unprotected, thereby offending the bulk of the public, or that gay sexual practices may be singled out for punitive treatment, thereby undercutting the myth of equality before the law.

125. Compare, Clune, Book Review: Courts and Legislators as Arbitrators of Social Change, 93 YALE L.J. 763 (1984) (arguing that the judiciary tends to be more activist when the legislative process breaks down as an arbitrator of social change, and more passive when the legislative process functions effectively).

of fomenting.

There are signs that the era of prosperity which has so far sustained United States-style democratic capitalism may be ending. Technology has begun to yield diminishing returns and to create more problems than it solves, more and more third-world countries are breaking free of imperialist domination, and competition among capitalist nations has become more intense. In the United States we see declining wages and increasing unemployment among the very workers who have supported the system, along with rising poverty and widening wealth disparities. These conditions are caused by the inability of the system to make the pie grow continually larger, and by the ability of those with more power to use their greater economic and political strength to retain or enhance their share at the expense of the masses. Whether it will be possible to revitalize United States-style democratic capitalism remains to be seen. If not, many may come to see the ideology which has helped sustain the system as the myth it really is. Once the fragile consensus on which the legitimacy of the system depends breaks down, there will be little the Supreme Court can do or say to change that.