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Authoritarian Constitutionalism in Liberal Democracies

Duncan Kennedy

This essay is about ideological conflict between what we might loosely call "authoritarian" and "republican" orientations ***within*** a constitutional regime that is generally understood as liberal/democratic. In a system of formal democracy, separation of powers, an entrenched bill of rights and judicial review, authoritarians tend to favor the presidency over parliament and the judiciary, plebiscites, emergency powers, domestic "order," national security, patriotism, a "bloodlines" (often but not always racist) conception of citizenship, an official role for organized religion, and "family values" over broader interpretations of civil liberties. On the other side, republicans favor the legislature over the president, interest group pluralism rather than corporatism, secularism and civil liberties defended by a strong independent judiciary, and an affiliative conception of citizenship. This dimension of conflict is independent of that, say, between left and right on economic issues, populism vs. elitism, and so forth.

Authoritarianism and Republicanism within liberal/democratic constitutionalism, as I will describe them, are ideologies in the weak sense of sets of internally related rhetorics or tropes that self-defined intelligentsias deploy as meta-legal arguments, beyond the technical, to justify legal outcomes. They do this at all levels, from the constituent assembly to trial court adjudication, and on all issues, from the definition of emergency powers in the draft constitution to the punishment of obscenity on high school students' t-shirts.

Neither authoritarianism nor republicanism is internally coherent and neither is so fully worked out that it can just be applied to new questions. Each is constantly being interpreted and reinterpreted, by its believers but also by their enemies. Because authoritarianism in my usage is incoherent and incomplete, it is hard to define what "it" *is*. This is despite the near universal sense that the positions in the list in the previous paragraph are related in a non-random way, and that people who favor them

are in some sense oriented so that you can meaningfully call them authoritarians or republicans.[1]

Out of caution and insecurity rather than on principle, the discussion in this chapter refers to Europe and the Western Hemisphere where authoritarianism (or simply "A") has a distinctive genealogical connection to conservative Catholic Monarchist and Fascist social thought. I hope that much of the analysis could be applied or adapted to other regions, and A in other parts of the world is in a relationship of mutual influence with the A discussed here. But figuring out how to scale up will have to be for another time.

In spite of the problem of definition, both A and republicanism (or simply R) understand A to be marginal and transgressive in relation to R as the dominant legal/political culture of "the West." Within R, it is common to distinguish what I will call the Progressive and the Conservative strands, P/R and C/R. C/R (represented for example by European Christian Democratic parties, by the successors of Gaullism in France and by the "mainstream" of the Tory and American Republican Parties) is understood to be closer, on a continuum, to A than is P/R, but, as we will, see nonetheless sharply distinct.

Like the ideologies, the actual contemporary constitutional orders that are understood to fall near the liberal or democratic or R end of the spectrum are incoherent and incomplete. They are patchworks of norms at different levels of abstraction with authoritarian and (progressive and conservative) republican antecedents and current advocates, reflecting earlier stages of ideological conflict as well as contemporary battles within each orientation. The constitutional norms that are the stakes of ideological struggle, for example defining what the police force can do to people when it arrests them, are sometimes vague and general and sometimes specific and contradictory. In either case they are interpreted by executive officers and courts, with some interpretations pushing the norm in the authoritarian and some in the republican direction.[2]

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[1] For definitions of ideology, ideological intelligentsia, metalegal arguments and ideological incoherence, as I am using them here, see Kennedy, Duncan (2012) 'Political ideology and comparative law' in Bussani, Mauro & Mattei, Ugo eds, *The Cambridge Companion to Comparative Law,* Cambridge: Cambridge University Press. Kennedy, Duncan (1998) *A Critique of Adjudication: fin de siècle*, Cambridge: Harvard University Press Chapter 3. An ideology in this chapter is a set of arguments that are "universalizing" rather than "partisan," and claim to represent Weberian "ideal interests" as opposed to particular material interests

[2] This description of legal fields as incoherent loci of conflicting projects is elaborated in Kennedy, 'A Critique of Adjudication' Chapter 7. For a similar analysis of liberal constitutional theories of judicial review of legislative action under a regime of entrenched individual rights, see Sultany, Nimer (2012) 'The State of Progressive

Authoritarian and republican legal commentators often speak as though decision-makers have to choose between flatly inconsistent visions of legitimate legal order. In practice, both sides pursue most of the time a "war of the trenches" with limited stakes within the larger patchwork compromise. Each side's arguments presuppose that the constitutional order is legitimate and based on the rule of law, although each side claims from time to time that the other side's affirmations in this vein are mere pretext or bad faith.

This means that the current "question to be decided" will be addressed through the accepted techniques of legal reasoning, with the limitation to a narrow context that usually implies. Each side exploits the indeterminacy of the materials and the flexibility of technique to argue that its solution is simply law application, rather than deliberate movement in one ideological direction or the other.

Over time, many small victories for one side, which are defeats for the other, can move the compromise a long way in one direction, possibly passing a threshold of transformation into a new kind of regime. And there are moments of "crisis" when one side or the other attempts a "war of motion," framing a legal question in such a way that the outcome can lead to immediate rather than gradual large scale change. Because of the ambiguities of the ideologies and of the positive legal order each side is likely to believe in times of crisis that the other has deployed arguments that are so patently legally false that they must be the product of bad faith.

I share the common view that a developed authoritarian constitutional discourse has long been strong in Latin America and has been on the rise in Central and Eastern Europe since the 1990s. Less obviously but still clearly, traces of it are present in the discourses of populist jurists that have burgeoned in recent years in the United States and Western Europe.

With the hope that it will contribute to understanding this situation, the rest of this chapter fills in the very bare outline above, taking up in order a series of ambiguities or problems that seem obviously to beset a model like the one proposed. A second objective is to persuade the reader that a notion of ideology in this weak sense (cf. CLS[3] and Vattimo's Pensiero Debole[4]) has, along with its difficulties, some advantages vis-a-vis two alternatives. First, by contrast with the "thicker" varieties that make

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[3] Kennedy, 'A critique of adjudication'; Kennedy, Duncan (2012), Kennedy, 'Political ideology and comparative law.' Other developments of the ideology notion include Gordon, Robert W (1988) 'Law and Ideology', *Tikkun Vol. 3, No. 1*; Balkin, Jack M. (1998) *Cultural Software: A Theory of Ideology*, New Haven: Yale University Press.

[4] Vattimo, Gianni & Riovatti, Pier Aldo eds (1983) *Il pensiero debole,* Milano: Feltrinelli Editore

authoritarianism a coherent theory in itself, or an aspect of a larger coherent theory (eg. neoliberalism), or a personality type, or a determinate result of something else (capitalism, modernity, empire), or a type of regime. Second, by contrast with the approach that treats any departure from what the speaker regards as basic norms of liberal constitutionalism as authoritarian by definition, regardless of the justification offered.[5]

1. A and R as directions in debates about particular rules

The first way we tend to identify A and R is as "forces" that push the opposing sides in debates about how to interpret particular rules that seem to the actors to dispose significant ideological stakes. The point here is the direction of change, not the starting point or the end point of the legal controversy. The intuition is that A pushes one way and R the other from whatever starting point is found in the positive law that is to be interpreted. For example, a common way to identify A is as the "something" that pushes constitutional language and constitutional interpretation in the direction of presidentialism.

To illustrate the point about the starting point, Human Rights Watch treated as an example of the "authoritarian" direction of the Erdogan regime a shift from professional toward presidential power in the judicial nomination process.[6] If we define A in terms of the rule rather than of the direction of change, we would conclude that the American judicial nomination systems are authoritarian. Nonetheless in the Turkish context, the move is clearly in the A direction.

The same holds true for other parts of constitutional texts and case law where movement will be interpreted, typically, as toward A or toward R, or as neutral. Take, for example, defining the scope of presidential power to declare a state of siege, or

[5] Ideology in the usage of this chapter is not a pejorative term nor does it designate the "merely political" or "result oriented" by contrast with the authentically "legal" or "principled." Contrast with this approach the tendency of Western liberal jurists, as critiqued by Nimer Sultany in this volume, to characterize authoritarian Arab constitutions as ideological in the sense of merely political, exaggerating their differences from their Western counterparts, and dismissing them as therefore without interest from the juridical point of view. Sultany, Nimer, (2019) 'Arab Constitutionalism and the Formalism of Authoritarian Constitutionalism', in Alviar, Helena & Frankenberg, Gunter eds Authoritarian Constitutionalism, London: Edward Elgar pp. I would make a similar criticism of Lepsius, Oliver (2003), whose otherwise excellent article, 'The Problem of Perceptions of National Socialist Law or: Was there a Constitutional Theory of National Socialism?', in Joerges, Christian and Ghaleigh, Navraj Singh eds., Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions, Portland: Hart Publishing 19, dismisses Nazi constitutional theory as merely ideological using arguments that could be easily turned against the liberal conception he treats as truly legal. See Section 8 below.

[6] Human Rights Watch (2017) 'Turkey: President Bids for One-Man Rule', *Human Rights Watch News*, 18 January 2017, accessed 23 August 2018 at https://www.hrw.org/news/2017/01/18/turkey-president-bids-one-man-rule

defining the scope of prosecutorial powers of detention without trial. It seems obvious that broadening the power is A and narrowing it is R, regardless of whether the rule on the table is comparatively broad or narrow to start with. It is likewise in some sense obvious where A and R stand in the American battles about religious observance in public schools and about the corporal punishment of school children.

Nonetheless, if we move from the paradigmatic cases of emergency powers or rule by presidential decree to more mundane questions of police discretion, say defining when the police need prior judicial approval to take a particular action, the difference between A and R is much less clear. In a typical debate about police powers, if the only question is over a matter of degree, of how far to push the rule in a pro-police or a pro-civil liberties direction, C/R advocates may in any given case ally with the A advocates in favor of police power. When the A's push "too far," the C/R line switches back to alliance with P/R. In debates about corporal punishment by parents, C/Rs may well align with P/Rs to regulate paternal power to punish, but then ally with the A's against an absolute ban with no exceptions.

And yet it seems crucial for the analysis of A to distinguish it sharply from C/R , because C/R understands itself to be A's historical mortal enemy. The A I am interested in as an ideological orientation within legal discourse likewise understands itself to be proudly distinct from center left and center right R alike. At this point, defining "it" in terms of a direction in debates about rules is no longer helpful except in polar cases.

2. The Catholic Monarchist and Fascist genealogies of Authoritarianism

Even if it is difficult to say what any of the tendencies "is," it is fairly clear what their historical roots look like, and it is easy to distinguish A from conservatism within R on this basis. The rhetorics that both A and C/R ideological intelligentsias deploy in legal battles at all levels appeal explicitly to the virtues of respect for authority, patriotism, organic community, family solidarity and militancy against dangerous internal and external enemies, to name just a few commonalities. The difference between the two has to do with the specific contents they give these virtues, based on their respective places in the political history of Europe. For A, there are two contrasting genealogical strands, each of which is strongly rejected by C/R: the conservative Catholic (and Greek Orthodox) Monarchist and the fascist.

As for the first, contemporary A arguments, I am suggesting, often resonate with historical memories of, or allude to, or indirectly evoke, although they name it explicitly only by mistake or inadvertently, the specifically European feudal form of

Weberian traditional authority.[7] As A's reconstruct it today, authority was distributed downward through a hierarchy whose members had reciprocal rights and duties of obedience in exchange for protection. God, King, Church, Nobility, Master of servants, Husband/Father. What made the authority traditional was that the subordinate was bound to obey regardless of the content of the command, and this entitlement had "always" existed because it was "natural" and also commanded by God.[8]

Fascism rejected this scheme and embraced formal legal equality for all but (racial, sexual, religious, political) "enemies,"[9] along with modernity, science and progress. The animating force was to be Weberian charismatic authority,[10] in a revised but still supposedly organic hierarchy composed of The Nation/Leader, the State/Party, the Army, and corporatist entities for business and labor and professions. Authority was personal to the leader, who drew his followers into the mindset of wholesale revision of norms as part of exceptional, often imperial political endeavors. The endeavors required the "routinization" of his charisma, achieved through the requirement of "absolute" obedience down the chain of command from the leader. State and Party were reconceived on a military model.[11]

The Catholic strand relies on the image of patriarchal authority in the traditional family and the fascist strand on the image of the political/military genius (Charlemagne, Napoleon, Bolivar). Ritualized symbolic enactment of the legitimacy of authority (the Mass) is part of the Catholic genealogy of A, but A's also tend toward what Frankenberg calls the "immediacy" of spectacle in fascism.[12]

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[7] Weber, Max (1922) *Economy and Society*, reprinted in Roth, Guenther and Wittich, Claus (eds.) (1979), Berkeley and Los Angeles: University of California Press 215

[8] Lovejoy, Arthur (1964) *The Great Chain of Being: A Study of the History of an Idea*, Cambridge: Harvard University Press; De Maistre, Joseph (1833) *Essai sur le Principe Générateur des Constitutions Politique et des autres institutions Humains*, Lyon: M.P. Rusan, Imprimeur-Libraire, xii, 4; De Bonald, Louis-Gabriel (1847) *Essai analytique sur les lois naturelles de l'ordre social ou Du Pouvoir, Du Ministre et du Sujet dans la Societé*, Paris: Biblioteque Imperiale, 166; Maurras, Charles (1972) *De la Politique naturelle au nationalisme intégral,* Paris: Vrin, 103. See Holmes, Stephen (1993) *The Anatomy of Antiliberalism*, Cambridge: Harvard University Press, xi, 16

[9] Hofstadter, Richard (1964) 'The Paranoid Style in American Politics,' *Harpers Magazine* November 1964 accessed August 3, 2018 at https://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics/; Schmitt, Carl (1932) *The Concept of the Political*, trans. George Schwab (1992) Chicago: Chicago University Press, 27

[10] Weber '*Economy and Society'* 241

[11] Bataille, Georges & Lovitt, Carl R. (1979) "The Psychological Structure of Fascism", *New German Critique No. 16 (Winter, 1979)*, 81; Paxton, Robert O. (2004) *The Anatomy of Fascism*, New York: Alfred A. Knopf, 133

[12] Frankenberg, Gunter (2019) 'Authoritarian Constitutionalism – Coming to Terms with Modernity's Nightmares' in Alviar, Helena & Frankenberg, Gunter eds, *Authoritarian Constitutionalism*, London: Edward Elgar xx

Both the Catholic Monarchist and the fascist strands were explicitly anti-Semitic and their literatures provide modern A's a plethora of anti-Semitic tropes, images, slogans and myths. These in turn provide models or templates for new racist rhetorics directed at whatever group the A's in a particular place have identified as the racial enemy. They may recycle them by allusive "dog whistling" (sending a signal to initiates that is inaudible to the general audience) where R hegemony has successfully banned them from overt public discourse. Racism can motivate a generally A ideological posture as well as driving particular positions within it, but there is plenty of racism outside A and plenty of A that is not racially motivated.

3. The Genealogy of Republicanism

In an equally schematic way, I'd describe the R genealogy, shared by progressives and conservatives, as no less an appeal to authority, but this time liberal legal/bureaucratic authority, again in Weber's sense,[13] based on formal legal equality. The duty to obey the law is higher than duties to traditional and charismatic authorities, and a fortiori higher than any merely personal claim to power. Law is authoritative because formally validated by democratic procedures that derive it from The People via the Constitution, the elected President and Legislature, checked by the Constitutional Court for consistency with the Equal Rights of Individuals, and administered under the Rule of Law.

The C/R strand affirms families and local communities as the organic basis of the whole structure, while adopting an atomized individualist view of the market; the P/R strand argues for interdependence and egalitarian solidarity in the market sphere, but for individual rights against the remaining hierarchies of family and locality. Both C/R, including neoliberalism, and P/R in the forms discussed here are committed to an at least slightly regulated market economy and to some version, quite large to very very small, of a welfare state.

R has a long history of internal critique of its own claims to being a purely rational construction. As Norman Spaulding puts it, what opposes authoritarianism is "constitutional faith," rather than certainty.[14] It is not faith in God or the Leader. It involves nonetheless a "leap" to belief that something ethically positive is immanent

[13] Weber, *'Economy and Society'* 217; See also: Kennedy, Duncan (2004) 'The Disenchantment of Logically Formal Legal Rationality or the Place of Max Weber in the Genealogy of the Contemporary Mode of Western Legal Thought' 55 *Hastings Law Journal* 5 1031

[14] Spaulding, Norman (2019) 'States of Authoritarianism in Liberal Democratic Regimes' in Alviar, Helena & Frankenberg, Gunter eds *Authoritarian Constitutionalism*, London: Edward Elgar pp

in the practice of writing, adopting, interpreting and applying republican or liberal democratic foundational texts. R belief in the constitution in this perspective is different from but no more a rational attitude than belief in God or the Leader, and like them can bring the bitter with the sweet by denying or masking communal responsibility for misery and oppression.[15] Within the larger culture of R, constitutional atheists[16] are rare, and usually silent.

4. A and R in relation to one another

The strands exist only in relation to one another. R in both C and P forms came into existence in revolutionary struggle with the *ancien regime*, defined precisely as the Catholic Monarchist order. The reactionary version of the Catholic Monarchist strand came into existence as revisionist history of the French Revolution, seen as an historical catastrophe.[17] The fascist strand was a reaction against the early 20th century triumph of R on the one hand and the post-WWI rise of communism on the other.[18] Clerical fascism, Franco and Salazar fused the reactionary Catholic strand with fascism across southern Europe from Portugal to Greece.[19] The contemporary version of R, with its emphasis on separation of powers, entrenched constitutional rights and judicial review is directly responsive to the triumph of fascism and Nazism (and Stalinism) in the 1930s over a large part of Western and Eastern Europe, Latin America and Asia.

While the R critique of A is widely known within the A intelligentsia, it is surprising to me how often the critic is unaware of the range of A critiques of R.[20] A sample: R destroyed the organic communities of the *ancien regime*, which were based on a common religious belief in the meaning of life and a common life organized to realize it. The ideology and the market society it produced reduced peoples to masses of alienated individuals with merely formally equal rights and no sense at all of what might make their exercise meaningful.

Or in the alternative, modernity created unlimited potential human technological power but R, and particularly its decadent elites, frustrated all attempts by natural

[15] Spaulding 'States of Authoritarianism' pp
[16] Kennedy, Duncan (1995) 'American Constitutionalism as Civil Religion: Notes of an Atheist,' 19 *Nova Law Review* 3 909
[17] De Maistre, Joseph (1859) 'Quatre chapitres inédites sur la Russie,' in De Maistre, Rodolphe ed, Paris: Libraire D'Aug. Vaton, Éditeur. For a discussion see: Holmes, *The Anatomy of Antiliberalism*, 13
[18] Paxton, *The Anatomy of Fascism,* 28
[19] Feldman, Matthew, Turda, Marius & Georgescu, Tudor (2008) *Clerical Fascism in Interwar Europe*, New York: Routledge 49, 145
[20] See Houellebecq, Michel (2015) *Submission*, trans. Stein, Lorin (2015) London: Penguin Random House

leaders to mobilize the people to acquire it and put it to use in the competition for greatness between nations. The atrophy of the will to power rather than the failure of community is the problem with R. There are distinct family resemblances, as well as dramatic differences, between A critiques of R and left critiques from within R.

5. A in the North Atlantic vs. A in Central and Eastern Europe and Latin America

One key to understanding A today is to distinguish the A of the capitalist core from the A of the capitalist periphery. In WWII, the North Atlantic political elites, identifying themselves strongly as R, used all the mechanisms of power to utterly defeat Nazism and Fascism in most of Western Europe and isolate it in Spain and Portugal. They understood the communist and fascist enemies as peas in a pod, variants of a single evil which they often called totalitarianism.[21] At the same time, variants of Christian Democracy defeated or marginalized the virulently reactionary strand of Catholicism that had been openly aligned with fascism. North Atlantic political culture became R in a very serious way, "militantly democratic," with the rhetorics of A clearly identified and stigmatized, and treated as major threats to all the R virtues.

Up until WWII, A legal thinkers, often allied with the organicist strands in C/R and P/R legal thought, made important legal theoretical and legal sociological contributions. (Carl Schmitt,[22] Santi Romano[23]) and their critiques of "classical" ideas about property, tort and contract got incorporated into the progressive agendas to "socialize" private law after WWII.[24] R legal elites shamelessly appropriated these contributions as their own, suppressing the extent to which the "darker legacies" of European legal thought (Joerges Ghaleigh)[25] are integral to R.

The result of this is that A strands, evoking reactionary Catholicism or fascism, have been until recently strikingly subdued across the North Atlantic. When they appear, they are in the guise of … A as required by R. In other words, as validated by the R

[21] Gleason, Abbot (1995) *Totalitarianism: The Inner History of the Cold War*, London: Oxford University Press
[22] Schmitt, Carl (2004) [1934] *On the Three Types of Juristic Thought*, trans. Bendersky Joseph W, Westport: Praeger Publishers.
[23] Romano, Santi (1918) *L'ordinamento giuridico: studi sul concetto, le fonti e I caratteri del diritto*, Pisa: Mariotti
[24] See Monateri, Pier Giuseppe & Somma, Alessandro (2003) 'The Fascist Theory of Contract' in Joerges, Christian & Ghaleigh, Navraj Singh eds., Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions, Portland: Hart Publishing; Brutti, Massimo (2013), Vittorio Scialoja, Emilio Betti. Due visioni del diritto civile, Giappichelli Torino; Kennedy, Duncan (2006) 'Three Globalizations of Law and Legal Thought: 1850-2000,' in eds Trubek, David M. & Santos, Alvaro, *The New Law and Economic Development: A Critical Appraisal,* New York: Cambridge University Press, 95
[25] Joerges, Christian, Ghaleigh, Navraj Singh & Stolleis, Michael (2003) 'Preface and Acknowledgements' in Joerges, Christian & Ghaleigh, Navraj Singh eds., *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, Portland: Hart Publishing ix

schema of legitimate democratic authority rather than by God or the charisma of the leader. The irony of this reversal is plain to all sides: authoritarians whose whole tradition is the critique of R operate inside it. They affirm their acceptance of its rules. When they have electoral success, they present the A critique of democracy as the will of the people. When they lose, they claim as a minority entitled to protection of A constitutional rights against the R majority.[26]

The quality of A argument in Latin America and Eastern and Central Europe seems to me quite different, the reason being that in neither region has R in its progressive and conservative variants achieved the level of general cultural and political hegemony that it achieved in the North Atlantic between the end of WWII and the 1990s. The discourses of A were enormously influential in Latin America and in Central and Eastern Europe during the 1930s, as they were of course in Western Europe, but R political tendencies were weaker. The popularity of A in the periphery was surely connected to the uneven course of capitalist economic development, and to the persistence of feudal social structures including peasant economy, large landholdings with dynastic claims and the strength of the Catholic Church, but "empire" also had a role.

The United States was complicit in A rule throughout Latin America throughout the Cold War, in the form of the military junta: Castelho-Branco rather than Peron. In spite of abundant lip service to R, US policy has barely changed since. The A rhetorics have been equally available to right wing authoritarian neoliberals (Pinochet) and to more traditional populist versions.

It was the Soviet Union not the Northern European alliance that overthrew the A regimes in Central and Eastern Europe. Communist satellite regimes then effectively destroyed the system and transformed society, violently suppressing the discourses of R and A equally. After 1989, both discourses were available to be deployed in the interests of rightwing and centrist political/social projects. The apparent supremacy of R rhetorics was based, precariously, temporarily, on the prestige of "the West" rather than on national histories of R victory over A, and proved short-lived.

In both regions, A rhetorics and tropes and slogans are far closer to the surface than they are in the North Atlantic core, more clearly themselves, less muted or disguised

[26] Striking claim of evangelical owned bakery that enforcing against it a rule against discrimination against gays would violate its freedom of religion by forcing it to cook a wedding cake for a gay wedding. See: Turkewitz, Julie (2018) 'Colorado Once Called the 'Hate State,' Grapples with Cake Baker Decision,' The New York Times, June 25, accessed 24 July 2018 at https://www.nytimes.com/2018/06/05/us/colorado-masterpiece-cake.html

or merely whispered.[27] The defense of A does not have to be in the paradoxical form of appeal to R, and A values can sometimes be written into the constitutional text rather arrived at by interpretive constructions.

6. The genealogies are a factor orienting the choice of direction in constitutional debates

The genealogies are one of the factors orienting the choice of a direction of argument in constitutional interpretation. Only one factor because in the weak conception of ideology, the actual choice of direction is over-determined by many aspects of the situation of the ideological intelligentsia in question. Moreover, the genealogies are matters of historical memory rather than present fact, and they are contradictory. Thus the Catholic Monarchist and fascist strands in contemporary A are in obvious conflict at almost every level. There is a less obvious contradiction, common to both strands, between the rhetoric of organic solidarity and fierce commitment to unequal wealth distribution based on bourgeois property rights.

When they face internal conflict, A's interpret their own views so as to mediate or compromise but never resolve their internal problem. The ideology can't be mechanically "applied" and therefore can't simply "determine" the choice of direction. There will be plenty of room, for example, for influence by the material interests of influential sectors of the A political base, and by the A intelligentsia interest in maintaining A intelligentsia power.

Nonetheless, recognizing the presence of Catholic Monarchist and fascist "cryptotypes" (Rodolfo Sacco),[28] idea-structures that rule the present from the grave, makes present day A directional choice much more intelligible and even predictable without exhaustively explaining it. (The same is true for R, with its contradiction between the idea of democracy and the idea of individual constitutional rights protected by final judicial review of statutes.)

7. Authoritarian Cyptotypes: The President as King/Leader and the Father as Patriarch

[27] Jacome González, Jorge (2015) *Estados de Excepcion y Democracia Liberal en América del Sur: Argentina, Chile, Colombia (1930-1990)*, Bogotá: Editorial Pontificia Universidad Javeriana; Pichi, Maximilian (2019) 'Constitution of False Prophecies: The Illiberal Transformation of Hungary', in Alviar, Helena & Frankenberg, Gunter eds *Authoritarian Constitutionalism*, London: Edward Elgar pp

[28] Sacco, Rodolfo (1991) 'Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)' in *39 The American Journal of Comparative Law 1;* Sacco, Rodolfo (1991) 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' in *39 The American Journal of Comparative Law 2,* 384

The president even (or especially) in an R constitution is part of the same symbolic system as the King and the fascist Leader. The cryptotypes accordingly orient contemporary A toward expanding presidential power at the expense of the legislature, home of all imagined R vices. The president (supposedly) acts decisively on the basis of his own reasons rather than on the basis of (supposed) collegial dialogue. When he decides, people obey him because of respect for the office (traditional), and when he has charisma he can sweep them away.

On the basis of his authority, A's imagine he may take needed or desirable or glorious transformative action where R parliamentary (cretinous) government would be sure to fail. He may even be able to save the whole society by taking the law into his own hands in an emergency when collective decision is paralyzed. Just as important, a great president can supposedly intuit what the people want, turning inchoate material into a vision that the people recognize as their own.

In the family context, A and R battle over whether a teenager must have parental consent to have an abortion, and if not consent, whether there is at least a duty of the provider to notify the parents. The push in favor of the parents can be seen as a matter of securing the "best interests of the child" who is too young to decide on her own. And yet… there is certainly cryptotypically present in the discourse an allusion, perhaps not so oblique, to the parents as stand-ins for the patriarchal head of the feudal household.

His children could not marry without his consent; he had an action for seduction of his daughter regardless of her consent, and another against anyone who interfered with her place in the household. Memories of his lost powers, good for some and bad for others, haunt the superficially R debate about the rights-bearing individual child's "legal capacity to decide," and it is not hard to guess what the A position will (usually not necessarily) turn out to be. The same memories are easier to see behind A's pushing against abortion on demand under full control of the pregnant woman and against same sex marriage. Husbandly authority vis a vis wives will be weaker in many specific situations of conflict if the wife has full power to abort. And the symbolic association of the idea of marriage with the idea of patriarchal power weakens when same sex marriage validates couples displaying no built-in male-female hierarchy.

8. The incoherence of supposedly R constitutional regimes

The A advocates within an R regime never refer explicitly to their Catholic monarchist and fascist genealogy, let alone to the substantial body of constitutional theory

produced by these tendencies during their times in power during the interwar period.[29] The norm is for them to affirm their commitment to the rule of law, separation of powers, democracy and constitutional rights of individuals and go from there. Oriented by the genealogies and whatever else, they argue in strictly legal, non-political terms, on the basis of the texts, jurisprudence and scholarship conventionally available. In so doing, they take advantage of the patchwork or hodge podge character of actually existing constitutional regimes that were designed by Rs, and meant to be at the R end of the A/R spectrum.

Gunter Frankenberg in this volume offers a striking and original catalogue of the ways in which R constitutions incorporate in fact provisions that authorize "government by man" as opposed to law[30] and it is these that provide R sources for A arguments. They start with the original act of constitutional imposition that binds dissenters and also the unborn (if it works), and majority rule in general has the same problem.

Then there are aspects of R that are acknowledged as problematic, but rationalized as exceptional, including Locke's royal prerogative. Then, in Frankenberg's vision, "run of the mill regimes of [R] break down the prerogative into a myriad of provisions bestowing discretion on administrative agencies (or courts). Although discretionary power must be used 'reasonably, impartially and avoiding oppression or unnecessary injury,' it remains broad and has the tendency to escape judicial scrutiny, installing instead the bureaucratic dominion of expertise and routine justified as a necessary precondition of flexible governance."[31]

Moreover, in "some countries" (he might have mentioned Germany, France, Britain and the U.S.) "emergency laws and models of militant democracy grant the executive … ample powers of surveillance and repression, the right to prohibit or limit political opposition and competition. In a similar vein, [R] customs of law-rule are disrupted by executive privileges…." R constitutions as interpreted by R courts universally authorize intelligence services, and secret services that engage in secret extra-legal

[29] See Lepsius 'The Problem of Perceptions of National Socialist Law or: Was there a Constitutional Theory of National Socialism?' and Somek, Alexander (2003), 'Authoritarian Constitutionalism: Austrian Constitutional Doctrine 1933 to 1938 and its Legacy' both in Joerges, Christian, Ghaleigh, Navraj Singh eds., *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, Portland: Hart Publishing 361

[30] Frankenberg 'Authoritarian Constitutionalism' in Alviar, Helena & Frankenberg, Gunter eds *Authoritarian Constitutionalism*, London: Edward Elgar pp

[31] Ibid p.

"operations."[32] The point being that regimes are on a continuum, and R advocates continually exaggerate the virtues of R constitutions by contrast with the evil A ones.

9. Regime incoherence as an enabling condition for authoritarian constitutionalism

For our purposes here, the importance of this catalogue is that these rules and their undefined and practically unlimited "exceptions" provide the basis for A legal argument within an R constitutional order. When a legal question arises that has significant stakes for A and R, the A's will appeal to already entrenched elements of the constitutional law in force as analogies and precedents for moving the norm in their preferred direction. R advocates will restate these same rules (typically exceptionalizing them) associating them with other analogies and precedents that push in the opposite direction.

The arguments on both side are strictly legal, as will be the judgment (judicial or administrative) that explains the decision setting the norm. Legal scholarship will applaud or denounce in the language of A or R only after critiquing as incompetence or bad faith the legal arguments of the other side. Ideologically driven but also highly technical reinterpretations will make the outcome a function of the coherence of the whole constitutional corpus (Dworkin's description of the practice is good here[33]).

Frankenberg doesn't discuss this phenomenon. In effect, he treats as pretextual the Rs' limiting and exceptionalizing explanations of apparently A-leaning norms. And he does not take seriously (not that he has to) the way A's develop rival reconstructions of the corpus to support their normative proposals. Frankenberg treats his catalogue of R incoherences as a kind of gallery of shame, with hints that they are all "really" examples of A.

10. Authoritarianism as a position rather than a democratic failure

If I have read him correctly, Norman Spaulding, in this volume, identifies authoritarianism as refusal of democratic norms and democratic cultural ideals, in favor of a combination of state control and forced "participation," with the regimes of the former Soviet empire as main examples. As Frankenberg does with "government by men, not law," he catalogues failure everywhere. Beyond the analysis of totalitarianism and mass society, he acutely applies the critique to many supposedly consensual aspects of life in liberal democratic societies. Beneath the velvet glove,

[32] ibid p.

[33] Dworkin, Ronald M. (1986) *Law's Empire*, Cambridge: Harvard University Press, 228

freedom of contract still masks a crushing handshake, between women and men as much as or more than between worker and boss.[34]

Michael Wilkinson in this volume also defines departure from democratic norms as ipso facto authoritarian. His "authoritarian liberalism" works by the violation of the letter or the spirit of the EU legal framework so as to accelerate the long term abrogation of the protective accomplishments of social democracy. For him, the "economic constitution," or the background regime governing relations of production, is categorically capitalist, based on the anti-democratic authority of liberal property rights (and particularly finance). The political constitution, which is at least formally democratic and participatory, however fragile, is always in danger of subversion from below.[35]

I agree with the tenor and admire the skillful totalizing portraiture of both of these critiques of what I have been calling the Republican dispensation. And I agree with both of them and with Frankenberg also that it is important to try to puncture self-congratulatory R use of an external authoritarian scapegoat to divert attention from internal failings. From my point of view, however, R is no more coherently democratic than it is coherently the "rule of law not men." R regimes lie on a spectrum with respect to the prerogative, and on another one with respect to liberal rights in relation to democratic powers.

Beyond the process of mediation of internal contradictions, I think it is useful to distinguish the external enemies that reject the whole liberal/democratic, progressive/conservative problematic. Authoritarianism in the Medieval Catholic and Fascist genealogy is one of these enemies, not the only one or even the only one we might want to call by that name. It is a particular substantive position antagonistic to R, rooted in the North Atlantic political/economic struggles of the last 250 years, rather than a default category for everything that is not democratic or not liberal.[36]

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[34] Spaulding 'States of Authoritarianism' pp

[35] Wilkinson, Michael (2019) *Authoritarian Liberalism as Authoritarian Constitutionalism* in Alviar, Helena & Frankenberg, Gunter eds *Authoritarian Constitutionalism*, London: Edward Elgar pp Cf. Marx, Karl (1843) 'An Essay on the Jewish Question' in *Early Writings*, trans. Livingstone, Rodney & Benton, Gregor (1992), London: Penguin Books, 211 Contra Kennedy, Duncan (1991) 'The Stakes of Law or Hale and Foucault!' in *15 Legal Studies Forum 327*

[36] Scott Newton's "serial constitutionalism" at the behest of a particular type of "network" in the Soviet genealogy is an example of a substantive conception of "an" authoritarianism, rather than A per se, and closely analogous to what I am attempting here. See Newton, Scott (2019) "*Plus ça change*… the riddle of all Central Asian constitutions" in Alviar, Helena & Frankenberg, Gunter eds *Authoritarian Constitutionalism*, London: Edward Elgar pp

I think we will have a better understanding of the legal politics of authoritarianism within republican constitutional orders if we understand both ideologies as internally contradictory, and A as nonetheless capable of producing substantive arguments that conservatives and progressives have to take seriously. That was the role of the cryptotypes as an explanation of how A advocacy of presidential power or parental power can be a critique and alternative to both C/R and P/R. They are not simply a failure to be R. They do pose, nonetheless, the problem of how to distinguish the good faith deployment of legal argument from the bad faith manipulation of the materials of the contradictory positive legal order.

11. The hermeneutic of suspicion: pretext and bad faith in constitutional argument

By the hermeneutic of suspicion[37] I mean the tendency of contemporary jurists to impute to their adversaries in legal argument a hidden, improper "ideological" or "political" intention that has led them to a wrong conclusion about what the law requires. The wielder of the hermeneutic is not an anti-legalist, but rather affirms that the correct legal conclusion for the dispute favored his own political or ideological position.

The hermeneutic arose as the Western legal intelligentsia gradually lost faith in the possibility of sharp distinctions between law application, legal interpretation in cases of doubt, and law making. After WWII, as this process unfolded, new constitutions consistently adopted for the first time final judicial review of legislation, understood as a safeguard for individual constitutional rights. In a significant number of countries, high courts have at one time or another exercised these powers to strike down or impede legislation in areas of political controversy, typically between various P and C tendencies within R.

When the court strikes down a statue, the hermeneutic suggests that the court's decision was consciously or unconsciously motivated not by the legal "truth," but by the hidden agenda of frustrating, on "ideological" grounds, which might be P or C or whatever, the will of the majority as reflected in parliamentary elections. The word ideological here has the meaning "merely political," or "partisan," or "result oriented," and therefore not committed to legal interpretive fidelity.[38] The wielder of the

[37] Kennedy, 'Political ideology and comparative law'; Kennedy, Duncan (2014) 'The Hermeneutic of Suspicion in Contemporary American Legal Thought' in *25 Law and Critique 91;* Pozen, David E. (2016) 'Constitutional Bad Faith' in *129 Harvard Law Review 4* 885, 896; Kennedy, Duncan (2017) 'A Social Psychological Interpretation of the Hermeneutic of Suspicion in Contemporary American Legal Thought,' in Desautels-Stein, Justin & Tomlins, Christopher*, Searching for Contemporary Legal Thought,* Cambridge: Cambridge University Press

[38] For the contrast between this pejorative notion of the ideological and the normatively neutral one that I have been developing here, see footnote 5.

hermeneutic concedes that there are high ideologically defined stakes in the case, but asserts that correct apolitical legal analysis gives the victory to his side.

The critic uses the techniques that show the manipulability of legal discourse to discredit the judgment's claim to validity, and proposes a counterargument that the law was constitutional or at least that there was no basis for the court to strike it down. In the reverse case, the judgment upholds the statute against a claim that it violates constitutional rights, and the critic shows that nothing other than ideological priors could explain the blatant legal errors committed by the court surrendering legal truth to legislative subversion.

The rise of authoritarian constitutionalism as a mode of argument inside R regimes, has intensified the hermeneutic of suspicion by a second suspicion. P/R and C/R plausibly affirm their loyalty to the R legal corpus. A's who have denounced it on general moral, political, economic, cultural, racial and psychological grounds face R suspicion that they are arguing within it to weaken or destroy it rather than improve it.

For example, A's loudly invoke the R principle of formal legal equality, for colorblindness and gender blindness against any kind of "affirmative action" or "positive discrimination." Progressive republicans defending race or gender-conscious intervention point to the grossly substantively unequal results—historical *sequellae* of the *ancien regime*—that existing R regimes perpetuate and intensify. Conservative republicans have to defend formal equality while denying the accusation that they are committing legal errors motivated by sympathy for the racist and sexist agenda of secret A allies.

Because A's and R's both argue within the web of R constitutional legality, a given argument that some see as self-evidently A may be defended by other as C/R, or even as left organicist within P/R. This problematic is particularly salient in arguments about proposals that attack the independence of the judiciary.

12. Judicial independence as R resistance to A

The A genealogy was hostile to the R understanding that the rule of law is an "unqualified human good"[39] that has as its self-evident meaning the separation of powers, with independent judges applying the law (in a pre-critical sense), without regard to the wishes or commands of the executive, to protect the rights of individuals. Kings and fascist leaders tended to see judges as higher or lower officers of the state bureaucracy charged with executing commands. They were theoretically

[39] Thompson, Edward Palmer (1975) *Whigs and Hunters: The Origin of the Black Act*, London: Allen Lane, 266

as well as practically hostile to the idea that the goal of government is rights protection. Their view of constitutions was equally hostile: they were the instruments of R assaults on their powers, to be accepted only as necessary compromises with popular political demands.

The corps of judges in liberalizing monarchies and the judges of modern European states taken over by fascist supreme leaders sometimes resisted overtly and covertly the authoritarian general program and specific illegal acts of their superiors. They were an important component of the ideological intelligentsia of emerging R and not uncommonly paid a price for it. The independence of the judiciary in this vision means R resistance to A and defense of an existing or potential democratic constitutional order. Restricting the independence of the judiciary means empowering A ideas, institutions and powerful individuals against R.

Current discussion of the rule of law in the R constitutional context presupposes the intricate progression of R victories in these battles. Authoritarians preface their arguments by assenting to the "obvious": judges not executive officers should have final say in disputes between private parties, likewise for claims by a private party that an executive officer has deprived him of a legal right. The next step is to accept that a court, albeit perhaps a "special" one inside the administration and identified with the state even if independent, can invalidate a regulation on the ground that it exceeds what the legislature authorized. Then that the regulation (not a statute) violates private rights.

The final step is for the constitution to authorize a high court to exercise final judicial review of legislation in order to protect entrenched constitutional rights. This last development is dramatic because it brings the R theory of the rule of law into conflict with the R theory of electoral democracy.[40] Or at least this is the case in a legal culture that no longer believes that legal reasoning about rights proceeds at least most of the time on grounds and to conclusions that have "nothing to do with politics" in the legislative sense.[41]

13. Juridification versus majority rule

Under a system of final judicial review of legislation, judicial independence takes on a new meaning simply because it now means law making authority independent of direct democratic control. In R theory, the rule of law means judicial independence;

[40] The locus classicus is Bickel, Alexander (1962) *The Least Dangerous Branch,* Indianapolis: Bobbs-Merril; See also Sultany, 'The State of Progressive Constitutional Theory' 378

[41] Kennedy, 'The Hermeneutic of Suspicion,' 99

but if independent judges pass on the validity of legislation, then the rule of law puts significant limits on majority rule. Of course the contradiction is not "absolute," because R theory will place a limit on independence as well: at some point, executive or legislative powers will be able to check just as they are checked.

Nonetheless, the long slow trend to constitutionalize more and more domains of public and private law continually expands the domain of potential conflict.[42] Private law and administrative law rules fix the contingent outcomes of contest between economic interests--capital and labor, consumer and retailer, debtor and creditor, landlord and tenant-- and fix the limits of social provision. The pervasive regulations of race and gendered existence mark out contingent lines of advance and retreat in the battle between progressive and conservative trends within R.

The incoherence of actual positive R constitutional regimes, their simultaneous affirmation of progressive and conservative principles and precedents, means that whatever is politically controversial will be open to constitutional contestation as well. This makes the highest constitutional court the "final arbiter" of the validity of the legal norms that settle political controversies.[43] It then makes sense for all political tendencies to attempt to incorporate their preferred general norms into the text, hoping that the high court will enforce them against the legislature and the administration.

Thus for example international civil society has believed for a generation in the legitimacy and effectiveness of incorporating human rights norms, and sometimes human rights treaties verbatim into the new national constitutions. Helena Alviar alerts us to the corresponding neo-liberal move to constitutionalize the Washington Consensus at the moment that its market shock ethos has lost popular plausibility.[44] In each case, the legitimacy of the drafting process, the fetishism of the text, and the authority—in the sense of ability to induce obedience—of the interpreting court are supposed to remove a range of important controversies from day to day legislative debate and decision.

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[42] Ibid

[43] Kumm, Mattias (2006) 'Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' in *07 German Law Journal 04,* 341*;* Teubner, Gunther (2006) 'Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory? in Joerges, Christian, Sand, Inge-Johanne & Teubner, Gunther eds, *Constitutionalism and Transnational Governance,* London: Oxford University Press 3; Kennedy, 'The Hermeneutic of Suspicion'. A prescient analysis is Shapiro, Martin M. (1966) *Freedom of Speech: the Supreme Court and Judicial Review,* Englewood Cliffs: Prentice-Hall, 103

[44] Alviar, Helena (2019) 'Neoliberalism as a Form of Authoritarian Constitutionalism' in Alviar, Helena & Frankenberg, Gunter eds *Authoritarian Constitutionalism*, London: Edward Elgar pp

It is an interesting question whether this alternating overreaching of progressive and conservative R constitutionalists vis a vis the public and vis a vis one another has caused the steady increase in the hermeneutic of suspicion. Constitutional faith bordering on idolatry has a shadow. It goes along with eroding confidence in the pre-critical sharp distinction between legal judgment and political judgment on issues that are both constitutionally and politically controversial. The Weberian legitimacy of judicial power weakens as its scope expands.

One result is a more and more anguished debate among and between progressive and conservatives in the R camp about "deference," or the duty of constitutional courts to defer to legislative judgment about the constitutionality of controversial measures.[45] The second debate is about the appropriate degree of independence of constitutional court judges, and here the challenge, in Eastern Europe and in Turkey, has been from the A side.

14. The political stakes in increasing or decreasing judicial independence

Different interpretations of the liberal requirement of judicial independence are controversial "in principle" because they represent different ideas of the proper roles of court, executive and legislature in the separation of power. These are "philosophical" or "theoretical" debates about "law and politics," "the people" and "the lawyers." At the same time, each choice of an interpretation will have indirect practical political consequences because each will differentially empower and disempower the political forces controlling court, executive and legislative branches.

If C/R tendencies control presidency and parliament, but P/R holdover judges control the courts, the sides will debate one way; if another control pattern, another pattern of argument. Both sides will strongly assert their background commitment to the rule of law and majority rule. The side arguing to restrict judicial independence will, however, find itself embarrassed by the recent appearance of A advocates supporting strong anti-judge positions, as part of the A program of emerging authoritarian governments in Central Europe.[46]

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[45] Duncan Kennedy (2018), 'Proportionality and "Deference" in Contemporary Constitutional Thought' in Perišin, Tamara & Rodin, Siniša, eds, *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union*, Oxford and Portland, Oregon: Hart 29

[46] Scheppele, Kim Lane (2015) 'Understanding Hungary's Constitutional Revolution', in Bogdandy, Armin von, & Sonnevend, Pál eds *Constitutional crisis in the European constitutional era: Theory, law and politics in Hungary and Romania,* Oxford: Hart Publishing; Pichi, Maximilian (2019) 'Constitution of False Prophecies: The Illiberal Transformation of Hungary', in Alviar, Helena & Frankenberg, Gunter eds *Authoritarian Constitutionalism*, London: Edward Elgar pp

From the A point of view, their long history of antagonism to rule by judges perfectly fits their interest in defending A power won in presidential and legislative elections. Judicial review of legislation is the direct descendant of the modest version of the rule of law that opposed princely absolutism and fascism. But it is much more vulnerable to A attack because the judges have now set up their power against the electoral will of the Nation/People under an R constitution. R's, both conservative and progressive, from legal professionals to the informed general public, rally strongly to defend the status quo.

15. R doctrine on judicial independence is incoherent and incomplete

R doctrine on judicial independence now acquires unaccustomed political importance. The A predisposition toward limiting judicial independence, starting from whatever rules are in force at the start of the dispute is clear. On the other side, as was true in Frankenberg's analysis of the prerogative within R constitutional theory, the abstract idea of independence is symbolically central, but too vague to give guidance in itself and as with presidentialism its practice within R is contradictory.

The strongest European version of separation would require judges to be tenured career civil servants selected by competition with their promotions controlled by an autonomous agency, perhaps composed only of judges, with no role for a ministry of justice, let alone the chief executive or the legislature. At the other extreme, in Germany the constitutional court justices are elected in a complicated legislative procedure that is structured to force deals among influential political insiders.

The United States also has its own sharply contrasting systems. There is no compulsory training and not even any professional qualifications for becoming a judge. At the federal level and in many states the chief executive appoints to life terms subject to some kind of legislative confirmation. In other states, judges, including supreme court judges, are elected to short terms in an unstructured supposedly "non-partisan" process. When elections are contested, they are financed by private interests rather than from a public fund.[47]

Actual R constitutional practice produces every variation on these themes. In other words, constitutional debate occurs, as with the other issues we've discussed, within the patch work hodge podge web of general and specific norms with multiple meanings for different players. For example, at the level of detail, is it legitimate for the U.S. president to ask potential nominees to the Supreme Court to tell him their

[47] Shugerman, Jed (2010) 'Economic Crisis and the Rise of Judicial Elections and Judicial Review,' Volume 123 Number 5 *Harvard Law Review* 1143

views about whether Roe v. Wade, forbidding the criminalization of abortion, should be overturned?

16. Is court-packing necessarily authoritarian?

In this configuration of contradictory ideologies operating within contradictory constitutional regimes, crisis is a real possibility. An ideological intelligentsia leading a large legislative majority and controlling the presidency may conclude that the constitutional court is no more than the instrument of the political ideology that has lost the electoral battle. And that the court's use of judicial review to put that minoritarian ideology into practice threatens evil and irreversible consequences for national welfare and national values. This elite may decide to reject the standard version of the separation of powers and try to "pack the court."

When the popularly elected leaders are in the mode of A now powerful in Central Europe, the packing of the courts seems just an extension of the mindset that includes racism, chauvinism, neoliberal commitments intertwined with traditionalism, and corruption. But … in these last few pages I would like to challenge the dominant notion that court packing is a priori inconsistent with the rule of law.

It seems plausible to me as a reader of the historical record that the conservative decisions invalidating not all but a large part of Progressive Era and New Deal social legislation over the whole period from 1895 to 1937 permanently stunted social democracy in the United States. There were arguably very large consequences for the political power of the moneyed elite, the level of inequality of all kinds, not just income, the fate of labor and of the least well off, the level of racism, the level of environmental degradation and more. Large legislative majorities voted the measures the Court struck down.

The political atmosphere up until 1914 and after 1929 was crisis. In 1937, President Roosevelt proposed to "pack the court" by adding a new justice for each justice over the age of 70 years and six months, through an amendment to the Judiciary Act of 1787 which had set up the Court. The threat, in spite of the failure of the proposal in the Democratic controlled legislature, probably somewhat speeded up the process of transition to a judiciary that reflected the massive liberal electoral successes of the Depression period.[48]

[48] For the mainstream description of the Court-packing plan, see: Leuchtenburg, William E. (1995) *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelet,* New York: Oxford University Press, 84-85, 96-97, 112-121, 142-143. For an account that challenges Leuchtenburg's description see: White, G. Edward (2000) *The Constitution and the New Deal*, Cambridge, MA: Harvard University Press and Cushman, Barry (1998) *Rethinking*

C/R critics and many P/R critics as well denounced the proposal as a direct attack on judicial independence, on the separation of powers, and therefore on the rule of law. "History" as far as I can tell uniformly accepts this view. Conservatives called Roosevelt a "fascist." It was certainly "arguable" (but by no means "the one right answer") that even though there was nothing in the Constitution about the size of the Court, the plan violated its basic presuppositions about the rule of law so that the Court should invalidate it if enacted.

In the United States in 2018, it is a common view that the President (often characterized as authoritarian) and the Republican Party have appointed enough young Supreme Court justices to lock in a very conservative majority, likely to last for another 30 year span. All agree that the C and P versions of constitutional law are radically different, with each version invalidating a large part of the legislative program of the other side. It seems likely that the impact of this court on American social democracy will be as larger or larger than that of the right wing courts of the 1895-1937 period.

If and when the P/R forces gain control of the presidency and both houses of the legislature, it seems as certain as these things can be that Congress will debate one of the variety of court packing plans that are already circulating within the left wing of the Democratic Party.[49] As was true in the 1930's, the plans will fall on a spectrum between a highly targeted attempt to replace a specific sitting C/R Court (or perhaps an A-C/R Court), an attempt to strengthen long term~~n~~ P/R influence on the Court, and an attempt to eliminate effective final judicial review of legislation.

Although I have no sympathy at all for A, I do not think that rejection of its rhetorics and imagery or its specific institutional forms is enough to condemn either Roosevelt's historic attempt or a future American left populist court packing scheme.

The New Deal Court: *The Structure of a Constitutional Revolution*, New York: Oxford University Press, 12, 18. For accounts of the opposition and denunciations of the plan at the time see: Alsop, Joseph & Catledge, Turner (1938) *The 168 Days*, New York: Doubleday Doran; Patenaude, Lionel V. (1970) 'Garner, Sumners, and Connally: The Defeat of the Roosevelt Court 1937,' in *74 Southwestern Historical Quarterly 1* 36; Patterson, James T. (1967) *Congressional Conservatism and the New Deal,* Lexington: University of Kentucky Press; McKenna, Marian C. (2002) *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937*, New York: Fordham University Press

[49] See Malone, Clare (2018) "Why a fringe idea about the supreme court is taking over the left," *FiveThirtyEight*, December 3 2018, accessed December 10 2018 at https://fivethirtyeight.com/features/why-a-fringe-idea-about-the-supreme-court-is-taking-over-the-left/

Judicial independence is a relative or spectrum concept within R, in deep contradiction with the notions of majority rule and indeed of democracy.

When I agree with a frustrated majority, *and* when the consequences of the exercise of judicial review are plausibly very dire, *and* when the specific court packing plan is sufficiently careful to avoid collateral harm, *then* I am in favor of a dramatic intervention, at the expense of judicial independence and the separation of powers, to "save the Republic."