George Skouras

Constitutionalism and Democracy

The Supreme Court Power of Judicial Review v. We the People

Springer

Constitutionalism and Democracy

George Skouras

Constitutionalism and Democracy

The Supreme Court Power of Judicial Review v. We the People

Springer

George Skouras
Astoria, NY, USA

ISBN 978-3-031-66905-7 ISBN 978-3-031-66906-4 (eBook)
https://doi.org/10.1007/978-3-031-66906-4

© The Editor(s) (if applicable) and The Author(s), under exclusive license to Springer Nature Switzerland AG 2024
This work is subject to copyright. All rights are solely and exclusively licensed by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.
The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.
The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, expressed or implied, with respect to the material contained herein or for any errors or omissions that may have been made. The publisher remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.

This Springer imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

If disposing of this product, please recycle the paper.

Contents

Chapter 1
Introduction: The Landscape and Implanting an Experimental Democracy in the New World

It should be made clear, straight away, that this work makes no novel claims, as to the determination of whether the Supreme Court acted properly or exceeded its authority by its application of judicial review power. I will not investigate each and every case that the Court ruled nor attempt to second guess the Court's opinions and behavior, under every single case, in the course of American history. Consequently, I will only be using a sample or a very small portion of Supreme Court history, as an example, which will hopefully illustrate the role the American Supreme Court plays as final arbiter and interpreter of the *Constitution*. The main point being that I am mostly interested in is whether there exists a legitimate reason that the Supreme Court should exercise such power and authority, in establishing a democratic state. The conclusion reached here is that it is illegitimate for the Court to have the power of judicial review.

It is of no concern to us whether the Supreme Court acted fairly, properly, or justly in its exercise of such authority. Whether it is a good steward of such power is beside the point. What I am essentially interested in is how such a power became lodged with this body of government, given the historical evidence that the British rejected such a power for their system. Was there anything special about the American system to suggest that such a power is good for America but not good for Britain?

Within the scope and focus on Supreme Court judicial review power, I will attempt to point out other instances that the separation of governmental power—divided branches of government—were susceptible to power grabs, with each division, from time to time in American history, attempting to poach power from the others. That is, the Montesquieu model of government failed to contain and properly demarcate the lines of division when the Founding Fathers incorporated it into the Constitution. So, poaching and power grabbing becomes a potential activity when a divided government comes to a standstill or is deadlocked. The Founders had a very good reason to divide government, the way they did, because history shows that investing all power in a King, Crown, or dictator can be very dangerous for *We the People*.

© The Author(s), under exclusive license to Springer Nature Switzerland AG 2024

G. Skouras, *Constitutionalism and Democracy*,
https://doi.org/10.1007/978-3-031-66906-4_1

It is hoped within the context of the American governmental structure, we will discover how the Supreme Court usurped the power of judicial review and how the other branches—the Legislative and Executive—also tried to power grab, especially during emergency conditions. Hopefully, the lesson learned is that when there exists divided government—with checks and balances—regardless of how theoretically it is supposed to work—it can be detrimental to *We the People* in the opposite direction from monarchy, authoritarianism, or dictatorship, in that it can lead to chaos and anarchy. Whether it be from the Right or the Left of the political system, it is dangerous for *We the People*. The Founding Fathers were properly concerned about the concentration of power, but what they overlooked was the possible danger of having a divided government. With too many "checks and balances" and not enough headwind to drive the ship of state safely. What appears to be the case is that constitutionalism is being used to hide an aristocratic system by calling it "democracy." That is the creation of a "thick" constitutionalism as a cover for a "thin" democracy.

1.1 On the Status of Democracy and the American Class System

I hope to unbalance "experience" and "reason" in the telling of the implantation of an experimental system called "democracy" in the New World. Given the human animal is not primarily a bundle of logic but an amalgamation of senses and instinctual life. But, unlike purely empirical or conceptual attempts to place the human animal in the domain of historical space and time, I reserve a domain of mental space, namely the role of consciousness, in giving the human animal the wherewithal to not only be aware of the external world but its own internal state. The linear telling of the story will be interrupted by non-linear interventions. One might assume that the best way to get from point A to point B is to map out the most direct and efficient route. However, here, I will try to balance linearity with non-linear systems as we travel the domain of jurisprudence, philosophy, political science and much else. That is, I hope the reader stays with me as I try to read the signs and map out historical roads of how a legal system can dominate a people—*We the People*.[1] That is, I hope you stay with me as I attempt to build a case as to why the Supreme

[1] Who is "We the People"? I will roll out "We the People" concept over the course of this work. It should be no surprise that the use of this phrase/concept will appear over and over in the course of this work. Of course, this needs lots of unpacking and hopefully might be able to eventually convince the readers that although *We the People* has political power, its ultimate foundational status is metaphysical. Michelman says: "Among contemporary American constitutional theorists of populist inclination, Bruce Ackerman is one who has grappled most seriously with the question of what counts as an expression of the legislative will of the people. Ackerman quite convincingly maintains that, on any plausible conception of a people's constitutional will that is morally deserving of respect, that the will (or that "people") can never be corporately or instantaneously

Court of the United States of America should be stripped of the power of Judicial Review.

I will seek to carve out a historical space that allowed the foundational democratic systems to co-exist with non-democratic elements that have been incorporated into the American Constitution. The general conclusion reached is that the experimental system known as "democracy," in the Eighteenth century, was too speculative, untested, and unproven to be able to be established in the Constitution of the United States. That is to say, the civilizational conditions were not conducive to bring such a system to life in late Eighteenth century America.

How does the idea of "democracy" relate to the "power of judicial review"? What does the power of judicial review have to do with democracy?[2] This work will make the following claim: under the established political system, whether it be called 'Republicanism' at the framing of the American Constitution or 'Democracy' with increased political freedoms after the Civil War and the passage of the Civil War Amendments, the Supreme Court power of judicial review is the wrong toolset to give the Supreme Court because it gives the Justices rather than *We the People* the opportunity to direct American policy. In this work we will focus on one domain—property—in the period between the Gilded Age and the New Deal, but the use of this power is universal in the sense that the Court can use it to knock down any legislation it finds offensive to the Constitution. Of course, the exploration of the totality of this power, as used by the Court in many other domains, is beyond the scope of this work. However, if the conclusion is correct that the Supreme Court should never hold such power, then there is no need to go down each domain, exposing how the Court has become the ultimate guide of American politics. And, further, this power was appropriated by the Court under a theory that presupposed that a written Constitution needed a proper guardian and protector—the Supreme Court voted itself to be the proper entity to expound on the final meaning of the Constitution. That is, the power of judicial review was appropriated by the Court by fiat rather than found within the Constitution. The Supreme Court appropriated this power on its own terms, free of Congressional oversight or approval[3] nor with any

present but can only be represented by time-extended courses of political events." Michelman (1998), p. 76.

[2] Symposium (1981), p. 259; Kammen (1987), p. 31.

[3] Prakash and Yoo (2003), pp. 892, 893. It is clear that these authors (Prakash and Yoo) do believe that the Framers of the Constitution granted the power of judicial review to the Supreme Court. "[W]e believe that modern scholars who insist that the Founders never authorized judicial review of federal statutes are mistaken." (p. 892) Clearly, they point to many pieces of writing and actions of those in the Convention and especially outside of Convention that would have included such a provision in the Constitution. However, the fact remains even though some might have been strongly inclined to do so, they did not. So, the bottom line is the Founders were unclear as to whether they wanted to incorporate such a power in the Constitution. However, the two authors above beg to differ with me. According to them: "Our goal here is to show that the necessary predicate for these theories—the Constitution's authorization of judicial review—is on solid textual, structural, and historical grounds. In short, the original intent behind the Constitution (what the founders intended the Constitution to provide) and the Constitution's original public meaning (what

regard for the other elected bodies of government. Nevertheless, if it can be established that such a power does not belong to the Supreme Court, we will at least have won half the battle. The other half of the battle is to further plough the fields as to whether the domain of democracy is even feasible in our civilizational time. If democratic theory does not make any sense or it is simply a metaphysical product, then power grabs, like the one the Supreme Court conducted, is perfectly in line with many other non-democratic regimes throughout history. That is, authoritarian regimes, and other special interest actors, grabbing as much power as they can, and leaving *We the People* in the dustbins of history.

The power of judicial review cannot be brought under democratic control unless it is stripped from the Supreme Court and given to Congress. Here is how Dahl unpacks the power of judicial review as understood, debated, or intended for the operation of this power. Dahl makes clear that the Founders were unsure how this power of judicial review was to function within the new constitution. He says: "What the delegates intended in the way of judicial review will remain forever unclear; probably many delegates were unclear in their own minds, and to the extent that they discussed the question at all, they were not in full agreement. [N]evertheless, it is likely that a substantial majority intended that federal judges should not participate in making government laws and policies, a responsibility that clearly belonged not to the judiciary but to the legislative branch."[4] In short, Dahl goes on to say that the Virginia Plan, on giving the Executive and Judiciary veto power over the legislature failed.

Further, this work will maintain that: ideal "democracy" is utopianism.[5] The reason for attempts to set up a democracy is to try to give voice/vote to a wider range of the population. Be it a "thin" democracy or something more substantial has so far not proven fruitful anywhere in the world. Whether a "thin" democracy is possible we will further explore here. As to a "thick" democracy we will leave to the metaphysicians. One reason a "thick" democracy is not possible in our civilizational time is the dynamics between property and the democratic dynamic. The other more important reason we will leave to future analysts or the evolutionists, has to do with

---

the Constitution would have meant to a single, informed, objective reader in 1787-1788) show that the Constitution authorized judicial review."), p. 893.

[4] Dahl (2003), p. 18. Dahl goes on to say: "A judicial veto is one thing; judicial legislation is quite another. Whatever some delegates may have thought about the availability of justices sharing with the executive the authority to veto laws passed by Congress. I am fairly certain that none would have given the slightest support to a proposal that judges should themselves have the power to legislate, to make national policy. However, the upshot of their work was that in the guise of reviewing the constitutionality of state and congressional actions or inactions, the federal judiciary would later engage in what in some instances could only be called judicial policy-making—or, if you like, judicial legislation." (p. 19).

[5] In order to find out what "democracy" is, it will require pinning down a definition of it. This is tricky business but hopefully this work will make some attempt to pin it down and show why it is a metaphysical concept—but keep the hope open that some strip-down version is possible. Becker (1941), pp. 3–9; Dahl (2006), pp. 4–29, Chapter 2: "Is Political Equality a Reasonable Goal?" (Dahl links the idea of political equality to democracy.)

our evolutionary development and such a system not being able to be birthed in our civilizational time. We will explore a bit of the biologisms involved here but not with any depth. Democracy has eluded all that have tried to establish such a system so far. Of course, a skinny version of democracy or a more pragmatic form may be possible by overlooking the content and substance of a democratic state and settling for a "procedural" democracy. The question becomes whether some, perhaps pragmatic form of democracy,[6] can be salvaged from the threat of authoritarianism. Democracy, in its "ideal" form, has never existed and could never exist outside of utopia or metaphysical universe. So, the question arises as to whether some variation or stripped-down version of democracy is possible?[7] And if such a democracy can exist in some form or variation, whether it can be improved upon or doomed to failure under the pressures of authoritarian systems. That is, can a "practical" form of democracy emerge from the foundations of our civilization? Is it possible to have a stable variation of democracy or a "pragmatic democracy," and if so, can it be

[6]The tug of war between rationalism and empiricism as to which school has the upper hand in the representation of reality. Does 'democracy' fall within the domain of rationality and comport to the ideals of the mind or is 'democracy' an empirical institution capable to reductionism and fragmentation to be torn to pieces by such schools as sociology, political science, economics, etc.? Can the idea of 'democracy' stand up to empirical investigations? Can it survive 'rational' examination?

[7]Dahl (2003), p. 5. Dahl at the start of this book brings up an important point as to whether the Framers of the American Constitution created a "republic" or a "democracy"? (p. 5) Dahl relying on Madison in his work takes the view that the Framers created a "democracy" and not a "republic." I will not dwell on the point here and, hope eventually to point this work in the direction, that the Framers created a "Republic" and not a "Democracy." That is, I believe based on the *structure* of the Constitution that the Framers created a Republic. But this is not to say that America remained a Republic throughout its history. I will be arguing here for the thesis that although the Framers created a Republic, America took on many aspects of Democracy and moved towards democracy to a degree, but the American Constitution has a Republican infrastructure and plumbing system at its core. Further, I will attempt to segregate democracy as found in textbooks from real or actual democracy—theoretical democracy from practical democracy throughout this work. If theoretical/ideal democracy is not feasible and real/practical democracy is too messy, unworkable, or too fallen from the ideal, can there be a middle range democracy that can serve as some sort of serviceable entity or workable solution for the masses to be heard in the hallways of political power? The theme between democracy as an "ideal" and democracy in "reality/practice" will be a continues matter of revisitation throughout the book. But it is safe to say that "ideal" democracy is impossible or metaphysical because it suggests a group of people can assemble and direct themselves and select policies and set a course of direction by themselves or more plausibly by their representatives. I will have more to say on 'representative democracy' later in the book, but even representative democracy is incapable of meeting the above criteria of democracy free of assumptions as to what *We the People* want individually or as a collective. The basic problem is ascertaining the wants of the masses by way of filtration of their representatives. Representatives must make lots of assumptions as to what their constituents want. Therefore, there cannot be uniformity of policies over a divergence of independent moral agents with a plurality of wills and tastes. Of course, the use of the standard democratic technique of "majority" rule is the way of setting modern day policy. However, the concept of "majority" rule can be as difficult to grapple with as the concept of "democracy" itself. So, the conflation of the concept and the technique leads to additional misunderstanding of the modern 'experiment' in democracy. We will see how this intertwining plays out here.

salvaged and harvested for use by *We the People*? That is, under our civilizational time can an idea like "democracy" be birthed given the human animals' predispositions toward a rather ruthless existence? There does not appear to have been a time since the human animal came down from the trees, which is historical time within each passing civilizational time, including our own, that such an animal has not been knee deep in blood. Therefore, the social structure or ethics needed to build up democratic systems have been antithetical to such system within our civilizational time. Purcell does a great job expressing the status of ethics, political theory, and human behavior during the early part of the Twentieth century. That is, science or "naturalistic" science dashed the hopes of those hoping to establish ethical systems and political theory as to the foundations of democratic government. The methods of "induction" or "deduction" were sharply limited in their application to ethical and political theory. These behavioristic or scientific models deemed "higher law" legal doctrine simply a metaphysical enterprise parading as practical law.

> In the years after 1910 scientific naturalists strictly confined induction to observable, concrete phenomena and ruled it out as a method of proving the validity of any moral principles. At the same time, they sharply redefined the nature of deductive logic, always closely allied with rational ethical systems. By demonstrating its wholly abstract and formal nature, scientific naturalists denied it any authority in questions concerning the legitimacy of moral values. Rejecting the possibility of demonstrating the truth of ethical propositions by either induction or deduction, they left moral ideals without a rational, theoretical basis.[8]

The "naturalistic" scientific approach also questioned the possibility that citizens had sufficient "rationality" to participate in the democratic process. "[I]n empirically examining human behavior and the actual process of American politics, scientific naturalists came to question and often reject three cardinal principles of democratic government: the possibility of a government of laws rather than of men, the rationality of human behavior, and the practical possibility of popular government itself."[9] That is, human decision making was not simply a rational exercise but a muddle of various inputs that could not be justified scientifically. With the rise of psychology, during the early part of the Twentieth century, along with the other social sciences, it was revealed that the human animal is not a purely "rational" animal and that the instinctual and emotional domain could either take the lead or serve as decision-maker well before any rational analysis came to the fore.[10]

According to Becker, the assumption of the possibility for democracy is more than the procedural business of counting votes. There must also exist, along with procedure, the substance of democracy. Becker says these are the "necessary

[8] Purcell (1973), p. 11.

[9] Purcell (1973), p. 11.

[10] Purcell (1973), p. 11. "Psychologists found human behavior was largely irrational, especially in the complicated and emotional arena of politics. Most individuals, they maintained, were unable to fulfill the traditional democratic obligations of citizens. Students of politics learned that in practice small groups of insiders dominated the government and that popular control was an illusion. Democratic government did not work as its theory claimed it should. By the early thirties traditional democratic theory seemed largely untenable."

assumptions and the necessary preconditions" for democratic government. Becker list a series of requirements as preparatory ground to sound citizen voting.[11]

Can the assumptions mentioned by Becker be met? It seems that they are pretty-hefty assumptions. Let us list them:

1. Are citizens capable of managing their own affairs?
2. Can there be reconciliation of diverse opinions?
3. Is compromise possible in a world of diverse opinions?
4. Measures adopted for the common good. What is the common good?
5. Individual interests v. class interests?
6. The assumption of rationality and the rational citizen. Is the human animal a rational animal?
7. Citizens as sound judges of good policy. Is this possible?

The *principle* may be stated this way:

> Attempts to study human behavior can go so far and no further. Experimental scientists or behaviorists during the early part of the 20th century attempted to study human animal behavior using natural science methodology. It became clear in the later part of the 20th century that such a methodology is weak and incomplete in capturing the essence or true human behavior by mechanistically devised experiments and ignoring or leaving out the core of animal being—consciousness. These naturalistic efforts reduced the whole of ethics and political theory to the junk heap of history until they were resurrected in the later part of the 20th century.

Obviously, Becker has strong criteria for modern democracy. To what degree the above criteria can be met or possible, we will see. We will try to separate reality from myth to the extent it can be done. Or it might be argued that: if the substantive version of democracy is impossible, perhaps there is a "skinny" version that is doable? As mentioned earlier, some sort of "thin" democracy that preserves the right of the general public to cast a vote. Perhaps, a majoritarian democracy with procedures in place that allows each citizen to be heard and have their voice/vote accounted for in the polity. The idea of democracy has historically been kicked around but never taken seriously as a realistic goal by any previous society with a few exceptions. So, the revival of the idea of democracy in America was an 'experimental' effort to have a go of it.

What is clear is that the Framers of the American Constitution were not supporters of what generally goes under the label of 'democracy,' and did not highly appraise such a form of government. Although they embarked, for their times, on an 'experimental' journey going under the label 'democracy,' it could and should be more accurately labeled 'republicanism' or a 'republican' form of democracy. It was originally assumed that the Founders were liberal-individualist Lockeans until this view came under scrutiny. The challengers believed the Founders were also influenced by the republican communitarian tradition of Machiavelli. So, the assumption that Locke was the Founder's philosopher, that went unchallenged for

[11] Becker (1941), pp. 14–15.

a long time, came under challenge in the twentieth century. The liberal-Lockean individualism tradition facing off with a republican-communitarian tradition became contested ground in the twentieth century.[12] It seems that Machiavelli was just as important as Locke to the Founders.[13] We will not settle this debate here. We simply note the fact that the Founders, regardless of liberal or republican persuasion—simply could not have designed a democratic constitution.

We simply ask was the design and structure of the Constitution to facilitate democracy and democratic values or to facilitate aristocratic hierarchy and aristocratic values. What is clear is that for the Founders, the less democracy, the better, and they mostly held a highly negative view of democracy.[14] So, any form or semblance of democracy to emerge from the Constitutional Convention had to be a less than an ideal form that will be incorporated into the Constitution of the United States. And, further, democracy was boxed in by the need to protect property interests;[15] therefore, if any conflict arose between democracy and private property, democracy had to be curtailed to safeguard property.[16]

Since America was initially setup as a republic, the appropriation by the courts of the power of judicial review, was not very harmful to the interests of *We the People*, in any large scale at least.[17] However, over time with greater efforts made to democratize America, especially after the Civil War, and with the addition of the Civil War Amendments,[18] and, especially toward the final decades of the Nineteenth century, during the consolidation and monopolization stage of Industrial America[19] and early formation of monopoly enterprise,[20] it became clear and evident that the

[12] For a clash between liberalism and republicanism, see: Morone (1990), pp. 15–19.

[13] Morone (1990), p. 16. "To them, the spirit of Machiavelli runs as deep in Americans as that of John Locke."

[14] As to just how democratic America is, *see generally:* Rodgers (1987); Fishkin (1997); Morone (1990); Ackerman (1991, 1998, 2014); Levinson (2006).

[15] Siegan (2001); *see also*, Lockean philosophy on property rights protections.

[16] Charles Beard's work *An Economic Interpretation of the Constitution of the United States* (1913) has been controversial from its inception. It has generated counterarguments and counterclaims from the opposite side of the economic and political spectrum. This book has become something of a landmark for progressive groups and interests. So, it has been heavily attacked and scrutinized by more traditional and conservative interest groups throughout the twentieth century. Readers may want to examine and analyze his claims for themselves and see if they holdup or not. Some of my previous works cited here go into greater detail as to his claims and the counter-literature it generated; *see in particular*, Skouras (2011), pp. 37–58.

[17] The only exception to this was the pre-Civil War case of *Dread Scott v. Sanford* that eventually led to the killing of more than 600,000 Americans.

[18] 13th, 14th, and 15th Amendments to the US Constitution, also known as the Civil War Amendments.

[19] For further views on Industrialism and capitalism during this period, see: Ginger (1975); Hobsbawn (1969); Diner (1998); Cochran and Miller (1942).

[20] Zunz (1990) for further analysis of this period—Industrialization & Monopolization of America, end of the nineteenth century: was there monopoly upsurge during this period? What was the nature of this business consolidation? Is this a contested truth given that America was undergoing

Supreme Court was using the power of judicial review as a check on any further push to democratize the economy by way of any reformist, regulatory, or legislative schemes that impinged on property values. That is, the basic fear of the Framers of the American Constitution was that of "democracy" interfering with property which was becoming a reality by the close of the Nineteenth century. But, instead of the Legislative branch stepping in to protect property interests, it was the Supreme Court. Now, who elected the Supreme Court to serve as the People's representative in these matters? What if *We the People* wanted change in the distribution of property? Is the Legislative branch or the Supreme Court the protector of property? Which branch of government has the final power as to how property is to function in any given age? Should property be a "fixed" concept and operate in the same manner under the Agricultural Age as in the Industrial Age?

The *principle* may be stated this way:

> Republicanism is not democracy. Republicanism is Aristocracy watered down. The Constitution being an Aristocratic Republican document only makes for provision of the protection of property, everything else is secondary or tertiary. Democracy is not the business of the American Constitution. That is, Montesquieu's model of democracy is a watered-down model of Aristocracy. Montesquieu was an Aristocrat; he understood matters via an aristocratic mind set. However, he made the effort to democratize aristocracy.

Nevertheless, the Supreme Court stepped into the breach to try to hold back *We the People* attempting to violate property rights via increased governmental regulations. The Court stepped in, using its self-appointed power of judicial review, to clean up any legislative efforts that rebalances property rights on the democratic side of the scale of justice. The threat to private property by the People, was deemed to be the

---

Industrialization, while shedding its agricultural workers; *See*, *United States v. Int. Harvester Co.,* 274 U.S. 693 (1927), *United States v. American Tobacco Co.,* 221 U.S. 106 (1911), oil industry (natural monopoly). John D. Rockefeller's *Standard Oil Company* cornered 90% of the market and was broken up in 1911; monopoly in the steel industry, Andrew Carnegie's company bought by J.P. Morgan and melded into *U.S. Steel* survived its monopoly battle under the *Sherman Act*; further instances of monopoly in 1) sugar, 2) tobacco, and 3) meat-packing; subsequently, the *Clayton Act* attempted to give further guidance and tighten up the Sherman Act by banning 1) interlocking directorates, 2) tie-in sales, and 3) certain mergers & acquisitions; *see further*, Areeda and Hovenkamp (2013) on antitrust; *see further*, Theodore Roosevelt and William Howard Taft and Progressive Era attempts to break up monopoly—*Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *see further*, Sunstein (2004), p. 67. "For Berle, corporate power was a serious threat to both democracy and economic growth. He believed that corporations had increasingly obtained the status of monopolies and did violence to the old idea of free and open competition." *See also*, Cooper (1990), p. 11. Cooper says that between 1897–1903, over three hundred consolidations took place that totaled $7.5 billion in capitalization which involved 40% of the industrial output. "These consolidations became a vast horizontal integration that brought large segments of an industry, and sometimes the whole industry, under the control of a handful of firms. Railroads led the way, with 95 percent of all trackage controlled by six lines in 1899. Steel soon followed suit; the formation of the United States Steel Corporation in 1901 brought about 80 percent of production under one company. U.S. Steel, whose formation was announced on March 4, 1901, the same day as the inauguration of the president, was the first business in the world to be capitalized at $1 billion. Other fields, most notably aluminum, tobacco, and life insurance, soon underwent consolidations that left them comparably concentrated."

job of appointed justices to remedy rather than the representatives of the People. Probably the Framers, given the value they placed in private property protection, would not be opposed to the Supreme Court, using the power of judicial review, at least in cases involving property, to stopping the masses, especially during the Fuller Supreme Court, from interfering in the interests of private property. However, the power of judicial review is potentially universal in scope and would give the Court massive power to re-arrange American society, well beyond the economic and property interests. This might have been one reason as to why this power was not explicitly written into the Constitution. Even if some of the Founders were disposed to a judicial check or veto on Congress, but as Dahl pointed out, most of the Founders would have been shocked to learn that the Supreme Court was serving as the legislative and policy guide and regulator of Congress. The Founders might easily be concerned that the Court, with such a power, might refuse to yield to the Legislative and Executive branches, as co-equal branches, if such a power is explicitly stated in the Constitution. This would also make a mockery of Montesquieu's co-equal and balanced governance model,[21] since the Court was to be the final arbiter in the conduct of government.

Of course, Montesquieu was not the only aristocrat that also believed that the "better sort" of people ought to rule. It was the standard, not simply of the *Age of Enlightenment* of the Eighteenth century, but from time immemorial observation and experience dictated that the "better sort" of people, not only should rule but were obligated to rule, if a tribe, community, city, or state is to survive. One need not be a Darwinist to know that not "all" of the people are capable of leadership or rule of any given territory and society. Even at the start of Western Civilization the Greeks and Romans were of the opinion the "best," the "strongest," or the "wisest" were the most likely candidates for rulership. Of course, what "ideals" dictate and what "reality" necessitates are not one and the same thing. Each passing Civilization develops standards for its day or horizon. It should be no surprise that each passing Civilization will deploy those traits and values it adjudges suitable for those living in that time horizon. This means that no human being can escape his or her time horizon. Each human animal is a prisoner of their time.

So, Montesquieu was not some sort of a radical espousing republicanism—as were not most of the Framers of the American Constitution, espousing some sort of radical idea that the candidates for rulership should come from "below" or from the commoners, in essence, *We the People*, but from the top of society as signified by property ownership. That is, they should come from the highest social ranks, preferably from the Aristocracy of blood, as was the case in Europe, or in the case of the United States, from an Aristocracy of merit/property. That is, a key reason the Framers of the American Constitution were drawn to Montesquieu's model of

[21] Montesquieu (1949), p. 12; here is how Montesquieu regarded democracy: "The people's suffrages ought doubtless to be public; and this should be considered as a fundamental law of democracy. The lower classes ought to be directed by those of higher rank and restrained within bounds by the gravity of eminent personages."

Aristocratic government—it was because it allowed the "better sort" to rule America, not *We the People*.

The Founders, like all elites, want their own kind to lead and rule their society—that is, set the example and standard for the rest of the populace. The Founding Fathers, in making sure that the "best" ruled America, did so by making property ownership the *sine qua non* of fitness for political office and rulership. How is the portion of *We the People* capable of rulership to be determined? By property ownership. It was first fully noticed in the North, that class politics can relieve a man of his duty to fight in the American Civil War. That is, the Enrollment Act of 1863 allowed a draftee to pay $300 for someone else to do their fighting in that bloody conflict. The South, too, reached an existential crisis when they were defeated by the North and realized that the Plantation structure was broken, with the defeat and collapse of the Southern plantation aristocracy. The South suddenly came face to face with those that it once enslaved, and those other subsistence farmers and homesteaders living on the edges of the large plantations, as outsiders to the planter class, were going to be neighbors and partners, with equal voting power, was unthinkable to a Pre-Civil War generation. But with the destruction of the South, it became clear that the resurrection of the South would require *de facto* means to control the former slaves and the petty farmers regardless of any *de jure* freedoms granted them by the North and imposed on them with the passage of the Civil War Amendments and Reconstruction. The American Founders were not democrats. Therefore, they could not have drafted a democratic constitution. They were an admixture of Lockeans and Republicans (republicanism traditionally understood). The Constitution they drafted contained and contains many aristocratic provisions. The American Civil War shattered some of the anti-democratic provisions but not all of them. The remainder of those provisions we are dealing with today. It left the South shattered and broken, with its old Planter class left in ruins. This meant that the former Planter Aristocracy needed new legal tools to control the undesirables in its midst.

The Supreme Court serves as a good vehicle, free from facing the voters, to restrain any nascent democratic efforts from swallowing up private property. As the Supreme Court started using the *Due Process Clause of the Fourteenth Amendment*, not as a *procedural* matter, but to make *substantive* changes to economic policy, *it was transforming the Civil War Amendments into new tools in the war of the classes.* It started to become clear, by the close of the Nineteenth century and early Twentieth century America, that the Court was prepared to act as the legislative branch and to use this power in the protection of the new emerging industrial class system.[22] As farmers started transitioning into industrial workers or the proletariat,[23] the Supreme

[22] American class system reference; *See also,* White (1997); *See generally*, Tiger and Levy (1977); Marcus (1972), pp. 260–276 (politicians of both parties did all they could to align themselves with the new elite industrialists).

[23] Lears (2009) (Giantism also leads to imperialism as a regular feature of American foreign policy since the close of the nineteenth century). *See generally*, Sennett (2006); Diner (1998) (Diner presents a cogent social history of the period); *see further*, Link and McCormick (1983).