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A Political Economy of Contemporary Legality

Duncan Kennedy

INTRODUCTION

This chapter starts with an observation: contemporary elite jurists pursue, vis-à-vis one another, a 'hermeneutic of suspicion', meaning that they work to uncover hidden ideological motives behind the 'wrong' legal arguments of their opponents, while affirming their own right answers allegedly innocent of ideology.[1] The rise of the hermeneutic of suspicion is a striking manifestation of the contemporary transformation of the relationship between legal elites and political/economic elites. This transformation accompanies and corresponds to the progressive juridification, judicialization and finally constitutionalization of the contemporary social order.

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[1]This chapter is a thoroughly revised version of Part II of Duncan Kennedy, 'The Hermeneutic of Suspicion in Contemporary American Legal Thought,' *Law & Critique* 25 (2014), 91-139. Earlier formulations of the hermeneutic of suspicion idea: Duncan Kennedy, *A Critique of Adjudication* (Cambridge: Harvard University Press, 1997) Chapter 8, 180; Duncan Kennedy, 'Political Ideology and Comparative Law' in Mauro Bussani and Ugo Mattei (eds.), *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012). I revised the version in the Law & Critique piece and published it as Duncan Kennedy, 'A Social Psychological Interpretation of the Hermeneutic of Suspicion in Contemporary American Legal Thought' in Justin Desautels-Stein and Christopher Tomlins (eds.), *Searching for Contemporary Legal Thought* (Cambridge University Press, 2017).

The "political economy" that my title proclaims as method for understanding all of this means incorporating at least the following elements of the social whole. There are groups, understood not just as collections of individuals but as collectives (usually but not always loose) with goals and strategies that are based on shared material and ideological, or "ideal" interests. They cooperate in all the aspects of social production and reproduction and are at the same time in conflict with each other over the distribution of stakes that are both material and "ideal" , and include the resources necessary for success in the next iteration of the process. The conflict is situated within institutionally established rules of the game. These are given at any particular moment but also in constant modification since the rules of the game are among the objects of the game. Marx's *The Eighteenth Brumaire of Louis Bonaparte* is for me a canonical example, but the schema is very general, across the many forms of social division and antagonism.[2]

With the exception of a cursory but instructive reference to German constitutionalism, this is an essay on contemporary American legal thought and legal institutions. My interpretation of these American developments is heavily influenced by my prior work trying to develop an account of transnational legal consciousness evolving through three stages: Classical Legal Thought (1850-1930), Social Legal Thought (1890-1968), and what was, when I developed the

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[2] Two other examples among many that I find inspiring are W.E.B. Du Bois, *Black Reconstruction* (New York: The Free Press, 1998 (1935)) and Yves Dezalay and Bryant Garth, *The Internationalization of Palace Wars: Lawyers Economists and the Contest to Transform Latin American States* (The University of Chicago Press, 2002). Antonio Gramsci, *Selections from the Prison Notebooks*, Quentin Hoare and Geoffrey N. Smith (eds) (New York: International Publishers, 1971) is another inspiration.. I attempted political economy inspired analyses in Duncan Kennedy, 'Legal Economics of U.S. Low Income Housing Markets in Light of "Informality" Analysis', *Journal of Law in Society* 4(71) (2002), 71-98; Duncan Kennedy, 'African Poverty' *Washington Law Review* 87 (2012), 205-235; and Duncan Kennedy, 'Commentary on Anti-Eviction and Development in the Global South' in Lucy E. White and Jeremy Perelman (eds.), *Stones of Hope. How African Activists Reclaim Human Rights to Challenge Global Poverty* (Stanford Univ. Press, 2010)

theory, Contemporary Legal Thought (1945-2000).[3] Up to WWII, in this account, the U.S. was a massive importer of European legal thought, and an innovator, but with negligible impact elsewhere, except for Latin America. After World War II, the US stopped importing or even relating to legal developments abroad, except to try to influence them in our various imperial ventures.

At the same time, the rest of the world fell under various kinds and degrees of American legal hegemony.[4] For this reason, my account of contemporary American legal thought has only minimal reference to foreign developments, although German and French legal thinkers have strongly influenced my analysis. It might nonetheless be interesting in legal contexts where importation from the US is a welcome or unwelcome reality. I am afraid that what I write here will be much less intelligible and so less interesting to readers who have not read at least a little of this earlier work, but I will try as I go along to give as much quick background as possible.

PART ONE

THE HERMENEUTIC OF SUSPICION

The charge of abuse of legal method with ideological intent (conscious or unconscious) is so common in contemporary legal culture that it seems fair to say that it is haunted by a

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[3] Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000' in David. M. Trubek and Alvaro Santos, (eds.), *The New Law and Economic Development: A Critical Appraisal.* (Cambridge University Press, 2006).
[4] An important work on this process, including its "two-way" character, is Diego Lopez Medina, *Teoría Impura del Derecho. La transformación de la cultural juridical latinoamericana*, (Bogotá: Legis, 2008)

'hermeneutic of suspicion' toward claims of legal necessity.[5] The most familiar form of the accusation is the claim that there was a right answer, but the jurist, who might be a judge, an advocate or a professor, disregarded it in order to produce a wrong answer that fit his ideological predispositions. The motivated reasoning error can be a wrong use of any of the extant types of legal reasoning (precedent, deduction, teleology, etc.) or more commonly a wrong use of many at the same time.

The defining aspect of this form is that the jurist claims not just that his opponent chose the wrong answer for the bad reason of covert ideological preference, but that there was a right answer, which countered the preference, and which the opponent was bound by fidelity to law to adopt. This fits the sense shared between popular observers of the system and elites with strong ideological commitments that 'the law' (defined by the constitution, justice, human rights, freedom, the nation) is intrinsically on their side, so that when the jurist defines the law against them there is something more than just error, something more like cheating or betrayal going on. There is no admission that their answer will be subject to an exactly analogous suspicion-hermeneutic as the one just critiqued. But every sophisticated jurist is acutely aware of this possibility, and of the impossibility of knowing for sure when suspicion will conquer certainty.

In developing the notion of a hermeneutic of suspicion as something common to Freud, Nietzsche and Marx, Paul Ricoeur insisted that it is part of a matched pair, or has a twin, called 'hermeneutics as the restoration of meaning'.

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[5] See footnote 1 above.

> The contrary of suspicion, I will say bluntly, is faith. What faith? No longer, to be sure, the first faith of the simple soul, but rather the second faith of one who has engaged in hermeneutics, faith that has undergone criticism, post-critical faith.[6]

Ricoeur uses interpretation in contemporary studies of religious consciousness as exemplary of the two hermeneutics, and treats the second mode as 'post-critical' because it does not simply affirm the truth of the sacred that lies behind and animates the texts in question, but acknowledges that they are contested. For American jurists, the hermeneutic of restoration that is the twin of suspicion as I will be developing it here is also post-critical, chastened by the vicissitudes of faith, from the reactionary "horrors" of Lochner v. New York[7] to the liberal activist "overreaching" of the Warren Court.[8]

The hermeneutic of the restoration of legal meaning animates the method of construction in induction/deduction, or the positing of overarching purposes of the legal order in teleological reasoning. It is a disposition, like the disposition of its twin to doubt and unmask, a tendency, in this case to search for and find values immanent in the body of legal materials, to believe in those values, and to deploy the techniques of legal argument to develop and apply them to shape the legal order through time. I sympathize with the suspicion-hermeneutic and not with the

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[6]Paul Ricoeur, *Freud and Philosophy: An Essay on Interpretation,* Denis Haven (trans.) (New Haven: Yale University Press, 1970 (1965)) pp. 28

[7] In this case, the United States Supreme Court invalidated as unconstitutional a state law establishing minimum work hours for bakers, creating a precedent subsequently developed to invalidate a large part of the progressive agenda for reform of labor/capital legal relations. Lochner v. New York, 198 U.S. 45 (1905)

[8] See Learned Hand, *The Bill of Rights* (Cambridge MA: Harvard University Press, 1958); Alexander M. Bickel, *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1978); John H. Ely, 'The Wages of Crying Wolf: A Comment on Roe v. Wade,' *Yale Law Journal* 82(5) (1973), 920-949.

restoration-hermeneutic, but reject its insistence on legal wrong answers as the locus of legal sin. To my mind ideology is mainly present not via betrayal but through professionally legitimate legal work on the legal materials that exploits or generates or eliminates open texture.[9]

Suspicion is a psychological propensity or tendency or disposition. The hermeneutic is a contemporary phenomenon. Although it has its origin in the critique of Lochnerism, in that phase it was a critique of a serious deviation from good practice, rather than an expectation about everyday practice across the whole domain of law. At a very abstract level, its contemporary rise makes sense to me because I see it as an important aspect of a Weberian 'disenchantment narrative' that begins with religion, moves on to natural rights and eventually reaches law, the last bastion.[10] But world historical narratives are not self-realizing. Has something changed in contemporary law, either in the way it is practiced or in our awareness or understanding of it, that would help explain this disenchantment, not another, now rather than at some other time?

The long term development of what might be called extreme skeptical legal theory, both academic and as part of the legal consciousness of the bar, is certainly part of the story. An extreme skeptical view had already emerged at the end of the nineteenth century as part of the attack on Lochnerism (although something like it had long been a part of populist lay legal consciousness). It was one tendency (but by no means the only one, or even the dominant one) within the German Free Law School of the first decade of the 20th century,[11] among the American

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[9] See Duncan Kennedy, 'A Critique of Adjudication,' Chapter 7, 157 and Chapter 8, 180.
[10] Duncan Kennedy, 'The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought', *Hastings Law Journal* 55 (2004), 1031-1076.
[11] Gnavius Flavius, 'The Battle for Legal Science,' Cory Merril (trans.) *German Law Journal* 12(11) (2011), 2005-2030.

legal realists[12] in the 1930's, and among the 'crits' in their 1980s heyday.[13] In this view literalism, induction/deduction and single purpose teleology are always abusive, and proportionality tests are 'inherently' political. They mean that no matter what the configuration of the legal materials there is "*never* a single right answer," although they are not clear as to how that absolutist claim could be supported.[14]

The typical practitioner of the hermeneutic in its common contemporary form deploys the critical techniques developed by skeptical legal theory, but strongly rejects the extreme skeptical conclusion. This is implicit in the affirmation that there is a correct legal answer we should adopt in this particular case (the answer may be 'deference'[15]), once we understand the ideologically motivated legal error of the other side. In other words, this particular form of contemporary legal consciousness deploys the suspicion-hermeneutic and the hermeneutic of the restoration of meaning one after the other, in tandem. There is nothing necessary about the connection since each can be and often is practiced without the other.

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[12] Felix Cohen, 'Transcendental Nonsense and the Functional Approach', *Columbia Law Review* 35(6) (1935), 809-849. Jerome Frank, *Law and the Modern Mind* (New York: Routledge 2017 (1970))

[13] E.g., Gary Peller, 'The metaphysics of American Law', *California Law Review* 73(4) (1985), 1151-1290

[14] For my view, that legal analysis can and often does have the "effect of necessity" on a relevant legal audience so that answer is right in the sense of not presently opposable, see Duncan Kennedy, 'A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation' in Duncan Kennedy, *Legal Reasoning, Collected Essays* (Aurora CO: The Davies Book Publishers, 2008). Available online http://duncankennedy.net/documents/Photo%20articles/A%20Left%20Phenomenological%20Alternative%20to%20the%20HartKelsen%20Theory%20of%20Legal%20Interpretation.pdf (Accessed, January 25 2019)

[15] See Duncan Kennedy, 'Proportionality and 'Deference' in Contemporary Constitutional Thought,' in Perisin & Rodin (eds.), *The Transformation of Reconstitution of Europe: The Critical Legal Perspective on the Role of Courts in the European Union* (Oxford and Portland OR: Hart Publishing, 2018)

I suggest in this chapter that the intensity of the hermeneutic is intelligible as a response to the changing relations between, on the one hand, ideological intelligentsias working for and against contemporary transformations of economic and social life,[16] and, on the other, the corps of jurists. This interaction produced three striking developments that provide the context for the hermeneutic.

First, the juridification of social life through the rise over the first half of the twentieth century of the regulatory/administrative state, theorized and implemented by jurists who had developed social legal thought[17] as a critique of the theory and practice of Classical Legal Thought.[18] Second, the judicialization of that juridified regime, as part of the reaction against the social after WWII. Third, its constitutionalization, beginning in the 1960s, as an aspect of a shift of power not just to the judiciary but within it and within the professional corps of jurists.[19] An important sub-plot is the emergence of 'ambitious believers' pursuing sometimes frankly ideological although strictly internal professional projects aimed, in Ricoeur's vocabulary, at the

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[16] For definitions of ideology and ideological intelligentsia, as I am using them here, see Duncan Kennedy 'Political ideology and comparative law'; Duncan Kennedy. *A Critique of Adjudication,* Chapter 3, 39 and Chapter 11, 264. An ideology in this chapter is a set of positions that are "universalizing" rather than avowedly "partisan," and claim to represent Weberian "ideal interests" as opposed to particular material interests. On intelligentsias, see Antonio Gramsci, *Selections from the Prison Notebooks* 5-23 . On universalizing political discourse, see Jürgen Habermas, *The Theory of Communicative Action. Vol. 1 Reason and the Rationalization of Society*, Thomas McCarthy (trans.) (Boston: Beacon Press, 1984 (1981)), 16-19

[17] On social legal thought, see Duncan Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's Consideration and Form', *Columbia Law Review* 100(94) (2000), 91-175 and Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000' in David Trubek and Alvaron Santos (eds.) *The Law and Economic Development. A Critical Appraisal* (Cambridge, 2006).

[18] On classical legal thought, see Duncan Kennedy, *The Rise and Fall of Classical Legal Thought – With a New Preface by the Author "30 years later"* (Washington D.C.: Beard Books, 2006 (1975)) and Duncan Kennedy, 'Three Globalizations of Law and Legal Thought', 25

[19] For these developments as important aspects of contemporary legal thought, see Duncan Kennedy, 'Three Globalizations of Law and Legal Thought'.

restoration of meaning to law as a whole through abstractions like efficiency or human rights, rather than at the local level.

The three developments combine (paradoxically? predictably?) with the gradual loss of faith in the determinate character of the techniques of legal reasoning that the judges are supposed to apply to their vastly expanded task of legal regulation. These techniques are roughly literalism, precedent, induction/deduction, teleology (aka "policy") and proportionality (aka balancing). The societal demand that they be applied in a strictly "neutral," "objective" and "apolitical" manner has become ever more insistent as the judges have become more powerful, just as competing critiques have undermined confidence in their capacity to play the role assigned to them. As I have argued at length elsewhere, the hermeneutic of suspicion is intelligible as a response to this situation by "projection," here of the actor's sense of the inevitability but also unacceptability of ideology in legal judgment, onto the opposing party.[20] The rest of this chapter explores the political economic preconditions for this response, keeping it in tense relationship with its twin hermeneutic aimed at the restoration of meaning.

[20] Duncan Kennedy, 'A Social Psychological Interpretation of the Hermeneutic of Suspicion in Contemporary Legal Thought'; Duncan Kennedy, *'A Critique of Adjudication'* Chapter 8, 180

PART TWO

THE JURIDIFIED UNIVERSE

1. HORIZONTAL SPREAD OF ADMINISTRATION

The oft-remarked 'juridification of social life' is obviously complex to say the least.[21] I hope that for our purposes a very reductive summary will be enough, a summary that emphasizes the place of the process of juridification in the progression from CLT to the Social to contemporary legal thought.

When people talk about juridification, the previous regime with which they are contrasting the current situation is CLT, modified by the social. The CLT regime was characterized by the existence of large pockets, or areas, where private parties, administrators, legislators and national governments had discretion to set rules and make determinations. Discretion meant that there was no institutional actor charged with applying constraining criteria of legal validity to their decisions. This was strikingly the case for the exercise of patriarchal power in the family, the control of persons in state custody, and international relations.

Outside the pockets, economic life had been commodified (land, labor and capital).[22] The ensuing market economy was fully juridified in the sense that it was governed by a judicially enforced regime of private law based on autonomy of the will. But there was little judicial,

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[21] Lauren B. Edelman and Marc Galanter, 'Law: Overview', in Neil J. Smelser and Paul B. Baltes (eds.) *International Encyclopedia of the Social & Behavioral Sciences*, first edition, (Elsevier, 2001), 8538-8544; Gunther Teubner (ed.) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Berlin, New York: De Gruyter. 1987)

[22] c.f. Karl Polanyi, *The Great Transformation.* (New York: Rinehart, 1944)

legislative or administrative regulation or oversight of the terms of the contracts that were the legal form of virtually all market relationships.[23]

The social regime had as principal objective to fill in the empty spaces and regulate the contracts.[24] The vehicles were legislation and administration. The key to understanding the social regime is that the typical techniques were (i) the 'separation out of social law'[25] by creation of regulatory regimes, typically with inspectorates, through techniques like licensing, enforced by low level criminal or civil penalties without private rights of action; (ii) the creation of bureaucracies to administer the regimes of social insurance (accidents, unemployment, health care) and welfare; and (iii) the 'move to institutions', meaning the development of new organizational forms.[26] This third is the least familiar: in the market it included labor unions, professional associations with regulatory powers, large public and semi-public housing projects, public service corporations running utilities; in the law of custody, juvenile facilities, orphanages, vast prison expansion, mental hospitals voluntary and involuntary, run by psychiatrists; in international law, beginning with the League of Nations, the proliferation of organizations from the ILO to the refugee regime.

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[23]Cf. Franz L. Neumann, "The primary function of the state is to create a legal order which will secure the fulfilment of contracts." Franz L. Neumann, 'The Change in the Function of Law in Modern Society', in William E. Scheuerman, (ed.), *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (Berkeley, CA: University of California Press, 1996 [1933]), 101-41, 116

[24] Jacques Donzelot, *L'invention du social: essaisur le déclin des passions politiques* (Paris: Fayard, 1984); Duncan Kennedy, 'Three globalizations of law and legal thought'

[25]Franz Wieacker, *A History of Private Law in Europe with Particular Reference to Germany*, John Weir (trans.) (Oxford: Clarendon, 1995)

[26] David Kennedy, 'The Move to institutions,' *Cardozo Law Review* 8(5) (1987), 841-985

All these developments involved new 'staff', expanded police forces, social work, lawyer economists in securities regulation agencies, and hosts of inspectors of everything from food and water to atomic energy. The ethos was professional and technical, with the schemes to be devised and also administered by experts, working in the 'public interest' on the basis of natural and social sciences.

The new institutions, the regulatory agencies and the welfare state bureaucracies operated according to a model in which the inmates or residents or beneficiaries of the various social institutions were understood as objects of administration. Theirs were 'privileges rather than rights', and the 'social' or 'public' interest rather than the individual interest was both the justification of the existence of the programs and the guide to how they should be structured and operated on the ground.[27] The emerging international regime was based on treaties obliging states to one another with no rights at all for persons (as for example, the minority protection regime).

What is important here is that although law, in the form of statutes and regulations and treaties is pervasive, indeed all-pervasive, judges definitely are not: juridification without judges. (Exception for the turn-of-the-century progressive romance with new courts for social problems.[28]) It is true that in all the relevant countries, administration was formally subject to the jurisdiction of courts, specialized or not, so the new regimes were formally within the

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[27] Cf. Karl E. Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941', *Minnesota Law Review* 62(3) (1978), 265-339

[28] E.g., Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* (Cambridge University Press, 2003)

conventional notion of the rule of law. But it was a rule of law that deliberately granted maximum discretion to the administrators. If courts wanted to do more than very passively and distantly oversee, they had to do battle with the ethos of the time, which regarded them as the historic enemies of the social project, and their power as a threat to its successful execution.

And like judges, rights and particularly individual rights were not only not central to the legal theorization of the social they were positively anathema. It was all about social needs, social purposes, groups, classes, functions, and against the 'individualism' of CLT. If there must be rights, they were social rights (e.g. the social Catholic 'right to family life') understood as guides to legislation.

2. POLITICS IN THE JURIDIFIED UNIVERSE

The juridification of much of social life, in the sense of its subjection to legislation and administration in the name of the public interest, meant that it was politicized in a new way. The issue was no longer the abstract one of whether to 'intervene in' or 'reform' the more or less laissez-faire late-nineteenth century regime. Nor was it the more concrete one of whether to favor a particular new regime of say, labor law. The social regime once in place, the issue was how it would evolve in practice, how major or minor changes in it would unfold, against the background of the major ideological confrontations that had brought it into existence.

The old ideological formations, say free market conservatism or progressivism, or consumerism or unionism or social Catholicism or civil libertarianism, or in Western Europe socialism and communism and fascism, constantly found that new battles, within the regime rather than over its existence, required them to take positions on small issues and to develop

strategies for the long term on large issues. The outcomes of micro and macro questions of adaptation to change would determine whether a given regime would develop or atrophy or unwind, whether liberal innovations would serve conservative ends and vice versa, and so forth.

After the Second World War, new ideological formations came onto the scene, with strong agendas for the reform or repeal or radicalization of the social regimes established over the previous decades. These included neo-liberalism on the right,[29] favoring massive deregulation of the economy. Neoliberals allied with social conservatives whose primary concern was the erosion of "traditional" values (and social hierarachies) supposedly dominant in a fantasized national past.

The liberals on the left initially favored an ambitious program to transform ineffectual social regulatory regimes for the market, the family, and the state, thereby completing the redistributive program of the New Deal. As time passed, influence shifted in the direction of advocates for individual rights (civil, constitutional, universal, social and economic, or human) as the basis for fighting against discrimination (de jure or de facto) on the basis of identity.

Both right and left were somewhat fragile coalitions not corresponding to (in the U.S.) Democrat/Republican party lines. The identity-rights-oriented liberals shared with the neo-liberals (but not with the social conservatives or the distributively-oriented New Dealers) a civil libertarian critique of the forms of power that had emerged in the new public and private organizations and regulatory and welfare bureaucracies.

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[29] Three canonical right wing critiques of the social: Friedrich A. Von Hayek, *The road to serfdom.* (University of Chicago, 1944); Ronald H. Coase, 'The problem of social cost,' *Journal of Law and Economics* 3 (1960), 1-44; Christopher Lasch, *Haven in a Heartless World,* (New York: Basic Books, 1977)

PART THREE

'JUDICIALIZATION' OF THE JURIDIFIED UNIVERSE

After the Second World War, the socially oriented legislators and administrators, with their jurist allies, continued to build their juridified universe into the 1960s (up to the famous fiscal crisis of the (welfare) state).[31] But during the post-war phase of the social, accelerating through the 1970s and after, judges began to play a more and more important role in the definition of the rules and practices of social law broadly conceived.[32] As contemporary legal thought began to differentiate more and more from social legal thought, it was characterized by an across-the-board increase in the modalities of judicial intervention in the various juridified domains.[33] This phenomenon seems to have developed first and to have gone furthest in the United States but it long since became characteristic to one degree or another of contemporary law worldwide.[34]

Like many others in the history of the transformations of legal consciousness, this development is difficult to explain in any straightforward causal way. It is certainly useful to advert to Ugo Mattei's striking and original theory of American 'exaggeration' of British strong

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[31] James O'Connor, *The Fiscal Crisis of the State* (New York: St. Martin's, 1973)
[32] Martin Shapiro and Alec Stone Sweet, *On Law, Politics and Judicialization* (Oxford University Press, 2002)
[33] Abram Chayes, 'The Role of the Judge in Public Law Litigation' *Harvard Law Review* 89(7) (1976), 1281-1316.
[34] Id.

judging and at the same time of German devotion to legal science based in legal education.[35] According to him, these traits combine with post-realist technical mastery, and the sophistication forced by a multi-jurisdictional but also hierarchized federal system, to produce a judiciary (particularly the federal judiciary) that is capable, albeit in a 'reactive' way, of exercising major power at the expense of a relatively 'weak state' (by European standards). This theory helps to explain how judicialization could happen, but leaves the question of why 'all of a sudden' after WWII.

Another way to understand it, I am going to argue, is as the emergence of a new form of interaction between the elites that dominate economic, social and political life, and the 'legal subsystem', as Teubner might have it,[36] operated by the professionally specialized 'corps' of the jurists socialized to understand their role as very different from that of the ideological intelligentsias[37] of the larger society.

Accurately assessing and explaining the very uneven diffusion of judicialization across the globe is obvioiusly difficult, and I will not attempt it here. Other than to mention in a conclusory way the three schemas of imposition by force, bargaining (as in IFI "rule of law" conditionalities), and prestige.[38]

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[35] Ugo Mattei, 'A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance', *Indiana Journal of Global Legal studies* 10(1) (2002), 383-448

[36] Gunther Teubner, *Autopoietic Law: A New Approach to Law and Society* (Berlin, New York: W. De Gruyter, 1988)

[37] For a definition and sources for the idea of an ideological intelligentsia, see Note 15 supra.

[38] Duncan Kennedy, 'Three Globalizations of Law and Legal Thought'

1. 'OUTSIDE' IDEOLOGICAL INTELLIGENTSIAS MOTIVATE THE PROCESS OF JUDICIALIZATION BY THEIR ALLIED 'INSIDE' LEGAL INTELLIGENTSIAS AS PART OF THE CRITIQUE OF SOCIAL LAW

Judicialization in this account is both the product of and the cause of the development of a small but, I would argue, disproportionately important subset of activist jurists (lawyers, professors and judges). As ideological intelligentsias realized that judicial power was crucial to the success or failure, not to speak of the day-to-day guidance of their projects, they developed their own legal specialists. In the beginning were liberals, sometimes the defenders of the social project and sometimes rights-oriented critics of it.

When they go to work for a union side law firm doing strategic litigation or for the ACLU or the NAACP Legal Defense Fund, NARAL-Pro-Choice America, the Environmental Defense Fund, the Legal Services Corporation, Human Rights Watch, an LGBTQT or an indigenous peoples' public interest law firm, they understand themselves and are understood by others in the know to be situated exactly at the intersection of 'outside' ideological projects and the 'inside' requirements of legal form. The same is true for union side labor law firms, firms specializing in employment discrimination cases and a significant part of the plaintiffs' side products liability bar. Sometimes they have ideologically defined organized interests as their 'clients', but sometimes they 'represent' diffuse interests that they amalgamate themselves for their own purposes, for example through consumer class actions. It was a striking development of the 1980s that a more or less mirror image 'conservative legal movement'[39] reproduced this structure at the other end

[39] Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, NJ: Princeton University Press, 2007)

of the political spectrum, joining the already thoroughly established "defense bar" that representing corporate institutions against day to day lawsuits made possible by the juridified social regime.

Depending on which party is in power, this is the pool from which chief executives draw appointees for law-related government jobs at all levels of the federal system and law schools recruit teachers of the more ideologically charged topics in the curriculum. Although they are a small minority of judges and government lawyers, a larger minority of law professors and a tiny minority of the bar, they are relatively visible members of the (American) political elite, as drivers of legal change, rightward as much as leftward.

As already mentioned, the many activist groups pursuing politically progressive reform agendas shared with the neo-liberals a civil libertarian, proceduralist critique of the juridified social regime, the regime created and controlled by legislators and administrators. The "objects of administration" were allowed few if any challenges to any aspect of official behavior within the myriad social institutional settings. The left activist jurists (including judges and professors) developed a multi-front attack on the statutory frameworks, the mass of administrative regulations, and the day-to-day administrative practices that constituted the social regime.

They were able to recruit crucial proto-neo-liberal allies ("Liberal Republicans") as long as the claim was for procedural justice rather than for redistribution. Their challenge was nonetheless to the ethos of the whole, as well as to the rule structure, to the arbitrariness of the experts, whose claims to professional knowledge had come to seem suspect rather than sacrosanct (medical malpractice is paradigmatic for this) and whose appeal to the public interest over the interests of individuals came to seem hollow or even hypocritical.

In the prevailing post-war context of legislative stalemate and administrative agency capture, the judiciary (systematically excluded in the development of social legal thought) was the only group of sovereign power holders likely to harbor potential allies in the program of reform. The reformers naturally tried to mobilize them, chiefly by public and then judicial exposure of scandalous administrative abuses, the very techniques that the muckraking social reformers had used against the regime of CLT. Together, they developed varied legal strategies based on litigation, sometimes as a supplement to strategies of legislative or regulatory change, but sometimes exclusively judicial, and so independent of the political fluctuations of legislative and executive power. If there was one thing they had in common across a very wide sweep of proposals it was the transformation of social protections into individual entitlements.[40]

One move was to demand micro-level judicial supervision of what had once been practically unreviewable, for example by mass appeal of routine administrative orders terminating welfare payments.[41] Another was class action litigation designed to get judges to more or less take over dysfunctional institutions, from prisons to mental hospitals to public housing projects to labor unions to failing public schools.[42] Yet a third was to press for substantive judicial review of statutes, regulations and informal administrative practices (say of police interrogation or hospital disclaimers of liability).[43]

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[40] Charles A. Reich, 'The New Property', *The Yale Law Journal* 73(5) (1964), 733-787

[41] Frances Fox Piven and Richard Cloward, *Poor People's Movements: Why they succeed how they fail how they fail* (New York: Vintage, 1978)

[42] Abram Chayes, 'The Role of the Judge in Public Law Litigation'

[43] Miranda v. Arizona, 384 U.S. 436 (1966); Tunkl vs Board of Regents, 60 Cal.2d 92 (1963)

A fourth, and in some ways the most dramatic, was the "socialization " of private law,[44] meaning adding judicially enforceable contract, tort and property rights to the social regime of administrative regulations, inspectorates, low level criminal penalties, and minimal or non-existent rights to appeal. Activists gave up on housing code enforcement through city administrators and litigated for judicial creation and enforcement of the individual tenant's "warranty of habitability." The tools of judicialization thus included constitutional law but also the non-constitutional norms of administrative law, micro- or macro-level statutory interpretation and common law precedent.

Up until 1970 and the demise of the Warren Court, the central preoccupation of activist jurists in the U.S. was "American apartheid," a complex race regime that like its namesake was and is pervasively a legal one.[46] In the beginning the neo-liberals allied with social conservatives and their allies in the agencies under attack against all attempts to expand New Deal redistributive programs and against the ambitious liberal program of rights for blacks. But as the liberals were discouraged or defeated on the fronts of race and redistribution,[47] a new configuration emerged. Once black demands for radical change in the race regime had been

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[44] Jay Feinman, 'Un-Making Law: The Classical Revival in the Common Law', *Seattle University L.aw Review* 28(1) (2004), 1-59; Martijn Hesselink, *CFR and Social Justice: A Short Study for the European Parliament on the Values Underlying the Draft Common Frame of References for European Private Law: What Roles for Fairness and Social Justice?* (Amsterdam: Sellier Europa Law Publishing, 2008)

[46]Daniel Fusfeld and Timothy Bates, *The Political Economy of the Urban Ghetto* (Carbondale IL: Southern Illinois Univerisity Press, 1984); Douglas S. Massey and Nancy A. Denton, *American Apartheid. Segregation and the Making of the Underclass* (Cambridge, MA: Harvard University Press, 1998)

[47] Kimberle Crenshaw, 'Race Reform and Retrenchment: Transformation and Legitimation in Antidiscriminatory Law', ,*Harvard Law Review* 101(7) (1988), 1331-1387

suppressed, the neo-liberals joined the left challenge to the social regime in the name of groups (e.g., women, mental patients) and practices (e.g., non-straight sex, unconventional speech) that the social regime had quite self- consciously left out.

The liberals pushed both new interventions and deregulation at the same time in the domain of sexual practices and indeed cultural control in general. This is captured by the simultaneous demand for a radical expansion of protection against domestic violence and discrimination on the basis of gender, with decriminalization of contraception, abortion, adultery, fornication, homosexual sodomy and pornography. The neo-liberals, heirs of the libertarianism that had always been a minority tendency within the Republican Party, joined this liberal project when the doctrine of colorblindness allowed them to give it an anti-black spin. They split from their right wing social conservative allies, who found themselves suddenly allied with the radical and cultural feminist backlash against the liberalized gender regime. On the left, the redistributivist camp, allied with the white working class, was ambivalent about many aspects of identity politics. The result was a modernist/traditionalist opposition that cross-cut the left/right divide.

2 . THE POLITICS OF LEGAL DISCOURSE IN A JUDICIALIZED UNIVERSE

In order for there to be a dramatic increase in the role of judges in the juridified social universe, it was not necessary that all the activist initiatives, or even very many of them, should succeed. As long as some succeeded, and as long as it was easy to see that there were an indefinite number of others that might plausibly succeed, then the dispersed defenders of existing institutions, governmental and corporate, and of the ethos of the order as a whole, had to be prepared to

defend themselves. They developed a pervasive practice of preempting attack by modifying the various regimes to make them less vulnerable to the reformers' demands. The result was a kind of managerial juridification, as large organizations of all kinds formalized their internal procedures governing both their treatment of their employees and clients and horizontal workplace relations, for example in the domains of discrimination and sexual harassment, that might generate liability for the institution.[48]

While it was above all the progressive, individual-rights-oriented groups that began the process, judicialization is now a simple fact of life for all tendencies. For contemporary legal consciousness, it is the normal situation for the endless questions of adapting, evolving, reforming, expanding, and contracting all the different regimes and sub-regimes of the juridified social universe to be referred to the expanded corps of lawyers and to end up regularly as legal questions settled in litigation.[49]

Empowering judges as decision makers at the expense of administrators or legislators, brought with it new court-centered procedural rules and also rigid discursive requirements. Ideologically motivated actors who used to spend their time with legislators and administrators now have to spend it trying to persuade judges. They have to develop legal arguments, rather than the familiar overtly political arguments for legislators, or policy arguments for rule-making administrators.

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[48] Richard Michael Fischl, 'Rethinking the Tripartite Division of American Work Law,' *Berkeley Journal of Employment and Labor Law* 28(1) (2007), 163-216

[49] Robert Kagan, *Adversarial Legalism: the American Way of Law* (Cambridge, MA: Harvard University Press, 2001)

The binding conventions of legal discourse require them to adopt a bizarre fiction. It is that the answer to any big or little question of legal evolution, no matter how clearly it is significant mainly or exclusively for its ideological content, is determined in advance by the 'sources:' statutes, administrative regulations, judicial decisions, and constitutional provisions, with a flavoring of law review commentary. No matter how implausible, they have to do it all with literalism, precedential reasoning, induction/deduction, teleology and balancing, all the while proclaiming that there is no choice but only legal necessity.

The activist jurists worked with the resources available in the legal materials, and the conflicting overarching orienting conceptions of Classical and Social Legal Thought. These had once been highly flexible "modes," available as a language for the justification of an indefinitely large number of specific innovations in the interests of the full range of ideological tendencies. The modes permitted but also channeled legal argument that was overtly technical, and not political or ideological, on whatever the judges had to decide.

In the US today, legal argument disposes major and minor ideological stakes through highly patterned arguments, along with equally standardized counter-arguments, that are templates for parry and thrust that will be contextualized to fit large numbers of problems of judicial interpretation.[50] There are many examples, but the most familiar may be the standardized argumentative repertoire for debating whether to expand or contract freedom of

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[50] Duncan Kenned, 'A Semiotics of Legal Argument', in Duncan Kennedy *Legal Reasoning: Collected Essays* (Aurora, CO: The Davies Group Publishers, 2008) Available online: xx

contract,[51] in myriad settings from consumer protection to labor law to family law to corporate law to international investment law to treaty law, and recently to Obamacare.

It is striking that the legacies of CLT and the Social are both omnipresent and transformed.[52] The characteristic CLT mode of argument was based on the will theory, a sharp public private distinction and the idea that the holders of rights and powers should be 'absolute within their spheres' as defined if possible by inductive/deductive method. These arguments are with us today, but oddly politicized: neo-liberal lawyers and informed laymen deploy the CLT arguments in the economic sphere to support the claims of economic power holders against weak parties in all domains. The cluster of arguments supporting freedom of contract and against regulation in the economy, like the argument for absolute property rights, is available as a template to be deployed against every new left initiative.

But in the domain of civil society, family, religion, health, education, culture, the same CLT arguments are left-identitarian: for absolute individual rights both against other individuals and against the state, rights to abortion, marriage equality, anti-discrimination, affirmative action, etc., in the same mode of induction and deduction that characterized the neo-liberal economic arguments.

The social has undergone a similar politicization combined with internal polarization, in the reverse sense. In the economy the arguments of the social for interdependence, solidarity, planning, regulation and institutional innovation beyond the public/private dichotomy, all to deal

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[51] Duncan Kennedy, 'A Semiotics of Legal Argument', xx

[52] Duncan Kennedy, 'Three Globalizations of Law and Legal Thought', last section on contemporary legal thought,' 63

with omnipresent inequality of bargaining power, are left-redistributive arguments. They underpin critiques of freedom of contract, and are very much on the defensive. In the civil society domains, on the other hand, the social arguments are social conservative, for protecting the fetus, organic family relationships, the native-born against immigrants, and in general the collective investments and accomplishments that depend on cultural or religious homogeneity and hierarchy.

The standard modes of legal argument of the two historical periods were once non-ideological in the sense that there was a right, a center and a left CLT, and a left, a center and a right Social. These two argumentative modes displaced more or less their predecessors' reliance on directly moral, religious or instrumental argument. When they politicized in this odd polarized way, so that each is left in one domain and right in the other, they produced a situation in which the surface of supposedly non-ideological argument suggests the very thing it firmly denies. The jurist's ideological preference can be predicted in advance from his doctrinal vocabulary even before we know his substantive positions.

A not surprising consequence was the slow but steady and ultimately pervasive politicization of the selection of judges. Judges were vetted by reference to their relationships to the "internal" legal-ideological intelligentsias, displacing the regime in which notables of the bar had substantial influence exercised in the name of supposedly non-political professional ethics and competence.[53]

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[53] Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, MA: Harvard University Press)

3. THE POLITICS OF THE SEPARATION OF POWERS

Left and right intelligentsias are not mere passive recipients of the political logic of judicialization. As repeat players in the game of litigation,[54] they assess it from the point of view of how its expansion or contraction will affect their interests. When considering different dynamics, they will have a general estimate of the relative sympathy for their projects of the different separated powers, legislative, executive, and judiciary.

If on balance and over a fairly long run, the judiciary is likely to be more sympathetic to a given ideological project than the executive or the legislature, it may makes sense to try to persuade their judicial allies to increase their intervention in the domain in question. A lot depends on whether they think that the legal materials that govern the domain are sufficiently open-textured so that there will be many occasions for ideologically oriented interpretation that will dispose significant stakes, and on the course of judicial selection over time.

Of course, the opposite conclusion about the judges will lead to a strategy of trying to keep them out, reinforcing the autonomy of the administrators and corporate managers who run the institutional complexes of the social, and preserving the balance of power among private actors. For actors (inside as well as outside the judiciary) who are trying to instrumentalize or neutralize the judges as power holders, judicialization and anti-judicialization have become possible strategic 'moves'. There will now be a 'politics of the separation of powers', just as there is a politics to all the substantive regimes the judges monitor or control outright.

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[54] Mark Galanter, 'Why the "Haves" come out Ahead: Speculations on the Limits of Legal Change', *Law & Society Review* 9(1) (1974), 95-160

Judicialization was and is the product of hundreds of discrete initiatives by activist jurists (including judges and professors as well as lawyers) pursuing uncoordinated but closely analogous strategies across dozens of legal doctrinal domains. Each instance of judicialization or de-judicialization is at once a victory or defeat for the substantive positions of the litigants and a change in the rules of the game of future conflict within that particular sphere. The players understand that the rules of the game are stakes of the game, and strategize on that basis.

It is easy to see why the reformers of the social chose the judiciary (as already noted: legislative gridlock and agency capture), and that conservative activists had no choice but to create a countervailing "conservative legal movement" in response. In these cases, it is the agendas of the "outside" or general political intelligentsias that push for or against judicialization, whether left wing (redistributivist/rights-identitarian) or right wing (neo-liberal/social conservative).

The left and right ideologies and their subdivisions are commonly understood to be responsive both to the material interests and to the principled aspirations of the groups that put them forward as grounds for political decision. A vulgar formulation might be neo-liberals represent capital, the redistribution-liberals represent labor, the rights-identitarian liberals represent educational capital, and the social conservatives represent traditional cultural capital.

A general transformation in the direction of judicialization, along with the rise of litigation as the dominant mode of social policy making, was never an explicit demand or proposal of any of the above--left, right, modernity or tradition. It seems worth asking

whether, apart from path dependence as given interests tried to take advantage of the peculiar institutional structure of the separation of powers, there were material or ideal interests driving transformation toward judicialization.

The legal activist elite (including principled anti-activists) is "liminal" in the sense of being situated on the border between lay and legal domains, translating lay demands into the discourse required in order to influence the judges. It seems plausible that the activist lawyers are the group that had a material class interest (transcending the left/right modern/traditional divides) in judicializing the juridified social universe. Within each intelligentsia, it meant a dramatic shift in power and, perhaps even more strikingly, in raw numbers and financial resources, between the outside and the inside, the general political and the legal sectors of the elites.

It meant a dramatic increase in legal activist power vis a vis all other political actors because of their possession of a legal discourse that defines the politically permissible but is in a flexible technical form that is incomprehensible to and thus not critiquable by the lay public. It arguably meant a decrease in the relative power of groups outside the consensus of the liberal democratic center left and center right. Those outside groups are not generally represented in the elite bar and consequently lack access to the opaque legal discourse necessary to play the game of judicialized power.

4. IDEAL INTERESTS OF LEGAL ACTIVISTS: SUSPICIOUS BELIEVERS AND REALISTS

Reducing the role of legal activist jurists in judicialization to the promotion of their own material interest in jobs, budgets and clout would be "reductionist." In any case, calculating the

impact of judicialization on their class power (disregarding the left/right division) would be impossible. But at a deeper level, judicialization has not been clearly in the activist interest because the accompanying politicization of legal discourse threatens the appearance of political neutrality that is one basis of their power (exercised through the judges). It gives rise, in short, to the hermeneutic of suspicion.

I defined the hermeneutic as a disposition to uncover hidden ideological motives behind the 'wrong' legal arguments of their opponents, while affirming their own right answers allegedly innocent of ideology. As the lists in the previous paragraphs illustrate, the judicialization of the juridified social universe was also the judicialization of most important and many many unimportant questions with all kinds of ideological stakes. First and foremost, the vast array of ideologically charged questions raised by the overlay of the domain of contested social law on the domain of contested classical law. The apparent political valence of the newly polarized CLT and SLT arguments in the economy and civil society beg for an attitude of suspicion, or even outright rejection of the claim to neutrality.

The situation might be less dire were it not for the progress, or devolution, of legal reasoning from induction/deduction to teleology to proportionality in the movement from CLT to the Social to contemporary legal thought. This development parallels the sequence of juridification and judicialization (and ultimately constitutionalization) that we have been tracing, along with the politicization of the orienting discourses of CLT and SLT (as in the freedom of contract example). As large and small ideological stakes came more and more to be disposed by judges, the task of distinguishing legal reasoning from political or merely moral reasoning became

both more important and more difficult. At the same time, the legal techniques available became more vulnerable to internal critique.

The rise of teleology in Germany, France and the U.S. after World War I was the alternative of SLT to the discredited Classical method of induction/induction.[57] The rise of proportionality after World War II was in part a response to equally devastating critiques of teleology, most trenchant in the U.S.[58] The internally critical destructive part of the hermeneutic of suspicion had undermined 'pre-critical' faith in legal reason to the point that a new 'last resort' seemed necessary. But balancing as a last resort is particularly vulnerable to the charge of easy manipulability for covert ideological purposes.[59]

One might have thought (some of us did think[60]) that the parallel developments at the institutional and technical argumentative levels would combine to produce a "legitimation crisis."[61] And I am indeed arguing that this double development explains (in large part) the intensification of the hermeneutic of suspicion, and is an important factor in the various "populist" revolts against liberal-democratic judicial power that developed across the post-

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[57] Duncan Kennedy 'From the Will Theory to the Principle of Private Autonomy', *Columbia Law Review* 100(94) (2000), 94-176

[58] Duncan Kennedy, 'A Transnational Genealogy of Proportionality in Private Law', in Roger Brosnword, Hans W. Micklitz, Leone Niglia, Stephen Weatherhill. (eds.) *The Foundations of European Private Law* (Oxford and Portland OR: Hart Publishing, 2011)

[59] Duncan Kennedy, 'The Hermeneutic of Suspicion in Contemporary American Legal Thought', *Law and Critique* 25(91) (2014), 91-139, Part I, 92

[60] Duncan Kennedy, 'Comment on Rudolf Wiethölter's "Materialization and Proceduralization in Modern Law" and "Proceduralization of the Category of Law"' in Christian Joerges and David M. Trubek (eds.), *Critical Legal Thought: An American-German Debate* (Baden-Baden: Nomos Verlagsgesellschaft, 1989), 511-524

[61] Jürgen Habermas,,*Legitimation Crisis*, Thomas McCarthy (trans.) (Boston: Beacon Press, 1975 (1973))

industrial West after the crisis of 2008. Yet paradoxically, albeit quite understandably, claims that baldly deny this sociologically 'obvious' fact seem as strong as ever, perhaps stronger.

The public response of ideological elites and their liminal legal representatives has been denial that contemporary legality has any problems at all of any kind, other than having to deal with "authoritarians" who overtly or covertly reject the whole premise of the rule of law. But this is pretense for the lay public, treated by the mainstream of the profession as simplistic and good only for consumption by the unwashed. There are many versions of a more "sophisticated" professional understanding.

Many legal activists might be described as "realist cause lawyers." In my experience of them, under the right circumstances they confess that they just 'pretend' to believe that the sources plus legal reasoning determine right answers in a way that excludes ideology. They practice the hermeneutic of the restoration of meaning, doing the legal work of interpreting apparently conflicting or ambiguous materials as leading inevitably to a conclusion. But the conclusion is not "up for grabs" as they do the work, but ideologically predetermined. They consciously manipulate legal discourse in the ideologically desired direction, but accept the duty to obey in good faith when there is no legally plausible route to the ideologically correct outcome, hoping that that will not happen in too many or too horrible cases.

They practice the critical branch of the hermeneutic of suspicion with cynical vigor, unmasking their opponents' legalisms as error in the service of bad politics, and apply it from time to time to their own side and to the judges they admire. They believe in their own legal correctness, but in a self-consciously non-dogmatic way. They see the judges as legitimately

powerful, but also meaningfully constrained political actors, directly contrary to the simplistic version of the separation of powers with its distinction between 'making' and 'interpreting' law.

The "suspicious believers" I introduced in Part One above are also practitioners of the negative side of the hermeneutic of suspicion, but they deny that their practice of the hermeneutic of the restoration of meaning is manipulation for ideological purposes. They say they act and I think many of them do act on the presupposition that the law itself immanently commands its own transformation to correspond to their particular ideological projects. The universalizing claims of the project are true (all ideologists believe this, by definition), and it so happens that law already contains that truth, at least so far as the work of interpretation is concerned.

This notion seems to me to be adopted not by all, but by significant numbers of jurists whose intellectual/political commitment is to law and economics, neoliberalism, religiously based social conservatism, civil liberties, feminism, identity-based anti-discrimination, or human rights. This is attitude provides a clue to the currently unfolding constitutionalization of the judicialized universe.

PART FOUR

CONSTITUTIONALZATION OF THE JUDICIALIZED UNIVERSE

Constitutionalization, I will argue here, is a process of change in the contemporary (liberal democratic industrial/post-industrial welfare capitalist) mode of social ordering through law, occurring within the already juridified and judicialized universe. Within a particular domain, a constitutional court changes an earlier approach by henceforth reviewing a recurring

ideologically sensitive practice by application of a test derived directly from the constitution. Constitutionalization is interesting and important when it becomes cumulative, occurring in a patterned way across many areas, always in the same direction of greater supervision of public actors of all kinds (and some private ones as well) by the highest constitutional court in the system.

At some indefinite point, quantity becomes quality and we can say that constitutional lawyers are operating a new paradigm, within a new political economy of the separation of powers. The various intelligentsias and those they represent will gain and lose according to their ability to operate the new system. Along with a shift of power upward toward elite lawyers and elite courts and away from everyone else, the new paradigm represents the triumph of Ricoeur's hermeneutic of the restoration of meaning. It realizes an ambitious internal legal project of believers to unify liberal democratic law, opposed by the camp of modest skeptics of the necessary powers of judicial reason. The development as a whole intensifies, perhaps to the point of crisis, the paradox of concentrating elite judicial power as judicial method slowly succumbs to the suspicion-hermeneutic.

1. CONSTITUTIONALIZATION AS NORMATIVE CHANGE IN A DIRECTION

The following are U.S. examples of constitutionalizing normative change. The new heightened level of top court supervision can take the form of a rule or a standard:[62]

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[62] Duncan Kennedy, 'Form & Substance in Private Law Adjudication', *Harvard Law Review* 89(8) (1976), 1685-1775

--In judicial review of any police interrogation the first question is whether the police violated the constitution by violating court-ordered rules (e.g. Miranda warning) explicitly designed to protect the suspect's right against forced self-incrimination.

--In the regulation of abortion, the court will ask whether any statute or administrative practice that has an effect on women seeking abortion wrongly balances the state's generic legitimate regulatory interest against the woman's generic right to privacy.

--The Court will test statutes criminalizing obscenity for compatibility with the first amendment and then review the application of the statute under the same test .

--Whenever a regulation significantly changes the value of a property interest the owner can challenge it under a constitutional test of "regulatory taking" based on multi-factor balancing case by case.

--The practice of disciplining of prisoners in prisons is subject case by case, or under court established rules, to a constitutional test of "cruel and unusual punishment" or a "dignity" based equivalent, and a procedural due process test, and the same is true for every imposition of the death penalty.

--Constitutional norms forbidding discrimination on identity grounds are applied directly to review statutes and regulations restricting sexual and cultural practices, as in rules about "sodomy" and same sex marriage.

--The private law rules of creditor conduct in debt collection by repossession must comply with the debtor's constitutional property, privacy and due process rights, to be determined case by case in balance with the constitutional protection of freedom of contract.

--Every application of the tort law of defamation must pass the test of compatibility with the first amendment rights of the defendant, and that includes deciding on constitutional grounds whether the plaintiff is a public figure and what level of care the defendant exercised.

For the U.S., the number of such examples could be multiplied many times, and the process certainly appears to be cumulative. Competent activist lawyers have long since turned constitutionalization into a technique for generating a constitutional issue and then constitutionally required remedies, for ideologically controversial practices of public or private

actors. Their opponents have standard answers at the ready to be adapted to each new case. In a striking discussion of German law, called "Who Is Afraid of the Total Constitution?", Mathias Kumm claims that:

> Under the guardianship of the Federal Constitutional Court the German Basic Law had, over the course of the second half of the 20th century, developed to become what Schmitt might well have referred to as a total constitution. If a total state is a state in which everything is up for grabs politically, a total constitution inverts the relationship between law and politics in important respects. ... The constitution serves as a guide and imposes substantive constraints on the resolution of any and every political question. The validity of any and every political decision is subject to potential challenge before a constitutional court that, under the guise of adjudicating constitutional rights provisions, will decide whether such an act is supported by good reasons. The legislative parliamentary state is transformed into a constitutional juristocracy.[63]

Political decisions, in this analytic, can include the definition of the rules of private law. In other words, following Schmitt, Kumm assumes that private law, once understood as the product of lega'l science working on universally shared ethical premises, is no less political than private law.

> A key function of constitutional rights is to provide the basis for claims against public authorities to intervene on behalf of rights claimants in response to threats from third parties. These third parties can be terrorists threatening to kill a hostage, nuclear power plant operators imposing dangers on neighboring residents, creditor banks enforcing a contract against a debtor, employers firing an employee, or landlords

[63] Mathias Kumm, 'Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', *German Law Journal* 7(4) (2006), 341-371, 343

threatening to evict a tenant. The public authorities to whom these claims are addressed can be the legislator ... the executive ... or the judiciary.[64]

For Kumm, constitutionalization has a major positive side because it subjects politics to a (**judicial**) test of 'good reasons', by which I take him to mean a relaxed Dworkinian idea of principled decision that does not categorically exclude policy argument and permits proportionality tests. A much darker view, in which the relations of force between law and politics are more balanced, with politics threatening to 'corrupt' law, or at least force it to 'adapt' to an alien rationality, is proposed by Gunter Teubner:

> In its relationship to politics, judicial constitutional review of legislation has presented the model that, so far, exists only rudimentarily in relation to other sub-systems. In what respect does the law have to adjust to the intrinsic rationality of the other sub-systems, and to what extent must influences that corrupt the law be warded off? The constitutional review of political legislation has developed extensive review techniques that neutralize party-political decisions, translate result-oriented 'policies' into universal legal principles, fit political decisions into legal doctrine in accordance with legal criteria of consistency, and, in the worst case, pronounce legislative acts to be unconstitutional. On the other hand, constitutional law has liberated the intrinsic logic of politics by 'politicising' the law itself: teleological interpretation, policy orientation, balancing of interests, impact assessment and result-orientation are indicators for an adaptation of law to the rationality of politics.[65]

Without the obscurantist language of "rationalities," Teubner is describing the disintegration of the law/politics boundary in adjudication, and identifying it with the rise of teleology, policy

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[64] Mathias Kumm, 'Who Is Afraid of the Total Constitution?', 344

[65] Gunter Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?', in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds.) *Transnational Governance and Constitutionalism* (Oxford and Portland OR: Hart Publishing, 2004), 3 – 28, 25

analysis and proportionality that followed the discrediting of literalism, precedent and induction/deduction. I agree with this view rather than with Kumm as Polyanna, and I think it well describes the U.S. as well as Germany. But to be convincing we need an account of the relationship between constitutionalization and politicization.

2. CONSTITUTIONALIZATION AS A DEVELOPMENT BEYOND JUDICIALIZATION

What has been constitutionalizing slowly within the movement of judicialization is the law that the judges developed into the heterogeneous juridified regime that succeeded CLT. As outlined in Part III(1) above, they took over oversight of the classical/social amalgam through a range of techniques, including statutory interpretation, rationality review of agency lawmaking, insistence on strict compliance with procedural or evidentiary requirements, and common law development of new private law rules. Constitutional law was at first one of this diverse set of tools, although in the US it was a bigger part of the story than anywhere else. Jurists thought of it as a list of specific or general requirements (procedural due process, the prohibition of religious 'establishment', and so forth) that would serve to strike down a specific rule or an application of a rule of the classical or the social legal regime.

The early reformers and their judicial allies had no intention of developing through reformist case law a new coherent theory of constitutional law under which, to use Kumm's description of contemporary German law, "the constitution serves as a guide and imposes substantive constraints on the resolution of any and every political question."[66] The self-conscious minimalism of their approach was part of the reaction against the "pre-critical"

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[66] Mathias Kumm, 'Who Is Afraid of the Total Constitution?'

believing conservative activist courts of the high classical era. The conservative jurists, according to the reformers, interpreted the federal constitution as a coherent document whose logic was inconsistent with progressive reforms. This was the reformers' "realist" methodological critique of Lochnerism as bad law driven by bad ideology. They believed they had banished it from mainstream American legal thought.[67]

Constitutionalization is a paradigm shift, not a function of the number of provisions in the document, and it is no less likely in an old fragmentary constitution like the American than in the highly theorized modern ones. It is based on a reconception of constitutional doctrine in which all legal actors in all their actions are exercising either rights or powers, all rights conflict with other rights, and with powers, and all powers conflict with other powers. Constitutional interpretation is the task of settling these conflicts as they arise, harmonizing with other interpretations on the presupposition that the document is a coherent statement, but without the hope of eliminating them for the future.

The text has transformed, to use an old analogy, into something more like a Continental civil law code, interpreted as a coherent whole applicable to every case. It is no longer like a set of unrelated, contingently motivated common law statutes each one modifying an item of the judge-made common law, seen as the true domain of coherence.

Subsumption is based on the complex patterns of argument about key issues understood to arise in multiple diverse policy contexts that jurists worked out when they moved the social

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[67] See Alexander Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics* (New Haven CT: Yale University Press, 1986 (1962))

into the courts. Left, right, traditionalist and modernist jurists adapt their complex argument-sets to the indeterminate Constitutional language (e.g., due process and equal protection), understood as creating and limiting rights and powers. This process was driven first by the Warren Court's massive development of constitutional protections for civil, social and some economic rights of minorities and weak parties. Left constitutionalization provoked neo-liberal and social conservative constitutional backlash.

Today both the right and the left, traditionalists and modernists, deploy their versions of the Lochner apparatus of absolute individual rights, as though they had never been discredited, along with a brand new post-WWII discourse of positivized human rights (e.g constitutional privacy).[68] In what seems like an ironic "overcoming" of the opposition of Lochnerism and realism, modern constitutionalists argue through rival contradictory coherentist theories providing "under the guise of adjudicating constitutional rights provisions," plausible opposite legal answers to questions of the "validity of any and every political decision" by any and every actor wielding discretionary legal power. (Kumm again). [69]

3 . THE POLITICS OF CONSTITUTIONALIZATION

Constitutionalization as I am developing it here has a second aspect, along with the paradigm shift to the constitution as code. The shift is interesting because it has gone with a dramatic intensification of judicial supervision of the juridified universe. Rather than develop "deference" as the key to operating the new paradigm,[70] constitutionalizing courts exercise supervisory power

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[68] See Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge MA: Harvard University Press, 2010)
[69] See Mathias Kumm, 'Who Is Afraid of the Total Constitution?' above
[70] See Duncan Kennedy, Proportionality and "Deference"

to restrict the power or autonomy of a legal actor, often but not necessarily increasing the freedom of action of another actor. That is, of the zones where decisions are granted strong presumptions of validity, or a wide 'margin of appreciation', or, conversely, tightly constrained by bright line rules and intrusive standards. Successful resistance to the process preserves whatever relations of power among legislative, administrative and private actors existed within the spheres of autonomy defined by the status quo.

An example: in the case of Lindsey v. Normet in 1972, the US Supreme Court decided that landlord/tenant law was normal economic regulatory law and therefore subject only to judicial constitutional review for minimum rationality, rather than to a more strict review based on the notion that the interests of tenants were 'fundamental', like those, say, of racial minorities to equal treatment. Landlord/tenant rules had been and continued to be subject to minimum rationality review. But the decision was nonetheless a victory for the anti-constitutionalizing forces, because stricter review would have meant more Supreme Court control of the then highly ideological issue of tenants' rights.

> Appellants argue, however, that a more stringent standard than mere rationality should be applied both to the challenged classification and its stated purpose. They contend that the 'need for decent shelter' and the 'right to retain peaceful possession of one's home' are fundamental interests which are particularly important to the poor and which may be trenched upon only after the State demonstrates some superior interest. They invoke those cases holding that certain classifications based on unalterable traits such as race and lineage are inherently suspect and must be justified by some 'overriding statutory purpose'. They also rely on cases where classifications burdening or infringing constitutionally protected rights were required to be justified as 'necessary to promote a compelling governmental interest'.

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions [71](Lindsey 1972, 74).

For ideological intelligentsias, the only question posed by activist constitutionalism as a general trend or in a particular legal domain is whether or not it favors their ideologically defined group interest. The imposition of new constraints on the legislature, executive or private sector is important not for the jurists' reasons of legal theory, but because the domain that is being narrowed is the locus of some balance of power between competing ideological tendencies. When the sphere is narrowed, there will be a new balance of power, favorable or not to each particular ideological tendency. When the sphere is widened, a different new balance emerges, depending on which ideological actors can take advantage of the new possibilities.

For example, Lindsey v. Normet was a major defeat for tenants' rights lawyers, and activists on behalf of the poor in general, because it signaled that the Supreme Court was not going to intervene on their behalf in the way it had intervened (up to quite recently) on behalf of minorities. Everyone understood that a high standard of review would have meant that state law rules that favored landlords would be under attack in a way not possible with a minimum

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[71] Lindsey v. Normet, 405 U.S. 54 (1972), 74

rationality test. The mere decision to increase the rigor of the test would have meant that many of those rules would not survive the change (otherwise why do it?).

In this case, constitutionalization was a strategy of the left liminal legal intelligentsia I described in the last section, and the case was a victory for the newly emerging but already better funded right-wing liminal legal intelligentsia. Suppose a constitutional court is controlled by judges whose ideological sentiments seem to the suspicious observer to be significantly to the right of those prevalent in the legislature and the executive. Whatever it may have argued in Lindsey, the left legal intelligentsia will argue here against constitutionalizing private law rules favoring property owners, and in defense of legislation changing those rules to grant public access to beaches.

4. CONSTITUTIONAL AMBITION VS. MODESTY AS "INTERNAL" POLITICS

As was true with judicialization, it is tempting to regard constitutionalization as simply one of the instrumental strategies of activist lawyers as they pursue goals set in the general political policy universe outside the legal discursive sphere. We might add the interest of elite activist lawyers and their elite opponents, since they are the ones who are the masters of constitutional argument in the federal courts all the way to the U.S. Supreme Court. Up until recently, constitutionalization intensified the effect of judicialization in empowering the ideological center left and center right, together, against the danger that the vagaries of the electoral process would produce radical left or radical right legislation upsetting to the status quo

consensus of liberals and conservatives. The movement to tighter control by a smaller number of elite judges is part of a counter-majoritarian agenda rather than a supposed "difficulty."[72]

A difference between the two processes is that judicialization was not the avowed program of any of the interest groups in presence. The same is not true of the development we have just been tracing. On the contrary, in a case like Lindsey, the Court's refusal to intensify constitutional scrutiny of landlord/tenant law was a right wing ideological move, *and also* an incident in a continuing dispute within legal theory, distinct from the ideological disputes of the larger society. In that debate, jurists favoring constitutionalization as a general phenomenon, the "Ambitious" as I will call them, square off against those opposing it, who I will call the "Modest."

The ambitious are typical proponents of suspicious belief, practicing the hermeneutic of the restoration of meaning on a grand scale. When right wingers re-constitutionalize neo-liberal ideas and left wingers work to make the Constitution seem like a derivation from the Universal Declaration of Human Rights they are taking the restoration far beyond what is necessary to make a distinctly legal case for some particular outcome.

The idea is that internal and contextual analysis of the Constitution reveals as its governing elements the normative principles (human rights or efficiency, for example) that they themselves believe are valid. Construction can be by induction/deduction or through the location of governing teleological principles. Ambitious suspicious believers can be civil

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[72] See Ran Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Cambridge MA: Harvard University Press, 2004) for an analogous line of argument about the globalization of judicial review.

libertarians, identity-based antidiscrimination advocates, neo-liberals, advocates of the efficiency norm in adjudication, religious social conservatives, and very strikingly human rights lawyers. What they share, if they are indeed suspicious believers and not just masquerading realist cause lawyers, is that the process of constitutionalization is for them much more than a tactic, more even than a strategy. When they work to interpret the document in line with their ideological projects, they are not instrumentalizing it, but rather 'working it pure' or realizing it. They suspect the hesitancies of the modest as covertly motivated by bad ideology (the enemy) or by a more or less craven principle-deficit (so-called friends).

The opponents of constitutionalization have typically based their objection in part on a skeptical view of judicial reason. Since the project depends on a supreme court as the final arbiter, its claim to transcend politics fails if interpretive technique is open to ideological manipulation. This was a key part of the Southern argument against Marshall's federalism,[73] and then the sociological jurists' and realists' argument against Lochnerism.[74] It was reborn in the fifties and sixties in Felix Frankfurter's and Learned Hand's professedly regretful liberal arguments against Warren Court activism,[75] and has been revived in reaction to the judicial activism of the Reagan/Bush/Bush/Trump Courts.[76]

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[73] William Jr. Rawle, *A View of the Constitution of the United States of America* (Clark NJ: The Lawbook Exchange, 2014 (1829))

[74]Felix Frankfurter, Baker v. Carr 369 U.S. 186 (1962)/ Dissenting Opinion, 369 U.S. 266

[75]Learned Hand, *The Bill of Rights* (Cambridge, MA: Harvard University Press, 1958)

[76] Mark Tushnet, *Taking the Constitution Away from the* Courts (Princeton NJ: Princeton University Press, 2000); Mark Tushnet *Weak Courts, Strong Rights. Judicial Review and Social Welfare in Comparative Constitutional Law* (Princeton NJ: Princeton University Press, 2009); Jeremy Waldron, 'The Core Case against Judicial Review', *The Yale Law Journal* 115(6) (2006), 1346-1406; Jeremy Waldron, 'Judicial Review and Judicial Supremacy' *New York University Public Law and Legal Theory Working Papers* (2014), 495

The ambitious program for public international law was set out in an explicitly "post-critical" way by Hans Kelsen in his Holmes Lectures at Harvard Law School in 1941.[77] The uncontroversial goal of world peace is best secured by the construction of a global legal order, based on a coherent but as yet merely potential scheme of democratically legitimated rights and powers overseen by a world court. A unitary order of principle has to be constructed by legal interpretation working within the existing order, which is fragmentary and gap filled and permits in theory and in practice a vast amount of action that is inconsistent with minimum ideas about democracy and rights. In other words, the basic tool for the jurist with this approach is the method of construction, whether pursued inductively/deductively, teleologically or through balancing.

In the European context, Joseph Weiler's "The Transformation of Europe"[78] is a classic study of constitutionalization, nothing if not ambitious, and his "Eurocracy and Distrust"[79] brings the "counter majoritarian difficulty," renamed "the democracy deficit" in close analogy to the U.S. problematic. Christian Joerges' proposal that the harmonization of European private law should be conceived as a conflict-of-laws problem is an example of sophisticated modest theorizing, explicitly critical of the dangers of ambition.[80] The same structure of argument

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[77] Hans Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures, 1940—1* (Cambridge, MA: Harvard University Press, 1942); David Kennedy, 'The international Style in Postwar Law and Policy', *Utah Law Review* 10(2) (1994), 7-104

[78] Joseph H.H. Weiler ,'The Transformation of Europe', *The Yale Law Journal* 100(8) (1991), 2403-2483

[79] Joseph H.H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities', *Washington Law Review* 61(3) (1986), 1103-1142

[80] Christian Joerges, 'Conflicts-law Constitutionalism: Ambitions and Problems', *ZenTra Working Paper in Transnational Studies*, 10 (2012). Available at SSRN: http://ssrn.com/abstract=2182092 (Accessed: November 6, 2018)

appears with respect to the international economic order (are the WTO rules "constitutional"?) and, according to a very interesting article of Gunther Teubner already quoted, the order of transnational non-state organizations of many different kinds.

The modest have the view that in many instances a movement toward principled unity under judicial supervision would be a bad thing, because necessarily suppressing differences that should be encouraged. It may be desirable in a particular case to reduce the level of internal coherence and unitary application of the existing order rather than increase it, for example by increasing the deference accorded to some particular governmental actor, or reducing judicial supervision, say, of an area of contract law or of the law of marriage.

In this view, legitimate profound differences, and also conflicts of economic interests, should often be handled by bargaining leading to negotiated agreement or voting or exit, rather than settled by the rational application of principles whose legitimacy supposedly transcends that of the various actors in conflict. In this view, judges are not the right people to settle the deepest kinds of conflicts of interest or of principle, i.e. ideological conflicts.

The modest charge the ambitious with "neo-formalism". The 'formalism' part is a systematic tendency to abuse induction/deduction to make preferences into legal necessity. It is 'neo' because it is a revival of the methods of late-nineteenth century legal thought, aiming at making the law coherent by bringing out an immanent rationality corresponding to a particular

vision of society. Because it is 'post-critical,' it is chastened: incremental, conscious of the dangers of backlash, wary of sounding Lochnerist.[91].

Neo-formalist projects that turn ideology into constitutional law while at the same time turning the constitution into ideology make the perfect object for the hermeneutic of suspicion. It is not only the more skeptical cause lawyers and self-avowed ideological neutrals who wield it against ambition. The constitutionalizing projects totalize in contradictory ways, for example, neo-liberalism against human rights, and ambitious suspicious believers deploy the hermeneutic against one another. They scavenge the critical resources left high on the beach with each flooding and ebbing of the critical tide, from sociological jurisprudence to legal realism to critical legal studies, for use in merciless attacks on their rivals.

I don't myself have a "right answer" to the conflict between the modest and the ambitious. I see each as representing a value that has to be compromised with the other, and unless the case for one or the other is very clear, I anticipate I will subordinate the "internal" debate to my own sense of what is politically fair and just (in other words to my own ideological orientation).

CONCLUSION

[91] For the private law variant of this tendency, see John Goldberg, 'Introduction: Pragmatism and Private Law' *Harvard Law Review* 125(7) (2012), 1640-1663

I think it is commonsense among legal theorists today that law in liberal democratic post-industrial welfare capitalism is neither mere superstructure nor autonomous. When we think of or refer to contemporary capitalism in this mode, its juridification is a defining feature. It "is what it is" because it is juridified. Judicialization is more or less complete in the U.S., Britain and its settler colonies, and the German sphere in Western Europe. Constitutionalization, and resistance to it, have a much more limited scope, but include the U.S. and Germany and the range of powerful transnational institutional systems. These specific positive law doctrinal developments "constitute" capitalism "relatively autonomously," through the work of legal intelligentsias across political divides.

For contemporary capitalism, it is still a key legitimation claim that conflict occurs within a framework that is stable, neutral between persons, and democratically legitimate. These characteristics are direct consequences of the idea that the framework is legal, in accordance with a pre-critical idea of law that is still prevalent across the social space. Why is the hermeneutic of suspicion a predominant disposition of jurists in this moment? I think the answer for the U.S. is that the gradual but enormous increase in the power of judges to determine the winners of ideological conflicts, some significant, some small but still visible, has come along with the undermining of faith that they have a method that is immune to ideology. Absent a method, their power to decide ideological conflict for one side or the other is arguably democratically illegitimate (counter-majoritarian difficulty, democracy deficit). The hermeneutic responds to this danger to the legitimating myth by denouncing ideology in the other while affirming the legal correctness of one's own answer, thereby reaffirming the rule of law.

A last paradox. The ambitious suspicious believing program is also a response to the potential (or actually unfolding as I write) legality-legitimation-crisis. Ambitious believers aim to rebuild liberal democratic legitimacy by constitutionalizing one ideological project or another, neo-liberal, social conservative, liberal-identitarian or redistributivist, under the supervision of a constitutional court. In another version, the believer aspires to constitutionalize several of the conflicting ideological projects that are represented diffusely throughout the constitutional materials by proportionality analysis.

This means concentrating more and more power in a single institution, the constitutional court, supported by a super-elite sub-set of an already unrepresentative lawyer class, ruling through a discourse inaccessible outside their circle, but easily recognizable to the whole public as supreme political power. Integrating the structure simultaneously makes it appear stronger and increases its vulnerability to unravelling. But the court's opaque discourse of power is experienced as legitimate by those subject to it only because of some mediation between the ruling legal elite and the public, carried out through the cultural and political intelligentsias of the society. As they polarize, and deal with their various populists, the destructive side of hermeneutic threatens to engulf the positive affirmation of legal correctness. It seems plausible, but by no means inevitable, that securing legitimacy through concentrating more and more power ("total" constitution) at a higher and higher level, will eventually reveal the temple as a house of cards, or a whole wardrobe of the emperor's new

clothes. Always acknowledging the plausible counter-narratives of Chicken Little ("the sky is falling") and The Boy Who Cried Wolf."[92]

[92] See Paul Veyne, *Did the Greeks Believe in Their Myths? An Essay on the Constitutive Imagination,* P. Wissing, trans. (Chicago: University of Chicago Press, 1988) 27-39 (Ch. 3: "The Social Distribution of Knowledge and the Modalities of Belief")