RESISTING NEO-LIBERALISM: DEVELOPING A NEW SOCIAL DEMOCRATIC CONCEPTION OF CONSTITUTIONALISM

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Social democracy has traditionally been associated with an ‘aspirational’ or ‘populist’ paradigm in which the institution of judicial review has been perceived to constrain the reformist possibilities of the legislature. The principal concern of this paper is to challenge this ‘aspirational’ model and to reinstate the judiciary (and the institution of judicial review) into a contemporary social democratic framework. The paper extends this analysis by seeking to show that many contemporary constitutions—such as the Constitutions of South Africa, Venezuela and India—have justiciable socio-economic rights with the potential for resisting moves to neo-liberal or economic austerity measures and compromising the level of well-being and affluence in advanced nations. Three examples, in particular, will be discussed: the State Constitutionalism/judicial federalism in America; the recent jurisprudence on South African Constitutional Bill of Rights (1996); and the Scandinavian Constitutions, whose provisions have explicitly rejected any notion of a neo-liberal politics emerging in these countries. Clearly, then, there is room to manoeuvre for the judiciary in a social democratic paradigm to resist the dominant neo-liberalism that pervades the ideology of advanced nations and reinstate a more progressive constitutionalism and politics.

I INTRODUCTION

This paper seeks to develop a distinctive and contemporary social democratic approach to constitutionalism. The novelty of the social democratic theory and practice developed herein is due to the importance accorded to the judiciary and the underlying concept of the justiciable constitution. Social democracy has in the past been closely associated with an ‘aspirational’ or ‘populist’ paradigm in which the institution of judicial review has been perceived to constrain the reformist possibilities of the legislature. The ideals of constitutional social democracy, according to this approach, are better realised when the practice of judicial review is abandoned and political reform is pursued in the institutional forum of Parliament. One of the concerns of this paper is to challenge this ‘aspirational’ approach and to reinstate the judiciary (and the institution of judicial review) into a contemporary social democratic

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framework. In promoting an institutional role for the judiciary, the paper considers the possibilities which inhere in judicial review and the manner in which it can promote or impel social democratic political agendas.

In undertaking this objective, this paper considers the potential for judicial review (and the judicial enforcement of socio-economic rights provisions) to resist the neo-liberal privatising and liberalising economic tendencies in the United States, South Africa, and Scandinavia. In doing this, it seeks to show how judicial enforcement of constitutional socio-economic rights can assist in the reinstatement of social democratic political agendas and the development of the (social democratic) welfare state in these respective countries.

An underlying concern of the paper, then, is to situate judicial review in social democratic theory and clarify the role that it can perform in social democratic political practice. It repudiates social democracy’s traditional antagonism to the judicial regulation of the political process and shows how judicial review can be used to resist neo-liberal political and economic agendas and promote interventionist social democratic programs.

The paper then moves on to consider the issue of constitutional political economy (particularly the theory of F A Hayek) and both considers and challenges the traditional association between neo-liberal constitutionalism, the liberalising of economies and positive economic outcomes. As will be shown, a strong association exists between interventionist political programs and low national unemployment rates. The implications of these findings for constitutional political economy and the theories of F A Hayek will accordingly be drawn out.

In spite of this, the paper considers some of the complexities associated with the enforcement of justiciable social and economic rights. In particular, enforcement of these rights often requires systemic and institutional or structural reform. The paper considers whether the judiciary has the institutional competence to perform this role, and whether such a role is not better performed by Parliament.

II DEVELOPING A SOCIAL DEMOCRATIC POLITICAL AND LEGAL THEORY

Social democracy, like socialism, cannot be constructed from a tabula rasa. In principle, social democracy depends on the accomplishments of earlier stages of political and material development. In this context, social democracy accepts liberal

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1 F A Hayek, The Road to Serfdom (Routledge, 1946).
2 One can envisage various stages of democracy extending from liberal democracy, at one point, to economic democracy at the other (end) point: Leo Panitch, Social Democracy and Industrial Militancy (Cambridge University Press, 1976). According to Panitch: ‘Social democracy clearly depends on the accomplishments of earlier stages of political and material development. Importantly, social democracy accepts liberal democracy’s affirmation of the rights of citizens to elect their own governments and to be constitutionally protected from arbitrary political treatment. What is not accepted, though, is the unnecessary liberal corollary that, once in place, governments ought to have their activities tightly proscribed. Such limitations on the scope of public activity amount [indeed] to a restriction on further democratic development’.
democracy’s affirmation of the (political) rights of citizens to elect their governments and to be constitutionally protected from arbitrary political treatment.³

What is not accepted, though, is the unnecessary liberal corollary that although they become technically possible, the activities of governments ought to be tightly proscribed.⁴ Such limitations on the scope of public activity, especially in their economic guise, amount to a restriction on further democratic development.⁵ Economic liberalism, then, is seen as the branch of political liberalism that has had the effect of retarding the extension of citizenship (social and economic) entitlements.⁶

To its credit, political democracy has the cession of political citizenship, with the imposition of the most minimal civic obligations. Ralf Dahrendorf has endorsed the claim quite strongly that ‘The key point about obligations of citizenship is not so much that they should be kept to a minimum, but that they have no trade-off relationship with citizenship rights. Rights are absolute’.⁷ This is a contemporary version of the argument of T H Marshall in his famous 1949 Marshall Lectures:

> The normal method of establishing social rights is by the exercise of political power, for social rights imply an absolute right to a certain standard of civilisation which is conditional only on the discharge of the general duties of citizenship. Their content does not depend on the economic value of the individual claimant.⁸

The social democratic assertion, though, is more problematic because it holds that entitlements envisaged by liberalism⁹ become unreasonably and undemocratically austere under the economic liberalism of liberal democracy.¹⁰ Access to reward is

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conditional. At the societal level, constraints on the legitimacy of politics itself imply a self-imposed denial of the capacity of the state to respond to changed circumstances – limitations that are experienced with more adverse consequences in countries without a strong ‘state tradition’, such as the United States, the United Kingdom and Australia than in those with less squeamish attitudes and institutions. 

Social democracy, then, is a claim for the disarticulation of rights and obligations, for the separation of reward and effort. Limits on the ability of any society to provide unconstrained access to resources for its citizens are minimised by social democracy’s permanent commitment to full employment. This commitment inevitably implies independent measures on the part of the polity to ensure that the level of services demanded outside the market are produced.

Social democratic ambitions cannot avoid ideological objections from economists who emphasise the ubiquity of scarcity and those unperturbed by market liberalism’s displacement by moral and political dimensions/criteria when prioritising the allocation of goods and resources.

Just as social democracy sought to exploit and transcend political democracy, so too is it inevitable that social democracy, perhaps even before its achievement, would be a stepping stone to more extensive entitlements. For many years, assertions of the rights of workers to participate in the decisions which determine how they interact with capital in the production process, or labour process, and of how work-life ought to be conducted, have been heard. These are claims for industrial and organisation democracy. They could well be made in conjunction with social democratic aspirations; but they are in principle more radical because they isolate a segment of the population and a particular aspect of social and economic life as warranting specific democratic concern. If conceded, therefore, industrial democracy constitutes further democratic development beyond social democracy. Hence, social democracy ought not to be regarded as a final or stable or contradiction-less stage of democratic development.

Economic democracy, or the assertion of the citizenry’s entitlement to have all macro-economic decisions subjected to public decision-making, is a claim even more at

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12 Gosta-Esping-Andersen, The Three Worlds of Welfare Capitalism (Polity, 1990), ch 1; Robert Jessop, State Theory: Putting the Capitalist State in its Place (Polity Press, 1990); Gerhard Lehmbruch, ‘Neo-Corporatism in Comparative Perspective’ in G Lehmbruch and P C Schmitter (eds), Patterns of Corporatist Policy-Making ( Sage, 1982).
14 Social democratic nations prioritise the commitment to full-employment and much employment is sourced in the public sector.
15 See Nozick, above n 9.
17 Tom Campbell, The Left and Rights (Routledge, 1983).
variance with liberalism.\textsuperscript{18} It has been argued that democratic control over investment and accumulation is eventually necessary to maintain the demands social democracy places upon economic activity.\textsuperscript{19} As the ten year (ultimately unsuccessful) campaign over wage-earner funds in Sweden demonstrates, resistance to this form of democracy will be especially strident, as it amounts to a definitive attack on the cornerstone of liberalism: private property.\textsuperscript{20}

III AN ‘ASPIRATIONAL’ OR ‘JUSTICIABLE’ CONSTITUTION?

An important issue that is implicated here relates to precisely how this expansion of the regulatory reach of the state should be undertaken and what mechanisms should be activated to fulfil such regulation. For example, should a social democratic model of constitutionalism commit to developing political mechanisms of coordination and regulation, thereby politicising democratic deliberation and the public decision-making process? Or should a social democratic paradigm commit to judicial and constitutional mechanisms of regulation, thereby (in effect) constitutionalising the public and wider private realms?

This raises the further issue regarding the precise role to be performed by the judiciary in a social democratic model and the extent to which (social democratic) constitutions should be ‘justiciable’. Should a social democratic constitutional paradigm embrace a purely aspirational approach to constitutionalism – one in which the constitutional process performs an exclusively educative or consciousness-raising function and where transformative change is pursued in the political (as opposed to the judicial) realm?\textsuperscript{21} Alternatively, should a contemporary social democratic theory conceive an important institutional role for the judiciary in promoting reformist agendas?\textsuperscript{22} Moreover, how is this activist judicial role to be rationalised?

\textsuperscript{18} Esping-Andersen, above n 11.
Social democratic constitutional theory has traditionally been regarded as being ‘aspirational’ in nature, wherein the incorporation of judicial review has been associated with a ‘weak’ liberal form of constitutionalism that is (perceived to be) inconsistent with a more genuinely transformative constitutional approach. This view is particularly reflected by Robin West when she declares that:

By acquiescing in a definition of the Constitution as a source of adjudicative law, progressives seriously undermine its progressive potential. Only by reconceptualising the Constitution as a source of inspiration and guidance for legislation, rather than as a superstructural constraint on adjudication, can we make good on its richly progressive potential.

An alternative social democratic paradigm can be developed – one that acknowledges the institutional importance of the judiciary and the significant role that the judiciary can play in promoting governmental action and in advancing progressive agendas. In this distinctive model, the judiciary can perform an active and transformative role in facilitating public intervention, reversing the dominant economic rationalist agendas of nation-states, as well as in promoting socio-economic rights and entitlements. This challenge to promote a more affirmative or positive judicial role is one that lies at the heart of developing a contemporary social democratic paradigm. As Erwin Chemerinsky argues:

Progressive constitutional scholars need to focus on defending a vision of constitutional law that will advance equality and basic human rights. We need to defend the courts’ unique role in accomplishing this, rather than turning against the judiciary. The emphasis should be on describing and defending what the Constitution’s guarantees should mean. The challenge for progressives is to articulate a version of judicial review; one different from that offered by conservatives or popular constitutionalists, one in which courts protect rights, enhance freedom and further equality.

It is unclear how far the court and the institution of judicial review should be allowed to intervene in the political process in this ‘justiciable’ social democratic framework. On one hand, Marius Olivier contends that the judiciary should be limited to...
reviewing government programmes and policies, 28 while on the other, Barry Friedman asserts that the court should be able to order the Government to distribute finances and resources to particular projects. 29

If the latter approach is adopted, concern has been expressed at the institutional competence of the court to adjudicate on issues that relate to social and economic policies in this social democratic paradigm. Archibald Cox (in an American constitutional context) draws attention to the court’s limited institutional capacity to collect facts on matters of public policy and argues that this should lead it to adopt a position of judicial restraint (or deference to the legislature) when adjudicating on (substantive) socio-economic issues. 30 Furthermore, Lillian de Vier shows that the adversarial nature of the judicial process diminishes the court’s institutional capacity to undertake extensive ‘fact-finding’ investigations into socio-economic policies. In this context, de Vier (again) emphasises the need for judicial restraint when considering essentially policy or policy-oriented issues. 31

IV  MARK TUSHNET’S ‘POPULIST CONSTITUTIONALISM’

This argument is expressed by Mark Tushnet, who advocates the embrace of a ‘populist constitutionalism’, 32 where issues arising from the ‘thin’ constitution are to be resolved by Congress. Tushnet associates the ‘thin’ 33 constitution with those provisions promoting individual rights, and contends that a more progressive constitutional agenda can be generated when the constitutional perspective of the judiciary is replaced with the perspective of the legislature when dealing with issues relating to the ‘thin’ constitution. Tushnet’s framework has led to a somewhat simplistic debate being undertaken among social democratic writers between the ‘aspirational’ constitution on the one hand, and the ‘justiciable’ constitution on the other. 34

It is unclear precisely why an ‘aspirational’ (as opposed to a ‘justiciable’) constitution is to be considered essentially more social democratic in orientation. Tushnet fails to explain why, in this respect, the legislative branch is a particularly appropriate (and social democratic) institution for interpreting and reviewing the Constitution. Even if

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32 Mark Tushnet, Taking the Constitution Away from the Courts (Princeton University Press, 1999). Populist constitutional law, according to Tushnet, ‘is oriented to realising the principles of the Declaration of Independence and the Constitution’s Preamble’, 181. Tushnet argues that removing constitutional interpretation away from the courts will promote his version of ‘popular constitutionalism’. As he declares, ‘Doing away with judicial review would have one clear effect: it would return all constitutional decision-making to the people’, 185.
the legislature is the ultimate arbiter of constitutional meaning (under this aspirational framework), there will still, in any case, be the need to engage in constitutional interpretation and judicial review in a manner similar to that performed by the judiciary. 35 In this respect, then, the elimination of judicial review in this aspirational model does not, in fact, remove or obviate the need for some form of constitutional interpretation. As Robert Lipkin contends:

Although Tushnet’s view might rid us of the courts it cannot rid us of the problem of interpretation. Legislators and executives, as well as citizens, must interpret the Constitution; thus textualist, originalist, structuralist and normative theories still need to be evaluated … Tushnet seems to suggest that taking the Constitution away from the courts magically answers the interpretive question of constitutional meaning … 36

In response, Tushnet argues that the constitutional perspective of the legislature produces an essentially more transformative agenda (in his populist constitutionalism) because Congress will, inevitably, use less technical and legalistic discourse. 37 Yet there is no particular reason why this should be the case, and the legislature could employ a more legalistic approach producing, in effect, a more conservative outcome. As Lipkin (again) argues:

Tushnet’s point calls for normalising constitutional jargon, if this is possible and desirable. However, even if normalisation is a worthwhile goal, it does not entail giving up either judicial review or even judicial supremacy. It just means that the institution responsible for constitutional interpretation should deploy a jargon-free discourse. In principle, there is no reason to believe that the legislature is better at using a jargon-free discourse than the courts. And given the assumption that the thin Constitution is preferable to the thick Constitution there is little reason to insist that the courts cannot use the thin Constitution better than the thick Constitution. 38

Furthermore, in an associated context, it appears unclear why Tushnet’s commitment to the general principles of the ‘thin’ Constitution has the effect of facilitating an essentially social democratic constitutionalism. A commitment to the ‘thin’ Constitution (or the general principles underlying the Constitution) may require an even greater reliance on the processes of constitutional interpretation and review leading to essentially the type of classical and neo-liberal outcomes of the type Tushnet wishes to avoid. 39

Tushnet’s ‘aspirational’ commitment to an unenforceable constitution furthermore neglects the important role that can be performed by the judiciary in promoting progressive political, economic and constitutional outcomes. 40 As will be shown, in an era of economic austerity and economic rationalism, judicial review and the

36 Ibid.
38 Lipkin, above n 35, 130.
40 Chemerinsky, above n 22 1013.
‘justiciable’ constitution can play a significant role in resisting these economic measures and promoting more progressive political and economic outcomes. Three examples will be given here – State constitutional (or judicial federalism) in the United States; the new South African constitutional framework (1996); and the liberalising pressures placed on the Swedish social democratic political model.

The social democratic constitutionalism that has been advocated so far commits to ‘justiciable’ socio-economic rights and entitlements. In developing a rationale for according importance to socio-economic rights, social democrats argue that political rights – such as participation in the public realm – cannot be properly exercised unless the public has access to substantive social and economic entitlements such as access to education, health care, housing and transportation. Yet constitutional social democracy also considers the provision of social and economic entitlements as an important constitutional end in itself, quite apart from their capacity to promote individual liberties and freedoms. Keith Ewing, for example, argues that the social democratic commitment to individual needs demands the inclusion of guarantees to social assistance, health care, education, public housing and recreational facilities. He asserts that:

At the very least, these rights would impose an obligation on the state to confer on the individual a right to a minimum level of income when unemployed or incapable of work, measures which ensure that people’s health needs are met; provisions for adequate housing; and the availability of a broad range of cultural and recreational facilities.

V THE NEED FOR JUDICIAL REVIEW AND JUSTICIABLE SOCIO-ECONOMIC RIGHTS

The aspirational commitment, then, to an unenforceable constitution neglects the important role that can be performed by the judiciary in promoting a progressive constitutionalism. In particular, judicial review and the judicial enforcement of (socio-economic) rights may potentially facilitate government intervention to ensure

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46 Ewing, above n 44, 116.
substantive social and economic equality – key goals in social democratic constitutionalism. The process of judicial review, then, can have the effect of placing important social democratic issues (such as the development of social welfare rights and economic entitlements) on the political (and constitutional) agenda, requiring the legislature to give some thought to their implementation.

The particular social democratic constitutional theory advanced here promotes constitutional and, more particularly, ‘justiciable’ rights and entitlements. In contrast to neo-liberal theory, constitutional social democracy emphasises the collective nature of rights, associating rights with the fulfilment of essential human needs.

As Keith Ewing has noted, most constitutions since 1982 have included justiciable socio-economic rights within their provisions. Italy and Spain, for example, have made the most extensive provision of social rights within their respective constitutions. These ‘justiciable’ socio-economic obligations, it is argued, can be used in such a way as to counter austerity and economically rationalist policies. Moreover, they can be used to impose constitutional imperatives on governments to implement the institutions and policies to facilitate full-employment goals that are consistent with social democratic political agendas. In the case of Italy, a title in the Constitution headed ‘Economic Relations’ deals with matters as diverse as vocational training (Article 35); an entitlement to wages ‘sufficient to protect [the worker] and his family in a free and dignified existence’ (Article 36); working time (including holiday pay) (Article 37); equal rights for women and entitlement to ‘the same wages for the same work as male labour’ (Article 37) and ‘freedom in the organisation of trade unions’ (Article 39).

In similar terms, the Spanish Constitution provides that all citizens have the right to ‘sufficient remuneration for the satisfaction of their needs and those of their families’ and that ‘in no circumstances may they be discriminated against on account of their sex’ (Article 35). There is also protection for collective bargaining and the right to strike, though the law must include safeguards for essential services (Article 37). Protection is made too for ‘a public social security system’ (Article 41); the protection of health (Article 43) and ‘decent and adequate housing’ (Article 47).

It is true that not all European states go nowhere near as far as this pair. Nevertheless, in France, the Preamble to the Constitution of the Fourth Republic (founded on ‘political, economic and social principles’) is incorporated into the Constitution of the Fifth Republic. The former recognises the right to work, as well as guaranteeing

49 However, Sec 53.3 of the Spanish Constitution provides that these rights can only be enforced within the manner in which the Spanish Parliament prescribes.
51 Chirwa, above n 26.
health care, material security, rest leisure and social security and promising equal access to education, professional training and culture. There is also a constitutional right to join a trade union of one’s choice and to take part in the activities of the union (despite this, France has the lowest level of unionisation in Europe). This is reinforced by the explicit constitutional recognition of the right to strike, albeit that it is a right which is heavily qualified in the sense that it is to be ‘exercised within the framework of the laws’ which regulates its use.\(^{53}\)

In Germany too – where there is otherwise little constitutional protection of social rights – the Constitutional Court has established a right to strike (and determined its boundaries) from the constitutional guarantee that everyone has ‘the right to form associations, to safeguard and improve working conditions’.\(^{54}\) This protects both the individual worker and the trade union in its organisational capacity.

These examples contrast with the position of those countries that cast their constitutional arrangements in the form of ‘duties’. This is a feature of the Scandinavian jurisdictions, in particular, though the form is not confined to such countries. In Norway, the Constitution provides by Article 110 that ‘it is the responsibility of the authorities of the state to create conditions enabling every person capable of work, to earn a living by his work’.” According to Manfred Schmidt, this ‘provides a legal obligation to do what is necessary to ensure full employment by presenting an injunction to the state to pursue an active employment policy when this is necessary to avoid unemployment’.\(^{55}\) Thus, ‘it implies a prohibition against unemployment being used as an instrument of economic policy’.\(^{56}\) Article 110 also imposes another duty or imperative by providing that ‘specific provisions concerning the rights of employees to co-determination at their workplace shall be laid down by law’. As Phillip Schmitter notes, this provision has been used to ensure that managerial prerogatives – via Scandinavia’s ‘Third Way’\(^{57}\) policy – have not usurped the traditional commitment to ownership by both capital and labour (co-determination) in relation to corporate management.\(^{58}\)

Similar constitutional obligations on public authorities are to be found in Denmark, where it is provided that ‘in order to advance the public weal efforts should be made to afford work to every able bodied citizen on terms that will secure his [sic] existence’, though it is also provided in the same article that any person unable to support himself [sic] or his [sic] dependants shall be ‘entitled to receive public assistance provided that he [sic] shall comply with the obligations imposed by statute in such respect’.\(^{59}\) Again, it is difficult to see how liberal austerity measures designed to reduce inflation (for example) through the countenancing of high unemployment levels could be used in the light of these constitutional ‘imperatives’.\(^{60}\)

\(^{53}\) Ewing, above n 50, 5-6.

\(^{54}\) Ibid.

\(^{55}\) M Schmidt, ‘Does Corporatism Matter?’ in G Lehmbruch and P Schmitter (eds), Patterns of Corporatism (Sage, 1992) 104.


\(^{57}\) See generally, Esping-Andersen, above n 12.

\(^{58}\) P C Schmitter, ‘Modes of Interest Intermediation’ in P Schmitter and G Lehmbruch (eds), Trends Towards Policy Intermediation (Sage 1992) 56.

\(^{59}\) The Constitutional Act of Denmark, Article 4.

\(^{60}\) This also forms part of the discussion in Brian Esper,‘Some Thoughts on the Puzzle of State
VI USİNG RIGHTS PROVISIONS TO RESİST NEÖ-LİBERAL TENDENCIES/TRAJECTORIES

The Swedish Constitution provides in general terms that ‘the personal, economic and cultural welfare of the individual shall be fundamental aims of public activity’, and then specifies particular duties of the public administration ‘to secure the right to work, housing, and education, and to promote social care and social security and a good living environment’. Article two of the Instrument of Government provides that:

Public power shall be exercised with respect for the equal worth of all and the liberty and dignity of the private person. The personal, economic and cultural welfare of the private person shall be fundamental aims of public activity. In particular, it shall be incumbent upon the public institutions to secure the right to health, employment, housing, and education and to promote social care and social security.

The public institutions shall promote sustainable development leading to a good environment for present and future generations. The public institutions shall promote the ideals of democracy as guidelines in all sectors of society and protect the private and family lives of private persons. The public institutions shall promote the opportunity for all to attain participation and equality in society. The public institutions shall combat discrimination of persons on grounds of gender, colour, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstances affecting the private person. Opportunities should be promoted for ethnic, linguistic and religious minorities to preserve and develop a cultural and social life of their own.

A similar approach is to be found in the Netherlands, where it is stated to be the ‘concern’ of the authorities ‘to promote the provision of sufficient employment’ (Article 19), ‘to secure the means of subsistence of the population and to achieve the distribution of wealth’ (Article 20) and ‘to provide sufficient living accommodation’ (Article 22).

In the Swedish context, these duties on the state are complemented by the right to freedom of association and an express provision that ‘any trade union or employer or association of employers shall be entitled to take strike or lock-out action or any similar measures unless otherwise provided by law or arising out of an agreement’.

In the Netherlands, other social rights have been introduced through the direct enforceability of provisions of the Council of Europe’s Social Charter of 18 October 1961. For instance, the decision in NV Dutch Railways v Transport Unions FNV, FSV and CNV held that the guarantees of the right to strike in article 6(4) could be directly enforced in the Dutch Courts.

As Daniel Brand has noted (when discussing the South African constitutional model), the emphasis on public utilities in the Swedish Constitution could be used to counter

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61 The Instrument of Government, Article 2.
62 The Instrument of Government, Article 3.
any austerity moves to privatise such utilities.\textsuperscript{64} Further, as Gosta Esping-Andersen noted in \textit{The Three Worlds of Welfare Capitalism}, the imposition of the ‘Third Way’ economic rationalist programme in Sweden and the consequent abdication of its national political and economic sovereignty to join the European Union has potentially infringed the socio-economic provisions of the Swedish Constitution.\textsuperscript{65} In other words, the socio-economic provisions of the Swedish Constitution might have been used instrumentally to resist neo-liberal moves to ‘open up’ the Swedish economy and dismantle the social democratic welfare state.\textsuperscript{66}

This is what Fritz Scharpf emphasises when he observes that, ‘while Europe has an identifiable commitment to the social dimension of democracy, the EU has brought about tensions between commitments to democracy generally, the social dimension of democracy, and the economic objectives of the EU integration project’.\textsuperscript{67} It is precisely this reason \textit{why} the social democratic provisions in the various European national constitutions can assist their constituent nations in resisting economic integration and maintaining some semblance of national economic and political control over their governance.

\section*{VII THE SOUTH AFRICAN CONSTITUTIONAL MODEL: RESISTING LIBERAL TENDENCIES}

The transformative potential of justiciable socio-economic rights is no better illustrated than in the relatively recent establishment of the Republic of South Africa Constitution in 1996.\textsuperscript{68} The South African framework has often been called a ‘Third Way’\textsuperscript{69} approach to rights enforcement insofar as it steers a middle course between the requirement for the immediate enforcement of civil and political rights (or ‘rights on demand’)\textsuperscript{70} and purely aspirational rights. It does this by providing that socio-economic rights, such as rights of access to social security as well as rights of access to basic health\textsuperscript{71} and social services,\textsuperscript{72} are to be established insofar as the Government has ‘taken reasonable legislative and other measures within its available resources’ to achieve the realisation of the right.\textsuperscript{73} The fact that no reference is made in the constitutional document between socio-economic rights, on the one hand, and political rights, on the other, demonstrates that the framers wished to accord aus
equally important status to both sets of rights, and that the Constitutional Court should not regard socio-economic rights as being any less significant than political or civil rights.74

As Paul Nolette seeks to demonstrate, there was significant pressure on the South African constitutional and political framework to liberalise, as well as deregulate, the economy and privatise the public assets75 that were extant when the Republic of South Africa was established in 1996.76 Mark Kende further demonstrates how the move to a deregulated laissez-faire economy conformed with trends in both Western and Eastern Europe and that socio-economic rights in the constitutions of the developing nations77 were perceived as being antithetical to these liberalising and deregulatory tendencies.78

The Constitutional Court, when compelling the African National Congress (ANC) to build more public housing,79 and schools,80 and adjudicating on health treatment to patients afflicted with the AIDS virus,81 was, to a certain extent, independent of these international forces, and could adjudicate on rights, entitlements and the level of national social and economic development through the enforcement of socio-economic rights. As the Constitutional Court declared in its First Certification82 decision, though less amenable to adjudication, socio-economic rights were nevertheless justiciable or judicially enforceable through its ‘supervisory’83 remedy.84

Debate is already gathering apace as the possibility of using the South African Bill of Rights and its constitutionalised public health urges the African National Congress to resist moves to privatise water and other public amenities.85

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75 The privatisation of water was a particularly contentious move: Chirwa, above n 26, 1.
77 Numerous celebrated writers have neglected the potentially transformative effect socio-economic rights can have on the citizenry; rather focusing on how deleterious they may be for the establishment of market economies in developing nations: most notably see Cass Sunstein, ‘Against Positive Rights’ in Andrea Sajo (ed), Western Rights? Post-Communist Application (Hague, 1996) 106.
82 Ex parte Chairperson of the Constitutional Assembly; In re Certification of the Constitution of the Republic of South Africa 1996 (10) BCLR 1253.
83 For example, Schedule 2 of the Constitution of the Republic of South America provides the Constitutional Court with jurisdiction to enforce, as well as to supervise, its orders. Furthermore, s 167 of the Constitution confers particular jurisdiction on the Court to ‘decide that Parliament has a constitutional obligation’.
85 Chirwa, above n 26, 1.
As has been argued, federal austerity measures have characterised many of the advanced nations. A feature of these measures is the retreat from government regulation in the important areas of health, education, social welfare, housing, and general public amenities. The United States and its absence of generalised health care measures; lack of minimum income guarantees; stigmatising and lowly paid unemployment benefits and, more generally, its low ranking in OECD data regarding public expenditure on government infrastructure and public amenities, as well as its notoriety as one of the lowest taxed countries in the OECD and the consequent significant social inequalities flowing from this aspect of political economy, has placed the United States at the forefront of nations seeking to liberalise their economies and dismantle the governmental and public welfare state apparatus. Resistance to these trends in the form of constitutionalised socio-economic rights would therefore reflect the efficacy of social democratic-oriented constitutions and their capacity to confront the dominant liberal political paradigms and offer (and indeed effectuate) alternative social democratic agendas.

This has been precisely what has happened with the rise of State Constitutionalism – or ‘judicial federalism’ – in the United States. Constitutional amendments, particularly since World War Two, to the American Constitutions have sought to entrench various substantive (social and economic) provisions and these have had the practical effects of facilitating an interventionist role on the part of the American States. Every American State Constitution, for example, now mandates the establishment of free public schools and requires governments to educate all children within their boundaries. In this respect, then, the American State Constitutions have been described as ‘reformed, reinvigorated and resourceful’ and are considered to have spawned ‘a new era of regulatory federalism’ which, although not strong in the United States, hints at developing progressive constitutionalism and politics that moves beyond civic republicanism, Dworkian liberty and equality as well as Cass Sunstein’s so-called ‘regulatory state’.

There are several distinguishing features of this State constitutional tradition that have assisted in promoting a more progressive American State constitutional and political
practice, and these features appear to have significant implications for the development of a pragmatic social democratic agenda in Australian federalism.

Firstly, the flexibility of substantive provisions in the American State constitutional processes is providing an opportunity for raising public awareness on legal and political reform. For example, Article 18 of the California State Constitution simply requires a two-thirds majority of the Legislative Assembly to amend the Constitution. Article 16 of the Ohio State Constitution requires a three-fifths majority of the Legislative Assembly to effect amendment. Commitment to State constitutional amendment is provoking debate on the ‘possibilities of politics’ and the need for an alternative constitutional and social democratic discourse – one that entrenches not only due process, but substantive due process. Incidentally, because of their inherent flexibility, it also draws attention to the purely instrumental or pragmatic aspect that there is even greater room to manoeuvre with respect to inclusion of additional socio-economic rights.

Secondly, the inclusion of substantive provisions in the American State constitutions is producing a quite new and distinct form of constitutional adjudication where litigants are seeking to compel State Governments to act (in an affirmative manner) in order to protect and facilitate socio-economic rights and entitlements. Writing in 2001 Helen Hershkoff noted that, in the previous decade alone, more than 20 lawsuits had been undertaken to ensure the enforcement of an adequate educational system. She also observed that a similar number of actions had been commenced which raised complicated and significant issues of welfare reform.

Thirdly, the substantive provisions of State constitutions are having a (positive) social democratic impact on American governmental policy and increasingly facilitating an interventionist and progressive political agenda – one where government action is occurring at a State level. In this respect, then, State courts are tending to perform a (social democratic) ‘agenda setting’ function, whereby they are resisting moves to economic rationalism and privatisation, as well as ensuring that educational, health, and social welfare concerns are being properly addressed by State legislatures.

The implication of this increasing American orientation to State constitutionalism is that the idealistic social democratic commitment to federal intervention should not neglect the State sphere where pressure can be put on the (State or regional) legislatures to resist the dominant economic rationalist discourse and pursue genuine social democratic and substantive due process transformation.

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94 Ibid, 1900.
97 Brennan, above n 42, 491.
In short, the substantive provisions of State constitutions are having a social impact on American governmental policy, increasingly facilitating an interventionist and active political agenda – where government action is occurring at the State level. This is counter-intuitive given that such important provisions as the ‘due process’ and ‘equal protection’ amendment are located in the federal constitutional instrument. Yet, it nevertheless supports Keith Ewing’s assertion that ‘justiciable social provisions’ hold significant potential to ensure:

… ‘not simply an equal right to liberty, which may require minimum social infrastructure, but rather a right to equal liberty: which may require something more in the sense of measures which have a greater equalising effect …’

The various American State constitutions, then, are tending to resemble regulatory statutes which comprise prescriptive social and economic policy provisions where they seek deliberately to shape the allocation of resources. As Daniel Elazar argues:

State Constitutions are determinants as to who gets what when and how in America because they are conceptual and at times very specific … State Constitutions are increasingly resembling regulatory statutes because they prescribe social and economic policies expressed in the light of positive rights.

The potential for State processes to resist concerted American federal moves to (enhanced) economic liberalism, economic deregulation, *laissez-faire* social policy where there is an absence of universal health care and a general ‘Social Darwinian’ approach to public policy, has led William Brennan to cling to the potential for justiciable socio-economic rights in State constitutions to resist such moves and reinstate some form of greater egalitarianism in American public discourse. It is nevertheless ironic (to say the least) that Brennan places his faith in that most elitist of institutions to respond to his concerns: the archetypal State Supreme Court.

In short, the developing (progressive) tradition of State constitutionalism or judicial federalism in the United States has important implications for the development of a new, reinvigorated and pragmatic approach to social democratic political and constitutional theory throughout the advanced world. It shows that constitutional social and economic rights can potentially impose constitutional ‘imperatives’ that oblige the legislature to resist the dominant economic liberal paradigm and take affirmative steps to ensure a right to work (full employment); right to health care (public health services); and a right to shelter (the development of infrastructure that can promote the establishment of public housing). This may require the state to go so far as to resist pressures to ‘privatise’ and ‘corporatise’ governmental agencies and expand the public sector to cater for the increased public provision of services. If this is so, then social democratic constitutions are working and are effectuating systematic and institutionalised reforms – ones that afford citizens a right to economic security which is the key objective of a contemporary social democratic jurisprudence.

The commitment to substantive due process and the provision of a degree of social equality so as to enable the citizenry to participate in the public and private realms raises the difficult question of whether constitutional social democracy should support

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98 Ewing, above n 50, 6.
the ‘constitutionalising’ of the private (market) realm.\(^{100}\) This means that constitutional obligations are not simply confined to ‘State action’ or where government action trenches on individual interests or, in other words, making the government accountable for its actions. It also means that constitutional rights and liberties are applied ‘horizontally’ so that they apply directly to relationships between individuals in the private sphere – a sphere where government interests are not implicated or where there has been no involvement or interference by government at all.

In the United States, social democrat Erwin Chemerinsky advocates the abolition of this previously discussed ‘State action’ doctrine and advocates the direct constitutional regulation of the private realm.\(^{101}\) Despite his account *Taking the Constitution Away From the Courts*, Mark Tushnet is another prominent social democrat who also supports this position.\(^{102}\) In a Canadian context Gavin Anderson, commenting on the famous *Dolphin Delivery Case*, argues that an eminently suitable social democratic outcome could not have resulted had the Canadian Supreme Court not done away with the ‘State action’ doctrine and applied the 1982 Canadian *Constitutional Rights and Freedoms* directly to free market realm.\(^{103}\)

X \hspace{1cm} SOCIAL DEMOCRACY AND CONSTITUTIONAL POLITICAL ECONOMY

This section shifts attention to a key relationship between social democracy and political economy. It however widens the debate to include the association between classical liberal theory and political economy, since it was these two disciplines which first postulated a relationship between the ‘negative’ (or classical liberal) constitution, evolutionary epistemology and economic outcomes.

Constitutional political economy has its antecedents in the writings of Friedrich Hayek,\(^{104}\) Robert Nozick,\(^{105}\) Ludwig von Mises\(^{106}\) and, in a contemporary context, Professor Suri Ratnapala\(^{107}\) of the University of Queensland Law School. The tenor of these writers was the emphasis on limiting the constitutional authority of the state and this was especially strident in the classical liberal and neo-liberal traditions where the focus of attention was on developing the least intrusive state necessary for the protection of individual freedom.

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\(^{101}\) Chemerinsky, above n 25 503.


\(^{104}\) Hayek, above n 1.

\(^{105}\) Nozick, above n 9.


F A Hayek in *The Road to Serfdom*, as well as in *Law, Legislation and Liberty: The Political Order of a Free People*, argued that the modern political order was not the result of deliberate political control or institutional intervention, but rather the outcome of coincident human activities. In this respect, he criticised the ‘constructivist rationalism’ of western constitutionalism and condemned the fact that it had deliberately sought to coordinate the design of legal and political orders. This approach led Hayek to adopt a classical liberal – or even libertarian – perspective by reasserting the importance of the liberal market economy and by seeking to undermine or repudiate the efficiency of deliberate governmental regulation and coordination of the social and economic systems.

Thus, Hayek’s libertarian framework perceived the legal order as one that facilitated market freedom and which was fundamentally inconsistent with even minimal degrees of public regulation or government intervention. The primary purpose of a neo-liberal constitutional order, according to Hayek, was to restrain the exercise of constitutional state power and to secure the efficient operation of the free market.

This association between an unregulated – or *laissez-faire* – free market economy and liberal legality is also contained in the more recent (libertarian) writings of Professor Suri Ratnapala in his essay *Law as a Knowledge Process* and in his later constitutional law text, *Australian Constitutional Law: Foundations and Theory*. Here, Professor Ratnapala seeks to identify an association between processes of economic liberalisation (or deregulation of the institutional coordination of the economy), on the one hand, and the maintenance and promotion of the rule of law, on the other hand. According to Ratnapala in his essay on evolutionary epistemology:

The extent to which economic liberalisation revives the rule of law tends to be overlooked by those who do not appreciate the inextricable connection between the rule of law in the classical sense and markets. The efficiency of the market is testament to the efficiency of the rule of law, as markets are founded on the stability of the general laws. Markets flourish where general laws rule and degenerate where there is lawlessness.

The *evolutionary epistemological* underpinnings of Ratnapala’s theory are clear and to that extent, he owes a great debt to F A Hayek.

The implication, then of Hayek’s libertarian theory is that little regulatory (or social democratic) scope should be afforded to the constitutional state to engineer desirable social or economic outcomes. Using the Hayekian libertarian framework, Ratnapala seeks to demonstrate that the discretionary nature of the social democratic welfare state contravenes the requirements of generality provided in the rule of law doctrine. In effect, Ratnapala attempts to employ Hayek’s specially libertarian concept of

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108 Hayek, above n 1.
111 Hayek, above n 1, ch 3.
112 Ratnapala, above n 107, 42.
114 Ratnapala, above n 107, 42.
constitutionalism (and the rule of law) to emphasise the (fundamental) incompatibility between government or welfare intervention and liberal constitutional theory. Given this essentially libertarian use of Hayek’s framework to undermine the legitimacy of the welfare state, it would seem that little institutional and constitutional room is present in Hayek’s approach for any degree of social democratic government intervention.

As Professor Neil MacCormick points out, a difficulty with this libertarian advocacy for reinstating a free market, or unregulated order, is that Hayek’s support for a deliberate imposition of a laissez-faire or free market system tends to contradict his underlying commitment to the spontaneous development of evolution of the law. It is unclear in this respect as to precisely why Hayek’s thesis is applicable to (social democratic) government planning, but is not equally applicable to explicit state attempts to introduce or to implement a deliberate market order.115 Hayek’s concern, then, with effectuating (free) market-oriented ends appears somewhat paradoxical in the light of his methodological concern to ensure that constitutionalism is committed only to facilitating processes within which (supposedly) spontaneous legal orders can evolve.

Another associated problem is that the deliberate restoration or reinstatement of a liberal market order in Hayek’s framework might suggest, in fact, that the resultant economic inequalities produced by the market are intended, and that the state should be held morally or politically responsible for such inequalities.116 In this respect, the underlying association drawn by Hayek between procedural fairness and free market outcomes (or inequalities) would seem to be undermined given that the operation of the market is the product of deliberate institutional design and purposeful government intervention.117

There is no reason then to equate procedural fairness with the operation of the free market, since it could be considered to be equally the product of deliberate human intervention and design – precisely in the same manner as that of the design of the political order.

A more fundamental limitation with Hayek’s framework is that the introduction of social planning and government intervention could, in some respects, be considered to be an essentially ‘spontaneous’ response to the deficiencies of the liberal market order. As Neil MacCormick declares:

116 Ibid. As Neil MacCormick states: ‘Those who seek to restore the market know that properly working markets generate considerable ranges of economic inequality. No such inequalities are or need to be intended by any of the market’s participants. But those who deliberately set about to restore a market-based economic order, must be deemed to intended what he or she knows to be the foreseeable outcome or his or her act’, at 75.
117 In view of this, Hayek’s (1982) contention that inequalities resulting from the free market are morally defensible because they are the consequence of voluntary and unintended transactions would be appear to be controversial and doubtful: see Hayek, Law, Legislation and Liberty (3 vols) ( Routledge, 1982) , 120.
It is not clear that some of the criticisms of the spontaneous order did not themselves evolved spontaneously as a result of critically rationalist extrapolation from developed ideas of justice.118

XI THE NEW CONSTITUTIONAL POLITICAL ECONOMY AND THE GROWTH OF GOVERNMENT

What is interesting in the developing ‘new constitutional political economy’ is that opposite economic tendencies are emerging to what has been expounded by Hayek, von Mises, Ratnapala and, more generally, the Centre for Independent Studies. These comparative studies, emerging in the 1980s, sought to explain why the Scandinavian models were achieving full employment throughout this decade, when the liberal economies of Australia, United States and the United Kingdom were achieving double-digit unemployment levels. Goran Therborn explained this tendency with reference to the discourse of ‘an institutionalised commitment to full employment’.119 This involves policies and institutions designed to deploy investment appropriately; incomes policies designed to deploy investment appropriately and prevent inflation while ensuring income distribution does not become too skewed, and an institutional network capable of generating productive employment in advancing of structural change of industry. In one form or another, state agencies in low employment countries have been prepared to accept encroachments onto market processes in the interests of successful employment outcomes.120

Significantly it has been those nations – Sweden, Norway, Denmark, Finland – which have sought to ‘institutionalise’ class conflict and government intervention within the liberal market (along the lines Therborn anticipated) that have generated full employment outcomes throughout the 1980s and 1990s. It is precisely those nations that have left industrial relations to market regulation – particularly the United States and the United Kingdom – which performed worst in terms of employment outcomes.121 Furthermore, despite the writings of F A Hayek, Suri Ratnapala and von Mises, all the evidence indicates that government is growing and continuing to grow, both in terms of the range of functions it is embracing as well as in terms of simple expenditure levels.122 In Sweden it is forecast that government expenditure levels will pass 60 per

118 MacCormick, above n 115, 73.
120 See also Frank Castles, Australian Public Policy and Economic Vulnerability (Allen and Unwin),1988; Alan Cawson, ‘Is there a Corporatist Theory of the State?’ in G. Duncan (ed), Democracy and the Capitalist State (Cambridge University Press, 1989). See also the writings of Phillip Schmitter, G H Lehmburuch etc. who have all pointed to the low unemployment rates in the Scandinavian nations which comprise ‘big’ governments with significant policy responsibilities and which undertake significant ‘corporatist’ agreements between the public and private sectors to implement government policy. As Ewing notes, ‘collective bargaining’ between employees and employers is constitutionalised and there remains significant flexibility in the Scandinavian Constitutions to negotiate on the part of the government with the private sector: see Ewing, above n 50.
121 Boreham et al, above n 87, chs 1 and 2.
cent of GDP. Yet even in the relatively poorest nation of the United States (in terms of government expenditure among the advanced OECD nations), the government continues to grow both in terms of social expenditures and range and capacity of functions it is embracing. What the OECD data on advanced economies indicates is that not only is the size of the state in spending and employment terms increasing, but the range of institutions, interventions and policy preoccupations has expanded dramatically in the ‘social democratic’ nations. Equally important are the divergences in terms of the growth of government; the type of ‘welfare state development’; the institutional preparedness to assume public responsibility for social and economic outcomes; and the extent to which decision-making has assumed a public or at least public-private (corporatist) profile. As will be seen later, the more interventionist (social democratic) nations – those which have resisted neo-liberal tendencies to liberalise their economies and dismantle their welfare states – have produced superior outcomes in terms of low unemployment rates.

XII JUSTIFYING AN INTERVENTIONIST ROLE FOR JUDICIAL REVIEW IN SOCIAL DEMOCRACY

The role envisaged for judicial review is an active one. As alluded to earlier in the paper, how is the interventionist role justified or rationalised? One way of justifying judicial review can be via the recent writings on common law constitutionalism and the rule of law by the Cambridge University scholars.

A relatively recent and sophisticated approach to the rule of law is represented in the writings of Jeffrey Jowell, who emphasises that the commitment of the rule of law to procedural fairness and legal certainty is facilitative of, and requires a degree of, individual participation in public decision-making processes. Jowell’s conception of the rule of law reflects a more nuanced understanding of the role to be performed by the judiciary in the parliamentary process and how the judiciary can in fact play an active and positive role in fostering public participation so as to ensure procedural fairness in the political system.

The increasing relevance of the rule of law in guaranteeing procedural fairness is evident in the contemporary doctrine of what has been termed common law constitutionalism. According to this doctrine, judicial review of legislative enactments should be based on the common law principles of fairness, justice and the rule of law since parliament is assumed to have enacted its legislation in accordance

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126 This research is heavily dependent on the writings of Esping-Andersen, above n 12..
127 Boreham et al, above n 87; Therborn, above n 119.
with the principle of the rule of law. This, in turn, casts doubt upon a positive obligation on the court (through the mechanism of judicial review) to actively promote individual rights and freedoms and to interpret legislation in such a manner as to secure these ends. As Paul Craig argues:

Parliament is taken to have intended that its legislation conforms to the principles of fairness, justice and the rule of law which operate in a constitutional democracy. However, because Parliament itself cannot realistically work out the precise ramifications of this general idea, it delegates power to the Courts, which then fashion the more particular application of this in accordance with the rule of law.130

A further exponent of common law constitutionalism has been T R S Allan, who contends that legislation should be interpreted as being consistent with the principles of the rule of law, justice and a ‘coherent conception of the common good’.131 In this respect, Allan seeks to argue that there should be a ‘constitutional dialogue’ between the legislature and judiciary wherein Parliament intends its enactments to be construed in accordance with the common law constitutional principle of the rule of law and its associated notion of the ‘common good’.132

Interestingly, Allan conceives the democratic process as extending beyond the simple majoritarian procedures of Parliament to one that authorises an important (affirmative) judicial role in facilitating more progressive (democratic) outcomes.133 As Allan argues, when referring to the traditional positivist distinction between parliamentary supremacy on the one hand and judicial activism on the other:

[t]he opposition between parliamentary sovereignty and the rule of law has been conceived too starkly. On close examination, these principles are more interdependent, enabling legislative will and common law reason to be combined in accordance with the demands of justice and the common good. When that independence is principally understood, we can begin to meet the objectives to judicial supremacy that any suggestion of limits to parliamentary supremacy inevitably produces.134

It is the ‘dialogic’ conception of the democratic process which has been used by the South African Constitutional Court to justify its increasing interference in the democratic process to resist moves to privatisation in the name of individual rights.135 This emphasis on the rule of law and common law constitutionalism reflects a shift in focus to a more vigorous and affirmative role for the judiciary and judicial review in upholding individual rights and freedoms – one that incorporates increased checks on parliamentary power to safeguard the rights and freedoms of individuals. As Thomas Poole argues:

The new constitutional review signals a fundamental shift in the nature of our democracy. For various reasons, not least the experience in the twentieth century of the kind of tyranny that can be wrought even by governments democratically elected, we

132  Ibid.
134  Allan, above n 131, 563.
have moved away from the model of majoritarian democracy towards a model of limited government.136

One way of conceptualising this ‘counter-majoritarian’ difficulty that is associated with judicial review is through the concept of ‘popular sovereignty’ – as distinct from ‘parliamentary sovereignty’ as articulated by A V Dicey.137 According to A V Dicey, parliamentary sovereignty requires that ‘Parliament has the right to make or unmake any law whatsoever’,138 and it has been argued that the concept leaves little (if any) room for the judicial or constitutional review of legislation.

An alternative (and preferable) theory of ‘popular sovereignty’ is emerging, which supports a role for the judicial process (and the institution of judicial review) in the checking of political power. This counters the view of A V Dicey that the court must at all times acknowledge the supremacy of Parliament.139 Such an approach has the potential to ensure the incorporation of a positive or affirmative judicial role in the constitutional and democratic process, as well as providing a democratic justification for checking public power and promoting judicial protection of individual rights and freedoms. As George Williams argues:

In the latter guise, the doctrine of popular sovereignty might support a role for the High Court as a buffer between governmental power and the people. The doctrine suggests that the Court has a role in ensuring that the people remain sovereign and in resisting any exercise of governmental power that would, for example, undermine the electoral process by which people exercise this sovereignty.140

XIII THE DIFFICULTIES WITH JUDICIAL RESTRAINT

Tusnet and other famous American social democratic writers, such as Lawrence Sager,141 urge judicial restraint. Yet it is suggested that judicial restraint can produce several undesirable and regressive consequences that require a more active judicial role in the process of constitutional review. In particular, judicial deference to the legislature may produce unjust outcomes on those matters where Parliament has failed to act and where it is constitutionally required to act.142 The principle of judicial restraint is premised on the assumption that the state can only infringe individual rights through direct action, rather than inaction. Yet government inaction may prove more pernicious than legislative action.143

138 Ibid, 10.
139 Phillip Pettit, Republicanism: A Theory of Freedom and Government (Clarendon Press, 1997) 571. According to Pettit, a model that is based on maximising public power should be rejected. Instead, a ‘system should be assigned such that there “is little room as possible for the exercise of arbitrary power”. According to Pettit, it should be ‘Maximally non-manipulable’: at 173.
143 Ibid, 2283.
According to Bandes, approaches to judicial review have traditionally been premised on a simplistic distinction in which courts are required to enforce essentially ‘negative’ constitutional obligations against the state, but are relieved from any duty to ensure that the more ‘positive’ constitutional responsibilities are undertaken and effectively implemented by the state. Clearly, then, a more flexible role for judicial review is needed – one that recognises affirmative imperatives on the judiciary to act when confronted by positive or substantive socio-economic rights.

Furthermore, as already pre-empted in the previous passages, judicial restraint is a clearly inappropriate approach to constitutional provisions that mandate or compel the judiciary to act in certain circumstances. A more prescriptive approach to judicial review is needed, for example, in cases of positive social democratic human rights provisions which oblige the state to act to ensure human welfare and well-being.

Moreover, judicial restraint has the potential to produce serious injustice where it assumes that outcomes produced by the political process are the result of fair procedures (or what John Hart Ely calls ‘procedural due process’) that are not unduly influenced by social or economic inequalities. In this respect, judicial restraint clearly needs to be contingent on what Stephen Loffredo calls the ‘democratic legitimacy’ of the political process. Courts should not (according to this concept) defer to political outcomes whereby the democratic legitimacy of the political process has been prejudiced or called into question through excessive wealth-based or socio-economic inequalities.

The clear implication of this commitment to ‘democratic legitimacy’ is that the Court (through the mechanism of judicial review) should affirmatively act to correct outcomes in the political process that result from significant economic inequality, social injustice or structural and institutional discrimination. This new role, in effect, shifts judicial review’s concern with securing (the liberal concept of) ‘due process’ to one that is more appropriately termed ‘substantive due process’.

XIV  CONCLUSION

This paper has sought to demonstrate the potential for judicial review, and in particular, the enforcement of justiciable socio-economic rights, to resist the dominant neo-liberal move to liberalising and deregulating the economies of the advanced nations. It has shown, through the examples of the United States, South Africa and Scandinavia, that the constitutional process can be used to resist political agendas. Moreover, it has been shown that the association between liberal constitutionalism, deregulation and economic outcomes is more complicated than first thought, and that there is significant evidence to suggest that social democratic interventionist policies

144  Ibid.
148  Ibid, 1306.
149  See Ely’s distinction between the two concepts in John Hart Ely, above n 146.
have a positive influence on unemployment rates, at the very least. The difficulty for social democrats will no doubt lie in the future in the form of the ‘justiciability’ of socio-economic rights and developing appropriate judicial remedies that can accommodate the enforcement of social democratic rights.