Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights

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American constitutional scholars have wrestled with the legitimacy of judicial review for many years. Judicial review's breadth of power raises the question whether in practice an organ authorized by democratic republican mechanisms can exercise such a degree of authority that the organ imposes legal rules upon the community in what Hannah Arendt describes as "a command-obedience relationship"¹ rather than in response to the community (a democratic republican relationship).² One

² Arendt contrasts "the Hebrew-Christian tradition and its 'imperative conception of law'... the result of a much earlier, almost automatic generalization of God's 'Commandments,' according to which 'the simple relation of command and obedience' indeed sufficed to identify the essence of law," id. at 39 (citation omitted), with the Greek and Roman concept of power and law whose essence did not rely on the command-obedience relationship... It was to these examples that the men of the eighteenth century revolutions turned when they... constituted a
strain of American commentary concedes that the foundation of judicial review, at least in part, lies beyond democratic republican theory. Those observers contend that the United States Supreme Court's aura, adherence to higher law, and other qualities induce the people to have a quasi-religious faith in the authority of its opinions. At its foundation, "the model, in whose image" such a system of constitutional law operates, is the command-obedience relationship used by God at Mt. Sinai. From the perspective of democratic republicanism, the handing down of the Law at Mt. Sinai constituted a violent imposition, because there was an absence of prior communal consent.

form of government, a republic, where the rule of law, resting on the power of the people, would put an end to the rule of man over man, which they thought was a "government fit for slaves." They too, unhappily, still talked about obedience . . . but what they meant was support of the laws to which the citizenry had given its consent.

Id. at 40-41 (citations omitted).


Those who do not justify the authority of judicial review by its responsiveness to the community do not necessarily base judicial review's authority on the Supreme Court's mystique. Many observers construct rationales such as the Court's reasonableness, morality, and political philosophy. Faith in judicial review based on the Court's responsiveness to precedent could fall into any of those latter three categories. See also HANNAH ARENDT, ON REVOLUTION 157 & n.32 (1965) (embracing natural law justifications for constitutional law and judicial review, while dismissing arguments for "supremacy [of] the Constitution . . . 'on the ground solely of its rootage in popular will'") (quoting Edward S. Corwin, The Higher Law Background of American Constitutional Law, 42 HARV. L. REV. 149, 152 (1928)).

4. See ARENDT, supra note 3, at 189 (Even though the substance of the American Constitution has Roman origins, the model of authority is "Hebrew in origin and represented by the divine Commandments of the Decalogue."). The substance of the Law handed down at Mt. Sinai is of a completely different character than that of the new laws and constitutional amendments adopted in Hungary. The Ten Commandments are rules of personal conduct, rather than rules setting forth the structure of government. I use the analogy to highlight only the issue of the source of the lawmaker's authority.

5. The Israelites' first voluntary manifestation of consent to follow God's Law occurred many years after the Exodus. This lack of a foundation for law in a manifestation of communal consent is in accordance with the statement in the Bible that the Jewish people must first follow the Law and only later make a decision whether to consent to the Law's authority. See EMMANUEL LEVINAS, NINE TALMUDIC READINGS 30, 31, 37 (1990). Levinas justifies the Biblical command-obedience relationship. He explains that prior consent requires indulgence in
A competing school of thought (the "communal consensus" school) avoids casting judicial review in a countermajoritarian role. This school contends that the Court's opinions respond directly to manifestations of the communal consensus, such as the text of the Constitution and significant historical trends. Both schools contend that constitutional restrictions upon a democratic republican State are essential to the success of such a State, but only the communal consensus school argues that judicial review's enforcement of those restrictions is founded upon the democratic republican notion of prior consent. Alexander Hamilton considered the substance of the Constitution to have derived from the "reflection and choice" of the people, rather than "accident and force." Similarly, the preconception, a form of knowledge which inevitably turns out to be false and corrupt. Id. at 37, 48.

For Arendt, American constitutionalism and higher law in general are able to avoid the role of "absolute despotism," even though the checks of popular consent are absent. The key is that the commands have origins in "divine principle" rather than human principles. Divine principle restrains the leadership, rather than permitting the leadership to exploit the command-obedience model for evil ends. ARENDT, supra note 3, at 162, 182-85. It is questionable though, how American constitutionalism can have origins in divine principle, if there is an amendment process without any apparent restrictions on the content of amendments. Both the American Constitution and the Supreme Court are arguably manipulable by political forces. See BRUCE A. ACKERMAN, WE THE PEOPLE 14-15 (1991).


Nor is the Constitution thoroughly democratic; indeed it was specifically designed to avoid the pitfalls of unbridled democracy, especially the dangers to individual rights. But this was accomplished without introduction of aristocratic or monarchical elements; all authority stems, even if indirectly, from the choice of the people. The constitutional scheme was designed and defended as "a republican remedy for the diseases most incident to republican government."

In Madison's words, "the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived. One of the
communal consensus school views judicial review as a mechanism enabling basic principles, which the majority of the community shares, to flourish and avoid subordination to the vagaries of the legislative process. Indeed, this Article's discussion of the recent history of constitutionalism in Eastern Europe shows that an elected legislature may neglect a community's fundamental, shared principles due to insufficient insight into an enactment's ramifications and as a result of special interest politics.

Whether constitutional law and judicial review operate through a command-obedience model or a communal consensus model is a particularly sensitive issue in the nations emerging from communism. The rhetoric of the historic days of change in Eastern Europe over the past two years has echoed with cries for the abandonment of the Mt. Sinai-type pretenses which characterized the forceful imposition of legal rules under communism. Now the question arises: Is a constitutional court simply a new politbur? This Article will discuss the nature of judicial review in Eastern Europe and whether it functions in response to the community or imposes upon the community.

8. The same question could be posed with regard to the exercise of authority by a directly elected legislature. An election process is no guarantee of actual representation of the electorate's will. See Robert Bernasconi, Rousseau and The Supplement to the Social Contract, 11 CARDOZO L. REV. 1539 (1990). And representation has not necessarily failed if the representatives exercise a deliberative function—i.e., they legislate based upon their own personal beliefs. See Cass R. Sunstein, Constitutions and Democracies: An Epilogue, in CONSTITUTIONALISM AND DEMOCRACY (Jon Elster & Rune Slagstaad eds., 1988). It is conceivable that the electorate prefers to have its representatives legislate in accordance with their own deliberations.

But the potential failure of representation is more pressing with regard to constitutional interpretation by a judicial body for three reasons: (1) the probability of responsiveness to the community is lower where the members of a court are not directly elected; (2) the interpretation of abstract constitutional terminology is prone to a variety of legal realist influences, many of which may lead to the espousal of viewpoints that conflict with the communal consensus; (3) a court's interpretation of a constitution's meaning limits the legislative activity of directly elected representatives and tends to have wide-ranging consequences.

9. The decision of a democratic republican institution does not "impose" on those who adhere to a minority point of view, because the minority has given its consent to the procedures by which that decision was reached and even bind
This inquiry requires examination of (1) the formal extent of the power of judicial review and (2) the substantive theories underlying opinions. This Article will identify and analyze both those factors which determine the extent of judicial review's formal power and those substantive constitutional issues critical to a new regime. The particular focus of the Article is the exercise of judicial review in Hungary by the recently formed Constitutional Court; but the analyses require insights into other systems of judicial review and the transitional experiences of other post-communist countries, post-World War II Europe, the United States, and other former colonies.

Part I provides a brief overview of the democratic foundations of the new Hungarian governmental structure. Part II shifts the focus to the Constitutional Court's prominent role in the new Hungary. After a summary of the Court's organizational structure, Part II analyzes the formal elements that determine the extent of the Court's power. The Court possesses jurisdiction to issue advisory opinions and to engage in review of legal rules before and after enactment. Recent decisions set forth ripeness requirements; however, the burdens on the Court remain heavy. The Court's vision of itself as a supreme interpreter rather than as a dispute resolver results in broad opinions and in the virtual absence of mootness standards. In addition, recent cases show how the prevalence of unconstitutional institutions left over from the prior regime, the lack of federalism, and the pervasiveness of State action enhance the responsibilities of the Court. Furthermore, due to a June 1990 constitutional amendment, the Court has greater authority than Parliament to determine the scope of constitutional rights. Finally, the Court has escalated its own authority by its reliance in recent opinions on an "invisible Constitution" and Western legal standards.

Part III sheds light on the substance of the Court's work through examination of the legal theories and policies underlying the Land Act Case I—a controversial and complex decision. This recent case challenged the constitutionality of proposals to provide compensation for property confiscated under the communist nationalization laws. The case presented
delicate issues of retroactive justice, property rights, and equal protection. After an examination of the case’s political and philosophical background, Part III analyzes the holdings and identifies the policies and constitutional theories endorsed by the Court.

Part IV uses the insights of Parts II and III to address the issue of whether the Constitutional Court functions in accordance with the democratic republican notion of government by consent. At the present time, whether the Constitutional Court’s authority responds to communal ideals is not clear.¹⁰ This Article takes some initial steps toward resolving the issue. Part IV proposes two normative categories for analysis of the relationship between the form and substance of judicial review and the Hungarian populace. If the Court’s authority is the product of communal consent, then it should respond to: (1) communal expectations of the nature of judicial precedents and the adjudicatory process, and (2) the popular ideals of the rendszerváltózas,¹¹ the social movement that underlies the creation of the Constitution. Part IV’s examination of these two categories supports the contention that communal roots underlie the form and substance of the Court’s work. Despite this apparent foundation, uncertainty exists as to whether the Court will remain a politically effective organ. Part V explains how recent developments in the relationship between the Court, Parliament, and the populace have given rise to this uncertainty.

I. THE ARRIVAL OF A DEMOCRATIC POLITICAL STRUCTURE IN HUNGARY

The election of a Hungarian Parliament in March 1990 was an important step toward fulfilling the democratic

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¹⁰ Hungarian Sociologist András Bozóki wrote in September 1990, “One can only answer the question whether the new Constitution and system of public law correspond to the political and legal culture of the country after several years of tested experience.” András Bozóki, Political Transition and Constitutional Change in Hungary, 39 SUDOST EUROPA 538, 549 (1990).

¹¹ Rendszerúvaltozás means literally “change of regime.” Hungarians use the term to describe the great “change” from Communist Party control. The word rendszerváltás is often preferred. The difference is that rendszerváltás implies that the change occurred passively, while rendszerváltás implies an active subject behind the change. By choosing the passive form, I do not intend to make an implication about the nature of the change.
republican goal of the rendszerváltás (change of regime). This representative body assumed broad legislative power over State activities as well as control over the selection and affairs of both the Council of Ministers and the President.\textsuperscript{12}

The authority of the elected Parliament also superseded that of the Civil Code and the judicial bodies which resolve non-constitutional issues. The rendszerváltás did not revoke the Civil Code as the source of private law, but the newly elected Parliament possessed the authority to revise the Code. The judiciary also remained intact following the rendszerváltás.\textsuperscript{13} However, the rule-making authority of the courts is limited in comparison with that of the elected Parliament. Hungarian courts primarily apply the Civil Code and the enactments of Parliament rather than develop a common law. Judicially created legal rules have precedential authority only when issued by the Supreme Court—the court of final appeal in Code and statutory matters—in response to an issue without a pertinent code or statutory provision.\textsuperscript{14}

\textsuperscript{12} The structure of the Hungarian government is essentially parliamentary and derived from the West German model. The single house of Parliament elects the Council of Ministers and the President. The President is a figurehead with limited powers to act independently of either the Parliament or the Council of Ministers. The President independently can petition the Constitutional Court for review of a bill before its passage or for an interpretation of the Constitution, appoint the President of the National Bank when the prime minister co-signs, set the dates for elections, and initiate referenda. He is also the commander-in-chief of the armed forces. See A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. III, art. 29(2) (Hung.).

Recently President Arpad Goncz has used the formal requirements that he sign all legislation and approve certain appointments to expand the President's scope of influence and limit the Democratic Forum's (MDF) domination. For example, President Goncz, who is a member of the opposition's Alliance of Free Democrats (SZDSZ), withheld his signature and thereby attempted to veto the MDF Prime Minister's appointments to the leadership of the Hungarian equivalent of the Federal Communications Commission. Goncz's refusal to sign parliamentary enactments prevented the enforcement of the Zetényi Act (permitting prosecutions for murder and treason committed over the last 45 years under the auspices of communism) and a statute providing for compensation for property lost to nationalization. A Constitutional Court decision in September 1991 held that the President's power over the armed forces and the political appointment process is subordinate to the authority of the Prime Minister.

\textsuperscript{13} Hungary has a single judicial system consisting of specialized courts, lower courts of general jurisdiction, appellate courts, and the court of final appeal in non-constitutional matters, the Supreme Court. The Constitutional Court commenced operation in 1990 and is discussed at length herein.

\textsuperscript{14} For a more detailed explanation of the significant differences between the legal cultures created by the Anglo-American common law tradition and the
A factor potentially more important than the elected Parliament in Hungary's transition is the Constitution. The present Hungarian Constitution is the product of meetings, from June 13, 1989 through September 18, 1989, between the Hungarian Socialist Workers Party (the communists) and the Opposition Roundtable, the collective leadership of the opposition parties. Those meetings developed amendments to the 1949 Stalinist Constitution.

The amended Constitution sets forth limits on State power. In particular, the document outlines restrictions on emergency power and provides for the guarantee of rights to property, education, a healthy environment, due process safeguards, equal protection, asylum, privacy, participation in elections, religious freedom, free expression, and other basic liberties. The Constitution also authorizes the creation of a new independent judicial body, known as the Constitutional Court, to enforce constitutional restrictions.

Whether the framers of the amended Constitution acted with the consent of the community, in accordance with republican theory, is questionable. The communist Parliament was the product of elections held prior to the legalization of the opposition parties. Those who formally approved the amended Constitution had appeared to be complying with Moscow's dictates a short time earlier. Furthermore, the opposition groups who were present at the negotiations were primarily

Hungarian Civil Code tradition, see infra part IV.A.

The judges on the aforementioned courts are appointed by the President of the Republic, with the exception of the President of the Supreme Court, whom the President nominates and the Parliament elects. The length of time in office is subject to the specific judiciary act covering the particular judgeship. There are no constitutionally guaranteed appointments for life.

A third group, made up of leaders of non-governmental organizations authorized by the communist party, also participated in these meetings. The meetings concerned not only the amendment of the Constitution, but also the law on political parties, the electoral law, the penal law, information policy, and safeguards for a non-violent transition.

The negotiations operated on the premise that all agreements must be the product of the consensus of all participating parties. The Alliance of Free Democrats (SZDSZ) and the Alliance of Young Democrats (FIDESZ) of the Opposition Roundtable did not endorse the results of the meetings, but those members also withdrew their power to veto unilaterally the final agreement. The issue which inspired these withdrawals was the timing of the election of the President. The dissenters wanted parliamentary elections to precede the election of the President. The dissenters eventually got their way as the result of a referendum in November 1989.
anti-communist associations. Many of their leaders had risen to prominence through courageous endorsements of slogans like free expression and human rights; but the leaders had never presented particularized outlines for a new government to the populace for approval.\(^\text{16}\)

16. Furthermore, "the public was almost completely locked out of these talks behind the scenes." András Bozóki, Hungary’s Road to Systemic Change: The Opposition Roundtable 18 (József Borócz trans., June 1991) (unpublished manuscript on file with the Brigham Young University Law Review).

Another reason for hesitancy to accept the legitimacy of the amended Constitution is that the opposition parties originally opposed putting constitutional reform on the agenda for the transition negotiations. The Opposition Roundtable only wanted to work out the basic issues necessary for a transition to democracy—free expression and multi-party elections—and then leave the development of the future to the democratically elected representatives. The communists insisted on putting constitutional reform on the agenda, because they thought that they could entrench socialism in the Constitution and ensure the perpetuation of socialism through the Constitutional Court. See Bozóki, supra note 10, at 541, 543. The communist strategy failed, as the Opposition Roundtable insisted on a nearly complete replacement of the text of the Stalinist Constitution. The only concession to the Socialists was a meaningless reference in the Preamble to the “equal standing” of “democratic socialism” and “bourgeois democracy.” The freely elected Parliament has subsequently repealed that portion of the Preamble.

Nevertheless, cynicism still exists toward the legitimacy of the present Constitution. Professor András Sájo’s account of the adoption of the October 1989 amendments gives little weight to the negotiations between the Opposition Roundtable and the communists as legitimating the amendments:

After only three hours of [parliamentary] “debate” the Hungarian Constitution was reshaped in October 1989. After the sudden collapse of the Hungarian Socialist Workers (Communist) Party, it was believed by Government and opposition elite alike that only quick codification could safeguard the compromise achieved at the round table talks between communists and the opposition.

.......

...[T]his was an ill-fated point of departure for a system which was aimed to serve as a transition to the Rechtsstaat .......

As a matter of fact, the new Constitution was born from a lie as it was declared to be an amendment only. The Parliament wanted to avoid the public referendum which was required for a new constitution.


A week before the Opposition Roundtable negotiations on constitutional reform commenced, János Kis, the leader of the Alliance of Free Democrats (SZDSZ) and a well-known dissident philosopher, published an article stating that the transition is “not [the product of a] mass movement” and that all of the “parties have not yet proved that they represent the masses.” János Kis, Not With Them, Not Without Us, UNCAPTIVE MINDS, Aug.-Oct. 1989, at 93-94 (translation of article originally
However, the fact that the October 1989 Constitution is not the product of a formal republican mechanism is no reason to dismiss Hungarian constitutional law as failing to embody a communal consensus. Although not elected, the framers were still subject to the influence of popular sentiments. Moreover, they were aware that they would soon be subject to popular scrutiny in elections following the adoption of the democratic Constitution.

Furthermore, the amended Constitution granted the elected Parliament the power to adopt both amendments and an entirely new Constitution by the simple process of a two-thirds majority vote. Thus far, the elected Parliament has amended the Constitution on six occasions, but does not appear to be planning to adopt a new Constitution in the immediate future. Most of the amendments are procedural in nature and simply add detail to or delete detail from the basic ideas of the framers.17 The elected Parliament’s failure to modify the basic

published in the official weekly HETI VILÁG GAZDASÁG on June 10, 1989).

However, Kis’s skepticism about the legitimacy of the Roundtable negotiation’s workproduct diminished after his SZDSZ attained a victory in a November 1989 referendum initiative to modify the presidential election provisions. Shortly after the referendum results were made public, Kis wrote:

The referendum not only corrected the shortcomings of the ‘triangular table’ negotiations, but more importantly, put the seal of popular approval on these negotiations. After September 18, [1989 —when the negotiations concluded—] it was still debatable whether the agreement was based on a national consensus. But, as modified and endorsed by the referendum, it can no longer be questioned.

Janos Kis, The Message of the ‘Four Yesses,’ UNCAPTIVE MINDS, Jan-Feb. 1990, at 40 (translation of article originally published in MAGYAR NEMZET on Dec. 12, 1989). I question the sincerity of Kis’s sudden shift from skepticism to complete faith in the Constitution’s democratic legitimacy. Kis wrote the “Four Yesses” article in the midst of an election campaign. The viewpoint endorsed by Kis’s SZDSZ had just emerged victorious in the referendum vote. Kis’s attribution of monumental significance to the referendum results was in his party’s political interest because it signalled momentum for SZDSZ. Actually, the referendum won by only a narrow margin with a voter turnout of not much more than 50 percent. In addition, the referendum was on only one major issue.

17. The only major amendment, for purposes of this Article, modified the relationship between the Constitutional Court and Parliament. See infra part II.F (discussing Article 8). Other amendments have (1) added the requirement that the parliamentary committee in charge of nominating Constitutional Court Judges shall contain one member of each party represented in Parliament; (2) added a description of the national coat of arms symbol; (3) elaborated on the provisions for municipal governments without conflicting with the original provisions on local authority; (4) repealed the requirement of a two-thirds vote to enact a law affecting the scope of State economic activity and the right to engage in free
ideas approved in October 1989, despite the easily accessible amendment and replacement processes, is in part due to the plethora of pressing non-constitutional issues, especially in the realm of financial and economic matters.  

Nevertheless, the elected Parliament's general lack of interference with the work of the framers is an indication that despite their nondemocratic origins, the October 1989 amendments are consistent with the communal consensus. Whether the Constitutional Court's interpretation of the Constitution is founded upon a democratic republican relationship with the populace is a more complex issue. To resolve that issue, analyses of the formal extent of the Court's power and the substantive theories underlying opinions are necessary. After a short overview of the Court's organizational structure, Part II takes on the first of those tasks.

II. FORMAL ELEMENTS OF THE STRUCTURE OF THE CONSTITUTIONAL COURT'S INTERPRETIVE AUTHORITY

A. Organization of the Court

The Constitutional Court currently consists of ten Judges. Commencing in 1995, there will be fifteen Judges. The communist Parliament elected the first five Judges following the October 23, 1989 revision of the Constitution. Those Judges took office on January 1, 1990. The freely elected Parliament appointed five more Judges. The Parliament of 1995 will elect an additional five Judges. The terms are nine years and a
Judge may be re-elected once. Only the Constitutional Court can impeach its members.\(^{20}\)

Parliament elects and re-elects Constitutional Court Judges after they have been nominated by a committee composed of one member of each party with a seat in Parliament.\(^{21}\) The re-election provisions have the potential to influence a Judge; however, the re-nomination process decreases the likelihood that Judges interested in re-election will be responsive solely to the particular views of the ruling parliamentary coalition.

While in office, Constitutional Court Judges cannot engage in political activity, join a political party, hold an office in a corporate enterprise, or earn money from an activity unrelated to the arts, science, or education.\(^{22}\) The President of the Court receives the same salary as the Prime Minister of the Republic and the other Constitutional Court Judges receive the same salary as the other Ministers.\(^{23}\) In addition, the Judges receive the same immunities as members of Parliament.\(^{24}\)

Currently, the Court's decisionmaking process rarely takes place with the benefit of oral presentations. In a report on the Court's activities, the President of the Court remarked that the few public sessions which the Court has held impeded efficiency and were unnecessary in light of the statutory prohibition against the collection of factual evidence by the Court.\(^{25}\) The Court has not made a public appearance since October 24, 1990, when the Court heard oral argument on one case and then immediately issued an opinion which had been prepared.

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20. Id. at ch. II, § 15.
21. A MAGYAR KÖZTÁRSASÁG ÁLKTÓTMÁNYA [Constitution] ch. IV, art. 32/A(4) (Hung.).

Candidates for Constitutional Court judgeships must be "outstanding theoretical legal experts, university professors, Doctors of Political Science and Law, or jurists having at least twenty years of experience practicing law." ACC, supra note 19, ch. II, § 5(2).

A Judge also must be between 45 years and 70 years of age at the time of appointment. Candidates cannot have been a political party employee or have held public office in the four years prior to their nomination. Id. ch. II, § 5(1), (2).

22. ACC, supra note 19, ch. II, § 9.
23. Id. ch. II, § 13. The role of the President of the Court is akin to that of the Chief Justice of the United States Supreme Court.
24. Id. ch. II, § 14(1).
25. See László Sólyom, President's Report on the First Year of the Constitutional Court 10-11 (Feb. 10, 1991) (unofficial translation on file with the Brigham Young University Law Review). The President of the Court issued the Report at his own discretion and for the benefit of the other members of the Court. He is not under a duty to report to the other branches.
The opinions themselves emphasize the Court's unity. The voting is not anonymous; dissents and concurrences are permitted. However, an "Opinion of the Court" signed by all of the participating Judges, including the dissenters, always prefaces a decision. The Court's rules do not allow "concurrences in the judgment only," although it is possible to detect that point of view by comparing the substance of a concurrence with the opinion of the Court. The Court has yet to deliver a plurality opinion. In a report to the other members of the Court, the President of the Court referred to the possibility of a plurality opinion as "unthinkable." 27

B. Jurisdiction

The foundation of the Constitutional Court's authority to interpret the Constitution is the set of rules embodied in the Constitution and in the Act on the Constitutional Court (ACC), 28 enacted by the communist Parliament shortly after the October 23, 1989 overhaul of the Constitution. Article 321A of the Constitution provides that the Constitutional Court "shall review the constitutionality of legal rules and shall perform the tasks assigned to it by law." The ACC sets forth three major areas of activity for the Court: (1) review of proposed legislation and regulations for constitutional infirmities, (2) interpretation of the meaning of constitutional provisions (advisory opinions), 29 and (3) review of enacted legislation and reg-

26. Id. at 6.
27. Id. at 19.
28. ACC, supra note 19.
29. In American legal jargon, the following characteristics of judicial opinions are among those which prompt the appellation of a judicial decision as an "advisory opinion": (1) when the allegations do not satisfy either jurisdictional requirements, such as the condition of "a case or a controversy," or justiciability standards, such as the "direct injury to a legal right" rule of standing; (2) when the Constitution has committed resolution of the issue to another court or to a non-judicial branch. See generally Hayburn's Case, 2 U.S. (2 Dall.) 409, 410-14 n. (1792); PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 67-72 (3d ed. 1988). Under the standards of the first characterization, all cases before the Constitutional Court, except those brought on by allegations of an injury resulting from a constitutional violation, constitute advisory opinions. Under the second characterization, there is no category of advisory opinions among the three listed areas of judicial review, because the Constitutional Court's decisions are constitutionally authorized as final and binding. Herein, the decisions in response to petitions for interpretation of the meaning
ulations, as well as actions and omissions, for constitutional infirmities. The ACC also authorizes the Court to decide issues of conformity with international treaties and to resolve conflicts over the scope of authority between national organs, between local organs, and between national and local organs.

Only members of government, specified by the ACC, can file petitions for advisory opinions and for the review of laws before their passage. Anyone, however, including individuals who wish to remain anonymous, can file petitions for review of enacted laws, actions, or omissions. Among those who are specifically authorized by the ACC to file petitions for the review of enacted laws and regulations are lower court judges and litigants before lower courts, who "consider unconstitutional a legal rule . . . which he/she [the lower court judge] should apply." Article 38 of the ACC provides that litigants and lower court judges may initiate an interlocutory appeal to have their constitutional concerns resolved by the Constitutional Court. An Article 38 appeal stays the lower court proceedings while the Constitutional Court decides the constitutional issue. Under Article 38, the Constitutional Court is the sole body entitled to engage in judicial review.

In addition, the duty of the Constitutional Court is to issue determinations on constitutional grounds. Unlike the United States Supreme Court, the Court has never avoided a delicate constitutional decision by resolution of the case on statutory or evidentiary grounds. However, lower courts in Hungary may attempt to resolve cases involving constitutional questions on

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30. Petitions for pre-enactment review can be filed by Parliament, a parliamentary committee, fifty members of Parliament, the President, or the Council of Ministers. ACC, supra note 19, ch. IV, §§ 33, 35-36. Petitions for interpretation of a constitutional provision can be filed by Parliament, a parliamentary committee, the President, any Minister, the President of the State Audit Office, the President of the Supreme Court, or the Chief Prosecutor. Id. ch. IV, § 51. These limits on petitioners, emanating from the ACC, conflict with the constitutional requirement that proceedings within the jurisdiction of the Court "may be initiated by anyone." A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. IV, art. 32/A(3) (Hung.).

31. ACC, supra note 19, ch. IV, § 38(1).

32. See generally Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (Constitutional issue should only be reached if case cannot be resolved on other grounds); Garner v. Louisiana, 368 U.S. 157, 173-74 (1961) (Supreme Court avoided ruling on constitutionality of lunch counter segregation law by holding that there is insufficient evidence for the convictions.).
nonconstitutional grounds. Article 48 of the ACC seems to presuppose that lower courts will act in this manner and thereby lessen the Constitutional Court's burdens. Article 48 requires litigants, who allege that their constitutional rights were violated, to exhaust remedies in lower courts before bringing a complaint in the Constitutional Court. However, Article 38's authorization of litigants and judges to file interlocutory appeals undercuts the likelihood that the Article 48 exhaustion requirement will effectively restrict the Constitutional Court's caseload. Indeed, the shift of decisionmaking burdens under Article 38 functions as an incentive for lower courts to encourage cases to be resolved on constitutional grounds by the Constitutional Court.

C. Justiciability

The ACC's broad grants of jurisdiction are fashioned as mandates upon the Court. The ACC only permits the Court to deny "an obviously unfounded" petition. In the future, however, the Court may attain an element of discretion over its jurisdiction through a modification of the ACC by Parliament. In a move reminiscent of the United States Supreme Court's efforts to persuade Congress to include certiorari provisions in the Judiciary Act of 1925, the President of the Constitutional Court has informed the Prime Minister of the Court's large caseload and need for a degree of discretionary jurisdiction. As of May 31, 1991, 2,981 petitions had been submitted to the Court and 630 remained unaddressed. For the present, the Court has managed the large caseload by deriving certain limitations


34. Most decisions are short written opinions. A panel of only three Judges addresses cases challenging ministerial regulations; a panel of all ten Judges addresses all other cases. As of May 31, 1991, only 63 decisions had been published in the official gazette, Magyar Közlöny. All decisions declaring an act, regulation or proposal unconstitutional are published and usually include a several page opinion. The Court had received 3,097 petitions by July 1991 (1,572 petitions in the first seven months of 1991). The Court has invalidated laws and regulations 47 times. The Court ruled in 235 cases in 1990 and in over 300 cases in 1991. E. Oltay, "The Post-Communist Judiciary," Report on Eastern Europe (Oct. 1, 1991) (published by the Radio Free Europe/Radio Liberty Research Institute).
on justiciability from the ACC.

1. Advisory opinions: "Distinct application" requirement

The Court has attempted to develop from the ACC a ground for deciding whether to deny the justiciability of advisory opinion petitions. ACC Article 22(2) provides: "The petition shall include a distinct application." In *The Rabar Case*, the Court interpreted Article 22(2) to require the rejection of Finance Minister Rabar's petition for an explanation of the scope of welfare rights under the Constitution. The Finance Minister had submitted the petition for assistance in developing several ambiguous ideas for drafts of a bill. The Court's scrutiny revealed that the Minister's ideas were subject to future development in a variety of directions, each of which presented different constitutional questions. Accordingly, the Court held that the Minister's embryonic ideas did not constitute a "distinct application."

*The Rabar Case* standard diminishes certain problems that accompany advisory opinion jurisdiction. The Finance Minister had petitioned the Court to select one of several ideas and then to provide instructions on how to develop that idea into a bill that satisfies constitutional standards. If the Court had helped to refine crude ideas into legislative proposals, it would have infringed upon the duties of Parliament and the Ministers. The Court noted that its involvement at such an early stage of the legislative process would "inevitably result in the Constitutional Court taking over the responsibility of the legislative and even the executive power and thereby creating some sort of government by the Constitutional Court, which is grossly opposite to the State organizational principles specified in the Constitution." Moreover, the requested advisory opinion would have eviscerated the Minister's responsibility to consider independently the constitutionality of his legislative proposals.

35. Judgment of Dec. 18, 1990 (The Rabar Case), Alkotmánybíróság Határozatai [Constitutional Law Court], 1990/128 MK. 136 (Hung.) (unofficial translation on file with the Brigham Young University Law Review; all pinpoint citations to this case which follow refer to the unofficial translation of the case on file with the Brigham Young University Law Review) [hereinafter *The Rabar Case*].
36. The Finance Minister's ideas concerned the National Savings Bank's increase in mortgage rates, which was the subject of several future decisions. See infra part II.E.2.b.
38. See id. at 3 ("the legislative and the executive organs also interpret the
The absence of a "distinct application" requirement would subject the Court's resources to inefficient use. Review of the many constitutional issues that emanate from an embryonic idea would require the Court to analyze issues that may never be considered seriously by the Ministry or Parliament. The requirement that all petitions relate to a specific and concrete problem also enables the Court to make its decisions more narrow and fact specific. Such decisions appear to infringe less upon the discretion of the political branches and are, therefore, less likely to lead to political condemnation of the Court.

A standard for identification of sufficiently developed ideas would facilitate the capacity of the "distinct application" requirement to bring about the aforementioned benefits. One possible standard would set forth a requirement that the Parliament or the pertinent Ministry engage in debate to resolve the constitutional issue prior to the submission of an advisory opinion petition. The requisite debate would crystallize the petition's "distinct application."

Currently the Court is considering a petition for an advisory opinion on the meaning of the clauses in the Constitution pertaining to environmental rights. The "distinct application" is simply the constitutionality of all future environmental protection statutes to be considered by Parliament. The Court's response to this petition may provide an occasion for further elaboration of the requirements for satisfying Article 22(2)'s justiciability standard.

Constitution in the course of providing for their duties); cf. BICKEL, supra note 3, at 22 (quoting JAMES BRADLEY THAYER, JOHN MARSHALL 106-07 (1901)) ("The tendency of a common and easy resort to this great function [judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.").

To encourage other branches to participate more actively in the process of constitutional interpretation, the Court has requested various members of the Council of Ministers and the Parliament, as well as the President of the Supreme Court and the Chief Prosecutor, to submit amicus briefs or expert testimony on advisory opinion petitions.

39. "The Republic of Hungary shall recognize and enforce the right of all to a healthy environment." A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. I, art. 18 (Hung.). "(1) Persons living within the territory of the Republic of Hungary shall have the right to physical and mental health care of the highest possible standard." Id. ch. XII, art. 70/D (1). "(2) The Republic of Hungary shall realize that right by organizing labour safety, health institutions and medical care, by ensuring opportunities for physical exercise, as well as by protecting the artificial and natural environment." Id. ch. XII, art. 70/D (2).
2. Pre-enactment review: Finality requirement

In April 1991, members of Parliament from the Alliance of Free Democrats (SZDSZ) sought an advisory opinion on the constitutionality of a legislative proposal to compensate former owners of private property for losses caused by the communist nationalization laws. The Constitutional Court denied jurisdiction. The opinion set forth a justiciability limitation on pre-enactment review. The Court held that unless a bill was exempt from further modification, it was not ripe for pre-enactment review.

The effect of this holding is ambiguous. Bills become law by a vote in Parliament and theoretically modification is possible until that vote occurs. Before the decision, the Deputy Speaker of the Parliament, who desired the Court to review the proposed bill, and the Minister of Justice, who opposed review, testified before a closed session of the Court. The Court requested the expert testimony to understand at what stage a bill can no longer be modified. The two experts disagreed. Whenever the Deputy Speaker would point to a final stage, the Minister would point out a way in which the bill could be subject to further modification prior to enactment. Consequently, at a press conference following the Court's decision, a spokesman for the Minister's Democratic Forum Party (MDF) asserted that the MDF interprets the principles set forth by the Court's decision as requiring absolute finality, which would virtually eliminate the Court's power to review a bill prior to enactment.

The MDF statement may be overly enthusiastic. At the time of the bill's submission to the Court for review, over 400 modifications to the bill had been proposed and were still awaiting debate. Accordingly, rather than requiring the abso-

40. Judgment of April 20, 1991 (The Land Act Case II), Alkotmánybíróság Határozatai [Constitutional Law Court], ___ MK. ___ (Hung.) (unofficial translation on file with the Brigham Young University Law Review; all pinpoint citations to this case which follow refer to the unofficial translation of the case on file with the Brigham Young University Law Review) [hereinafter The Land Act Case II]. The Court's restraint in this case not only was a likely response to the Court's heavy workload but also may have been a reaction to criticism of the Court's activism and an attempt to have the issue of compensation defeated in the political arena. For an analysis of the particular political circumstances surrounding the decision, see Ethan Klingsberg, Hungary: The Constitutional Politics of Compensation, in 2 SOVIET AND EAST EUROPEAN LAW 1 (June 1991) (published by the Parker School of Foreign and Comparative Law at Columbia Law School); see also infra part V.
lute unamendability of a bill, the Court's holding may still allow pre-enactment review so long as there are no outstanding modification proposals. If the holding does require absolute finality, then pre-enactment review may virtually disappear. Parliament would have to pass a bill and set a prospective date for enforcement to enable the Court to review an enactment before it comes into force. Currently the Spanish Parliament utilizes such a post-enactment/pre-enforcement mechanism to obtain review by its Constitutional Court. A major problem with such a procedure, however, is the time pressure it puts on the Constitutional Court to decide the constitutionality of an enactment before the enforcement date arrives. Motions for preliminary injunctions and for temporary restraining orders require United States district courts to face similar pressure in deciding complex constitutional issues in a short period of time. However, the decision of a district judge is subject to extended appellate processes, unlike the unappealable decision of the Constitutional Court.

Even if the Spanish option were a practical alternative, the ACC requires the Court to engage in pre-enactment review as well as post-enactment/pre-enforcement review. Separate provisions of the ACC mandate jurisdiction over proposed bills and over legislation that has been enacted but not yet come into force.\(^4\) The MDF's interpretation of the recent decision is unlikely to be correct, because it conflicts with the ACC provision that "the Constitutional Court shall examine for unconstitutionality any contestable provision of a bill."\(^{42}\) In contrast, an interpretation of the opinion's justiciability standard as requiring the lack of any outstanding modification proposals would be consistent with the ACC.

**D. Beyond Dispute Resolution**

Ironically, while the Court has indicated that it would like to trim its caseload,\(^43\) it has taken certain steps toward expanding its jurisdiction. These steps and their ramifications, which will be discussed in the two subsections that follow, can be more fully understood as part of the Constitutional Court's

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41. Compare ACC, supra note 19, ch. IV, § 33 (pre-enactment review) with ACC, supra note 19, ch. IV, § 35 (post-enactment/pre-enforcement review).
42. Id. ch. IV, § 33(1) (emphasis added).
43. See supra text accompanying notes 33-34.
general trend toward minimizing the adversary nature of its proceedings. The trend appears most blatantly in the marginal role to which the decisionmaking process often relegates the petitioner. The President of the Court, Judge László Sólyom, described a recent decision as exclusively the product of input from "experts and friends." Judge Sólyom continued, "It is our business as to what sort of help we intend to use to form our position." In some decisions the petitioner's name is not even listed.

The Constitutional Court's position that it is not bound by the adversary constraints of a case is in part due to the prescribed jurisdictional rules. Because anyone may bring a case before the Court, many petitioners lack any personal stake in the outcome. Advisory opinions and reviews of proposed legislation are also often non-adversary. In some cases, a request for an advisory opinion or review of a proposed bill takes on an adversary character. For instance, parliamentary debate of an issue prior to the submission of a petition can divide the political sphere into camps of conflicting constitutional interpretation. However, the more common advisory opinion or pre-enactment review is sparked by uncertainty as to "what the Constitution says about this issue," rather than by a marked disagreement about the Constitution's meaning.

1. Mootness

The Court's vision of itself as a supreme interpreter, rather than a dispute resolver, affects mootness requirements as well as the scope of its opinions. The Court's conception of mootness permits the issuance of an opinion even though the petitioner is no longer affected by resolution of the constitutional question. As long as the issue still has pertinence to society, the Court will issue an opinion. Moreover, the Court has ruled that it will issue a type of declaratory judgment even if there is no way to remedy the alleged unconstitutional act or omission. That view approximates the "case or controversy" conception

44. See Sólyom, supra note 25, at 10 (commenting on The Death Penalty Case, infra note 50, which held that capital punishment is a per se violation of the right to human dignity).
45. Id.
46. Id. at 15.
47. See supra part II.C.1 (discussing The Rabar Case, supra note 35).
endorsed by American law commentators who favor broad powers for federal courts.49

2. Scope of opinions

Another consequence of the absence of adversarial concerns limiting the Court's authority is that opinions occasionally extend far beyond the issue posed in the petition. One example is The Death Penalty Case,50 an opinion declaring capital punishment to be a per se violation of the right to human dignity. This decision includes a lengthy dissertation upholding the constitutionality of self-defense provisions. The opinion does not approach the constitutionality of self-defense as a peripheral issue, on which the Court's commentary would only constitute dictum.51 Instead, the separate section treats the self-defense laws as if the petition had directly challenged their validity. The petitioner, The League of Those Opposed to the Death Penalty, had never challenged the self-defense laws in

49. Compare Linda R.S. v. Richard D., 410 U.S. 614 (1973) (no justiciability if no remedy available to plaintiff other than a declaratory judgment) with William A. Fletcher, The Structure of Standing, 98 YALE L.J. 221, 280-81 (1988) (justiciable controversy exists even if the sole remedy available is the issuance of declaratory judgment).

The Constitutional Court set forth this latter principle when it held in The Land Act Case I, infra, that it would review the constitutionality of the communist Parliament's nationalization laws, even though there would be no way to remedy the nationalization laws' alleged unconstitutionality. The Court wrote:

The Constitutional Court notes that it is now examining the constitutionality of the different regulations on nationalization. The Constitutional Court refers to . . . the provision that the annulment of a regulation of law—as a principal rule—does not concern the legal relations and the rights and obligations resulting therefrom that had come into existence before the publication of the decision.

Judgment of Oct. 4, 1990 (The Land Act Case I), Alkotmánybíróság Határozatai [Constitutional Law Court], 1990/98 MK. 73 (Hung.) (unofficial translation on file with the Brigham Young University Law Review; all pinpoint citations to this case which follow refer to the unofficial translation of the case on file with the Brigham Young University Law Review) [hereinafter The Land Act Case I]. However, in its decision on nationalization, the Court did not issue such a retroactive declaratory judgment. See The Nationalization Case, infra note 53.

50. Judgment of Oct. 31, 1990 (The Death Penalty Case), Alkotmánybíróság Határozatai [Constitutional Law Court], 1990/107 MK. 88 (Hung.) (unofficial translation on file with the Brigham Young University Law Review; all pinpoint citations to this case which follow refer to the unofficial translation of the case on file with the Brigham Young University Law Review) [hereinafter The Death Penalty Case].

51. See id. at 33-35 (Sólyom, Pres., concurring).
their papers.

E. Circumstantial Factors Contributing to the Court's Authority

The role of the Constitutional Court in Hungary is also a product of circumstances such as the large number of unconstitutional institutions left over from the prior regime, the lack of federalism, and the pervasiveness of State action.

1. Widespread unconstitutionality and remedial mechanisms

A nation cannot effectively complete the change from central European communism to Western democratic republicanism in the same short period that it takes to adopt a new Constitution and to hold elections. Even a year and a half after the rendszerü változás (change of regime), many institutional remnants of the prior regime thrive. If the Constitutional Court scrutinized every one of these remnants, it could probably declare many aspects of State activity in Hungary unconstitutional.

For example, the Court has declared the vast socialist system of government agencies to violate the Constitution.52 Another decision held unconstitutional the Act on Social Insurance, which is responsible for supporting all elderly and needy Hungarians.53 The agencies were held to violate due process

52. Judgment of Dec. 22, 1990 (The Agency Case), Alkotmánybíróság Határozatai [Constitutional Law Court], 1990/130 MK. 145 (Hung.) (unofficial translation on file with the Brigham Young University Law Review; all pinpoint citations to this case which follow refer to the unofficial translation of the case on file with the Brigham Young University Law Review) [hereinafter The Agency Case].

53. Judgment of Apr. 27, 1990 (The Social Insurance Case), Alkotmánybíróság Határozatai [Constitutional Law Court], 1990/37 MK. 50 (Hung.) (unofficial translation on file with the Brigham Young University Law Review; all pinpoint citations to this case which follow refer to the unofficial translation of the case on file with the Brigham Young University Law Review) [hereinafter The Social Insurance Case].

Until the Constitutional Court decision in May 1991, the nationalization laws still permitted the Minister of Construction to enlarge the list of nationalized property. See Judgment of May 20, 1991 (The Nationalization Case), Alkotmánybíróság Határozatai [Constitutional Law Court], ___ MK. ___ (Hung.) (unofficial translation on file with the Brigham Young University Law Review; all pinpoint citations to this case which follow refer to the unofficial translation of the case on file with the Brigham Young University Law Review) [hereinafter The Nationalization Case].
because a system of administrative courts is not available to review their decisions. The Act on Social Insurance contains gender classifications that violate a constitutional provision which mandates equal treatment of men and women.54

Although the Court has declared major, longstanding institutions to be in conflict with recently adopted constitutional standards, it has acted delicately in setting forth remedies. Initially, the Court considered undertaking the responsibility of rewriting all of the Social Insurance provisions to eliminate gender distinctions.55 However, in both The Agency Case and The Social Insurance Case, the Court only held the legal rules prospectively unconstitutional. The Agency Case and The Social Insurance Case set deadlines for Parliament to act to remedy the unconstitutional conditions.56 Under these decisions, the structures of the agency decisionmaking process and the Social Insurance Act are constitutional until the deadlines pass.

ACC Article 43(4) authorizes this concept of prospective unconstitutionality. The ACC states that in the presence of "a particularly important interest of legal security,"57 the Court can set a date in the future when a legal rule and its application become unconstitutional. The Court relied on Article 43(4) to avoid the chaos that would have resulted from orders enjoining the current decisionmaking processes of government agencies and the current operation of many provisions of the Act on Social Insurance.

Reliance on Article 43(4) also increases the chances of compliance by designating an opportunity for Parliament to fill the gap that would be left by the invalidation of current laws. Nevertheless, Parliament has been slow to react to The Agency Case. With reference to the lack of parliamentary progress

54. A MAGYAR KÖZÁRSASÁG ALKOTMÁNYA [Constitution] ch. XII, art. 66 (1) (Hung.) ("The Republic of Hungary shall ensure the equality of men and women in respect of every civil, political, economic, social and cultural right.").
55. Sólyom, supra note 25, at 17.
57. ACC, supra note 19, ch. IV, § 43(4). The term "legal security" derives from the German concept of Rechtssicherheit. Article 43(4) enables the Court to refrain from upsetting established legal relations and expectations.
toward creating administrative courts, the President of the Court has written, "I wonder whether the legislators keep a record of these deadlines." The use of Article 43(4) facilitates the Court's efforts to force Parliament to reconstruct the country, but it remains to be seen whether Parliament is equal to the challenge.

2. Federalism and State action

One limit on the authority of the Constitutional Court is certain. The authority of the Constitutional Court can be no broader than the authority of the Constitution itself. This section discusses the effect in Hungary of two Western doctrinal limits on the scope of constitutional law: federalism and State action.

Federalism sets limits upon the authority of the national law, including the Constitution, in deference to local law. State action doctrines limit the applicability of certain constitutional provisions, in deference to the rules of private law. In Hungary, the laws governing transactions between private individuals are in the Civil Code and parliamentary statutes. Supreme Court decrees also fill in gaps in the Code and legislation.

Ultimately, the scope of the doctrines of federalism and State action and their effects upon the scope of constitutional law depend upon two factors: (1) the substance of constitutional provisions and (2) the nature of the society. The first factor is determined by whether the Constitution sets aside realms for local law and private law autonomy and by the breadth of the legal rules set forth in the Constitution. The second factor depends upon the levels of development of regional governing structures and of the private sector. The ensuing subsections examine the role of the doctrines of federalism and of State action in Hungary through reference to these two factors. A third subsection analyzes the effect these doctrines have on the

58. Sólyom, supra note 25, at 29. Parliament's failure to meet a deadline may be due to the presence of other pressing concerns during this transitional period, rather than a lack of respect for the Court. As discussed in the Part I, many complex financial and economic matters are before Parliament and the nature of operations in Parliament has been slow and distracted.

59. In Hungary there is only a national constitution. Accordingly, all references to constitutional law are to national law.

60. See infra part IV.A (comparing Civil Code and common law).
Constitutional Court's approach to a case concerning abortion regulations.

a. Federalism. Chapter IX of the Hungarian Constitution requires Parliament to divide the country into regions and to permit local governing bodies to "independently regulate and administer the municipal affairs" of those regions. Chapter IX also requires the approval of two-thirds of Parliament for passage of an act "restricting the fundamental rights of the municipalities." Parliament passed an act empowering local governments pursuant to Chapter IX during the summer of 1990. The vague terms of the Act provide for the structure of local governments and empower them to pursue measures directed toward ensuring the general welfare. Despite Chapter IX and the Act, the American idea of federalism—that certain areas of lawmaking are more appropriately subject to the control of regional governments—has not yet appeared as a factor in the Constitutional Court's decisions.

Federalism is not functioning to limit the areas of the Constitutional Court's jurisdiction because a realm of local authority does not yet exist in practice. Elections of local officials began in the fall of 1990. However, financial factors have hampered the authority of these officials. At the present time, most of the funding for local activities originates in the nation-
The significance of local law is further dwarfed by the absence of regional constitutions and local judicial systems to interpret local rules. Most importantly, the prior regime eliminated remnants of local control over law enforcement agencies, financial institutions, hospitals, welfare programs, schools, and judicial systems. An additional indication of the lack of importance of Hungary's new regional authorities was the turnout of only 25 to 40 percent of eligible voters at most local elections.

Hungary's centralized past may be responsible for the slow start of the development of local government, but post-communist antipathy toward centralized control may yet come to fruition. In contrast to Hungary's anti-centralization sentiments, the United States experienced anti-regionalism some two hundred years ago upon the demise of the Articles of Confederation. Just as the new Hungary must now confront a long history of centralized power, the new United States had to confront a tradition of State power. It took many years and several transitional events (including a civil war, a New Deal, and a civil rights movement) for the Union to overcome the remnants of States' rights. Similarly, it may take many years and additional acts of near-revolutionary change for Hungary to rid itself of centralized control.

64. During the eighteenth century, power in Hungary was primarily at the county level. After World War I, the nation began a centralization trend which has yet to cease. The future development of autonomous, regional universities may strengthen the desire of university towns to exert local authority. See Máté Szabó, Was There A Strategy? Hungary's Path To Democracy (June 25, 1991) (unpublished paper presented at Convention of the Hungarian Sociological Association in Budapest, on file with the Brigham Young University Law Review).

Gábor Demszky, the Mayor of Budapest, explains the lack of power on the local level. "A significant portion of the new political organizations find it very difficult to accept that they must share power, must curb it, that they cannot decide issues single-handedly . . . . [D]ecades of ingrained behavior patterns must be changed . . . ." Gábor Demszky, Local Government Finding Its Way, BUDAPEST WEEK, Aug. 15-21, 1991, at 2 (Amy Modly trans.). In particular, Mayor Demszky notes, "It took fourteen months after the democratic parliamentary elections for legislation to be enacted on the legal status of Budapest municipal governments. In effect, their executive abilities were paralyzed to this extreme . . . ." Id.


66. By "near-revolutionary," I do not imply an overthrow of the government but a shift in direction such as the Civil War Amendments or the New Deal in the United States. See Ackerman, supra note 6, at 458-59, 474. The so-called "Reagan Revolution" was an attempt to dramatically transform the United States back into a more decentralized system.
Currently there is little indication of movement toward regionalism in Hungary. The national government continues to play a leading role in running the economy and in dealing with the West to resolve domestic crises. Moreover, aside from the vague language of Chapter IX, the Constitution provides the national government and courts with authority over most subject matter.

b. State action. Two factors combine to expand the authority of constitutional law over life in Hungary: (1) the prevalence of State action in society as a result of the nation’s communist history and (2) the many constitutional rules that limit State action.67

State action in Hungary is prevalent because the State owns and manages the majority of property and enterprises. Although privatization plans have been enacted, the process has been extremely slow thus far. On February 12, 1991, *The Washington Post* reported that “only 130 out of 2,300 sellable [sic] enterprises were privatized” in the last year.68 An example of the failure to effectuate a quick sale of State property is the fate of the First Hungary Fund. This group of foreign investors arrived with 60 million dollars in its coffers, but one year later reported purchases of only approximately 2.5 million dollars of Hungarian property.

There are several reasons for the slow pace of privatization. One is administrative. Auditing the value of enterprises and property takes time. Investors as well as government property administrators both proceed cautiously to assure that they receive a fair bargain. Another factor is the political influence on the privatization process of managers and unions who fear the loss of jobs which usually results after a private entity purchases an inefficient, State-run enterprise. Finally, the failure of the government to resolve the claims of those whose property was confiscated by the former regime has caused many investors to hesitate to pursue deals out of fear that Parliament will

67. Certain constitutional rights, such as the rights of children, impose obligations on both the State and private individuals. Examples of the few constitutional rules pertaining exclusively to the private sector are the rules pertaining to trade unions, political parties, and citizen violence. The main sources of private law are the Civil Code, parliamentary statutes, agency regulations, and Supreme Court precedents.

attempt to return the property to its pre-nationalization owner.

In a society where State actors are so prevalent, many commercial, contract and tort disputes enter the realm of public rather than private law and raise questions of whether the State has infringed on an individual's constitutional rights. Banking is one State-run enterprise which has put the Constitutional Court in the business of resolving what appear to be private law issues. The reform of Hungarian banking laws over the last decade has resulted in the opening of a small number of semi-private banks, which in theory are independent of the State and have a range of powers. Nevertheless, in practice, the National Savings Bank of Hungary remains the organ with which most citizens engage in savings and loan transactions.69

A contract dispute between the National Savings Bank and a class of private citizens who had taken out loans turned into a major constitutional case this past year. The National Savings Bank Case arose from a decision by Parliament, in its capacity as head of the National Savings Bank, to pass legislation which authorizes an increase in the interest rates on loans that citizens had taken out for the purpose of buying homes from the State. Parliament acted on information indicating that, due to inflation, the Bank would be on the verge of bankruptcy without the increase.70 The borrowers challenged the increase as a violation of the terms of their loan contracts. In Hungary, as in the United States, a contractual promise from a State body creates a property interest on behalf of the promisees.71 Accordingly, the allegation that the National Savings Bank was in breach of its promise raised the issue of State infringement on the promisees' property rights.72

69. See HUNGARIAN CHAMBER OF COMMERCE, The Transformation of the Hungarian Banking System, in PUTTING THOSE HECTIC YEARS IN PERSPECTIVE 1987-1989, 9-10 (1989). (discussing limited citizen transactions with new semi-private commercial banks, which are currently owned primarily by the State and State enterprises).

70. According to the Bank, the increase is permissible because its survival is in the best interests of the country and the borrowers. In addition, the Bank argued that it is fair for the State to ask for increased mortgage rates because the State had increased the salaries of most of the borrowers (the vast majority of whom are State employees) to keep up with inflation.


72. Cf. Lynch v. United States, 292 U.S. 571 (1934) (government taking of
The Constitutional Court must now resolve this case by deriving standards from Article 13 of the Constitution which prohibits the State from taking an individual's property without compensation. The resolution of a complex commercial dispute from the abbreviated text of the Article 13 "takings clause" is a difficult task. If the case had arisen from a breach by a private party, then a civil court could have applied a refined excusable breach of contract rule derived from the Civil Code and Supreme Court private law precedents. However, the Bank's alleged breach is not subject to a challenge under those non-constitutional provisions because the rate modification is in accordance with a Parliamentary enactment. The only means for challenging the legality of Parliament's action is through reliance on the Constitution. The National Savings Bank Case shows that if State action remains widespread in Hungary, then constitutional interpretation will play a central role in the resolution of litigation in "private law" realms like commerce and banking.

c. The abortion issue without federalism or a private sector distinction. A brief comparison of the handling of the issue of abortion rights by the United States Supreme Court and the way in which the Constitutional Court has to approach challenges to the constitutionality of the Ministry of Health's abortion regulations manifests the significance to Hungarian constitutional jurisprudence of both the absence of federalism and the prevalence of State action.

The major issue before the United States Supreme Court in recent abortion cases is how much authority the States have to establish their own abortion regulations. The trend toward resolution of this issue in favor of local autonomy requires careful scrutiny of concepts of federalism. The focus on federalism has enabled the current Supreme Court majority to avoid answering the more sensitive question of when a fetus is viable. Even if federalism does not give States plenary authori-
ty in the area of abortion regulation, the United States Supreme Court may still refrain from reviewing the substance of many laws restricting abortion because of the well-developed American private sector. Ignoring the poverty factor, Chief Justice Rehnquist, writing for the majority in Webster v. Reproductive Health Services, concluded that a Missouri statute's restrictions on a woman's ability to have a State-subsidized abortion do not even raise the issue of abortion rights. Even if there is a right to an abortion, the removal of the State from the business of abortions would not infringe upon that right. The "reality" underlying the Chief Justice's reasoning is the availability of abortions in the private sector.75

By contrast, constitutional review of regulations governing State-subsidized abortions in Hungary has to meet head on the substantive questions concerning the scope of abortion rights, because neither the federalism question nor the public/private distinction are issues. The Hungarian Court cannot evade the question of when life begins by holding that the question falls within the discretion of local authorities. The national government promulgates the abortion regulations and hospitals run by the national government conduct the abortions.

Chief Justice Rehnquist's private sector distinction is also not a factor in the consideration of the abortion issue in Hungary. Private abortion facilities in Hungary are now conceivable under the new constitutional provisions protecting private enterprise initiatives. Nevertheless, the possibility of private

75. Chief Justice Rehnquist defends the regulations because they "only restrict a woman's ability to obtain an abortion to the extent that she chooses to use a physician affiliated with a public hospital." Id. at 509. The legal basis for that statement is that there is "'no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'" Id. at 507 (quoting DeShanney v. Winnebago County Dept of Social Servs., 489 U.S. 189, 196 (1989)). Nevertheless, a footnote reveals that this legal basis is only legitimate because there is a private sector option available. In the footnote, the Chief Justice concedes, "A different analysis might apply if a particular State had socialized medicine and all of its hospitals and physicians were publicly funded." Id. at 510 n.8. The Webster dissenters argued that for most women who seek abortions in Missouri, the private sector is not a viable option and that the failure to qualify for a State-subsidized abortion means the impossibility of having an abortion. See id. at 540 n.1 (Blackmun, J., dissenting) (noting that 97% of all Missouri hospital abortions occur in public institutions, and therefore those who are "too poor to travel [to another State for a publicly funded abortion], perhaps [are left with] no choice at all").
sector abortions will not be a factor in the deliberations over the abortion issue at the Hungarian Constitutional Court. One possible reason is that Hungarians cannot afford private sector abortions. But there must be something more. Most abortion seekers in Missouri could not afford private sector abortions, but this factor did not inhibit Chief Justice Rehnquist's reasoning in Webster. The United States Supreme Court could rely on the private sector alternative to avoid the issue of women's rights to abortion in a case challenging governmental withholding of funds because such reasoning reflects a common American belief in the significance of the private sector. The Constitutional Court's refusal to give credence to the legally feasible private sector option while deliberating over the abortion question is a product in part of the failure of the Hungarian private sector to develop in practice, but more significantly it is a product of the private sector's failure to develop in the communal imagination of Hungary.


1. The original Article 8

The absence of federalism and private sector considerations enlarges the national government's responsibility to interpret the Constitution. The increased burden on the national government, however, does not necessarily mean that the Constitutional Court's responsibilities should increase. As in the United States, the members of all branches of government in Hungary take oaths to uphold the Constitution. There is nothing inherently illegitimate about delegating the ultimate responsibility for constitutional interpretation to Parliament or to the Council of Ministers.

76. Chief Justice Rehnquist recognized that "indigency . . . 'may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions' without public funding." Webster, 492 U.S. at 509 (quoting Maher v. Roe, 432 U.S. 464, 474 (1977)).

77. The Constitutional Court's first abortion decision found a way to evade the issue of abortion rights. The Court held the current abortion laws unconstitutional because they had been enacted by the Ministry of Health, rather than by Parliament. Dictum in the decision stated that the Constitution does not specify when life begins. If the Christian Democrat Party, a member of the ruling coalition, attempts to push a restrictive abortion law through Parliament, then the Court will have to decide whether the Constitution protects a woman's right to an abortion.
The Constitution, as amended in October 1989, contained such a provision. Article 8, Section (2), stated, “Rules affecting fundamental rights and duties shall not be provided for by legal rules other than acts of constitutional force.” Under this provision, the constitutionality of “rules affecting fundamental rights” depended on the “constitutional force” vote in Parliament. An act of constitutional force is an act passed by a two-thirds vote of Parliament. Although adoption of a constitutional amendment requires the same two-thirds majority,\(^\text{78}\) a bill designated as an act of constitutional force is not an amendment to the Constitution. Furthermore, an act passed by a two-thirds vote of Parliament is an ordinary statute unless predesignated as either an act of constitutional force or a constitutional amendment. Article 8, Section 3, added that an act of constitutional force could only be passed under Section 2 if it is “indispensable” to a limited set of government interests: namely, “State safety, safeguarding of home, law and order, public security, public health, public morals, or the protection of the fundamental rights and freedoms of others.”

Article 8, Sections 2 and 3 were replaced in June 1990, but while in operation they enabled the Constitutional Court to shift to Parliament the burden of resolving hard cases in which rights conflicted either with each other or with compelling government interests. Examination of The National Savings Bank Case and The Abortion Case, described in the previous section, shows how Article 8 can function to relieve the Court of the responsibility of making substantive decisions on difficult legal questions with potentially serious economic or political consequences.

The National Savings Bank Case required the Court to decide whether the National Savings Bank’s increase in interest rates was unconstitutional interference with property interests. Article 8, Section (2), relieved the Court of having to resolve this difficult constitutional issue. The Court held that the law “affected a fundamental property right” and presented the risk of grave social consequences. Therefore, the Court concluded, Article 8 required Parliament to pass the rate increase as

\(^{78}\) A slight difference exists between the prerequisites for a constitutional amendment and an act of constitutional force. The former requires a two-thirds majority of all members of Parliament, while the latter requires a two-thirds majority of all members who are present at the time of the vote.
an act of constitutional force and with the support of a Section 3 justification. The pending challenge to the Ministry of Health's abortion regulations could have been handled similarly if it had come before the Court prior to the June 1990 modification of Article 8. The Court could have held that abortion regulations "affect fundamental rights" of unborn life and female liberty and that therefore Parliament must enact the Ministry of Health's regulations by a two-third's majority for the rules to have validity.

Article 8 relieved the Court of the burden of deciding delicate questions, such as banking and abortion issues, to which the Constitution provides no clear answer. The determination of the constitutionality of a rule that "affects" a fundamental right rested almost entirely upon the outcome of parliamentary debates on acts of constitutional force. The Court's roles were (1) to shift the burden to Parliament by identifying when a rule "affected" a fundamental right and (2) to assure that a compelling Section 3 interest supported all acts of constitutional force.

2. The amended Article 8

In June 1990, Parliament amended Article 8 to alter dramatically the roles of the legislature and the Court in determining the scope of constitutional rights. Under the amended Article 8, Section (2), "rules respecting fundamental rights and duties shall be determined by Law which, however, shall not limit the essential contents of any fundamental right." Section 3 was eliminated in its entirety.

Under the old Article 8, an act of constitutional force and a Section 3 justification were necessary for any enactment "affecting" a fundamental right. Now, however, Article 8 only imposes restrictions upon enactments that "limit the essential contents" of a fundamental right. Consequently Parliament has free reign to pass laws that expand—i.e., "affect" but do not "limit"—the scope of a right.

The amended Article 8's restrictions upon enactments that limit rights are of even greater consequence. Article 8 now invalidates "Law" that imposes limitations upon rights. Accordingly, the Court must approach issues of whether legislation limits constitutional rights in a new manner. The Court can no longer shift the responsibility for determining the proper scope of rights to parliamentary debates on acts of constitutional force, because an act of constitutional force cannot limit the
essential contents of a right. The Constitutional Court is now solely responsible for outlining the "essential contents" of a right and protecting those "essential contents" from all State interference.

Even though Article 8 burdens the Court with the task of setting forth the essential contents of a right, the Court might not have the "last word" because of the amendment process. It is questionable, however, whether the amended Article 8's proscription against "Law . . . limit[ing] the essential contents of a fundamental right" leaves Parliament with the option to amend the Constitution in a manner that would infringe on the essential contents of a fundamental right. If Parliament attempts to infringe upon the "essential contents" of a right by constitutional amendment, then the Court will have to decide whether the June 1990 amendment in effect amended the Constitution's rules of amendment to prohibit amendments that limit fundamental rights. The resolution of this issue will have important implications for the exclusivity and superiority of the Constitutional Court's determinations of the contours of rights.

79. The amendment's framers must have intended acts of constitutional force to fall within those acts of "Law" that are inadequate to limit the "substantial contents of any fundamental right", A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. 1, art. 8(2) (Hung.), otherwise the June 1990 amendment would not have accomplished any significant modification of the old Article 8 provision that acts of constitutional force permit the enactment of "rules affecting fundamental rights." Id.

In apparent conflict with Article 8's absolutism, clauses providing for restriction by an act of constitutional force accompany the provisions for the rights to travel, to reside, to strike, to associate, to worship, and to have personal data protected. See id. ch. XII, arts. 58(3), 59(2), 60(4), 70/C. When a statute infringing on the right to have personal data protected was recently challenged, the court did not declare the law unconstitutional because it was not supported by an act of constitutional force. Instead, the court asked whether the statute infringed on the "substantial contents" of the right, as proscribed by Article 8, Section 2. The court then declared the statute unconstitutional for infringing on the essential contents of a fundamental right. See Judgment of Oct. 4, 1990 (The Communist Data Case), Alkotmánybíróság Határozatai [Constitutional Law Court], ___ MK. ___ (Hung.) (protecting privacy right of former communist officials).

80. Prior to the amendment of Article 8, no restrictions applied to the content of amendments that could be adopted under Article 24 of the constitution.

81. For an insightful discussion of whether it is logically possible for an amendment process to authorize amendment of the amendment process, see John M. Finnis, Revolutions and the Continuity of Law, in OXFORD ESSAYS IN JURISPRUDENCE (SECOND SERIES) 44, 50-61 (A.W.B. Simpson ed., 2d ed. 1973) (discussing H.L.A. Hart, Self-Referring Laws, in FESTSKRIFT TILL AGNAD KARL OLIVECRONA 314-16 (1964); H. Kelsen, THE PURE THEORY OF LAW 195-200 (1967); A. Ross, ON LAW AND JUSTICE 81-83 (1968)). After pointing to holes in all attempts to resolve
On a technical level, it appears plausible that the June 1990 amendment was intended to entrench fundamental rights in the Constitution beyond the reach of the amendment process. The prerequisite for an amendment—a two-thirds majority of Parliament—was unchanged by the June 1990 amendment. Prior to the June 1990 amendment, Article 8 permitted infringements upon fundamental rights by acts of constitutional force, which also required a two-thirds majority of Parliament. If the June 1990 amendment did not achieve entrenchment, then the only real change the amendment made was to require Parliament to label its votes on whether to limit a fundamental right as votes on an amendment rather than on an act of constitutional force. It is unlikely that Parliament would amend the Constitution to achieve such an insignificant change.

There are also indications that the consensus in Hungary is to entrust the Constitutional Court with the duty of the absolute protection of fundamental rights from all interference including that of Parliament’s amendment process. The basis for this sentiment is a reaction to the history of constitutionalism under the prior regime, the implications of which will be explained further in Part IV. The Constitution in force for four decades prior to the rendszerváltás (change of regime) contained an extensive list of fundamental rights. Today the Parliament, which amended Article 8, looks back with disdain on the way in which the old Constitution’s rights were rendered meaningless in practice. What eliminated the meaning of those rights was not a denial by the State that the rights existed, but the constitutional provisions that left the contents of the rights subject to the whims of the political branches of government.

82. But see supra note 78 (slight difference between prerequisites for constitutional amendment and act on constitutional force).
83. See A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. VIII (Hung.) (1949 version).
84. An analogous historical precedent of fascism supported the decision of the West German and Austrian peoples to adopt constitutional systems which prohibit amendments that limit certain fundamental rights. GRUNDGESETZ [Constitution] [GG] art. 79 (F.R.G.); Rudolf Machacek, Law and Politics I, 9 (1990) (unpublished
The operation of Article 8 as a restriction on the amendment process is a practical means of assuring the protection of rights. The ease of attaining a two-thirds majority in Parliament leaves fundamental rights vulnerable to frequent amendments. Moreover, an easy amendment process means that an amendment could fail to embody a firm national commitment. A two-thirds majority at one meeting of the Parliament might reflect only the views of a temporarily popular special interest group.85

Although the elected Parliament has amended the Constitution six times in the past year, there has not been an amendment since the fall of 1990. Parliament may be disciplining itself despite the easy process. However, a more likely explanation is that the current ruling coalition possesses only a 60 percent majority. If a two-thirds majority becomes attainable in the future and Parliament begins to resort more to the amendment process, the authority of both the Constitutional Court and the Constitution could become trivialized. The interpretation of Article 8 as insulating the Court's fundamental rights jurisprudence from modification by the amendment process is one way to prevent such a result. The following section presents another way.

G. Beyond the Control of Amendments: The Invisible Constitution and the Influence of Western Legal Standards

The determination of whether Article 8 permits amendments which limit the essential contents of rights may not have a definitive effect on the division of power between the Court and Parliament with regard to certain constitutional matters. Examination of two recent decisions, The Death Penalty Case

85. See Bozoki, supra note 10, at 548-49 ("The objective [of the June 1990 amendment] . . . was to avoid the 'dictatorship of the legislature.' "). The view that the new Article 8 entrenches fundamental rights from modification by amendment has not been recognized at this time by either Parliament, the Council of Ministers, or any court.

James Madison observed that a difficult amendment process encouraged democratic "bargaining and mutual learning" and heightened the quality of the amendments. See Stephen Holmes, Precommitment and the Paradox of Democracy, in CONSTITUTIONALISM AND DEMOCRACY, supra note 8, at 218.
and *The Union Case*, reveals that factors beyond the text of the Constitution play an important role in the Court's development of constitutional law.

*The Death Penalty Case* held capital punishment to be unconstitutional *per se*. *The Union Case* proscribed trade unions from representing employees without their consent. In both cases the Court relied upon two extra-textual factors: (1) conceptions of the right to human dignity and (2) the precedential value of Western legal standards.

An application of the right to human dignity served as a basis for both decisions. Such a right can be found in Article 54(1) of the Constitution. Nevertheless, *The Death Penalty Case* and *The Union Case* both explain further that the right to human dignity is a foundational principle of Hungarian constitutional law and therefore it would exist even without a reference in the constitutional text. The concurrence of the President of the Court in *The Death Penalty Case* described the decision's reliance on the right to human dignity as a utilization of the "invisible constitution"—[which is] beyond the [control of both the] Constitution, which is often amended . . . [, and] future Constitutions." The *Union Case* adds that when "none of the . . . named fundamental rights are applicable for a given state of affairs," then the "general personal right [to dignity] . . . may be relied upon at any time by the Constitutional Court."\(^8^6\)

The Court rested *The Union Case*’s holding upon the right to dignity even though the Constitution contains clauses that specifically relate to the right of unions "to safeguard and represent the interest of employees."\(^8^7\) The Court could easily have held that these clauses only authorize representation by

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87. The quote is found in the *The Union Case*, infra, at 5: Judgment of Apr. 23, 1990 (The Union Case), Alkotmánybiroság Határozatai [Constitutional Law Court], 1990/36 MK. 42 (Hung.) (unofficial translation on file with the Brigham Young University Law Review; all pinpoint citations to this case which follow refer to the unofficial translation of the case on file with the Brigham Young University Law Review) [hereinafter *The Union Case*].

88. "Trade unions and other organizations for the representation of interests shall safeguard and represent the interests of employees, members of cooperatives and entrepreneurs." A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. 1, art. 4 (Hung.). "Everybody shall have the right to form organizations with others with the aim of protecting economic and social interests." Id. ch. XII, art. 70/C(1).
The decision to rely on the admittedly extra-textual right to human dignity, rather than the more relevant clause on union representation, further signals that the Court does not see a need to link its interpretations to the text of the Constitution.

A complementary trend, which minimizes the importance of the Constitution's text and the input of Parliament, is the Court's reliance on Western legal standards. The Union Case and The Death Penalty Case cite Western legal norms to establish both the irrevocable presence of the right to human dignity in Hungarian constitutional law and the contents of that right. While The Union Case only briefly cites "modern constitutions and the practice of constitutional courts" to support its holding, The Death Penalty Case contains an extensive analysis of Western conventions.

The Death Penalty Case reviews the various European protocols, as well as the status of capital punishment in the United States. Curiously, the standards of the West, including those of the Council of Europe, do not mandate the death penalty ban adopted by the Court. Only optional protocols in the West prohibit the death penalty. However, a brief look at the case law of the judicial arm of the Council of Europe—the European Court of Human Rights—reveals that the death penalty conflicts with Western European values. The European Court requires very strict procedural safeguards for an application of the death penalty to comply with the ban on "inhuman and degrading treatment." Recently, an extradition case presented the European Court with the opportunity to review the procedures surrounding the application of the death penalty in the State of Virginia. The European Court found a likelihood that Virginia's sentencing and appellate process would violate

89. The explanation for not relying upon those union clauses was that they were remnants of the Stalinist Constitution and therefore could not be interpreted to require prior consent to the union representation.

90. The two "optional protocols" outlawing capital punishment are the Supplementary Protocol, Art. I (adopted on April 23, 1983) to the Convention for the Protection of Human Rights and Fundamental Freedoms (signed on November 4, 1950) and the European Parliament's Declaration On Fundamental Rights and Fundamental Freedoms, Para. 22. Both instruments call for the abolition of the death penalty. However, the terms of each document provide that it is only binding on the signatories and is not a pronouncement of international or European norms. See The Death Penalty Case, supra note 50.

the prohibition against “inhuman and degrading treatment.” The European Court added that satisfaction of the standards of the United States due process clause and “cruel and unusual punishment” clause were inadequate to ensure consistency with European standards.

The extreme nature of the European Court’s procedural emphasis indicates that capital punishment conflicts with the Council’s substantive values. Accordingly, the Constitutional Court actually did live up to its opinion’s claim to be “moving in the same direction” as Europe.

III. SUBSTANTIVE THEORIES

Part II analyzed the formal components of the structure enabling the Court to implement its authority over Hungary. This Part presents a substantive analysis of the controversial and multifaceted Land Act Case I. The purpose of this Part is not to pass judgment on whether the logic and policy implications of the decision are good or bad, but to identify the legal theories underlying the opinion and their social science implications.

A. The Land Act Case I: Facts and Holdings

In March 1990, Hungarian voters elected the Democratic Forum Party (MDF) to a plurality of seats in Parliament.

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92. Professor Charles Black explains that “‘procedure’ and ‘substance’ lock and become one” in a court’s decision to require such heightened procedural safeguards surrounding the death penalty. CHARLES L. BLACK, JR., CAPITAL PUNISHMENT 95-96 (1974). Relying on the decisions of the high court in ancient Jerusalem, Black concludes that the setting forth of such safeguards are not “collateral or accidental means . . . to avoid its [the death penalty’s] infliction.” Id. Rather, a court’s decision to implement strict procedural safeguards surrounding capital punishment embodies the point of view that “the justice of man is altogether and always insufficient for saying who may be” sentenced to death. Id.

93. See The Death Penalty Case, supra note 50, at 14-35 (Selyom, Pres., concurring).

94. Sixty-two parties took part in the elections.

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Percentage of the Vote, March 25, 1990

<table>
<thead>
<tr>
<th>Party</th>
<th>Percentage</th>
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<tr>
<td>Hungarian Democratic Forum (MDF)</td>
<td>24.7%</td>
</tr>
<tr>
<td>Alliance of Free Democrats (SZDSZ)</td>
<td>21.3%</td>
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<tr>
<td>Smallholders Party</td>
<td>11.7%</td>
</tr>
<tr>
<td>Socialist Party</td>
<td>10.9%</td>
</tr>
<tr>
<td>Alliance of Young Democrats (FIDESZ)</td>
<td>8.9%</td>
</tr>
<tr>
<td>Christian Democrat Party</td>
<td>6.5%</td>
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</tbody>
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The MDF platform combined economic pledges to institute a free market system and nationalist pledges to avoid permitting the country’s assets to fall under the exclusive control of foreigners. The appeal of the latter, nationalist sentiment left the MDF in a bind. Few Hungarians, other than some former members of the communist *nomenklature*, could afford to purchase

<table>
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<th>Seats</th>
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<td>Joint Candidates:</td>
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**Individual District Mandates**

**Territorial Mandates**

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<td>Independent:</td>
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<td>Joint Candidates:</td>
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**National Mandates**

**Total Mandate**

These statistics were compiled by Professor Andrew Arato from a variety of sources, including the tables in R. Barnabas, *Political Pluralization in Hungary*, 43 *Soviet Studies* 120 (1991).
State property. Yet if State property was not sold off, entrepreneurs would have little with which to work in developing a capitalist system.

One solution to this conflict between desire for capitalism and resistance to foreign domination was to recreate a class of property owning Hungarians by giving large amounts of land and indemnification payments to those Hungarians from whom the communists had confiscated property. At first the idea may have seemed to be a stroke of political genius. It brought the needed support of the Smallholders Party—representing former peasant landowners—into the MDF ruling coalition and increased the potential for domestic participation in and enthusiasm for privatization.

During the ensuing months, however, the MDF began to comprehend more fully the extent of Hungary's financial problems. The nation could not afford the costly compensation scheme fervently advocated by the Smallholders. The best solution for the nation was to expedite investment by foreigners rather than to spend money subsidizing citizen participation in investment. The MDF Council of Ministers retained a list of enterprises that had to remain at least 51 percent State or Hungarian owned, and the MDF concluded that the country must not be sold to foreigners at bargain prices.

Meanwhile, the MDF became dependent on the Smallholders to retain their majority coalition. Other issues had eliminated any chance of the MDF abandoning the Smallholders to form a coalition with one of the other two major parties, the Alliance of Free Democrats (SZDSZ) and the Alliance of Young Democrats (FIDESZ). The central issue of the Smallholders platform was compensation for land taken

95. In addition, foreign investors had little interest in many properties, such as steel mills and small properties, which offered no immediately foreseeable profits.
96. In addition, economists predicted that compensation would cause inflation.
98. Arguably, the MDF had always preferred the implementation of capitalism through sales to foreigners rather than through re-privatization or compensation programs. Accordingly, MDF may well have perceived its adoption of the Smallholders' platform on re-privatization and indemnification as a political compromise rather than as a stroke of political genius.
99. The Christian Democrat Party was also in the MDF coalition.
100. The MDF also did not consider the Socialist Party, who won nine percent of the seats in Parliament, to be a viable candidate for a coalition partner.
by the communists. The MDF could not back out. The coalition drafted a bill providing for all those who had lost land due to the nationalization laws of the communist Parliament, commencing in 1949, to receive either the original plot or a similar plot. All those who had lost personal property were to receive a payment.

Polls revealed that approximately two-thirds of the nation believed the final proposal to be economic suicide. At the last minute, the MDF figured out a way to delay having to vote on this proposal, while simultaneously keeping the coalition intact. The Prime Minister stayed the moment of truth by using his power under the ACC to request an advisory opinion on the matter from the Constitutional Court.

The Prime Minister set forth a "distinct" query for the Court to answer. He asked the Court only whether the equal protection clause, contained in Article 70A of the Constitution, permitted the Parliament to compensate former real property owners by a different means than would be used to compensate former personal property owners. This question did not indicate any antipathy toward the general concept of providing former owners with compensation.

On October 2, 1990, the Court issued a decision responding to the Prime Minister's question in the negative. The reasoning was straightforward and is not the subject of this Part. The Court held that payment constituted treatment that was significantly different from the restoration of ownership of actual property. The Court concluded that such differential treatment violated the equal protection clause because it was not justified by any compelling government interest.

What is more intriguing is the reasoning the Court used to resolve the larger issue which was plaguing the nation politi-

101. Radio Bridge Report (Radio Broadcast, Budapest, Hungary, 8:30 P.M., March 12, 1991); see also infra note 224 (survey results).
102. See supra part II.C.1 (discussing ACC, supra note 19, art. 22(2)).
103. The Republic of Hungary shall ensure human and civil rights for everyone within its territory without discrimination of any kind, such as upon race, color, sex, language, religion, creed, political or other opinion, national or social origin, property, birth or other status.

The Republic of Hungary shall promote the attainment of the equality of rights also by measures aimed at eliminating inequalities of opportunity.

cally: whether to compensate for past injustices at all. The Court determined that the coalition's current compensation proposal would be unconstitutional even if it compensated former owners of land and former owners of personal property by the same means. Under the decision, any distribution of government largess that discriminates between a former owner of property and a "non-former owner" (NFO) violates equal protection principles. The Court's decision was based on its conclusion that the bill's discrimination against NFO's was justified by neither an enforceable retroactive property right of the former owners nor a scientifically grounded policy objective. 104

In addition, the Court included in the same opinion a decision resolving another issue on which the Prime Minister had requested an advisory opinion. The latter issue was whether the current regime could authorize the taking of land owned by agricultural cooperatives without providing compensation. The Court held that cooperatively owned property was independent of the State and therefore entitled to protection by the "takings" clause. 105 The decision concluded by stating that the Constitution required full compensation for all takings, whether the taking was the result of a "single official resolution of expropriation" or of any other State authorized infringement upon private property rights.

B. The Political Delicacy and Significance of Property Right Reform in Post-Communist Hungary

The tale of *The Land Act Cases* is one of property right reform. In the United States property right reform brings to

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104. The wording of the decision did not declare the compensation bill to be absolutely unconstitutional. Since it was an advisory opinion rather than the review of an actual piece of legislation, the court simply stated that a scientific policy showing was necessary for the discrimination against NFO's to be constitutional. Such a showing is impossible. Providing capital to the former owners would facilitate the participation of Hungarians in the new free market economy; however, providing capital to NFO's would also have this favorable result. In essence, the Court characterized compensation to former owners as an affirmative action program that is misdirected because it economically assists a group with neither a special need nor a right to the aid. See infra part III.D.

105. "Expropriation of property shall be allowed only exceptionally and for public interests, in cases and ways as determined by law and with full, unconditional and immediate compensation." A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. 1, art. 13 (Hung.) (1990).
mind the State interfering with property interests over which private citizens previously thought they had control. In a society emerging from a system where nearly all property rights were possessed by the State, property right reform is of a different nature. It involves the reform of the State's previous all-encompassing entitlement and the gradual creation of entitlements to State property on behalf of others. Heretofore, the reform of property rights was occurring primarily by purchases from the State. The Land Act Cases raise the specter of State decisions to reform property rights by the creation of entitlements on behalf of certain individuals to certain property interests. This subsection explains the political and philosophical significance of property rights debates and why resolution of such debates is a particularly delicate and profound task in post-communist Hungary. The four subsections which follow will then analyze the substantive theories relied upon by the Constitutional Court to bring unity to the property right reform disputes present in The Land Act Cases.

1. Political delicacy of property right reform

According to James Madison, "the most violent struggles . . . [occur] between the parties interested in reviving, and those interested in reforming the antecedent state of property." Avoidance of such factionalism was one of the reasons Madison endorsed a political structure that shields property rights from the possibility of modification through political debate. Professor Ronald Dworkin seems to advocate a different approach when he states, "Government must constantly survey and alter its rules of property, radically if necessary, to bring them closer to the ideal of treating people as equals under the best conception [of equality]."

The difference between the advice of Madison and Dworkin is due to the different aims of their work; but they share a

107. Alexis Toqueville similarly believed that to "polarize politics around the question of prosperity . . . would make the establishment of stable democratic institutions a more or less permanent impossibility." ROBERT MEISTER, POLITICAL IDENTITY 132 (1990) (describing Tocqueville's model of a "sincere democrat" in the aftermath of the 1848 upheavals).
108. RONALD M. DWORIN, LAW'S EMPIRE 310 (1986).
common premise: both perceive the rules setting forth property rights as central to the definition of a community. As a political scientist interested in framing a nation's future, James Madison concerned himself primarily with maintaining the unity of the people of the United States. He realized that if there was any dispute capable of tearing the American community apart, it was a dispute rooted in conceptions of property rights.

Dworkin does not focus on unity, but shares an ultimate belief in the critical role of property rights. His work consistently cites the fulfillment of a community's favored conception of equality as a basic function of the State. Accordingly, he asserts that the State's most important obligation is adherence to a particular concept of equality, rather than to any particular set of property rights. Nevertheless, Dworkin concedes that property rights are the area of the law that must be addressed to bring about the realization of society's purpose of fulfilling the communal conception of equality. Thus, the respective thoughts of Dworkin and Madison, reflected in the above quotations, rest upon a vision of the rules governing property rights as pivotal to the direction of a society.

Dworkin's philosophical approach urges the modification of property rights rather than restraint. He views modification of property rights as the way to bring about different types of ideal societies. Madison, the political scientist, perceives the promotion of the modification of property rights as a way to pit proponents of opposing idealized visions against each other and thereby catalyze the division of an otherwise unified community. For Dworkin, the modification of property rights can fulfill a communal vision. That is true, when the community exists in the imagination. However, when the goal is to safeguard the unity of a certain grouping of people living within a defined geographical area, then debates on how to modify property rights are dangerous because such debates may divide the community.

Dworkin concedes that radical modifications of rules governing property rights can result in the creation of at least three fundamentally different types of communities. How-

109. RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 277-78 (1978) (denying that there are natural property rights to which all just States must adhere); DWORKIN, supra note 108, at 295-301 (explaining that rules governing property rights depend on which conception of equality a society chooses).

110. See DWORKIN, supra note 108, at 297-301 (outlining three different models
ever, he never expresses dismay over the possibility that the radical changes in rules governing property rights, which his approach permits, might lead a community to divide into two or even three communities. For a philosopher, such a result is a successful step on the difficult path toward actualizing ideals. For a founding father of a unified nation, like Madison, such a result is the mark of failure.

2. Significance of property right reform in post-communist Hungary

How are property rights intimately connected to the basic ideals that either support or destroy the unity of a community? Property rights define entitlements or the expectations that will be guaranteed by law. The standards underlying a concept of property rights dictate basic economic relationships. Accordingly, property rights, along with the expectations they sustain, structure the practical aspects of life in which a citizen has faith.

of equality based on different notions of property rights: natural rights, resource or material end equality, and utilitarian equality).

111. See Jeremy Bentham, Utilitarian Theory of Property, in THE RATIONAL BASIS OF LEGAL INSTITUTIONS 206, 211-12 (John H. Wigmore & Albert Kocourek eds., 1923) (Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it . . . . Now this expectation, this persuasion can only be the work of law.); L.L. Fuller & William R. Perdue, Jr., The Reliance Interest in Contract Damages: 1, 46 YALE L.J. 52, 59 & n.10 ([Damage to 'property' is really damage to an expectancy." (citing SCHLOSSMANN, DER VERTRAG § 39 (1934)).

112. See Bentham, supra note 111, at 212 ("The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case."); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 10-15 (1973) (property rights enable modern economic relationships to exist); see also Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089 (basis of tort duties in entitlement theories).

113. See Bentham, supra note 111, at 211. Bentham emphasizes that man is not like the animals, limited to the present; . . . he is susceptible of pains and pleasures by anticipation . . . . Expectation is a chain which unites our present existence to our future existence . . . . The sensibility of man extends through all the links of this chain.

. . . . [Accordingly, property is] a sentiment which exercises powerful influence upon human life.

Id. 210-11; see also Morris R. Cohen, Property and Sovereignty, 13 CORNELL L.Q. 8, 13 (1927) ("The extent of the power over the life of others which the legal order
The resolution of the entitlement issues in *The Land Act Cases* will have dramatic socio-economic consequences. In Hungary's free market, rights to capital will play a central role. Currently, most Hungarians lack capital. Virtually all of the current rights to capital lie with the State or with foreigners. The standards that determine whether and how to distribute State property rights to citizenry will determine who is to be empowered economically in the future. Citizens could face radically different futures depending on whether entitlements are determined by the unfettered discretion of a vote in Parliament, certain property titles antecedent to the nationalization laws, a particular theory of equal protection, a particular theory of utilitarianism, or a combination of the above. Foreigners as well as Hungarians anxiously await the standards that will determine citizen entitlements to State property. Cries by the Smallholders contingent in Parliament to return all property to "rightful owners" inhibit foreigners from investing in many State properties.

Despite (and, perhaps, as a result of) their centrality, entitlements are based on precarious concepts. There is no natural or pre-political substance to property rights. The community and State authorities can construct the nature of property rights in a variety of directions. Absolute property rights advocates like Robert Nozick embrace the view that "[t]hings come into the world already attached to people having entitlements over them." Commentators as diverse as utilitarian Jeremy Bentham, post-structuralist Jean Baudrillard and natural law scholar John Finnis, have pointed out that a man-made myth is necessary to support that view. Finnis observes that Nozick neglects to realize that "things" did originate "from nowhere, out of nothing" and that therefore "things" only attain significance when a normative structure of property rights is imposed upon them. Accord-

115. *See* Bentham, supra note 111, at 206-19. "[T]here is no such thing as natural property, . . . it is entirely the work of law. . . . Before laws were made there was no property; take away laws, and property ceases." *Id.* at 211-13.
ingly, Finnis concludes that diverse systems of property rights, including those supported by the standards of "bad men," can be "natural."^{118}

The history of Hungary impresses this idea on the citizenry, thereby increasing the anxiety accompanying debates on property right reform. Although property rights in the United States have gone through significant shifts, they have consistently been constructed upon strains of economic efficiency theories, distributional preferences, and certain traditional notions of justice.^{119} By contrast, in Hungary, standards such as anti-semitism and other ethnicity based criteria, the divine right of the Crown, and communist ideology have governed property rights over the years.

Hungary is now in a position where the standards governing the distribution of property rights can head in a variety of directions. The text of the amended Constitution provides some guidance, although not enough to resolve definitively current debates, such as those pertinent to The Land Act Cases. Certain standards are out of bounds. Most noticeably, the Constitution proscribes those standards of the past such as bigotry

118. See id. at 187-88 (Natural law would require the redistribution of property when it would "crystallize and enforce duties the property-holder already had . . . . Distributive justice is here, as in most contexts, a relation between citizens, or groups and associations within the community, and is the responsibility of those citizens and groups."); id. at 251 (referring to Sir John Fortesque's opinion that natural law possibly embodies the views of "bad men"); see also Bentham, supra note 111, at 214 ("Tyrannical and sanguinary laws have indeed been founded upon that property right.").

Finnis does place some boundaries on just how "bad" "natural" property rules can be. "Natural law" requires conformity with the standards of the mature person of practical reasonableness, the spoudaios. However, the standards of the spoudaios are arguably not pre-defined, but dependent on the culture. Finnis, supra note 117, at 15-19.

Professor Sunstein also argues against a pre-political state of property rights. Cass R. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689 (1984). He points out that all current property entitlements have been created by State actions and inaction. Sunstein's outlook relies in part, as does Finnis' view, on the hermeneutic truth that everything with a significance has a prior normative source—i.e., a "thing" does not attain definition "from nowhere, out of nothing." Since that normative source is constructed by the community or the State rather than by a divine entity, then it is not immune from modification. Id. at 1776; see also A. M. Honoré, Property, Title, and Redistribution, in PROPERTY, PROFITS AND ECONOMIC JUSTICE 84, 87 (Virginia Held ed., 1980) (Nozick's approach to property rules ignores the significance of historical and social context.); infra note 147.

119. See, e.g., Calabresi & Melamed, supra note 112 (discussing substantive bases for entitlements in American common law).
and the absolute right of the State to possession of all property.\textsuperscript{120} The text of the Constitution offers some additional guidance through clauses providing for equal protection, fundamental rights to certain types of welfare,\textsuperscript{121} and the protection of property from State interference without “full, unconditional, and immediate compensation.”\textsuperscript{122} As American commentators and courts have shown, however, interpretation of an equal protection clause, welfare rights, and a compensation clause can lead to a wide spectrum of standards.

Madisonian fears of a “violent struggle” over property rights are exacerbated in Hungary by the unavailability of a longstanding adherence to a particular conception of property, such as that of Locke, which the country could fall back upon as the “natural” law. The conflict in Hungary is not between those “interested in reviving and those interested in reforming the antecedent state of property.”\textsuperscript{123} All factions appear to reject the antecedent state of property. The efforts of the Smallholders to revive the pre-communist State is just another version of post-communist reform. Everybody in Hungary with an opinion on the direction of property rights today is a reformer. Debate on the issue must occur. Due to this apparent clean slate, post-communist Hungary is perhaps the most fertile territory imaginable for a Dworkinian approach. For a Madisonian, Hungary is a worst case scenario.\textsuperscript{124}

In The Land Act Case I, the Constitutional Court attempt-

\begin{itemize}
\item \textsuperscript{120} The limitation or the deprivation of the right of ownership “on the basis of branding people and certain social groups or any kind of discrimination may not be viewed as a public necessity . . . . The almost complete liquidation of property may not be viewed as [in the] public interest today.” The Nationalization Case, supra note 53, at 8-9.
\item \textsuperscript{121} The Hungarian Constitution guarantees the rights to provisions necessary for subsistence in case of old age, illness, disability, widowhood, orphanhood, and unemployment due to circumstances beyond the person’s control; A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. XII, art. 70/E(1) (Hung.) (1990); to medical services and to “opportunities for physical exercise”; id. ch. XII, art. 70/D; and to education; id. ch. XII, art. 70/F; see also id. ch. XII, art. 70/I (requiring every citizen “to contribute, proportionally to his/her income, and property circumstances, to public expenditures.”).
\item \textsuperscript{122} Id. ch. I, art. 13; see also id. ch. I, art. 9. (setting forth the rights of enterprise and free competition and the right of equal treatment of private and public property).
\item \textsuperscript{123} See Letter to Jefferson, supra note 106, at 23; see also text accompanying note 106.
\item \textsuperscript{124} But see infra note 63 and accompanying text (suggesting Madison did not advocate eliminating all debate regarding property rights).
\end{itemize}
ed to resolve some of the most thorny questions in the debate over how to reformulate property rights in Hungary. The Court had to set forth standards for determining: (1) whether property rights in effect antecedent to the communist regime were entitled to recognition; (2) under what circumstances the State could selectively distribute property; and (3) under what circumstances to require the State to provide compensation for interference with property. The following subsections examine the substantive theories underlying the Court's holdings on these three questions and how the Court's endorsement of these theories functions to enhance the capacity of the Court to bring unity to the factionalism marking Hungary's current property right reform debates.

C. Retroactive Recognition of Property Rights and the Continuity of Law

Although The Land Act Case I involved decisions about property entitlements, the overriding issue in any debate on the modification of property rights is which conception of equality to pursue. All entitlement rules discriminate by definition. They permit one party to have and thereby preclude another party from having. Which discriminatory entitlements the Constitution will permit depends on which substantive theories shape the Court's interpretation of the equal protection clause.

The proposed legislation under review in The Land Act Case I would have created entitlements that discriminated against NFO's. In the United States, those excluded from entitlements created by welfare programs have brought analogous challenges to the State's criteria for distinguishing between the entitled and the unentitled. In most cases, the United States Supreme Court has upheld the allegedly discriminatory classification because "[g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency." In Hungary, however, the potential consequences of inclusion in or exclusion from the compensation scheme were too great for the Court to take the Land Act's discrimination lightly. Accordingly, the Court engaged in an equal protection analysis of the proposed Act's discrimination be-

125. See supra text accompanying notes 103-04 (explaining the term "non-former owner" (NFO) and how the Land Act discriminated against NFO's).
The first issue was whether the discrimination was justified by the former owners' alleged fundamental right to the compensation funds. The Smallholders claimed that such a right existed prior to any enactment by the new Parliament. Whether the new system would recognize any entitlements stemming from rights antecedent to the nationalization laws is the one issue of post-communist property right reform most likely to lead to one of Madison's feared "violent struggles." Virtually the sole issue on the Smallholders' agenda has been the reform of property rights to reflect recognition of the pre-nationalization rights of peasant land owners. Even after the Constitutional Court denied the legitimacy of their claim, the steadfast Smallholders threatened to bring down the ruling coalition if Parliament did not move quickly to enact a bill granting special entitlements based upon pre-nationalization property rights.

The Court rejected the Smallholders' view that pre-nationalization rights had any legitimacy under the present regime. The Court cited Article 10(2) of the amended Constitution which permits the State to continue in its role as the owner of the property and enterprises to which it currently holds title.127 The Court then added that the titles resulting from nationalization were "legally sound," because they were in accordance with acts of Parliament, which supersede any Civil Code rules protecting property rights.

The Court noted that its holding that former owners lacked inherent rights to compensation was not dependent on whether the nationalization laws were consistent with the Stalinist Constitution in effect at the time of the enactments.128 The

127. See A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. I, art. 10(2) (indicating that the scope of the exclusive property and economic activity of the State shall be defined by law).
128. In May 1991, the Court ruled on the constitutional challenges to nationalization legislation. The Court held the nationalization laws, which were still on the books, to be invalid prospectively. But the Court refused to review the retroactive validity of the nationalization laws, because ACC art. 43(4)'s preconditions for retroactive review were not met. The Court explained:

[I]t would be a grave violation of legal security if legal rules[,] which were in effect for quite a substantial period of time and were applied in a great number of cases, and the legal relations[,] which developed on the basis of those legal rules . . . [,] were [retroactively] repealed. Most of the chattels taken into State ownership on the basis of the now [prospective-
Court concluded that even if the nationalization laws somehow violated the Stalinist Constitution, "their [invalidation]... would not [affect] legal relations and the rights and obligations resulting therefrom that came into effect prior to the publication of [a] decision" by the Constitutional Court. The Court cited limitations on its jurisdiction to impose solutions to correct past injustices as the basis for the latter statement.

The substance of the Court's reasons for denying the existence of pre-nationalization property rights is not readily discernable from the text of the opinion. The controlling variable appears to be the amended Constitution's failure to reject the legitimacy of the results of nationalization. However, Article 10(2), which the Court found decisive, only states, "The scope of the exclusive property and economic activities of the State shall be defined by law." The "defined by law" clause permits an interpretation of Article 10(2) that would allow Parliament to adopt legislation defining State property as limited by what Parliament perceives to be the rights of former owners.

In addition, the Court's blanket statement about limitations on its powers to retroactively "undo" unconstitutional interferences with property rights is overstated. There is no statute of limitations on remedies for constitutional violations in Hungary. Accordingly, a finding of an unconstitutional interference with a property right always requires a court to "affect the legal relations and the rights and obligations resulting therefrom" by ordering compensation and by enjoining the State interference from continuing. The Constitutional Court apparently realized that it had overstated the limits on its remedial powers, because it added that in other cases retroactive judicial interference could take place because of the pres-

ly] repealed rules cannot be found in the form... in which they were at the time of the nationalization. Certain properties are annihilated, e.g., because of city-planning or for other reasons; others were in the meantime altered to a great extent;... and finally, a number of properties are no longer in the ownership of the Hungarian State.

The Nationalization Case, supra note 53, at 14-15. This May 1991 decision followed the Land Act Case I by "not affect[ing] the ownership right of the State based on" nationalization. Id. at 13. The Nationalization Case concluded that legal claims to compensation and legal challenges to State ownership could be premised upon the texts of the nationalization laws and regulations, see infra note 134, and that any compensation or re-privatization legislation had to be in accordance with the contemporary principles of equality set forth in The Land Act Case I.

129. The Land Act Case I, supra note 49, at 6 (emphasis added).
ence of “important interests” of “legal security or . . . of the petitioner.”

1. The continuity of law principle

The Court's refusal to deny retroactively the validity of the reform of rights effected by the communist nationalization laws exemplifies more than responsiveness to Article 10(2) and limitations on the Court's remedial powers. Implicit in the Court's refusal to recognize the current validity of pre-communist rights is the Court's embrace of the continuity of law. An understanding of the substance of this theoretical strain, which is at the foundation of the Court's holding, reveals why it is an effective means for resolving this hotly disputed issue of property right reform.

The continuity of law means that the present regime's position of authority is a continuation of the last regime's position of authority. From this point of view, the authority of each regime that has been in power throughout history has been equally valid during the period of its power. The new regime can use its authority to completely modify the current laws. But the present authority lacks any power to deny the authority of the prior regime's laws during the period of the prior regime's existence. In the essay “Revolutions and Continuity of Law,” Professor Finnis sets forth a succinct statement of the effect of the continuity of law on the current authority of a past regime's law reforms:

A law once validly brought into being, in accordance with the criteria of validity then in force, remains valid until either it expires according to its own terms or terms implied at its creation, or it is repealed in accordance with conditions of repeal in force at the time of its repeal.131

According to the above principle, the negation of property rights by the nationalization laws, despite its arguably unethical character, legitimately deprived citizens of property rights, because those laws conformed with “the criteria of validity then in force”—i.e., the will of the communist government in power at the time.

130. Citing to ACC, supra note 19, arts. 40-43; see also supra note 57 (on term "legal security").
131. Finnis, supra note 81, at 63.
To have been legitimate, the "criteria of validity then in force" need not have been related to the consent of the citizenry. The obsession with having consent serve as a basis for the legitimacy of "criteria of validity," especially when the State action being validated is the reform of property rights, is an Anglo-American phenomenon. To others, the legitimacy of authority rests primarily upon effectiveness and acquiescence rather than on consent. There is no doubt that the communist regime's nationalization reforms of "legal relations and the rights and obligations resulting . . . had come into force." 

2. Exceptions

Finnis adds, however, that an authoritative rule—a rule to which the citizenry appears to acquiesce—can lack legitimacy in certain instances. These occasions, when effective laws are not authoritative, can be applied to identify those situations in which rules, despite their consistency with "criteria of validity then in force," should not be treated as the authoritative rules for a past period. Finnis's two exceptions to the statement that "the sheer fact of effectiveness is presumptively (not indefeasibly) decisive" are (1) when community rules have designated a different party as authority during the past time or (2) when the minds of "mature practical reason" during the past period rejected the content of the law.

132. See, e.g., RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 146-60 (1985) (explaining that common law principles underlying takings clause require that a taking by the State be justified by an individual's explicit waiver of a property right and not simply by prior notice from the State that a taking without just compensation could occur).

133. See FINNIS, supra note 117, at 247-49; see also H.L.A. HART, THE CONCEPT OF LAW 113-14 (1961) (obedience by citizens and acceptance by officials are the criteria for validity of a legal system).

134. Land Act Case I, supra note 49, at 6. In response to a direct challenge to the constitutionality of the nationalization laws, the Court refused to invalidate retroactively nationalization. Instead, the Court, in accordance with the Finnis continuity principle, held that victims of nationalization could currently "enforce their rights at the competent organs" if their particular property confiscation "exceeded the provisions of the legal rules in effect at that time" when the confiscation occurred. The Nationalization Case, supra note 53, at 12 (emphasis added); see supra note 128.

135. FINNIS, supra note 117, at 250-51.

136. Id. at 247-51. In the paragraphs that follow the term "minds of mature practical reason" is used to refer to those adhering to the communal order or sacred traditions. For a commentary on how to identify the contents of "minds of mature practical reason" in contemporary Western society, see PHILIP RIEFF,
A way to better understand the operation of these exceptions is to examine the question of the legitimacy of the laws of the imperialist in a colony. Natives often avoid punishment by appearing to comply with a colonizer’s rules, while they retain steadfastly their own culture’s rules. In fact, social scientists have documented native communities’ maintenance of the authority of native laws under the camouflage of compliance with imperialist rules. In such a scenario, community rules and mature minds can be said to adhere to the native sacred order in many areas of the law, rather than to the “effective” imperial law.

A decision that an imperialist law of the past was not legitimate and therefore is not entitled to recognition as having set forth rules governing that time period, rests upon the determination that a distinct cultural rule thrived in “mature minds” during that past time period. The effect of such a decision is to put forward the present day authority as a continuation of a pre-existing communal order that is distinct from the authority in power during the immediate past. The denial

137. The ensuing analysis of the practical application of the exceptions is my own and Finnis may well disagree.
138. For a description of (1) how independent cultural orders are maintained under the “camouflage” of compliance with the rules of imperialists, racists or sexists; and (2) how the imperialists, racists and sexists cannot perceive the subversive activity, see LUCE IRIGARAY, THIS SEX WHICH IS NOT ONE (C. Porter trans., 1985) (developing feminist strategy of mimesis in which women comply with stereotypes and consequently subvert the stereotypes); Ethan Klingsberg, Narratives of the Resistance of Jamaican Women (Apr. 29, 1989) (unpublished manuscript on file with the Brigham Young University Law Review) (discussing works of a Jamaican sociologist and novelist and relying on theories of resistance in H. K. Babha, Signs Taken for Wonders: Questions of Ambivalence and Authority Under a Tree Outside Delhi, May 1817, 12 CRITICAL INQUIRY 144 (Autumn 1985)); see generally M. Holquist, Stereotyping in Autobiography and Historiography, 9 POETICS TODAY 453 (1988) (explaining how compliance with societal stereotypes can simultaneously reveal society’s imperialist apperception).

An example of camouflaged compliance would be the Maranos, the Inquisition Era Spanish Jews who convinced the Catholic Church that they had converted to Catholicism while they actually retained adherence to the rules of Judaism. See ABBA EBAN, HERITAGE: CIVILIZATION AND THE JEWS 172 (1984) (The Maranos “‘were Jews in all but name, and Christians in nothing but form.’”). In such an instance, the Church would be considered an illegitimate authority in the Jewish community, despite the fact that its authority was in force.
139. See McConnell, supra note 6, at 1505 & n.17 (“Allegiance to the memory of an idealized past, with its idealized principles, has historically been the leading impetus to constructive social . . . transformation” in English history and according to the analyses of Hannah Arendt and of Michael Walzer.).
of the continuity of law relegates the prior regime to what H.L.A. Hart calls "a period of interruption."\(^{140}\) The trials of Nazis in Western Europe after World War II attempted to achieve this effect. For example, the determination by the French that rules of "war crimes" and "crimes against humanity" governed behavior on French territory during World War II, rather than the Nazi laws in force at the time,\(^{141}\) has been portrayed as France's attempt to distinguish its culture from that of the Nazis.\(^{142}\) Similarly, Czechoslovakia's current lustrace or "communist purgation" process is an attempt to associate the present authority with a community distinct from the authority of communism.

Arguably the principle of the continuity of law should have another exception: The present regime should deny the continuity of law when the prior regime's rule conflicts with universal mores of conduct. However, reliance on universal norms as a separate exception to Finnis's continuity principle is superfluous and potentially misleading. If a prior regime's rule transgresses a universal rule, then it will activate the aforementioned exception on conflicts with the mature, native order. Moreover, the formulation and application of transcendent

140. Hart, supra note 133, at 115-16. Hart insists that the "questions . . . as to what was or was not 'law' in the territory during the period of interruption . . . may not be . . . [questions] of fact." Id. at 115. He is willing to grant the new regime unfettered discretion to pass laws which label the prior era a "period of interruption" and which retroactively deem the prior regime's rules to have been illegitimate. Hart dismisses attempts to evaluate empirically the legitimacy of a prior regime's authority. He explains that the determination of the stage at which one legal system has legitimate authority and a suppressed legal rule or system has "ceased to exist is a thing not susceptible of any exact determination." Id. I tend to agree on one level. This subsection's (III.C.2) criteria of legitimacy may not be subject to exact results. Moreover, the standard favors recognition of the validity of a prior regime—like the communists—which utilized ruthless methods to eliminate virtually all space for private adherence to a distinct, native order.

But on another level, Hart's willingness to ignore empirical evaluation exhibits a lack of foresight into the dangers which can result from a new regime's unfettered discretion to deny the continuity of law. The decision whether to recognize the continuity of law must have an empirical basis to avoid the dangers of unintended self-condemnation and neglect of contemporary values. See discussion infra part III.C.3.

141. Despite the frequent portrayal of Nazi authority as "lawless," the codes were filled with positivist enactments authorizing the regime's vast powers. See Hannah Arendt, Eichmann in Jerusalem 290 (1964) (Nazi atrocities "took place within a legal order. That, indeed, was their outstanding characteristic.").

rules is a precarious exercise. Otto Kirchheimer relates the difficulties which the Nuremberg tribunals had defining "universal" concepts like war crimes, crimes against the peace, and crimes against humanity. The basis for those difficulties was the diversity of local norms among the Allies. Consequently, the Nuremberg tribunals based charges whenever possible on war-crime charges derived from "all the traditional common crimes." The implicit justification for the application of traditional, domestic laws of crimes to the Nazis is the aforementioned "mature, native order" exception.


144. KIRCHHEIMER, supra note 143, at 323-27. The definition of war crimes was subject to the "uncertain and shifting boundary lines of warfare," id. at 324; the definition of crimes against peace was undermined by the post-War dissension among the Allies, id. at 325; and crimes against humanity suffered from the "absence of a boundary line between atrocity beyond the pale and legitimate policy reserved for the individual state," id. at 326.

145. Id. at 323-27.

146. A similar outlook on trials of Nazis can be derived from HART, supra note 133. At one point, Hart severely criticizes a post-World War II German Court of Appeals decision upholding the conviction of a Nazi informant. Id. at 204-07. Hart defends the convict as having complied with valid Nazi era laws. He reasons that the Nazi laws were valid based on "the distinction between what law is and what law ought to be." Id. at 206. Earlier in The Concept of Law, Hart seems to contradict his stance on the German Court of Appeals ruling. He defends a new regime's right to declare a prior regime's laws retroactively invalid. Id. at 115-16; see supra note 140.

Hart's apparent contradiction can be resolved. There is a difference between the basis for the denial of the continuity of law by the German Court and by Hart's hypothetical new regime. The faulted German Court relied on universal, higher law principles—a "sense of justice." HART, supra note 133, at 254-55. By contrast, the hypothetical new regime's justifiable denial of the continuity of law is founded on a vision of the prior regime as "a period of interruption." Id. at 115-16. The "period of interruption" theory is consistent with the approach advocated by this Article; it invalidates a prior regime's law based on the view that the true, native order was suppressed during the prior regime and has been resurrected by the new regime. See supra note 140 and accompanying text.

Hannah Arendt makes a similar point in her argument that the Israeli judiciary's authority in the Eichmann trial would have been more well-founded if it had been founded on a "territorial principle" rather than on "universal jurisdiction." See ARENDT, supra note 141, at 258-63. Under the territorial principle, Eichmann would have been charged for infringement upon the legal order of the Jewish community rather than for a nebulous universal violation. Arendt explains that the
Application of transcendent norms, without identification of a basis in the particular community, is especially inappropriate in the realm of property rights. While many societies are prone to believe that visions of a free conscience are natural and universal, the idea of natural, universal rights to property is clearly an oxymoron. The contours of property rights on-

trials of Nazis in Poland, Czechoslovakia, Hungary, Yugoslavia, Greece, Russia, and France were premised upon the "territorial principle" or infringement upon the distinct orders of those lands. Id. Later, however, Arendt changes perspectives and argues for the establishment of an international tribunal with "universal jurisdiction" in the case of genocide, because genocide is a crime beyond any common crime within a community. Id. at 267-77.

Resurrection of the "mature, native order" which preceded the prior regime is also more effective than reliance on assertions of universal laws when the prior regime is put on trial by the successor. The three main defenses in so called "successor trials" are (1) the act of State doctrine, (2) the superior orders defense, and (3) the claim that the conviction constitutes retroactive justice in violation of ex post facto principles. See, e.g., WILLIAM J. BOSCH, JUDGMENT ON NUREMBERG 40-66, 130-44 (1970) (international and domestic lawyers' critiques of problems with Nuremberg trials). With regard to the first two defenses, the resurrection of the traditional law preceding the prior regime de-legitimizes the acts of the prior State and the superior orders of the prior regime. With regard to the third defense, the charges are not based upon malleable universal rules which appear to have been created especially for the occasion, but upon longstanding, native traditions.

For a survey of the international law instruments available for prosecution of a prior regime's human rights violations and an argument in favor of their potential effectiveness, see Roht-Ariaza, State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law, 78 CAL. L. REV. 449 (1990). See discussion supra part III.B. The following statement reveals a typical Western distinction between norms that are universal and norms that are products of a particular legal system and therefore inherently flexible: "[P]roperty (unlike freedom of conscience, for example) could not exist without the mechanism of government." Jennifer Nedelsky, American Constitutionalism and the Paradox of Private Property, in CONSTITUTIONALISM AND DEMOCRACY, supra note 8, at 241, 264. Even freedom of conscience, however, is a particularistic norm. For example, a community of monks would set forth different rules to create a free conscience than would a community of so-called "free-thinkers." Nedelsky hints that she is aware that other rights are no more absolute and transcendent than property rights: "[P]roperty is, of all the basic rights, perhaps most obviously the creation of the state . . . ." Id. (emphasis added).

In Johnson v. McIntosh, 21 U.S. 543 (1823), discussed in the next subsection, Chief Justice Marshall recognized the continuity of a British legal rule on property rights even though it was "opposed to natural right, and to the usages of civilized nations." Id. at 591. "[P]rinciples of abstract justice" amounted only to "the private and speculative opinions of individuals," because the rule was consistent with the particular "system under which the country had been settled" and the particular circumstances of the settlement. Id. at 572, 588, 591.

Michel Foucault dedicates his scholarship to illustrating that all that is considered "natural"—from sexual behavior to the ideals of political liberation movements—are concepts constructed by humans with historicist rather than divine or natural origins. See infra note 204.
ly exist as a result of a country's particular legal rules, and therefore certain contours can be "natural" only with regard to a particular community or set of communities which have the same rules simultaneously.

Another misleading consideration in continuity of law determinations is whether the prior regime legally authorized the present regime. Under the Finnis approach, such a technical, legalistic factor is irrelevant to the continuity of law. Simply because a prior regime legally authorized a subsequent regime, as was the case in the Hungarian transition, does not mean that the prior regime's law is entitled to retroactive recognition. The prior regime's laws may lack legitimacy and the present regime's authority does not rest on the prior regime's authorization. Conversely, if a regime takes power by technically illegal means, such as a coup d'etat, then the continuity of law still may apply. Professor Finnis points to several examples from British history in which a monarch forcibly regained power from a usurper. The monarch then recognized the validity of the usurper's laws during the prior period, because the usurper had legitimate authority during that period. The United States Constitution's supersession of the Articles of Confederation is another example of a technically illegal transition in which the continuity of law prevailed.

148. See Finnis, supra note 81, at 44-61 (criticizing Hans Kelsen's focus on "lawful devolution").
149. Neither the Articles of Confederation nor State laws authorized the methods used to ratify the Constitution. See, e.g., Ackerman, supra note 6, at 456-57 & n.3. Nevertheless, the continuity of law was never doubted. James Madison wrote that, even without a reference in the Constitution, see U.S. CONST. art. VI, § 1, the debts and property rights against and in favor of the United States which had been established under the Articles would retain validity under the Constitution. THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961); see also infra note 213 and accompanying text (discussing the assumption of the prior regime's debts as a manifestation of the continuity of law). Professor Ackerman notes that the framers considered it irrelevant to search the Articles to find legal authority for the Constitution's ratification. Ackerman, supra note 6, at 456-57 & n.3. A basis in popular sovereignty was all that was necessary "to legitimate their act of constitutional creation." Id. at 457 n.3. Ackerman's assertion that popular sovereignty is the sole legitimating factor and that attempts to "legalize" the Constitution's ratification are unnecessary parallels Finnis's emphasis on the "mature sector of society" in response to Kelsen's "pure law" approach to changes of regime. As long as "popular sovereignty" or the "mature sector of society" (spoudaia polis) is at the foundation of the prior and new regimes, then the continuity of law should be affirmed without regard to whether the prior regime legally authorized the new regime.
3. Problems accompanying the denial of the continuity of law

a. Unintended self-condemnation. Two problems may plague denials of the continuity of law. The first problem is that the present regime can be easily construed as a continuation of the past regime. In Czechoslovakia for example, the lustrace is showing that the authority of the prior regime was of such a pervasive nature that nobody outside of prison maintained a distinct set of cultural rules under the camouflage of compliance with communism. The revelations of the lustrace may eliminate the capacity of the present regime to put itself forward as a continuation of a communal order that was distinct from the authority of communism.

Similar links existed between the supporters of British oppression of Native American Indians and the community authorizing the independent American government. Consequently, Chief Justice Marshall in 1823 upheld the continuity of a British rule on Indian rights, rather than denying the continuity of law and simultaneously condemning the values and authority of the contemporary American government. The dispute in Johnson v. M'Intosh was whether Indians, in years prior to the independence of the colonies (1773 and 1775), could have made valid land sales to private individuals. Following the principle of the continuity of law, Chief Justice Marshall looked to the legal rule in force in 1773 and 1775. The British legal rule—which was "maintained and established as far west as the river Mississippi, by the sword"—permitted Indians to possess rights to occupy land, but prohibited their possession of rights to sell that land.

Chief Justice Marshall's continuity of law inquiry, like the approach derived from Finnis, did not end with the identification of the legal rule in force in 1773 and 1775. Two potential obstacles to Marshall's recognition of the British legal rule stemmed from the rule's "wantonly oppress[ive]" nature. The first obstacle was the conflict between the British rule and "principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man." Marshall

150. 21 U.S. 543 (1823).
151. Id. at 587-88. The European principle of "discovery gave [Great Britain] an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest." Id. at 587.
disposed of this argument by dismissing the applicability of “abstract justice” to a rule that is consistent with “that system under which the country has been settled” and the particular circumstances of that settlement. Flaws with the “original justice of the British rule” merely amounted to “the private and speculative opinions of individuals.”

The second obstacle, which stemmed from the “wantonly oppress[ive]” nature of the British rule, was that it inhibited the Indians from “separat[ing] from their ancient connexions.” The Indians had not accepted the British rule’s validity and therefore America had not become “one people” under one authority. Marshall therefore perceived the legitimacy of the British rule’s authority over the Indians to be questionable.152

Nevertheless, the Supreme Court applied the British rule to the pre-Revolution transactions. Marshall succinctly stated the basis for his acceptance of the continuity of the British law: “The British government . . . was then our government,” while those who authorized the sales by Indians chiefs were “their people.”153 The “civilized inhabitants [who] now hold this country,” were part of the British community in 1773 and 1775, as opposed to a community of “savages.”154 The continuity between the oppressors of American Indians and the post-Revolution American authorities was further exemplified by the incorporation of the British rule in State and federal laws following the Revolution. The United States was the heir to the British with regard to the “savages,” rather than the heir to either the Indian order or a higher order of “abstract justice.” Johnson v. M’Intosh aptly avoided a condemnation of the cherished regime of the present which accompanies the denial of the continuity of law when the prior regime and the present regime

152. [H]umanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired . . . [so] that [the conquered people’s] confidence in their security should gradually banish the painful sense of being separated from their ancient connexions and united by force with strangers. When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

Id. at 589-90.

153. Id. at 588 (emphasis added).

154. Id. at 587 (emphasis added).
are closely linked.

b. Neglect of contemporary values. The second potential problem with the denial of the continuity of law is that contemporary values often fail to emerge. If the continuity of law is denied, then the current authority must adopt rules that supposedly reflect the true communal order suppressed during the prior regime's rule. These laws often function as a vehicle to make a statement that "we" of the present are not "them" of the past, rather than as an expression of the affirmative beliefs of the present community. At the Klaus Barbie trial, the legal rules stated only that Nazism was unlawful, without any elaboration of what substantive, French standards of conduct made Nazism unlawful. The lustrace emphasis is also basically anti-communist, without an emphasis on what distinctly Czechoslovakian values distinguish communist acts as transgressive.

c. The continuity of nationalization. Both of the aforementioned problems would have applied to Hungary had the Court denied the continuity of the nationalization laws' reform of property rights. First, condemnation of the supporters of nationalization as anti-Hungarian would have been a condemnation of the Hungarian community rather than of outsiders. While it is true that elements of violent enforcement and Soviet imperialism characterized communist rule in Hungary, it would be false to claim that a Lockean culture existed over the last four decades beneath a camouflage of Hungarian compliance with the communist nationalization laws. Although communism arguably suppressed a traditional strain of free market activity in Hungarian society, nationalization did not in-

155. See Binder, supra note 142, at 1328, 1339-55.

Obviously there is a general tendency in the Hungarian transformation process to offer survival possibilities for many supporters of the communist regime. As a matter of fact there were too many collaborators or at least non-resistants. Hungary (and the GDR or Romania) is different from Poland where "you expect the great divide to lie between opposition and collaboration, black and white, the craven and the brave."

Id. (quoting TIMOTHY G. ASH, THE USES OF ADVERSITY 148-49 (1989)).

157. Elemér Hankiss writes, "Until the late 1940s Hungary was a market economy. Entrepreneurship and entrepreneurial spirit had a long tradition both in the cities and in some of the rural areas." Elemér Hankiss, Between Two Worlds, in RESEARCH REVIEW: PROJECT NO. 2, CHANGING VALUES IN HUNGARIAN SOCIETY 39, 44 (P. Somalai ed., 1989). Hankiss further notes that "without the skills, attitudes,
fringe upon an innate Hungarian tradition of natural property rights. Prior to the communists' rise to power in 1947, property rights had been founded upon State ordered confiscations from large landowners in 1945, from Germans in 1945, and from Jews during World War II. Moreover, prior to the rise of communism, the "large-scale involvement of the Hungarian government in the country's economy [reached] the point where it is not an exaggeration to say that the nationalization of the Hungarian economy began during World War II."

and values transmitted by this tradition, the 'second economy' could not have taken off so easily and swiftly in the 1960s and 1970s."

158. See Charles Gati, From Liberation to Revolution, in A HISTORY OF HUNGARY (P. Sugar et al. eds., 1990) ("[T]he Land Reform Act of 1945 . . . provided for the expropriation of estates larger than one thousand hold (1,420 acres) and the seizure of some smaller estates as well."). Viktor Orbán also notes that "the beneficiaries of the 1945 land reform [which broke up large estates and distributed land to individual farmers] obtained their property precisely because of the same violation of the sanctity of property as those who received theirs as a result of collectivization." Viktor Orbán, The Case Against Compensation, UNCAPTIVE MINDS, Summer 1991, at 35 (speech by leader of FIDESZ Party in Parliament on February 4, 1991) (brackets in original).

159. See Celestine Bohlen, Hungarians Debate How Far Back to Go Right Old Wrongs, N.Y. TIMES, Apr. 15, 1991, at A1, A6 ("Ethnic Germans estimate that 980,000 acres and about 60,000 homes were seized after the war.").

In 1945, following the end of World War II, Hungary not only redistributed to the poor the land of ethnic Germans, but also large amounts of property owned by "Horthy fascists," the Church, as well as banks and other private enterprises involved with Germany. J. HOENSCH, A HISTORY OF MODERN HUNGARY 169 (K. Traynor trans., 1988).

160. Hungarian Jews not only lost businesses under various World War II property reform laws, see L. Tilkovszky, The Late Interwar Years and World War II, in A HISTORY OF HUNGARY, supra note 158 (discussing transfer of property rights to "high ranking officials and military leaders" under "[t]he law of 1942 which nationalized land owned by Jews"), but also had land expropriated pursuant to decrees issued in the 1920s. See HOENSCH, supra note 159, at 106. Much of the land expropriated in the 1920s ended up in the hands of Admiral Horthy's 18,000 member Order of Heroes. The State granted each member of this ultra-patriotic organization a farm of up to 50 hectares at no charge. Id. at 107. Hungarian participation in the Holocaust also led to confiscations from Jews. See Bohlen, supra note 159 ("An estimated 337,000 properties belonging to [Hungarian] Jews who died in Nazi concentration camps were turned over . . . under deeds that showed that the former owners had died of 'poisoning.' ").

The Constitutional Court similarly traced the "gradual[]" implementation of nationalization back to the racist takings of the World War II era and the post-War land reform: "At the beginning, this was directed at certain social groups, then it was executed according to the size of the property, and finally, the nearly complete liquidation of property took place." See The Nationalization Case, supra note 53 (holding nationalization laws prospectively unconstitutional).

161. Gyorgy Ranki, The Hungarian Economy in the Late Interwar Years, in A
The second problem with the argument against the continuity of law in Hungary is that it would hinder the development of property right reforms that reflect the views of contemporary Hungary. The explanation of the first problem indicates that Hungary has a flexible tradition in the realm of property rights. The property rights of a particular moment prior to 1947 are not distinctly Hungarian and have no definitive connections to the present Hungarian community. The recognition of pre-communist rights would be part of an effort to deny the connections between the prior regime and the Hungarian community, rather than the result of any connection between the pre-communist order and the present Hungarian community. The Court's validation of pre-communist rights would amount to an imposition on Hungary of fundamental rights that have no roots in the current community.\textsuperscript{162}

\textit{HISTORY OF HUNGARY, supra note 158, at 366. Other pre-communist departures from the sanctity of property rights occurred in 1941 and December 1945. In 1941, Hungary authorized the expropriation of non-Magyar property in the territories regained from Hungary's neighbors during World War II. See \textit{HOENSCH, supra note 159. Under the 1945 armistice, those territories were returned to Hungary's neighbors.}

On November 7, 1945, Hungarians elected a Parliament in the "the freest and least rigged of any [national election] ever held in Hungary." Id. at 173. On December 6, 1945, that Parliament voted to place the mines "under state control—amounting in practice to nationalization." Id. at 174. That measure, introduced by the Communist Party, which only had 17% of the seats, passed with the support of popularly elected left wing leaders of the Smallholders Party (57% of the seats) and the Social Democrat Party (17% of the seats). Id. at 173-74.

From one perspective, the various pre-1947 property reforms and confiscations reaffirmed the centrality of free market property rules in Hungary. If free market property rules had not also been in force in pre-1947 Hungary, then the pre-1947 takings would not have been able to achieve their purposes of harming and benefiting respective sectors. However, the pre-1947 reforms and confiscations were not considered to have been unlawful stealing any more than the confiscations by the Crown in nineteenth century Hungary. Instead, those pre-1947 takings were considered natural departures from free market principles for the sake of various higher State purposes, such as bigotry and opposition to aristocracy. The post-1947 reform of property rights under nationalization was in this same tradition of serving a State principle superior to free market rules.

The various post-1947 nationalization programs reflected Hungary's ambivalence toward respect for and infringement upon property rights. At no time was all private property ordered to be nationalized. Moreover, some of the nationalization laws had provisions for compensation and permitted portions of the economy to remain subject to private control.

162. \textit{See Ethan Klingsberg, "Letter to the Editor," The New York Times Magazine, Dec. 1, 1991} (Article on the return of property in the former G.D.R. to pre-communist owners showed that the result was the subordination of "the contemporary German community's interests" to "the interests of someone from another era
Madison might have viewed such a denial of the continuity of law as an ingenious solution. The inevitable "violent struggle" accompanying the creation of new property rules after the rejection of communism could be avoided simply by structuring new entitlements on the basis of those property rights in existence prior to communism. It is more likely, however, that Madison would have endorsed the continuity of law approach taken by the Constitutional Court. One of the bases of Madison's opposition to the reform of property rights was that the current state of property rights reflected the existing communal traditions. His fear was that if the topic was opened up for debate, then the unity might disintegrate. In contrast, Hungary has yet to produce a stable communal vision of property rights with which to begin before Madisonian prudence can be invoked. The suppression of debate on a topic on which a communal consensus does not yet exist would infringe on Madison's basic notions of liberty and popular sovereignty.163

The Court's decision to uphold the continuity of law did not resolve the debate, but it enabled the debate to avoid certain obstacles. Recognition of the continuity of law eliminates the credibility of the distracting and false claim that pre-communist entitlements are the true Hungarian state of affairs. The Court's decision directs energies away from futile efforts to distinguish the past four decades and toward the constructive

and, as [the former owner] has come to realize, another place.

163. Madison advocated neither the elimination of all factionalism stemming from property rights nor the imposition of constitutional rules that do not emanate from the people.

On Madison's embrace of factionalism, see The Federalist No. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (Madison indicated that there were two ways to eliminate the "disease" of factions. First, one could eliminate the liberty "essential to its existence," but that would be "worse than the disease" itself. A second option was "giving to every citizen the same opinions" which is "impracticable").

Later in the same essay, Madison recognized that "the most common and durable source of factions has been the various and unequal distribution of property." Id. at 79. This recognition indicates that Madison's response to Jefferson (that property rules must remain stable and that the unequal distribution of property must not be interfered with by the State, see supra part III.B) assures the continuation of factionalism, rather than serving to eliminate factionalism. Despite Madison's reluctance to permit upheavals, as indicated in his response to Jefferson, Madison realized that even by taking a prudent approach he was permitting widespread factionalism.

On Madison's vision of popular sovereignty, see McConnell, supra note 6 (the people are the fountain of all power).
and pressing project of communal self-definition.

D. The Prospective Creation of Property Rights: The Rejection of Metaphysical Justifications in Favor of Scientific Policy Objectives

The Land Act Case I did not end after the Court's refusal to recognize pre-communist rights. The Constitutional Court did not just take away the possibility of using pre-communist rights as guideposts for the creation of entitlements and then leave Parliament to its "violent struggle." The Court proceeded to set forth constitutionally permissible standards for determining entitlements. The Court held that the grant of an exclusive entitlement to former owners, a party who lacked a prior fundamental right to such a property interest, would only be permitted if "such a distribution of State property would have a more favorable total social result than equal treatment, and if it undoubtedly follows from the facts that another solution that is not discriminatory against non-owners [NFO's] would not be comparable to this [total social] result."164 The opinion explained that to establish a "more favorable total social result," "it is necessary [for the Parliament] to give a complete account of the interests of both the preferred and discriminated groups together with the method of evaluation."165 While the Court did not elaborate further on the contours of "a more favorable total social result," it implied that the "total social result" is the product of an empirically based, utilitarian policy calculation and that the precise nature of the formula is subject to the discretion of Parliament.

The only apparent justification for Parliament's proposed creation of a discriminatory entitlement on behalf of the former owners was to remedy injustices of the past. The Court did not have to make a final determination on whether the explanation would ultimately satisfy the "favorable total social result" standard, because The Land Act Case I was a request for an advisory interpretation of the Constitution, rather than for a review of an actual enactment or proposed enactment. The Constitutional Court observed, however, that the basis appeared to be

164. See supra text accompanying notes 103-04 (explaining term "non-former owner" (NFO) and how the Land Act's provisions discriminated against NFO's).
166. Id. at 10.
inadequate.\textsuperscript{167}

Parliament's sense of justice could only support the discriminatory distribution of State property if the roots of this sense of justice could be traced beyond the metaphysical realm of moral sentiments to a policy-oriented, forward-looking "favorable total social result" formula. Nationalization undoubtedly had harmed the former owners. Nevertheless, the entitlement of the former owners to benefits would neither meet a special need of assistance, which they have and other Hungarians lack, nor benefit the entire community more than a non-discriminatory scheme would.\textsuperscript{168}

\begin{itemize}
\item \textbf{167.} Another possible justification was the facilitation of domestic entrepreneurial activity. The argument was quickly dismissed because providing entitlements only to former owners did not encourage free market activity anymore than distributing the State largess in a non-discriminatory manner (to all citizens without regard to possession of pre-communist rights).
\end{itemize}

\begin{itemize}
\item \textbf{168.} I have included the satisfaction of individual special needs as falling within the penumbra of "favorable total social result." See, e.g., Zobel v. Williams, 457 U.S. 55, 70 (1982) (Brennan, J., concurring) (government can address special needs as part of efforts to improve community). A focus on addressing special needs to bring about a "more favorable total social result" must include consideration of the new needs created by the cost of benefitting a special need. For an attempt to give content to the term "special needs" based upon a communal consensus of basic rights, see Thomas C. Grey, Property and Need: The Welfare State and Theories of Distributive Justice, 28 STAN. L. REV. 877 (1976).
\end{itemize}

Any demoralization suffered by the former owners as a result of nationalization has to be measured by nationalization's infringement upon their expectations. The discussion of retroactivity and the continuity of law in the previous section shows that nationalization did not violate any fundamental vision of property rights prevalent in Hungary; therefore, the special needs of the former owners for compensation to help them overcome the demoralization of nationalization are minimal. See Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165 (1967) (explaining demoralization costs).

A variety of economic factors dictate against the provision of benefits to pre-nationalization property owners such as the lack of sufficient funds in the Hungarian Treasury, the administrative costs of verifying pre-communist rights, and the risk of inflation.

Most compensation proposals provide pre-nationalization owners with preferences or subsidized opportunities to purchase their former properties. Such an enactment would be costly. Many years may pass before the State Property Agency and the courts will be able to clarify which properties have former owners with verifiable pre-nationalization titles. The State Property Agency may have to delay the privatization of many properties while claims to preferences (based on pre-communist rights) are pending. Furthermore, investors will continue to hesitate to purchase property out of fear that a "rightful" owner may be identified. Moreover, the owners of those State properties that have become private, such as agricultural cooperatives, will hesitate to invest in the long-term future because of the probability of a "rightful" owner making a claim. Current private owners who lose property
At first glance, it appears strange for a court to hold that a legislature’s sense of justice is insufficient grounds for the creation of an entitlement. Metaphysically based concepts of justice have been present in determinations in the United States of whether an adequate justification exists for a discriminatory distribution of entitlements. For example, a fundamental constitutional right often only has a basis in a metaphysical sense of justice, and satisfaction of such a right is a sufficient grounds for the creation of an entitlement to State property. On occasion, a metaphysical sense of justice also has played a role in the United States Congress’ formation of entitlements, like those proposed in The Land Act Case I, that do not emanate directly from a fundamental right in the Constitution. For instance, a metaphysical sense of justice motivated the United States Congress recently to grant entitlements to those who had been interned in concentration camps during World War II with the approval of the Supreme Court. The legal status of the recently entitled victims of Korematsu v. United States was similar to that of the Hungarian victims of nationalization. According to the courts, both groups lacked a prior fundamental right to the entitlements. Moreover, all of the members of each group did not necessarily currently possess a special, forward-looking need for the entitlement. The only basis for the entitlement was morality. However, a

to “rightful” owners will suffer demoralization.

For a discussion of how the costs of remedying past injustices outweigh the benefits in America, see EPSTEIN, supra note 132, at 346-49.

169. See Ronald Dworkin, Appendix: A Reply to Critics, in TAKING RIGHTS SERIOUSLY, supra note 109, at 291, 364-68 (by definition, rights do not have a utilitarian justification).

170. These metaphysically-based rights are inherent rights existing prior to any legislative action. See Frank I. Michelman, Property as a Constitutional Right, 38 WASH. & LEE L. REV. 1097 (1981) (distinguishing between “direct rights” to property which emanate from the Constitution and “indirect rights” to property which are created by a government promise); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 685-701 (1988) (distinguishing between inherent or core rights and positivist rights).


172. It is arguable that the victims of World War II internments possessed a special need for the funds to enable recovery from their demoralization. Cf. Michelman, supra note 168 (fitting justice concerns into utilitarian calculation). It would be more difficult to argue that former owners are emerging from Hungary’s four decades of communism any more demoralized than the rest of the Hungarian people.
metaphysical sentiment such as justice or morality is rarely the sole basis for the creation of an entitlement to property in the United States. Anglo-American law has a longstanding tradition of limiting the scope of legal interference to realms of scientific policy, as opposed to pure morality. Accordingly, in the absence of a prior fundamental right, the presence of a scientific policy justification is usually necessary in the United States for Congress to create an entitlement.

Opinions in a recent United States case analogous to The Land Act Case I offer insights into the substance of the rationale for invoking the scientific-policy/metaphysics dichotomy in the equal protection scrutiny of entitlements. In Zobel v. Williams, the United States Supreme Court struck down an

173. For a discussion of the history of purely moral justifications for interference by the State in America, see Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685, 1725-28 (1976). Kennedy relates how prior to the Civil War, the American legal system limited its non-constitutional justifications for interference to the pursuit of policy objectives as opposed to purely moral aims. After the Civil War, justifications for legal interference took the form of an ethic which had a strong practical, scientific dimension; simultaneously, jurisprudence experienced "the total disappearance of religious arguments, and the fading of overtly moralistic discussions." Id. at 1728.

Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497, 522 (1961), lists the rare and delicate situations in which the State has "traditionally concerned itself with the moral soundness of its people." Kennedy, supra, at 1728. Yet even those situations—such as restrictions upon obscenity and homosexual conduct—do not pursue metaphysical or moral objectives without regard for scientific policy concerns. Obscenity restrictions apply only to expression without redeeming social merit, see Miller v. United States, 425 U.S. 435 (1976), and cannot apply to obscene expression without any conceivable social ramifications. See Stanley v. Georgia, 394 U.S. 557 (1969). The Supreme Court upheld Georgia's sodomy prohibition because homosexuality "malign[s]" people just as rape does. Bowers v. Hardwick, 478 U.S. 186 (1986) (Burger, C.J., concurring). Perhaps Chief Justice Burger's opinion in Bowers shows that virtually any moral viewpoint can masquerade as a policy in the pursuit of the general welfare. I will explain at the end of this section why the identification of some sort of scientific policy objective is important from a political science perspective, although meaningless to perceptive legal observers.

To survive equal protection analysis, a classification must have a scientific policy element. See Zobel v. Williams, 457 U.S. 55 (1982); see also McGowan v. Maryland, 366 U.S. 420 (1961) (legislature's scientific policy justification for the provision of time for recreation activities enables Sunday closing laws to survive equal protection challenge).

174. Of course, there are limits on the acceptability of certain policy or utilitarian justifications. See Ronald Dworkin, Reverse Discrimination, in TAKING RIGHTS SERIOUSLY, supra note 109, at 222-39 (distinguishing the argument that segregation has a utilitarian value because it prevents race riots).

attempt by Alaska to create discriminatory entitlements justified by a communal sense of morality. Alaska had sought to distribute its surplus mineral profits to residents in amounts proportional to the length of time a resident had lived in the State. The longtime residents, like the pre-nationalization property owners, lacked a fundamental right to the larger entitlements. Accordingly, the Supreme Court had to determine the motive behind the discriminatory scheme and whether it was constitutionally adequate.

The basic motivation of the Alaskan legislature was to compensate the longtime residents for the hardships they had endured while living in Alaska prior to the discovery of oil there. Then-Justice Rehnquist disagreed with the majority over whether a utilitarian policy justification accompanied this motive. The majority held that, despite the existence of these past hardships, a utilitarian concern, such as a special need on the part of longtime residents or the improvement of life in the State, did not exist to justify the discriminatory entitlements. Accordingly, the Court held that the scheme violated equal protection. Justice Rehnquist in dissent, citing the post-Lochner legacy of deference to legislatures, was willing to give the Alaskan legislature the benefit of the doubt that a utilitarian justification existed.

Justice O'Connor also disagreed with the Zobel majority, but on a much more fundamental level than Justice Rehnquist. She found nothing “innately improper” about

176. Id. at 61-63 (denying that the statute has a rational relation to any of the forward-looking policies advanced by Alaska as the purpose of the statute). Alaska unsuccessfully advanced three justifications for the discriminatory treatment of the compensation plan: (1) the need to create financial incentives to induce individuals to stay or move to Alaska; (2) the need to reward residents for their contributions to the State; and (3) the need to encourage proper management of the State mineral revenue trust fund.

177. Id. at 84 (Rehnquist, J., dissenting) (“In striking down the Alaskan scheme, the Court seems momentarily to have forgotten ‘the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.’” (quoting Dandridge v. Williams, 397 U.S. 471, 486 (1970))).

178. Justice O'Connor concurred in the judgment only. She voted to invalidate the enactment solely for its infringement on the right to travel. The majority holding was based on both the right to travel violation and the more general equal protection violation discussed herein. Justice Brennan's concurrence elaborated on how the majority opinion's right to travel discussion was not essential for the finding of the equal protection violation upon which this Article focuses.
the legislature's reliance on a metaphysically based conception of justice or of "civic virtue."

In response, Justice Brennan's concurrence pointed directly to the danger of the principle endorsed by Justice O'Connor. Inherent in any metaphysical belief that justifies discriminatory creation of property entitlements is the "premise that 'some citizens are more equal than others.'" The only way to show that such a premise does not underlie the discrimination is to show empirically that the result will benefit the community, compensate individuals for a lack from which they currently suffer, or "remedy continuing injustices." If such forward-looking justifications do not exist, then the basis for the enactment is simply a metaphysical belief that something in the past, without any material relevance to the present or future, makes "some citizens more equal than others." Brennan concluded O'Connor's viewpoint would allow legislatures to distribute entitlements on grounds such as the recognition of aristocracy. Indeed, overtones of the recognition of the inherent rights of nobility characterize the creation of entitlements to property in response to the length of time one has lived in a State or to the amount of property one owned many years ago.

The anti-metaphysics principle of Zobel and The Land Act Case I can be summed up by an analogy to basic equal protection standards governing the creation of entitlements for African Americans, also known as affirmative action programs. Slaves, longtime residents of Alaska, and pre-nationalization property owners all have suffered in the past. However, the suffering during slavery days, like the troubles caused by the lack of oil in Alaska and by nationalization, did not violate any fundamental rights for which one would be constitutionally

179. 457 U.S. 55, 72 (O'Connor, J., concurring); see also Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543 (1986) (identifying a theme of deference to community value choices or "civic virtue" in O'Connor opinions such as her Zobel concurrence). For a general discussion of the metaphysical, as opposed to scientific, basis of "civic virtue," see RIEFF, supra note 136.

180. For additional criticism of the potential dangers of permitting "civic virtue" rather than utilitarian calculation to serve as a justification for property right reform, see EPSTEIN, supra note 132, at 344-46. Epstein also considers much of what many post-Lochner thinkers would let pass as utilitarian policies to be negative-sum gains.

181. 457 U.S. at 68-71 (Brennan, J., concurring).

182. Id. at 69 & n.3 (Brennan, J., concurring).
entitled to a current benefit. In light of the absence of any fundamental rights to a current benefit, something more than merely a communal desire to redress the difficulties of the past is necessary to justify the discrimination of an affirmative action program, the Alaskan surplus distribution plan, and the Land Act. The past has to have left these groups with current, special needs that would be met by the creation of entitlements. Alternatively, the entitlement should benefit the community in a way that non-discriminatory action could not.  

From a certain perspective, even the scientific policy requirement in both Zobel and The Land Act Case I has an element of metaphysics to it. A scientific policy objective often brings to State action more of a mystique of acceptability than actual scientific justification. In reality, there are so many different utilitarian formulas, as well as definitions of special need and "favorable total social result," that many different types of property reform could be adopted and found acceptable by a scientific policy calculation. Evidence of this truth is the current, post-Lochner era of judicial review. Government attorneys and judges in this era have become ingenious at identifying a utilitarian policy consideration underlying regulatory enactments.  

The United States Supreme Court even rationalizes discriminatorily underinclusive distributions of entitlements as first steps toward addressing broader utilitarian needs.

*The Land Act Case I* indicates that the Constitutional Court may not be so permissive. The decision condemns as

183. Kathleen Sullivan argues that affirmative action should not only redress the "sins of discrimination" but also pursue a vision of the future. See Kathleen M. Sullivan, *Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986). Both of those objectives are forward-looking policies. Affirmative action as a response to the "sins of discrimination" is based upon redressing the current and future harmful effects of past discrimination rather than purely upon backward-looking moralism.  

184. See, *e.g.*, Dandridge v. Williams, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting) (arguing that "the extremes to which the Court has gone in dreaming up rational bases for state regulation" in the post-Lochner era has gone too far in equal protection review of entitlements); see also McGowan v. Maryland, 366 U.S. 420, 426 (1961) ("A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.").  

185. See *Dandridge*, 397 U.S. at 486-87 (citing Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911) to support the underinclusive classifications of a welfare program).
unacceptable an enactment with a policy justification that is either underinclusive (if the justification does not support entitling all of the former owners) or overinclusive (if the justification would also support an enactment entitling NFO's). Nevertheless, the Constitutional Court's "favorable total social result" standard is inherently vague and will not totally eliminate metaphysical underpinnings from justifications for entitlement decisions by Parliament.

Although the perceptive legal scholar may be able to deconstruct the myth of the scientific policy/metaphysics dichotomy, the Court's requirement of a scientific policy basis for the Land Act may play an important role from a political science perspective. As discussed earlier, stormy political controversies lurk behind the legal issues of The Land Act Case I and of similar property right reform issues that are inevitably in store for Hungary and all other nations emerging from communism. Simply suppressing these debates is impossible. Some degree of property reform is inevitable when leaving behind a communist state of affairs. Moreover, suppression of these debates would enhance the dangers of divisiveness and limit the chances of arriving at innovative solutions which could unify the nation.

The Court's requirement that scientific policy objectives underlie the contents of this inevitable debate is a means of making Hungary's future struggles over entitlement reform less divisive and more constructive. Metaphysical debates tend to be divisive because their contents embody opposing basic beliefs and values. Parties adhering to different basic beliefs

186. See supra text accompanying notes 103-04 (explaining term "non-former owner" or "NFO" and how Land Act's provisions discriminated against NFO's).

In The Land Act Case III, the Court stated that, to avoid violation of the equal protection clause, Parliament must provide an overview of its future plans to entitle those excluded from an underinclusive entitlement scheme. The Land Act Case III, supra note 63. By contrast, the United States Supreme Court has been willing to uphold underinclusive plans based on its assumption that Congress would proceed "one step at a time." Williamson v. Lee Optical, 348 U.S. 483, 489 (1955); see also supra note 184 and accompanying text.


188. See supra text accompanying notes 119-24 (discussing how property right reform is inevitable when leaving communism behind and how the Land Act Case debate cannot be limited by resurrecting fundamental rights to property from the 1940s).

189. See Sunstein, supra note 8.
and values can appear to each other as if they are from different communities. In contrast, scientific debates on property reform can encompass radically different viewpoints, but they force all parties to arrive at a common language—empirical measurements—and the same conceptual goal—"more favorable total social result."

If Parliament reforms entitlements on scientific grounds, then the effect on the losing parties will be less alienating than if Parliament rejects the losing parties' views on metaphysical grounds. The defeat of a viewpoint on metaphysical grounds labels that position's means and ends as devoid of moral justification. Theoretically, the victorious proposal in a scientific policy debate need not be repugnant to the basic values of the backers of the losing proposal. A scientific defeat only indicates disagreement with empirical measurements rather than fundamental value differences.

In addition, because the defeated proposals have the same objectives and underlying standards as today's victorious scheme, the losers in a scientific-policy debate have the consolation that the proposals defeated today will have a chance for enactment in the future. In contrast, a metaphysically grounded viewpoint is not subject to modification by experience. Accordingly, metaphysical divisions in a community are not only likely to be perceived as more fundamental, but they also may result in more longstanding and insurmountable disputes.

The above analysis admittedly oversimplifies the reality of the scientific-policy/metaphysics dichotomy; however, the reality is not necessarily as important as its political effect. If Hungary will have to face difficult questions of entitlement reform, then the Court's ruling that Parliament's resolutions must pursue scientific policy objectives should modify the nature of the debates. The factions will avoid focusing on issues that highlight differing fundamental beliefs within Hungary, such as what inherent significance one believes pre-communist titles have today. The theme of how to help Hungary will provoke differing opinions, but it will also facilitate the maintenance of unity in a community of diverse beliefs.

E. A Lesson of The Land Act Case I:
Leaving the Past Behind and the 'Metaphysical Justice/Scientific Policy' Dichotomy

The pursuit of forward-looking policy objectives constitutes
not only a wise approach to the delicate issue of property right reform, but also an efficient and unifying method for leaving behind the unattractive remnants of communism in general. For instance, members of the new government have complained that many senior members of the judiciary are simply leftover communist party hacks, rather than skilled jurists. The Parliament must now choose between two approaches to remediating this problem. The metaphysical justice approach would be to undertake a process like Czechoslovakia’s *lustrace*. Such an approach would find senior judges unworthy of office based upon their strong ties to the illegitimate authority of the past. The social consequences would be the dangers explained in III:C:3. By contrast, a forward-looking policy to leaving behind the era of unqualified judges would avoid such drawbacks. The scientific policy approach, which has recently found favor among some members of Parliament, would subject all senior judges to a competitive exam which measures professional legal skills. Those judges who occupy senior positions solely because they issued the decisions ordered by communist party officials, rather than as a result of their superior legal skills, would be identified. The past’s “hack” judiciary would be left behind through focus on improving the capacity of Hungary’s judiciary to function with intelligence and independence, rather than through a witch-hunt with costly social implications.

F. Addressing Uncertainty

The final part of *The Land Act Case I* is a completely different advisory opinion that the Court included in the same decision. The petition submitted by the Prime Minister asked whether the Constitution’s takings clause requires payment of compensation when the property of an agricultural cooperative changes ownership by “virtue of law” rather than by an “official resolution of expropriation.” The question raised two issues

190. Oltay, supra note 34.
191. Id.
192. I concede that the advocated approach would not identify all communist party hacks. Moreover, the creation of neutral, merit-based exams is a difficult task. However, the records relied upon by the *lustrace* process are also turning out to be far from accurate.

Another step critical to the reform and independence of the Hungarian judiciary is the improvement of salaries and working conditions, which are currently far below those of the average private attorney.
concerning the situations under which the Constitution requires compensation: (1) what types of owners are entitled to compensation after a taking and (2) under what circumstances does a taking occur.

The Court answered the first question by holding that the takings clause protects all property right owners, including cooperatives, "natural persons," and "legal entities." The owners only need to operate independently of the State. An owner is still protected even if it is regulated by the State or was formed originally by State action.

The Court answered the second question by stating that the Constitution requires the payment of compensation for the taking of a property right even if the taking occurs by a means other than an official decree of expropriation. If State action infringes upon the property right or if the State transfers the rights to another private party, then the Constitution requires compensation. The Court also emphasized that all compensation must be "immediate, unconditional and full."

The opinion appears to impose an element of absolute respect for property rights onto Parliament's property reform efforts. The Court may have made such statements in this advisory opinion to counteract uncertainties as to the integrity of property rights in Hungary. Two circumstances peculiar to this opinion had the potential for creating the harmful economic consequences which flow from such uncertainties.193

First, the Court probably wanted to eliminate any uncertainty in the economy created by the first part of The Land Act Case I. The rejection of the rights of pre-communist property owners to compensation could be misinterpreted as a sign that the protection of property rights is not a priority of the new regime. The convenient inclusion of this opinion alongside the rejection of the Smallholders' claims enabled the Court to avoid letting the first part of the decision create the impression that post-communist property rights are not protected from future


On the costs which result from uncertainty as to the integrity of property rights, see generally BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 41-70 (1977) (discussing utilitarian approach to takings clause adjudications); POSNER, supra note 112 (discussing the economic theory of property rights).
nationalization efforts.

Second, the opinion appears to be a response to Smallholders' Party proposals to order the transfer to pre-nationalization owners of the rights to certain properties. These proposals had been hindering the privatization process by scaring investors away from State properties once owned by supporters of the Smallholders Party. The opinion serves to eliminate those investors' apprehensions and the negative effects they were having on the economy. In particular, the opinion relieves the uncertainty as to the future value of the property rights of independent agricultural cooperatives, which were formed from nationalized land.

These two circumstances are rooted in the particular context of this case. Accordingly, whether the Constitutional Court's future applications of the takings clause will have the same fervor as the rhetoric in this advisory opinion may depend on whether the foreseeable takings at that time have as high a potential to disrupt the economy as the takings at issue in this opinion.

IV. ULTIMATE SOURCES OF AUTHORITY

Parts II and III examined the formal extent of the Court's power and the substantive theories underlying a major opinion, respectively. In one sense, Parts II and III revealed sources of the Court's authority. From a hermeneutic perspective, however, those sources must have a source as well. The Article now goes a step further to examine the ultimate source of the form and substance of the Court's authority. In accordance with the democratic republican notion of government by consent, the Hungarian community appears to be at least partially the ultimate source of the Court's exercise of power.

The Court's capacity to root the form and substance of its authority in the Constitution and the ACC is prima facie proof that the Court is responsive to the community. Democratic republicanism does not require the Court to ignore the constitutional text or jurisdictional legislation because of its perception of a contradictory popular consensus.¹⁹⁴ Technically, responsiveness to the Constitution and the ACC should be a

¹⁹⁴. Cf. McConnell, supra note 6 (criticizing Professor Perry for advocating a system of judicial review which responds exclusively to extra-legal sources, rather than the actual written law).
sufficient indication that judicial review is responsive to the community. However, skepticism often exists as to whether judicial review conforms with democratic republican theory, even when the Court is acting within the scope of its lawful authority.\textsuperscript{195} This is especially true in Hungary, where the democratic republican roots of the Constitution and the ACC are not readily apparent.\textsuperscript{196} Accordingly, investigation beyond the technical legality of judicial review is necessary to clarify the issue of the Court's legitimacy as a democratic republican body.

The following subsections discuss two aspects of the community pertaining to the function of judicial review: (1) expectations of the nature of judicial decisionmaking and (2) expectations of the meaning of constitutional law. The first subsection shows how the Court's formal authority responds to Hungarian culture's visions of judicial precedents and the adjudicatory process. The second subsection examines whether the Court interprets the Constitution in a manner which is consistent with the ideals of the social movement which produced the amended Constitution.

\textbf{A. Hungarian Legal Tradition}

The American jurisprudential mind may find anathema the Constitutional Court's advisory opinion and pre-enactment jurisdiction, as well as the other factors that increase the scope of the Court's power to interpret the Constitution. The roots of this reaction are, at least partly, due to two aspects of American jurisprudence that are absent from Hungarian legal culture: the common law adjudicatory tradition and legal realism. The ensuing discussion shows how Hungarian legal traditions are responsible for the absence of these two strains of American legal thought from Hungarian culture and how Hungary consequently has significantly different expectations of the nature of judicially created precedent and of judicial interpretation of legal texts. Both of those expectations are sources for the Court's extensive authority to issue binding precedents and

\textsuperscript{195} See \textit{supra} note 16.
\textsuperscript{196} \textit{Id.}; see Bozóki, \textit{supra} note 10, at 549 ("One can only answer the question whether the new Constitution and system of public law correspond to the political and legal culture of the country [Hungary] after several years of tested experience.").
to engage in constitutional interpretation.

1. **The difference between precedent in Hungary’s civil code culture and America’s common law culture**

   In the United States, expectations of judicial adherence to broad, neutral principles are in constant tension with expectations of narrow, specific holdings. The former expectation emanates from the universal definition of legality, while the latter is an attribute of the common law tradition. America’s common law heritage emphasizes the restrictions upon the scope of holdings. Decisions are fact-bound. The principles they set forth are readily malleable with changes in distinguishing circumstances. Decisions may discuss abstract principles; but common law adjudicatory techniques stress that each decision is limited to analogous fact patterns. These restrictions on common law adjudication technically do not apply beyond the development of the common law. However, in American constitutional case law, the common law tradition has created expectations of the scope of judicial authority. These common law characteristics are equally prominent in constitutional case law. Accordingly, if a United States Supreme Court Justice’s opinions lean too far toward setting forth and adhering to neutral principles that apply “across the board,” then he will be criticized as an ab-

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197. This subsection shows that the Civil Code tradition serves as a source within the Hungarian community for the Constitutional Court’s scope of authority, notwithstanding the fact that in practice Hungary may not be a purely Civil Code legal system. For instance, the Constitutional Court is not a Civil Code court; the Constitutional Court’s opinions have characteristics of the common law case approach; and Hungarian Civil Code adjudications may be moving in a direction where common law innovations and fact-bound precedents become more frequent as a diversity of novel and complex issues like pollution disputes begin to come before the courts. This subsection relies upon the Civil Code solely for its role in defining the Hungarian community’s expectations of judicially created precedent.

Perceptive observers could point out the fact-bound nature of precedents in a Hungarian Civil Code system. In addition, the common law system has attributes of the Civil Code system. See, e.g., Pasley v. Freeman, 100 Eng. Rep. 450, 456 (K.B. 1789) (“Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the instance, and the only question is the application of a principle recognized in the law to such new case, it will be just as competent to Courts of Justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago . . . .”) (quoted in Epstein, supra note 193, at 559 n.5).

My goal is to show the role played by popular propositions and expectations, rather than to demystify these popular conceptions.
solutist and possibly as an activist and a counter-majoritarian.188

Hungary's Civil Code tradition has produced a legal culture with different expectations of precedent. Prior to the operation of the Constitutional Court, the only judicially created precedents in Hungarian law were those Supreme Court opinions in response to fact scenarios without a pertinent Code provision.199 The Hungarian Supreme Court precedents set forth the principle missing from the Code, rather than a solution bound to a fact pattern. Hungarian lawyers do not rely on the particular circumstances from which a precedent was derived to limit the applicability of the precedent's principle.200 Law-

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198. See BICKEL, supra note 3, at 162, 173-74 (criticizing Justice Black's lack of passive virtues); Deutsch, supra note 3 (discussing the extreme adherence of Justice Hugo Black to neutral principles and the consequent "immodesty" of his jurisprudence).

The expectation of common law restraint in constitutional case law surfaced in a recent debate between Justice O'Connor and Justice Scalia on the appropriate scope of the Webster v. Reproductive Health Services opinion. Justice O'Connor, who favored a limited holding, wrote that there is a "fundamental rule of judicial restraint," 492 U.S. 490, 526 (1989) (O'Connor, J., concurring) (quoting Three Affiliated Tribes v. Wold Eng'g, P.C., 467 U.S. 138, 157 (1984)), which states that the Supreme Court will not "generally formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." Id. (O'Connor, J., concurring) (quoting Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (quoting Liverpool, N.Y., & Phila. Steamship Co. v. Commissioner of Emigration, 113 U.S. 33, 39 (1885))).

Justice Scalia responded with an insightful analysis of recent opinions which shows that the Supreme Court's adherence to the fundamental rule quoted above is only a myth. Nevertheless, even after this penetrating critique, Justice Scalia concluded that he had only shown that it is a "reality that our policy not to formulate a rule of constitutional law broader than is required by the precise facts' has a frequently applied good-cause exception." Id. at 534 (Scalia, J., concurring) (emphasis added). Despite the revelations of his survey of recent opinions, Justice Scalia showed that the expectation of judicial restraint is still present because he felt compelled to provide a "good-cause exception" to justify expanding the scope of the Webster holding.

199. Technically, there is no such thing as a binding case law precedent in Hungary's Civil Code system. The Hungarian Supreme Court fills in gaps in the Code by issuing decrees of varying specificity, rather than by resolving an actual case. The actual Supreme Court case law, as opposed to the Supreme Court decrees of legal principles (the judicially created precedents), is not binding precedential authority.

200. However, it would be an overstatement to claim that a skilled Hungarian lawyer, while disputing whether a precedential principle governs a case or what result a principle requires, would refrain from referring to specific fact scenarios to which courts have applied the principle. My point is only that the American cultural perception is that at the foundation of a common law precedent are the facts from which the precedent is derived, while the Hungarian cultural perception
yers look to these Civil Code precedents as if they were "black letter" rule entries in the Code, rather than holdings with possible *sui generis* characteristics. Hungary's Civil Code tradition defines precedents as broad, abstract pronouncements. Accordingly, the Constitutional Court, unlike the United States Supreme Court, emerged from a legal culture that lacks the tension between expectations of neutral principles and expectations of precedents of limited substance and authority. The Constitutional Court's broad powers to issue abstract principles reflect the communal expectations in Hungary of a high court's role.

However, whether Hungarian legal culture will always accept Constitutional Court precedents with the same ease as the decrees of the Hungarian Supreme Court is questionable due to one significant factor: the Constitutional Court's abstract pronouncements restrict the will of Parliament, while the Hungarian Supreme Court's announcements of norms complement Parliament's efforts by filling in gaps in legislation. Conflicts between the Constitutional Court and Parliament may well inspire Parliament to attempt to challenge Hungarian cultural expectations of judicial precedent with respect to the Constitutional Court's work.

2. The non-legal realist vision of the interpretation of legal texts

Hungary's civil code tradition also results in an absence of legal realism from mainstream Hungarian legal thought. The bulk of Hungarian judicial decisionmaking involves the application of the pertinent Code provision, rather than the creation of precedents. Most Hungarians view the application of the Code as a technocratic act, rather than a decision dependent on ideological preferences. The case study method appears to a typical Hungarian jurist as an emphasis on practical studies. Hungarian lawyers typically claim, "American law students do not have any exposure to theory when they only learn by the case study method." American legal realists do not share

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201. I witnessed such remarks by Hungarian, Czechoslovakian, and Romanian lawyers at the Hungarian Ministry of Justice Seminars, Budapest, January 21-23, 1991; the Jan Hus Foundation Law Reform Conference, Bratislava, November 1990; and the Soros Foundation Rule of Law Conferences, Cluj-Napoca and Bucharest,
this reaction because they view a case as the product of a judicial interpretation that could have gone in other directions. By contrast, a Hungarian jurist does not perceive a simple adjudication of a case under the Code as requiring theoretical choices for the judge.202

This vision of self-applying law is likely a product of the Soviet influence on the judicial system and of East-Central Europe’s naivété about the Western civil code tradition, rather than of the civil code system itself. In contrast to the civil code judiciaries emerging from communism, courts in Western civil code countries frequently cite authorities to justify their particular interpretation of a legal rule.203 A court’s denial of the role of authorities guiding interpretation conceals the controlling influences upon the interpretation of a rule and facilitates manipulation. Such easily accessible manipulation was in the interest of communist regimes. In addition, a decision that shows the genealogy of its interpretation of a rule implicitly concedes that the interpretation is subject to future supersessive interpretations, while a decision that purports to be the product of a self-applying rule implies finality and perfection.204

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202. See Sájo, supra note 16, at 18 (Hungarian judges “want very clear rules and refuse responsibility for creative precedent-setting. They would like to act as the paragraph-automat of Max Weber.”).

203. Professor George Fletcher has repeatedly pointed this out to lawyers and judges in post-communist nations who claim that civil code legal cultures have no use for the study of case law and for the citation of authorities to justify a judge’s particular interpretation of a rule. See Remarks of George Fletcher and of Hungarian lawyers and judges, Hungarian Ministry of Justice Seminar, Hungary, January 21-23, 1991; Remarks of George Fletcher and of Romanian lawyers and judges, Soros Foundation Rule of Law Conferences, Bucharest and Cluj-Napoca, Romania, May 27, 29, 1991; Remarks of George Fletcher and of Czechoslovakian lawyers, Jan Hus Foundation Law Reform Conference, Bratislava, Czechoslovakia, November, 1990. However, Western civil code judiciaries regard the authority of professors and treatises more highly than do common law courts.

204. The research of Michel Foucault focuses on revealing genealogies or the history of the authorities which society implicitly relies upon to support visions of “the natural” and “the truth.” Foucault’s revelation of genealogies enables him to unmask the apparently “natural” and “true” as only an artificial construct. See Michel Foucault, Two Lectures, in POWER/KNOWLEDGE 83 (1980) (“Genealogies... are precisely anti-sciences. Not that they vindicate a lyrical right to ignorance or non-knowledge.... [Genealogies] are concerned, rather, with the insurrection of knowledges that are opposed... to the effects of the centralising powers which are linked to the institution and functioning of an organised scientific discourse
Hungary's non-legal realist outlook contributes to the acceptability of the Constitutional Court's broad powers of constitutional interpretation. Hungarians are accustomed to accepting judicial application of the Code and are more willing to view a decision of the Constitutional Court as the sole, correct application of the constitutional text. To Hungarians accustomed to observing civil law adjudications, the Court's tasks of constitutional interpretation appear much more innocent and less subject to interpretive discretion than they would to a legal realist culture.

The absence of legal realism from Hungarian culture is likely to disappear quickly, at least with regard to the Court, for two reasons. First, the Constitutional Court explicitly cites the extra-textual authorities which guide its interpretation of the constitutional text. References to philosophers, Western European domestic laws, international norms, Hungarian legal experts, and previous decisions of the Court have all appeared in recent Constitutional Court opinions. The Court's implicit concession that the Constitution is not self-applying invites criticism that the Court has chosen the wrong interpretation. The second factor is that the Constitutional Court is not engaged in the application of Parliament's rules but in the review of those rules. Consequently, the political branches are more likely to engage in criticism of the Court's work. Such critiques will surely lead to legal realist allegations that ulterior motives influence decisions.205

B. The Rendszerváltozás and the Constitution

Judicial review can be responsive not only to the communal outlook upon the judicial role but also to the outlook upon the meaning of constitutional law. Hungary's present amended Constitution emerged from the rendszerváltozás.206 If the

within a society such as ours."). In case law, the revelation of a legal interpretation's genealogy subjects the interpretation to supersessive interpretations. 205. Indeed, the Court's opposition to compensation schemes has been attributed to the alleged communist sympathies of the Judges. Part III's extensive discussion of the Court's legal reasoning in The Land Act Case I shows that accusation to be unfounded. However, true motivations can always be hidden behind legal reasoning and reliance on precedents. That is why even a court which cites authorities for its interpretation of a legal rule is subject to legal realist accusations of manipulation by dark forces. 206. See supra note 11 (rendszerváltozás means "change of regime").
Court's constitutional interpretations are the products of prior communal consent, then they should reflect the communal ideals of the rendszerváltozás. Social scientists have not yet definitively resolved what the rendszerváltozás means to Hungarians.\textsuperscript{207} However, based upon available evidence and scholarship, this subsection arrives at three normative categories for analysis of the transition's significance. Each category is used to assess the democratic republican character of the Court.

1. The rendszerváltozás as restoration

   a. A change without a focus. A good place to start a search for the ideals of the rendszerváltozás is Hungary's past. Paraphrasing the observations of Hannah Arendt and Michael Walzer, Professor Michael McConnell writes, "[A]llegiance to the memory of an idealized past, with its idealized principles, has historically been the leading impetus to constructive social... transformation."\textsuperscript{208} There are some indications that the ideal of the rendszerváltozás is a resurrection of the state of affairs before the communist infiltration of the government began in the late 1940s. Streets have regained their pre-communist names. In addition, the traditional Hungarian coat of arms has replaced the red-starred shield as the national symbol. Most importantly, several "sleeping beauty" political parties have awakened from their several-decades-long sleep... to claim legal continuity\textsuperscript{209} with the pre-communist era. Among the "sleeping beauties" are the Smallholders Party, the Hungarian People's Party, the Social Democrat Party, and the Christian Democrat Party.

   However, legal signs, as well as the observations of sociologists, tend to indicate that the transition was not a revolutionary "swinging back"\textsuperscript{210} into a particular preordained order. If the rendszerváltozás has continuity with the pre-communist era, then the rendszerváltozás must view the communist era as the illegitimate suppression and reformation of the pre-commu-

\textsuperscript{207} Bozóki, supra note 10, at 538 ("A generally accepted set of conceptions and a scientific paradigm of the post-communist transition are not yet available.").

\textsuperscript{208} See McConnell, supra note 6, at 1505 & n.17 (quoting ARENDT, supra note 3, at 35-36).

\textsuperscript{209} Bozóki, supra note 16, at 6.

\textsuperscript{210} ARENDT, supra note 3, at 35-36.
nist era. But, unlike Czechoslovakia, Hungary has refrained from undergoing a *lustrace* or purgation process premised on the belief that association with the prior regime was association with an illegitimate authority.\(^{211}\) Indeed, the new regime recently prosecuted someone for unlawful infringement upon the authority of the communists, before it prosecuted two communist officials for having breached their lawful authority.\(^{212}\) Another sign of the continuity between the authority of the prior regime and the present regime is the unquestioned inheritance of the communist debt.\(^{213}\)

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211. In November 1991, Parliament passed a law which permit[s] trials of all those people accused of committing murder and treason between December 1944 and May 1990 whom the Communist Government had protected from being brought to trial . . . . Sponsors of the legislation say that perhaps 100 people could be tried, compared with the hundreds of thousands who could possibly lose their [public employment] positions [under the *lustrace* law] in Czechoslovakia. Judith Ingram, *Coming Trials That May Try the Hungarian Soul*, N.Y. TIMES, Nov. 13, 1991, at A4. Moreover, the new law may never go into effect. President Goncz has refused to sign it and a challenge to the law before the Constitutional Court will be resolved in early 1992. See Letter of Dr. Gabor Halmai, Chief Clerk to President Sólyom of the Constitutional Court, to Ethan Klingsberg (Dec. 20, 1991). Goncz similarly precipitated a constitutional challenge to Parliament's third Land Act bill by his refusal to sign it. See *infra* note 257. The President's decision to exploit the formal requirement that he sign all legislation is a significant development in the balance of power in Hungarian government, because Goncz is a member of an opposition party.

212. The new Chief Prosecutor charged the defendant in the first case with unlawfully revealing State secrets. The defendant had informed the public that, prior to and during the transition negotiations, the secret police were monitoring the meetings of the "Opposition Roundtable"—the leaders of the opposition parties—and then providing the information to the Socialist Party. The defendant received a "censure": a mild form of a conviction which carries no sentence with it. The communist defendants, put on trial several months later, were the supervisors of the operation which the defendant in the first case had revealed to the public. The defendants in the second case received "the lightest possible sentences." Z. Lovas, "After Danubegate," *Uncaptive Minds*, Summer 1991, at 17. *See also* Sájo, *supra* note 16, at 17 ("In Hungary, a handful of the most prominent judges who have sentenced innocent people in political trials or the participants in the 1956 revolt were asked to retire. All that took place without any publicity."). Such singling out of those judges who suppressed the 1956 uprising, as opposed to those judges who enforced nationalization and other communist programs, corresponds with the next subsection's reading of the centrality of 1956 for the *rendszer változás.*

213. *See* Holmes, *supra* note 85, at 212 (explaining natural law principle: "if you inherit another's property (e.g., his throne) you also inherit his debts"). Such a theory of debt inheritance is premised upon the continuity of law theory elaborated in Part III. If you inherit another’s throne you also inherit his past generally—including his laws, legal institutions, and property right reforms. Al-
Furthermore, sociological analyses have not characterized the *rendszerváltás* as a revolutionary call for the restoration of the pre-communist state of affairs. These preliminary assessments of recent events emphasize the decentralized nature of the transition and the consequent failure of a particular set of ideals to emerge. As Hungarian sociologist András Bozóki puts it, the transition has been "morose rather than cathartic."\(^\text{214}\)

Several factors are responsible for confounding efforts to put labels on the significance of Hungary's transition from communism. One factor is the key role of the Hungarian communists in the transition. The degree to which communist leaders facilitated and took part in the *rendszerváltás* while simultaneously endorsing socialist rhetoric can baffle attempts to make sense of the transition. A complementary factor is the gradual nature of the transition. Sociologists link the transition of 1989 to reforms which began a decade earlier.\(^\text{215}\)

Another factor is the factional nature of the opposition to communism. Unlike the situation in Poland and Czechoslovakia, a single anti-communist movement never existed in Hungary.\(^\text{216}\) The various opposition groups which did emerge pos-


\(^\text{215}\) Sociologists' incessant focus on Hungary's gradualism makes one suspect whether there really was a marked change in the last two years. See, e.g., Bozóki, supra note 214; Szabo, supra note 64.

\(^\text{216}\) Szabo, supra note 64.
sessed radically different outlooks and often fiercely criticized the agendas of their fellow anti-communists. The first free elections manifest this phenomenon. Six parties, each with a unique platform, attained an influential number of seats in Parliament, while no party emerged with a majority of seats. The “sleeping beauty” parties with their pre-1947 ideals only fared slightly better than the Socialist Party. Traditional political trends, such as nationalism and rivalries between urban and country dwellers, characterized the transition; but the rendszervaltozas neither resurrected a particular collective ideal from the pre-communist era nor rejected the legitimacy of the authority exercised by the communists in the past.

The Court’s constitutional interpretation in The Land Act Case I reflects the insignificance of the pre-communist era values to the popular movement which led to the creation of the amended Constitution. The Court had to decide whether or not Article 10(2) of the Constitution permits Parliament to recognize pre-communist property rights. The Court interpreted Article 10(2) to recognize nationalization’s reform of property rights as a legitimate exercise of authority and to deny the current validity of the pre-communist rights. Part III established that this interpretation rested on sound legal theo-

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Bozóki writes of the plethora of disputes between opposition parties prior to, during, and following the Roundtable negotiations. It appears that only resentment toward the communist attempts to exploit this factionalism resulted in any cooperation at all. See Bozóki, supra note 16; Bozóki, supra note 10.

218. See supra note 94.

219. The two most successful “sleeping beauty” parties were the Smallholders with 11.7% and the Christian Democrats with 6.5% of the votes. The Socialists received 10.9% of the votes.

220. Szabo, supra note 64.

221. Indeed, Bozóki argues that opposition to communism developed on an individual level rather than on the level of any collective ideals. See Bozóki, supra note 16.

222. See discussion supra part III.C.

223. If Parliament could recognize pre-communist property rights, then a justification would exist for enactment of an entitlement scheme which discriminates in favor of the pre-communist property owners. Article 10(2) of the amended Constitution indicates that the scope of the exclusive property and economic activities of the State shall be defined by law. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. I, art. 10(2) (Hung.).
ry and social policy. This examination of the social events which created the Constitution shows the decision to have also been responsive to the Hungarian community.

However, the thesis that the Court interpreted the Constitution in a manner consistent with the popular vision which led to the creation of the amended Constitution must overcome one striking piece of evidence: The majority of the first elected Parliament endorsed the recognition of pre-communist property rights. The parliamentary majority’s support for the Smallholders Party’s effort to resurrect pre-communist property rights does not necessarily indicate that all aspects of the Land Act responded to majority views of the Hungarian community. Surveys reveal that only the minority Smallholders Party and an additional small percentage of the citizenry actively supported the Land Act. The Smallholders used threats to bring down the ruling coalition, rather than the backing of a popular majority, to attain the support of a parliamentary majority.224

Normally, the results of such special interest politics are consistent with democratic republicanism.225 Moreover, judicial review’s role is not to confound the efforts of special interest groups. However, when special interest group politics result in legislation founded on conflicts with the majority’s fundamental beliefs, as reflected in the Constitution, then judicial review is consistent with democratic republican principles. In such a scenario, judicial review and constitutional law are more responsive to the community than is the legislature. The Land Act Case I was one such scenario.226 Judicial review in The

224. Of those surveyed in June 1989, when the Opposition Roundtable first began the transition negotiations with the communists, two thirds said that some reform of the State’s monopoly on property rights was needed, but only 18% endorsed returning land to the pre-communist owners and only 9% endorsed the return of other types property to the pre-communist owners. Hankiss, supra note 157, at 55 (Gallup survey). A survey conducted in March 1991, five months after The Land Act Case I and two months before Parliament endorsed another compensation scheme, revealed that two-thirds of the nation opposed the compensation concept. See supra note 101.

225. Cf. supra note 9 (the dissenters or minority in a republic consent to the majority’s adopted decision or rule, because, as participants in a republican government, the minority has consented to decisionmaking procedures and to the results of those procedures).

226. For a more detailed account of the political events preceding The Land Act Case I, see discussion supra part IIIA. For a defense of the consistency of judicial review with majoritarianism in American history, see Ackerman, supra note 6; Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 YALE L.J.
Land Act Case I operated on the basis of neither surveys nor the Judges' sociological instincts; it operated on the basis of constitutional interpretation. Surveys and other indications of public sentiments, however, affirm that the Court's application of the Constitution was responsive to the populace.

b. 1956 and the ideals of 1989. Even though the transition was not a consensual call to return to the pre-communist era, there is one past event which served as an inspirational model for the rendszerváltozás: the 1956 uprising. Like the rendszerváltozás, the 1956 conflict was between the Soviet backed wing of the communist party and a diverse group of reform communists, bureaucrats, Smallholders, nationalists, students, and urban intellectuals. Due to the diverse nature of the 1956 movement, all participants in the rendszerváltozás have been able to draw upon those events for support and inspiration.

Simultaneously with the announcement that the communist party would “accept political pluralism,” reform communist Imre Poszgay attracted attention by publicly describing 1956 as a “popular uprising.” Poszgay’s statement was a radical revision of the previous appellation: “counter-revolution.” It was the “rehabilitation” of a previous era and therefore an indication that a transition was at hand. Then the commencement of the negotiations between the Opposition Roundtable and the communists was marked on June 16, 1989, by the formal reburial of reform communist Imre Nagy and other heroes, who had been executed by the Soviets in 1956 and then buried ignominiously. Hundreds of thousands attended speeches by leaders from the Opposition Roundtable and the communist party. The speakers associated their respective causes and roles in the current negotiations with the martyrs of 1956.

227. For emphasis of the importance of this event, see Szabo, supra note 64; Bozóki, supra note 16.

Reform communist Imre Nagy “began to lose his once enormous popularity” by October 24, 1956, when it appeared that the 1956 Revolution would succeed. Charles Gati recalls, “The people no longer [would] think in terms of the Party and its factions. At issue was not ‘socialist legality’, but a more fundamental change to political pluralism. Gati, supra note 158, at 380. A similar fate befell 1989’s popular communist reformer Imre Pozsgay after the legalization of political plurality.

228. See Fekete Doboz, THE HUNGARIAN TRANSITION (Video with English narration) (showing the Imre Nagy Funeral, the digging up of Imre Nagy’s bones as
Then finally, Parliament intentionally passed the amendments which entirely changed the 1949 Constitution on the anniversary of the 1956 uprising, October 23, 1989.\footnote{228}

The transition's identification with the events of 1956 is helpful in assessing the significance of the rendszerváltózas. The 1956 uprising is not just a malleable icon of opposition to orthodox communism. Similarly, the rendszerváltózas was more than merely the ouster of the communists without any accompanying idealistic focus. The 1956 movement and the rendszerváltózas may not have been definitive calls to return to either the pre-communist or any other particular state of affairs;\footnote{230} however, both 1956 and 1989 stood for democratization, the legalization of factionalism, and the limitation of the State's unfettered domination of property rights, public debate and other fundamental aspects of civil society. Moreover, 1956 and 1989 both stood for the cooperation of groups who share these broad ideals despite their ultimately diverse agendas. Bozóki's analysis of 1989 concludes, "[O]pposition cooperation was the movement of nationwide scope."\footnote{231}

well as pre-1989 illegal ceremonies at the unmarked Nagy grave site and in the streets of Budapest commemorating the 1956 uprising). The events in the video all link the recent transition movement to 1956.

A similar reburial of communists, who had been ignominiously executed by orthodox communists, helped spark the 1956 movement. On October 6, 1956, László Rajk and three other communists who had been killed in the 1949 purges were reburied in a ceremony attended by tens of thousands. At the Rajk reburial, as at the Nagy reburial, the authorities used the ceremony to manifest their commitment to reform, while the opposition used the ceremony to show the Communist Party's guilt and corruption. Gati, supra note 158, at 377-79.

\footnote{229} In addition, a quiet purgation process has been directed at judges who imposed sanctions against the participants in the 1956 uprising, but not against judges who helped enforce nationalization and other communist programs. See supra note 212.

Although nobody in government would risk the backlash of refraining from praising the 1956 uprising, there are members of the government who try to play down the importance of the memory of 1956. Many current party leaders had stayed on the sidelines during the 1956 revolt and now associate the 1956 movement with reform communism. Accordingly, MDF neglected to commemorate the anniversary of the reburial of Imre Nagy and has endorsed a national holiday based on the accomplishments of St. Istvan rather than the events of October 1956.

\footnote{230} As in 1989, the movement of 1956 had a few indications of a popular desire to return to an earlier era: Nagy's government announced plans to restore the traditional emblem; the post-World War II political parties announced plans to reorganize; and Cardinal Mindszenty was liberated from prison. See Gati, supra note 158, at 379-83.

\footnote{231} Bozóki, supra note 16, at 19-20 (emphasis in original); see also Viktor
On a formal level, the Constitutional Court embodies the broad ideals embraced by the Hungarian transition movement. The extensive burden placed on the Constitutional Court to provide binding pronouncements of constitutional law responds to an underlying desire to impose restrictions upon the State. During the communist era, restrictions on the State had been meaningless, despite the existence of a Constitution and the founding in 1983 of a constitutional advisory committee to the Parliament.\(^{232}\) By 1989, it had become clear that binding enforcement of constitutional law by an independent body was necessary to effect the ideal of restricting the State. Moreover, the broad grants of mandatory jurisdiction enable the Court to serve as a reliable guardian of constitutional rights. In contrast, if jurisdiction was more difficult to attain, the Court’s role as the designated protector of constitutional limitations upon the State would be diminished.

The Court not only limits the State in order to provide room for Hungary’s affinity for factionalism and civil society, but the Court also limits factionalism and the exercise of liber-

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\(^{232}\) The Constitutional Law Council was made up mostly of members of the Congress of People’s Deputies, the body which the Council was supposedly instructing. Moreover, the Council lacked the power to review enactments or to issue binding constitutional interpretations. The positivist legal acts of the government continued to determine the scope of constitutional law despite the existence of the Council. See generally Istan Kovács, From the Constitutional Law Council to the Constitutional Court (April 1989) (unpublished manuscript included in Materials of Roundtable Conference on Constitutional Reform, February 1990). The Constitutional Law Council failed to function as an independent guardian of constitutional rights as a result not only of formal factors, but also of the fact that the members of the Council were communist party collaborators.

The creation of the Constitutional Court is part of post-communist Hungary’s effort to reform the Constitutional Law Council so that its work has authority. The authorization of the Constitutional Court to take over the advisory opinion requests on the Council’s docket reinforces this vision of continuity between the two bodies. See ACC, supra note 19, ch. 5, § 58; see also Kovács, supra.
ty so as to protect the *rendszerváltozás* ideal of cooperation. A statement by the Minister of Justice on the transition encapsulates how the Constitutional Court is a response to this sentiment:

The unintended consequences—especially anarchy, a lack of patience for changes, and the danger of violent solutions—are real, partly as a consequence of the special characteristics of the Hungarian political culture, and partly due to the unforeseeable, at present still unknown, patterns of the disintegration of the previous political system. The process of constitutionalism may play a special role in warding off these unintended consequences.233

Empowering the Constitutional Court with vast jurisdiction permits the Court to impose boundaries on factional agendas and thus to ensure unity with regard, at least, to certain basic principles.234

2. *The rendszerváltozás and the scientific policy ideal*

The *Land Act Case I* opinion’s rejection of metaphysical State objectives and requirement of verifiable scientific policy justifications for State action235 also responds to an apparent attribute of the transition. The thesis of this subsection is that the public, being disillusioned with the communist regime’s metaphysically based policies, supported the *rendszerváltozás* so that critical scientific analyses would support future govern-

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233. Kálmán Kulcsár, Constitutional State, Constitutionalism, and Human Rights in the Transformation of the Hungarian Political System 10 (Feb. 1990) (unpublished manuscript included in materials of Roundtable Conference on Hungarian Constitutional Reform). Kulcsár was the Minister of Justice during the historic law reforms of October 1989 and is now ambassador to Canada. See also Bozóki, supra note 16 (describing contemporary fears that national socialist demagoguery will take over in Hungary).

234. A recent call by President Vaclav Havel for the creation of a Czechoslovakian Constitutional Court reflected a similar response to post-communist fears of factional violence. Public fears of civil strife arose after certain leaders of Slovakia issued a series of separatist statements in late 1990. President Havel stated that he would never utilize the military to ensure unity. Instead, Havel called for the immediate creation of a national constitutional court to review the legality of the proposed actions of the Slovak leaders. Havel believed that constitutional law could unify the country more effectively than could military force. Since the Czechoslovakian Constitution at the time was still the discredited Stalinist Constitution of the pre-Velvet Revolution regime, it would be even more precise to say that Havel’s confidence was in the institution of the constitutional court.

235. See discussion supra part III.D.
ment policies.

The communist regime had originally rested its authority upon claims to both a metaphysical "mission" and the scientific pursuit of the public good. By the 1980s, the propaganda emphasis on the latter ground intensified. The so-called "scientific worldview" and "entrepreneurship" of the communists, however, lacked any demonstrable basis. There is some preliminary evidence that the populace behind the rendszerváltás sought a new regime characterized by well-founded, scientific policy. A study of Hungarian voting patterns in 1990 by Susan Gal and Katalin Kovacs reveals that voters preferred to choose candidates based on the evidence of their technical expertise, as opposed to their party affiliations and platforms. Furthermore, surveys in the 1980s revealed that Hungarians have little respect for natural rights. This is another indication that the decision to head in a new direction

236. The party justified its leading role, in part with its claim of a historic mission, in part through the claim that, as the only repository of a scientific worldview, it is its sole prerogative to define the "public good." In terms of this ideology, society is not competent to participate in political decisions.


237. See Hankiss, supra note 157, at 46 (describing how "entrepreneurship" and "enterprising" had become key phrases in communist propaganda in the 1980s).


239. Elemer Hankiss, assessing the results of the European Values Systems Study of 1982, concludes that Hungarians do not exhibit "an individualism rich in values but a rude, resentful, convulsive egoism and privatism." Hankiss, supra note 157, at 42. For instance, only 31% of Hungarians responded that they would raise their children to respect others, while the rest of Europe responded positively to that question on an average level between 43% and 62%. See id.

Based upon a national survey of rights consciousness in Hungary in December 1986 and January 1987, András Sájo writes, "Arguments on human dignity are scarce and because of prejudices some people are not willing to extend human dignity to all members of society . . . . There is little respect among the citizens toward each other." András Sájo, Rights-Awareness in Hungary, in Research Review: Project No. 2, Changing Values in Hungarian Society, supra note 157, at 27, 38. Sájo seems to doubt not only citizens' rights consciousness, but also the public's capacity to question whether social policy is scientifically grounded: Hungary is "a country where childish dependence on the goodwill of the authorities was raised into supreme virtue and where experience teaches that insistence on rights is being overfussy." Id.
occurred largely out of recognition of the practical utility of such a change, rather than as part of a sudden awakening to the moral superiority of the free markets and liberalism.\textsuperscript{240}

The Land Act Case I instructs Parliament that laws affecting entitlements must have a demonstrable scientific policy justification. As discussed in Part III, the Court implies that for Parliament to create entitlements the Constitution requires more than simply a vague, post-Lochner reference to the public good. This interpretation of the Constitution responds to the popular enthusiasm for scientific policy which, according to preliminary evidence, underlies the rendszerváltás.\textsuperscript{241}

3. The rendszerváltás and the ideal of the West

A final candidate for an ideal of the rendszerváltás is the desire to emulate the West. Part II.G explained how Western legal norms play an authoritative role in the Court's constitutional interpretations. This subsection proposes that such a development responds to a popular trend underlying the creation of the amended Constitution.

The Hungarian community may not be fully knowledgeable of the substantive details of Western legal standards,\textsuperscript{242} but in a democratic republican State, the populace often consents to the pursuit of broad ideals rather than detailed particulars.\textsuperscript{243}

In the realm of constitutional law, the adoption of judicial review and the text of the amended Constitution both manifested

\textsuperscript{240} On the economic utility of recognizing human rights, see discussion \textit{infra} part IV.B.3 (explaining that conformity with human rights norms enables membership in the Council of Europe which is a stepping stone to the practical benefits of membership in the EEC).

\textsuperscript{241} This thesis, like the prior one, must overcome the fact that the elected Parliament has enacted legislation in a manner contrary to this supposed attribute of the majority. See discussion \textit{supra} part IV.B.1.a (constitutional interpretation can be more responsive to communal ideals than acts of the legislature).

\textsuperscript{242} See Sájo, \textit{supra} note 16, at 7 ("The choices [for the future] are determined by the available Western models (which are often little and selectively known . . .").

\textsuperscript{243} Westerners often refrain from authorizing their legislators and judges to implement particularized results. Instead, the populace authorizes officials to deliberate for it in accordance with certain broad ideals. See \textit{supra} note 8 (explaining how exercise of deliberative function is responsive to electorate and in accordance with democratic republican theory of government by consent). See also Sájo, \textit{supra} note 16, at 15 ("[I]t is quite understandable that in a society at the verge of economic collapse and where the faculty of self-determination was systematically destroyed, one expects an active intervention even in [the] shaping of liberal institutions . . .").
a desire to emulate the legal norms of the West. Judicial re-
view is a Western concept, as are most of the clauses of the
amended Constitution. The President of the Constitutional
Court recently warned, “If considerable limitations were im-
posed on our jurisdiction, then the Hungarian legislature would
have to encounter intense reaction from all over Europe and
would need to give an explanation.” A departure from Eu-
ropean expectations of the Court’s formal role would require an
explanation, because the Hungarian community perceives con-
formity to Western legal conventions to be of significance.

While Hungary’s general fascination with the West may be partially attributed to psychological reasons, there are also practical bases underlying the communal desire to have legal standards conform to those of the West. The responsive-
ess of the Court’s constitutional interpretations to Western
norms manifests this practical foundation. The Death Penalty
Case’s adherence to Western European legal trends may fa-
cilitate Hungary’s admission into the Council of Europe and
ultimately the European Economic Community. If Hungarian
legal standards, especially in the area of human rights, satisfy
Western criteria, then the Council of Europe is more likely to
admit Hungary. Admission to the Council is important because it serves as a stepping stone to the financial benefits of mem-
bership in the European Economic Community. In the Fall of
1990, Hungary began a one year probationary period preceding
admission to the Council. If during this period the Council had
reviewed Hungarian procedures surrounding the application of
the death penalty and had found them to be inadequate, as it

244. See Machecck, supra note 84, at 10 (judicial review by a constitutional
court is “form of expression of the European legal culture”).
245. Sölyom, supra note 25, at 1-2.
246. Hankiss provides a survey from 1989 which shows the Hungarian admira-
tion for the West. Hankiss, supra note 157, at 57-58. However, he notes, “It is one
thing ... to admire the success of Western countries; and it is another and more
difficult thing ... [to choose] to adopt an already existing” model of economics and
government. Id. at 58; cf. Sájo, supra note 16, at 8 n.7 ("The early communist
regimes of the region tried to justify themselves by proving that the legal solutions
they applied were identical with those of the Soviet law. Now the most common
reference is that the legal solution is in conformity with the Western solution.
People are never particularly clear what ... they mean [by] Western."). Professor
Sájo adds that appeals to religion, anti-communism, nationalism, and consumerism
may be more persuasive than references to standards of Western constitutionalism.
Id. at 7.
247. See discussion supra part II.G.
did those in the United States, then Hungary's chances for admission by the end of 1991 would have been seriously harmed. Accordingly, the effort of The Death Penalty Case to conform Hungarian law to European norms responded to practical concerns which may underlie the desire to emulate the West.

The strict standards of the takings clause enunciated in The Land Act Case also manifest a practical strain in Hungarian constitutional case law's responsiveness to the transition movement's Western ideals. As described in Part III, the holding attempted to eliminate circumstances which inhibit Western businesses from participating in the Hungarian economy. The decision's acquiescence to Western property right standards could well result in economic benefits for the country.

V. EPILOGUE:
RECENT DEVELOPMENTS AND FUTURE UNCERTAINTY

Parts II and III set forth the structure of the Hungarian Constitutional Court's authority. Part IV traced the credibility of judicial review's form and substance to sources in the Hungarian community. Whether the roots of the Court's formal elements of power and substantive theories in underlying communal sources will be sufficient for the Court to be politically effective is currently indefinite.

Since October 1990, Parliament has enacted three compensation statutes in defiance of the fundamental principles enunciated in The Land Act Case. The first enactment, the Church Property Act, provides for grants of State property to churches. With regard to such a statute, The Land Act Case's

248. See discussion supra part II.G (discussing Council's standards for procedures surrounding the death penalty and Soering v. United Kingdom, 11 Eur. Court H.R. (ser. A) at 28 (1989)).
249. See The Land Act Case I, supra note 49.
250. See supra part III.F (discussing how opinion was responsive to factors inhibiting foreign businesses from (1) making long-term investments because of the possibility of future nationalization efforts and (2) investing in properties targeted by Smallholders Party for reprivatization).
251. The majority of elementary schools and large numbers of university dormitories will be returned to religious groups. The Act provides the churches with ten years to establish a "social function." Although this Act ostensibly facilitates the development of civil society, the pervasive role of State support actually stunts such development. See Arato, supra note 217.
principles set forth the following rules: (1) the churches have no inherent right to any State property even though the State acquired property from the churches through nationalization; and therefore (2) the creation of entitlements on behalf of churches discriminates against other private organizations, unless Parliament can show that the goal of the statute is the pursuit of "a more favorable total social result." The Act superficially attempts to comply with The Land Act Case I's requirement that such a discriminatory entitlement scheme have "a more favorable total social result." Under the terms of the Act, the churches receive the property rights to facilitate their fulfillment of a forward-looking "social function," rather than exclusively as restitution for the communist confiscations. Putting aside the issue of church/State separation, the "social function" objective would probably enable the Act to survive deferential, post-Lochner equal protection type scrutiny. However, The Land Act Case I implies that more than simply a superficial reference to the present and future general welfare is necessary to satisfy the "more favorable social result requirement." In addition, The Land Act Case I stresses that "underinclusive" justifications are unacceptable. The "social function" objective appears to be underinclusive, because Parliament failed to consider that the creation of equivalent entitlements on behalf of secular organizations would also fulfill a "social function." The Court has yet to review the Church Property Act, even though it has been subject to popular criticism.

The other two enactments are revised plans to compensate pre-nationalization property owners. The revisions respond to

252. The churches function separately from the State in the Republic of Hungary. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [Constitution] ch. XII, art. 60(3) (Hung.).
253. See, e.g., McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday closing laws against equal protection challenge because closing businesses on Sunday serves a beneficial social function as well as a religious function); cf. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1223 n.61 (2d ed. 1988) ("If the society decides that all enterprises whose dominant purpose is charitable . . . should be granted an exemption [from having to pay taxes] for all their activities, there seems no strong reason to withhold such beneficial treatment from charitable institutions which are religious in character.").
254. The President of the Court indicated, with regard to the Church Property Act, that the Land Act Case I had not been studied by Parliament in its context. Sólyom, supra note 25, at 41; see also supra text accompanying notes 184-86 (discussing level of scrutiny).
255. See supra text accompanying notes 166, 184-86.
minor constitutional issues, but still violate the equal protection clause and takings clause principles discussed in Part III. Any attempt by backers of these compensation statutes to limit the Court's power is unlikely, because the ruling coalition lacks the two-thirds majority necessary to amend either the ACC or the Constitution. Nevertheless, the Court has exhibited signs of appeasing the ruling coalition on the compensation issue. In April 1991, the opposition Alliance of Free Democrats petitioned the Court to review the proposed Land Act II before its passage. As described in Part II.C.2, the Court denied jurisdiction. The development of a justiciability limitation in that case may have been not only an attempt to limit the burden of the Court's large docket, but also a sign of deference to the political branches on a delicate topic. In May 1991, Parliament passed the Land Act II. On June 3, 1991, the Court struck it down. In contrast with The Land Act Case I's unanimous declaration of the fundamental constitutional problems with compensation schemes, the most recent opinion focused only on minor issues. Only one concurring opinion restated the foundational principles discussed in Part III.

256. See supra part II.C (justiciability restrictions are a response to large docket).

257. See The Land Act Case III, supra note 63 (Voros, J., concurring).

The Land Act Case III responded to the six questions set forth in the petition of President Arpad Goncz. Both the Court and President Arpad Goncz's SZDSZ, which is a strong supporter of the institution of judicial review, may have focused on the six minor issues so that the Court could strike down the Act without putting itself into fundamental conflict with the compensation concept and the ruling parliamentary coalition. The explanation for such a desire would be the avoidance of criticism of judicial review by the ruling coalition. In addition, the limited scope of The Land Act Case III prevents the leader of the ruling coalition, the Hungarian Democratic Forum (MDF), from delegating responsibility for a difficult political decision to the Constitutional Court. Taking into account public opinion and sound economic policy advice, the MDF would probably prefer to withdraw its support for the compensation concept. Nevertheless, MDF is bound to maintain its support for compensation because of the demands of its coalition partner, the Smallholders Party. If the Court had pressed the issue of discrimination against NFO's, see supra text accompanying notes 103-04 (explaining term "non-former owner" or "NFO" and how Land Act's provisions discriminated against NFO's), and thereby had declared the compensation concept fundamentally unconstitutional, then the Court would have done MDF's dirty work. Both the Court and SZDSZ would prefer to have compensation ultimately defeated in the political arena to preserve the Court's political capital. In addition, the limited holding is in SZDSZ's interest because it increases the likelihood that either the MDF-Smallholders coalition will collapse or the MDF will be associated with an unpopular bill.

In response to the six questions in President Arpad Goncz's petition, the Court held that (1) the limitation of compensation to those who lost property after 1949
On June 26, 1991, the ruling coalition passed the Land Act III. The statute attempted to respond to the most recent holding but made no attempt to remedy discrimination against NFO's (non-former owners). On June 28, 1991, the Socialist Party announced the commencement of a campaign to initiate a referendum to block the enforcement of the Land Act III. The signatures of 100,000 citizens is necessary to initiate a referendum. If over fifty percent of the population participates in the balloting, the results of the referendum vote become as binding as a Court holding.

The drawn out referendum process has similarities to the democratic republican vision of movements to amend the constitution, a process "through which mobilized masses of ordinary citizens finally organize their political will with sufficient clarity to lay down the law to those who speak in their name on a daily basis in the national legislature. The fact that the referendum process can fulfill a role parallel to that of judicial review is revealing as to the democratic republican ideals of judicial review. But the decision of opponents of the Land Act III to turn to the referendum process to enforce the communal consensus, rather than simply to petition the Court, is an indication of a lack of confidence in the capacity of judicial review and constitutional law to enforce the communal consensus. The Court's own recent passivity in the last two Land Act Cases may be responsible for that dearth of confidence. Future developments in the compensation scheme controversy and

is not inherently unconstitutional, (2) but the Compensation Act violates the Constitution due to its failure to provide either (a) a “constitutional reason” for the plan's exclusion of those who lost property as a result of pre-1949 confiscations, such as those directed at Germans in 1945 and at Jews in 1939, or (b) an outline of plans to compensate pre-1949 victims; (3) the limitation of compensation to victims of financial and material losses is constitutional; (4) the Act violates the Constitution's equal protection clause by ensuring that at least 94% of former land owners will receive full compensation, while only providing partial compensation to former owners of other types of property; (5) the Act violates the constitutional rights of local governments by ordering property under local control to be turned over to former owners; and (6) the Constitution permits Parliament to create coupons exchangeable for shares of property currently under the control of agricultural cooperatives. For a more detailed critique of the politics and reasoning behind the recent decision, see Ethan Klingsberg, Hungary: The Constitutional Politics of Compensation, 2 SOVIET AND EAST EUROPEAN LAW 1 (June 1991) (published by Columbia Law School's Parker School of Foreign and Comparative Law).

258. See supra text accompanying notes 103-04 (explaining term "non-former owner" or "NFO" and how Land Act's provisions discriminated against NFO's).
259. Ackerman, supra note 6, at 475.
other upcoming events, such as the possible adoption of a new Constitution and parliamentary elections, will further clarify the nature of the Court's authority.\footnote{260}

**CONCLUSION**

This Article should enable readers to understand better the bases for the authority of constitutional courts. The various procedures and circumstances which make the Hungarian Court's power possible have been reviewed. Moreover, the ramifications of the policy and philosophical choices available in the critical constitutional matters confronting the post-communist regimes are now clarified. Most importantly, investigations such as this into the sociological underpinnings of judicial review demonstrate that despite the circuity of the connections between an institution exercising judicial review and the populace, those connections can be meaningful.

This last realization is particularly important with respect to Eastern Europe where cynicism about the legitimacy of the new constitutionalism is widespread.\footnote{261} While Hungarian legal thinkers appear willing to take refuge in natural law\footnote{262} as a basis for the new constitutional law and judicial review, those same thinkers continue to question the legitimacy of the new constitutional system through reference to the criteria of democratic republican theory.\footnote{263} To an extent, this natural law/majoritarianism schizophrenia haunts all serious probes into the foundation of judicial review. But in Eastern Europe, the ambivalence has a special significance.

Most of the dissidents under communism relied upon natural law, because it enabled them to justify radical positions that lacked the support of either a symbol of authority or mass popularity.\footnote{264} Now that those dissidents possess the seats of

\footnote{260. The referendum initiative failed to materialize. The Court has received thirty petitions challenging the constitutionality of the most recent compensation statute, but has yet to issue a decision. Letter from Dr. Gabor Halmai, Chief Clerk to President Sőlyom of the Constitutional Court, to Ethan Klingsberg (Dec. 20, 1991).}

\footnote{261. See supra note 16.}

\footnote{262. H.L.A. Hart explains the classical underpinning of "Natural Law: that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid." HART, supra note 133, at 182.}

\footnote{263. See supra note 16.}

\footnote{264. The Solidarity movement is an exception. Solidarity had the authority of an}
power and their stances are becoming enshrined in law, the need to appeal to higher law is no longer necessary. But these new leaders realize that a transition from communism is not successful simply because certain higher principles have become the law of the land. The change from communism to democracy requires the development of a new type of citizenry. New participatory muscles will have to be used by the masses. If the directions of the new regime are ultimately dictated by the higher law visions of an elite group of law professors serving on the Constitutional Court, then the development of those new muscles will be futile. Fear of such a scenario is why the former dissidents still question the legitimacy of the new constitutional system, despite its substantive consistency with their beliefs. This Article responds to their concerns by showing that there is a connection between the Court and the public. Many characteristics of the public's input indicate that the citizenry is not taking full advantage of its potential for influencing the Court. For example, the popular desire to imitate the West, as well as the current expectations of precedent and the adjudicatory process, indicate citizens' willingness to abstain from development of particularistic views and to invest the Court with a large degree of discretion. But the important factor is that the connection between the Court and the public exists. The rest can be left to the evolution of a more educated

independent hierarchy and large demonstrations for most of the 1980s. In Hungary, Bulgaria, and Czechoslovakia, the situation was much different. Opposition was often not manifested. Dissent passively existed only in the minds of individuals. Consequently, dissidents lacked even “underground” authority. As late as 1985, most Hungarian citizens refused even to indicate dissatisfaction with the State in anonymous surveys. See Hankiss, supra note 157, at 49-51 (Hankiss attributes “radical, though contradictory, changes” in responses to similar surveys conducted in 1985 and 1989 “to the fact that people are now, in 1989, . . . less constrained to show themselves loyal to the system and its institutions; . . . [there is a] newly acquired courage . . . ”). This is why social science analysts generally misjudged Eastern Europe. As late as 1988, few social scientists thought the populace of communist nations, other than Poland, had any impetus to support profound changes. Only observers like Timothy Garton Ash, who took a more journalistic, first-hand approach, were able to perceive that the masses were ready to give active support to alternative regimes. See, e.g., Timothy Garton Ash, Prague—A Poem Not Disappearing, in VACLAV HAVEL: LIVING IN TRUTH 213-21 (Jan Vladislav ed., 1986).

265. See supra Part III.B & III.C (discussing JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS (under most circumstances, mature minds of practical reason look to the law that is in force as the embodiment of “natural law,” as described in note 262)).
and activated citizenry. Moreover, the cynicism of new leaders and domestic commentators is a positive sign, because it shows that they are truly dedicated to democracy and will not settle for an era founded solely on natural law.