

## The Supreme Court of the United States and Anarcharsis' Theory of the Law: A Review Article

Of the book, *Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America*, By Adam COHEN (2020) New York: Penguin Press, 416 pages. ISBN: 978-0-73522-150-5

Braham Dabscheck

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[See table of contents](#)

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# The Supreme Court of the United States and Anarcharsis' Theory of the Law: A Review Article

Braham Dabscheck

**Of the book, *Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America***

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**" Written laws are like spiders' webs, they will catch, it is true, the weak and poor, but would be torn in pieces by the rich and powerful."**

Anarcharsis.<sup>1</sup>

**" The Court upholds a scheme of judicial review whereby justice remains a luxury for the wealthy."**

Justice Douglas.<sup>2</sup>

## Introduction

Courts provide a mechanism for resolving disputes within a given society. They base their decisions on interpretations of Constitutions, legislation, their previous decisions and those of other courts. A Supreme Court will be the last port of call in resolving disputes with its decisions being followed, or applied, by lower courts. There is an expectation, or maybe it is an heroic assumption, that courts will hand down impartial decisions, that judges do not possess and/or will be able to ignore any biases they have. With this view of the law, what is referred to as formalism, judges are mere technicians applying the law to cases presented to them for adjudication. For example, John Roberts, at his confirmation hearing prior to his appointment as Chief Justice of the Supreme Court of the United States, in 2005, said, "it's my job to call balls and strikes, and not to pitch or bat" (p. 77).

In adjudicating the competing claims of litigants courts are required to make a choice (an umpire's call on whether it is a ball or strike determines the result of a game), which favours one litigant over another; and whatever is decided tautologically becomes 'the law'. William Jethro Brown, President of the South

Australian Industrial Court from 1916 to 1927, said judges seek to maintain the fiction that it is 'the law', rather than themselves, which make decisions:

Lest they should innovate prematurely or capriciously, they have affected as a profession of faith that they cannot innovate at all...and, in so far as they have innovated, they have sought to conceal the fact from themselves as well as the public.<sup>3</sup>

What determines the choices (decisions) made by judges? A realist view of the law says decisions, despite protestations to the contrary, are based on the background and biases of judges. Adam Cohen provides empirical support for this realist view in *Supreme Inequality: The Supreme Court's Fifty-Year Battle for a More Unjust America*.

Cohen distinguishes between two types of judges, liberal and conservative. He reports that liberal judges who have supported the rights of those with limited life opportunities have generally experienced and overcome personal or family hardship and/or discrimination. Conservative judges, on the other hand, generally have privileged backgrounds and little experience or understanding of the problems of those who live in straightened circumstances; they favour the rich and powerful, not just individuals but also corporations. In the last fifty years conservative judges on the Supreme Court of the United States have outnumbered liberals, usually by 5 to 4.

Cohen begins his analysis with an examination of the Supreme Court under Chief Justice Earl Warren, from 1953 to 1969. The Warren Court pursued a liberal agenda which advanced the rights of minorities and the poor. Its most famous decision was *Brown v Board of Education of Topeka (1)*,<sup>4</sup> in 1954, which overturned racial segregation (the 'separate but equal' doctrine contained in *Plessy v Ferguson*,<sup>5</sup> in 1896) in public schools. Cohen documents how conservative judges have been antithetical to the jurisprudence developed by the Warren Court. He says, "For five decades, the Court has, with striking regularity sided with the rich and powerful against the poor and weak, in virtually every area of the law" (p. xv). Its operation is consistent with the observation of the Greek philosopher Anarcharsis at the head of this review.

Under the United States Constitution, Supreme Court members are appointed following nomination by the President and endorsement by the Senate.<sup>6</sup> Cohen points out that conservative judges "have done a much better job of handing their seats to justices who share their views than liberals" (p. xix). They have timed their retirements to coincide with Republican administrations. Republicans have also worked to block the appointment of liberals to the Court by a Democrat administration (President Johnson's attempt to nominate Abraham Fortas as Chief Justice in 1968; President Obama's nomination of Merrick Garland in 2016). With the subsequent election of a Republican Administration (Richard Nixon in

1968 and Donald Trump in 2016) conservatives were appointed to the Court. The Nixon administration also intimidated Fortas into resigning with threats of investigations by the Justice Department (p. 21-29 and 216); thereby securing the Court's conservative majority.

Cohen has provided an exhaustive account of the decisions of the Supreme Court over the last half century. His prose is clear and concise and accessible to readers who do not have a legal background. He has conducted extensive research in combining case law with academic, political, interest group and media accounts of events. He situates the various cases into their respective contexts and their impacts on both affected groups and America more broadly. These dimensions will not be considered here due to reasons of space. Cohen has an extensive section on sources and commentaries, which runs to 73 pages, for those who would like to pursue issues in greater detail.

This commentary will examine the major decisions of the Supreme Court over the last half century; drawing on Cohen's comprehensive account. It will be organized into three sections. The first, following Anarcharsis, will focus on how the Supreme Court has used the law to catch the weak and poor. The second, on how it has not held back the rich and powerful. The third, will provide a conclusion.

## Catching the Weak and Poor

The Fourteenth Amendment was ratified in 1868 in the aftermath of the Civil War and the abolition of slavery. It was designed to provide former slaves with the same rights as whites.<sup>7</sup> Section 1 of the Amendment says,

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Note the word 'All'. It has the appearance of being encompassing; not brooking of exceptions. However, it wasn't until *Brown v Board of Education of Topeka (1)*,<sup>8</sup> in 1954, and *Reed v Reed*,<sup>9</sup> in 1971, that the Court allowed African Americans and women, respectively, to be included in the ranks of 'All'.

In 1938, during the New Deal, in *United States v Carolene Products* the Court developed a means for the Equal Protection clause of the Fourteenth Amendment to protect 'discrete and insular minorities'. It said that it might need to subject legislation as to "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those

political processes ordinarily to be relied upon to protect minorities, and which may call for correspondingly more searching judicial inquiry".<sup>10</sup>

The Warren Court undertook such 'searching judicial inquiry' in enhancing the rights of the poor. It found that an Illinois law which required the provision of transcript to an appeals court was in breach of the Equal Protection clause.<sup>11</sup> It also invoked this clause and the Sixth Amendment (right to an impartial trial) in upholding the rights of the poor to be represented by legal counsel.<sup>12</sup> In 1966, the Court again used the Equal Protection clause in striking down the payment of a poll tax as a requirement for voting in Virginia; it discriminated against the poor.<sup>13</sup> It also found against state laws not allowing single mothers on welfare to have a male friend who it was assumed was providing her with financial support ('a man in the house');<sup>14</sup> a (lengthy) residential requirement for the receipt of welfare payments;<sup>15</sup> and a wage garnishment law, which did not include a procedure for a hearing.<sup>16</sup>

After the retirement of Earl Warren and the resignation of Abraham Fortas, both in 1969, the Supreme Court, to paraphrase Cohen (p. 41), turned against the poor. It upheld state legislation that put a cap on welfare benefits irrespective of the size of the family/number of children (doesn't violate the Equal Protection clause); with Justice Potter Stewart stating that 'intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of the Court'.<sup>17</sup>

It enabled benefits to be cut off for welfare recipients who would not grant case workers access to their homes (it did not transgress the Fourth Amendment's prohibition on unreasonable searches);<sup>18</sup> a requirement of community support for building affordable housing for the poor (doesn't violate the Equal Protection clause);<sup>19</sup> an eviction linked to poor maintenance by a landlord (not a Due Process issue under the Fourteenth Amendment);<sup>20</sup> mandatory payment of a fee for filing bankruptcy (is not a constitutional issue);<sup>21</sup> and payment of a filing fee to appeal against a reduction in benefits (not covered by the Fourteenth Amendment). It was in this latter case where Justice Douglas said, "The Court upholds a scheme of judicial review whereby justice remains a luxury for the wealthy".<sup>22</sup> The Court also found that cutting off benefits prior to a hearing did not violate Due Process rights.<sup>23</sup>

In 2010, President Obama signed *The Patient Protection and Affordable Care Act*,<sup>24</sup> what is colloquially known as Obamacare. One of its provisions required States to provide Medicaid insurance for childless adults whose incomes were up to 133 per cent of the federal poverty level (those with children were already covered). If a State did not expand its coverage, it would lose all of its Medicaid funding. The provision relied on the Taxing and Spending Clause of the Constitution.<sup>25</sup> The Court, despite the Constitution providing the Federal government

with such a power, struck down this provision. Chief Justice Roberts, writing for the majority said such a provision “is a gun to the head” of the States and constitutes “economic dragooning”.<sup>26</sup> Cohen points to Roberts’s activism and calls him out for his hypocrisy; he (and the majority) were not just concerned with calling balls and strikes (p. 85-86).

The discussion above has mainly focused on welfare provisions and rights of the poor. Equally, if not more important, to the welfare of the poor is how they are treated by the criminal justice system. Besides upholding the right of the poor to be represented by legal counsel, the Warren Court, handed down two other decisions which protected their rights. The first was *Mapp v Ohio*<sup>27</sup> which found that evidence seized without a warrant violated the Fourth Amendment’s prohibition on unreasonable seizures and searches. The second, *Miranda v Arizona*,<sup>28</sup> where a person arrested has to be advised of their rights and represented by counsel in legal proceedings.

Post Warren Courts have steadily turned away from both *Mapp* and *Miranda*. The Court ruled that evidence obtained from an invalid warrant issued in good faith trumped *Mapp*;<sup>29</sup> and sanctioned random searches on buses.<sup>30</sup> It was further eroded in a case involving an individual who was arrested for an outstanding warrant on another matter who was found to be in possession of drugs. It rejected the proposition that the arrest was based on an illegal search and violated his Fourth Amendment rights.<sup>31</sup> The decision was criticized in that it encouraged police to stop people in poor areas, invariably where African Americans and Latinos reside, with no legal basis for doing so and check them against a database of outstanding warrants; of which Cohen says there are more than 7.8 million. He maintains that such a system “sounds more totalitarian than democratic” (p. 304 and 307).

*Miranda* (reading of) rights could be waived if testimony was provided which impeached or contradicted previous testimony;<sup>32</sup> and if a person was questioned at police headquarters and not arrested.<sup>33</sup> There has also been a steady erosion in the right to (effective) legal representation. The Court found that not having a lawyer present in a police line-up did not fall foul of the Sixth or Fourteenth Amendment;<sup>34</sup> and that a lawyer should only be provided to an indigent on a first appeal.<sup>35</sup>

A more general problem is the quality of the legal representation provided to poor defendants. The Court rejected an application that a defendant had received an inadequate defense, his lawyer had not sought character or psychiatric testimony, in a trial where he was sentenced to death. It found that the representation had been good enough and doubted if such omitted evidence would have resulted in a different sentence. Justice Thurgood Marshall, in dissent, pointed to the problematic nature of such a conclusion as “seemingly impregnable cases

can sometimes be dismantled by a good defense counsel".<sup>36</sup> Cohen said that this decision provided States with an incentive to reduce funds for legal protection of the poor (p. 282).

Cohen goes on to identify problems with public defenders falling asleep, being drunk and on drugs during a trial which reduces the effectiveness of their representation; "A whole jurisprudence developed on how much sleeping, during what parts of a trial, was acceptable" (Cohen, p. 281). Caps on fees payable to public defenders compromise their ability to mount defenses in difficult cases. This in turn has resulted in increases in plea bargaining where innocent defenders accept a 'short time' in incarceration because of fear of a longer term, where a public defender persuades them on such a course of action being unable or disinclined to mount a case on their behalf (p. 281-288). Cohen also maintains that setting 'high' rates of cash bail (beyond the reach of those with limited financial resources) for persons charged with non-violent felonies violates the Eighth Amendment's prohibition on excessive bail. In 2019, the Court refused to consider the case of Maurice Walker who spent six days in jail after being charged with walking while intoxicated because he could not post bail (p. 293-294).

At various times American politicians have pursued a 'law and order' or 'get tough on crime' agenda, which can result in life time prison sentences for those who commit three crimes; the so called 'three strikes and you're out' rule. A California court committed a person to two consecutive twenty five year terms for petty theft; he had stolen DVDs for his daughter. He appealed the decision under the Eight Amendment's prohibition on cruel or unusual punishments. The Supreme Court found the punishment did not contravene that test.<sup>37</sup>

Education provides a means to avoid poverty and the attractions of crime. In *Brown v Board of Education of Topeka (1)* the Court ruled against school segregation, declaring that "education is perhaps the most important function of state and local governments".<sup>38</sup> Despite *Brown* there were major differences in the funding provided to children which was determined by the wealth of the school districts they lived in; American public education is organized on a district rather than a state basis. Cases were mounted that this arrangement violated the Equal Protection clause in the Fourteenth Amendment. The Court turned away from *Brown*. It did not see anything in the Constitution that said that education was a 'fundamental interest' and favoured a situation where "each locality is free to tailor local programs to local needs".<sup>39</sup> This was a principle that it was only prepared to endorse in certain situations. Some school districts adopted a voluntary system of integration. The Court found against such arrangements declaring they violated the Equal Protection clause.<sup>40</sup> Local control of education had lost its appeal.

Work is the means by which most of us obtain income. Post Warren Courts have not been sympathetic to workers who have experienced discrimination. Lilly Ledbetter discovered after nineteen years of employment that she had received a lower salary than males performing the same functions. She successfully pursued a case under Title VII of *Civil Rights Act of 1964*, which prohibits workplace sex discrimination.<sup>41</sup> The Court, on appeal, overturned the decision because she had not satisfied a 180 day period from when the discrimination first occurred, rather than when she became aware of it.<sup>42</sup> There was a strong negative reaction to this decision. President Obama signed into law the *Lilly Ledbetter Fair Pay Act of 2009*<sup>43</sup> to overcome the Court's decision.

In 1971, in *Griggs v Duke Power*, the Court unanimously found criteria a company utilized in determining who it would employ—a diploma and intelligence tests—contravened racial discrimination (against African Americans) as prohibited by the *Civil Rights Act of 1964*. The criteria were not relevant to the performance of the work.<sup>44</sup> The Court subsequently retreated from *Griggs*. In 1989, it ruled that employees had to demonstrate that employment rules were due to racism per se and not a result of the racial composition of the local labour market.<sup>45</sup> President Bush signed the *Civil Rights Act of 1991*<sup>46</sup>, which, amongst other things, restored the *Griggs* test.

The Court has handed down other decisions which foreclose the ability of litigants to pursue employment discrimination cases. An age discrimination case was rejected on the basis that the litigant needed to show that age was the crucial, not one of the factors in the discrimination he experienced.<sup>47</sup> It rejected a sex discrimination class action by female employees against Wal-Mart as those involved needed to show they all had a common experience of discrimination.<sup>48</sup>

In 2013, the Court also rejected a racial discrimination harassment case of an African American woman by her immediate supervisor due to her not being a 'manager' and not subject to Title VII of the *Civil Rights Act of 1964*. Determination of work assignments was not viewed as important as the right of a manager to hire or fire.<sup>49</sup> Cohen did not contrast this 'narrow' definition of 'manager' with the 'broader' approach the Court has applied with respect to persons who are employers and precluded from becoming members of unions under *The National Labor Relations Act of 1935*. The Act excludes 'employers' from union membership who are defined as to include, "any person acting as an agent of an employer directly or indirectly".<sup>50</sup> Employees who implemented decisions of their employer (Bell Aerospace), faculty members at a university and nurses who give directions to less skilled workers were found to be 'employers' and hence ineligible to become union members.<sup>51</sup>

*The National Labor Relations Act* supported the rights of workers to join unions and collective bargaining as a desirable method for the conduct of industrial re-



lations. Before the legislation had a chance to bed down, the Court effectively subverted its usefulness. In 1938, in *National Labor Relations Board v Mackay Radio & Telegraph Co*, the Court ruled that during a strike an employer could employ replacement workers and continue to employ them when the strike had ended.<sup>52</sup> Striking provided a pathway to unemployment, and the demise of both unions and collective bargaining. In a seminal article Karl Klare maintained that *Mackay Radio* constituted a judicial de-radicalization of *The National Labor Relations Act*;<sup>53</sup> a conclusion endorsed by Cohen (p. 209).

Post Warren Courts have placed further restrictions on the operation of unions and their ability to participate in collective bargaining.<sup>54</sup> It found that a union was trespassing on an employer's property when it placed union leaflets on employees' cars at the employer's parking lot. There were other ways for unions to distribute material to workers.<sup>55</sup> Agency fees are paid to unions by non-members who benefit from the conditions obtained in collective bargaining to stop 'free riding'. The Court has steadily eroded the payment of such fees. In *Abood v Detroit Board of Education*, it ruled that such fees should only be levied to cover the cost of collective bargaining and other core union activities; not for political or other broader issues.<sup>56</sup> It subsequently overturned *Abood* declaring that the payment of 'fair share' fees by non-members violated their free speech rights under the First Amendment.<sup>57</sup>

The poor and minorities, like other better off citizens, can vote for candidates they believe are more likely to pursue a political agenda consistent with their objectives. Post Warren Courts have limited the ability of the poor and minorities to give effect to and participate in the electoral process. Controversy surrounded the 2000 Presidential election over the counting of votes—hanging chads (the bit of paper punched out when registering a vote—in Florida). Whoever won Florida would be elected President. The Florida Supreme Court ordered a recount.<sup>58</sup> The Supreme Court of the United States overruled this decision finding that a recount violated the Equal Protection clause for George Bush—in finding for Bush they denied an equivalent right for Al Gore; and there wasn't enough time for a recount. The decision was not to have any precedential value.<sup>59</sup> Cohen points to those who criticized the decision for its 'ad hocery' and partisanship; the recount should have been allowed to continue (p. 170).

The Court has been unprepared to overturn examples of gerrymandering because these are 'political', not 'judicial' issues better resolved via political processes;<sup>60</sup> upheld voter identification laws, which reduce the ability of the poor and minorities to participate in elections as such requirements, were not excessively burdensome;<sup>61</sup> and allowed the purging of voting rolls of those who had not voted in recent elections.<sup>62</sup>

The Fifteenth Amendment, Section 1, prohibited governments from “denying a citizen the right to vote based on that citizen’s race, color or previous condition of servitude”. Section 2 added, “Congress shall have power to enforce this article by appropriate legislation”. The *Voting Rights Act of 1965* contained provisions for the Justice Department or a Federal Court to issue a preclearance certificate to ensure that voting arrangements, such as providing enough polling booths within various areas to enable voting to take place, within (mainly Southern) states, did not discriminate against minorities.<sup>63</sup> The issuing of a preclearance certificate was challenged by Shelby County in Alabama. The Court found for Shelby County and overturned these provisions.

Chief Justice Roberts, writing for the majority, said the *Voting Rights Act of 1965* in applying preclearance clauses for some states and not others constituted a “dramatic departure from the principle of all States enjoying equal sovereignty”.<sup>64</sup> A retort to this was that there is no doctrine of equal sovereignty in the Constitution (p. 184). Moreover, Chief Justice Roberts, of calling strikes and balls fame and not wishing to pitch or bat, had not only struck down an Act of Congress but ignored the Fifteenth Amendment which granted Congress unfettered power to give effect to voting rights, irrespective of a citizen’s race or colour.

## Not Holding Back the Rich and Powerful

The rich and powerful, like the poor and minorities, can seek to elect and lobby politicians whose policies they endorse and/or to make decisions in their favour. The rich have more resources than the poor to participate in political processes. At various times legislation has been introduced to regulate political donations. The *Federal Election Campaign Act of 1971* placed limits on campaign expenditures.<sup>65</sup> The *Act* was challenged on the basis of it breaching freedom of speech protected by the First Amendment. The Court rejected this proposition with respect to restrictions on donations by individuals and groups—they enhanced democratic processes; but upheld it on limits on independent expenditure by candidates—it curtailed their First Amendment rights.<sup>66</sup>

The Court gradually extended First Amendment rights to corporations. It upheld the right of a bank to participate in a referendum in Massachusetts in 1978.<sup>67</sup> Note this was a decision which applied to a referendum. In 1990, it upheld legislation in Michigan, which prohibited corporations from spending money to elect candidates. It said that such legislation was,

preventing corruption or the appearance of corruption in the political arena by reducing the threat that huge corporate treasuries, which are amassed with the aid of favorable state laws and have little or no correlation to the public’s support for the corporation’s political ideas, will be used to influence unfairly election outcomes.<sup>68</sup>

Corporations attempted to get around this by 'phony ads', which provide support for an issue, rather than or against candidates running for election. In 2007, it upheld the right of a Wisconsin Right to Life group to express its position, seeing its role as promoting rather than stifling speech.<sup>69</sup> The Court, in 2010, in *Citizens United* lifted restrictions on corporations finding they had the same speech rights as individuals.<sup>70</sup>

On other occasions, the Court has been less inclined to endorse First Amendment rights of those seeking to contribute to the political process. It prohibited a local action group from 'posting' unstamped material in private mailboxes as no one else other than the US Postal Service can use them;<sup>71</sup> the posting of political material on utility poles due to its visual clutter;<sup>72</sup> and a law, which provided funding to candidates competing against high spending candidates as it might induce the latter to spend less to stop the former receiving such additional funding.<sup>73</sup> A law which promoted speech and provided a more 'level playing field' was dismissed as being antithetical to speech.

The problem of rich individuals and corporations being able to dominate electoral funding is that politicians will be 'captured' and do their bidding. Is it possible to maintain that the provision of such favours is not inconsistent with corruption? Cohen documents the various ways in which rich individuals and corporations, aided by legions of lobbyists—with over 11,000 registered in Washington—have obtained concessions and benefits, which have further enhanced their wealth, *vis a vis* the rest of society and Americans' faith in democracy (p. 156-166). Also see Nancy MacLean's *Democracy in Chains*, which examines how the super-rich and corporations have not only 'captured' politicians but have also been active in securing appointees on courts with views consistent with their concerns.<sup>74</sup>

Post Warren Courts have found more specific ways to enhance the income and wealth of corporations. American law has provision for the awarding of punitive damages in addition to compensatory damages where laws have been breached; decisions which are usually determined by juries. The purpose of punitive damages is to deter similar behaviour in the future. In 1984, the Court expressed concern about the impact such decisions could have for corporations. It said,

Punitive damages pose an acute danger of arbitrary deprivation of property [...] the presentation of evidence of a defendant's net worth creates the potential juries will use their verdicts to express biases against big businesses.<sup>75</sup>

In a case involving the sale of a defective car, it found that corporations should be afforded "Elementary notions of fairness [as] enshrined in the Court's constitutional jurisprudence".<sup>76</sup> Problems of the poor were not the business of the Court (see above); those of corporations were.

In a case where an insurance company decided not to pay the total amount of a claim to a client seriously injured in a car accident—a clear example of taking advantage of a vulnerable individual—the Court decided that the level of punitive damages should not be more than a single digit (nine times) the level of compensatory damages.<sup>77</sup> A widow sued Philip Morris whose husband had died of lung cancer. While acknowledging that Philip Morris' conduct had been extraordinarily reprehensive, the Court overturned the damages awarded by a jury as it may be punishing Philip Morris for harm to smokers who were strangers to the litigation.<sup>78</sup>

An Exxon tanker was involved in a major oil spill in Alaska's Prince William Sound. It incurred a damages award of \$2.5 billion, on top of compensatory damages of slightly more than \$500 million. This 5 to 1 ratio was within the Court's single digit rule. Exxon appealed the decision. The Court heard the decision under maritime law, giving where the incident occurred. The Court concluded that in maritime cases the ratio between compensatory and punitive damages should be 1 to 1, saving Exxon \$2 billion.<sup>79</sup>

In recent decades corporations have included arbitration clauses in contracts with customers, employees and others to waive their rights to be sued in court. Corporations determine the rules of private arbitration such as time limits in filing complaints, location of arbitration and requiring litigants to pay their own travel and other expenses, class action waivers, fees including not specifying their level, procedures/rules of evidence (if in fact there are any)/non-publication of decisions, and appointment of arbitrators. Private arbitrators work on an *ad hoc*, case by case, basis. Cohen maintains that arbitrators have "a strong incentive to rule in favor of corporations" and "can easily find themselves blackballed if they rule for an employee or consumer." He also says that, "Ruling exclusively, or almost always, in favour of corporations can be a lucrative career" (p. 252).

Post Warren Courts have upheld the use of such clauses, relying on *The Federal Arbitration Act*,<sup>80</sup> which came into force in 1925. In 1991, in an age discrimination case, the Court found that an arbitration clause in a contract held sway over the *Age Discrimination in Employment Act of 1967*.<sup>81</sup> A purchaser of a mobile home objected to an arbitration clause, which did not specify what the cost of arbitration would be if she mounted a grievance, fearing that such an action had the potential of driving her into bankruptcy. The Court waived this suit aside on the basis that it was not clear what costs would be incurred if arbitration occurred.<sup>82</sup> Cohen maintains, "That was, of course, precisely Randolph's point, that it was not knowing that was unfair to her" (p. 255). The Court has also used *The Federal Arbitration Act* in rejecting suits involving clauses requiring consumers having to pay sales tax for 'free phones';<sup>83</sup> 'monopoly fees' imposed by American Express on restaurants, thereby voiding antitrust legislation;<sup>84</sup> and the non-payment of overtime 'entitlements'.<sup>85</sup>

## Conclusion: Anarcharis Confirmed

Cohen's account of decisions by post Warren Courts supports Anarcharis's observation of the law catching the weak and poor and not holding back the rich and powerful. They have turned their back on sections in the Constitution and struck down legislation which protects the rights of the poor to receive welfare, their treatment under the criminal justice system with curtailment of Due Process and Equal Protection rights and enabling local police forces to conduct random searches of and harass persons in poor areas, provision of 'adequate' education, discrimination in employment and attacks on unions and to participate in elections and democratic processes. At the same time, 'very' rich individuals and corporations have been given *carte blanche* with respect to electoral spending, which has aided their ability to 'capture' politicians and enhance the wealth of corporations by reducing levels of punitive damages awarded by juries and the ability of consumers and workers to pursue grievances before courts.

It is not the first time that the Supreme Court has acted in this way. America fought a Civil War which ended slavery. It passed the Thirteenth, Fourteenth and Fifteenth Amendments and passed *Civil Rights Acts* in 1866 and 1875<sup>86</sup> granting citizenship, with the same rights and immunities as whites to African Americans and former slaves—citizenship being determined by birth or naturalization (though not for women and Native Americans who were not granted voting rights until 1920 and 1924, respectively). The Supreme Court played a major role in the undoing of this in 1883 with a decision<sup>87</sup>, which overturned *The Civil Rights Act 1875*; and *Plessy v Ferguson*, in 1896, which provided a legal imprimatur to racial segregation and the 'institution' of Jim Crow.<sup>88</sup> For a fuller account of developments in this period see Eric Foner's *The Second Founding*.<sup>89</sup>

The Warren Court returned to the reformist agenda developed in the post-Civil War period, with *Brown v Board of Education of Topeka (1)* continuing through to the *Civil Rights Act of 1964* and the *Voting Rights Act of 1965*. A reading of Adam Cohen's *Supreme Inequality: The Supreme Court's Fifty – Year Battle for a More Unjust America* provides extensive detail on how Post Warren Courts stifled this and pursued an agenda which constrains the poor—which in America is a euphemism for African Americans, especially and other minorities—and did not so much holdback as enhance the position of the rich and powerful.

Adam Cohen is to be congratulated for the extent of his research and scholarship in examining the decisions and the role of the Supreme Court of America over the last fifty years. As I came to the end of this review, I found myself unable to put aside the thought if there was one book you should read to reach an understanding of contemporary America it would be this one by Adam Cohen. It is a masterpiece.

## Notes

- 1 Ed E. Knowles (1999) *The Oxford Dictionary of Quotations*. (Fifth Edition), Oxford: Oxford University Press, p. 14.
- 2 *Ortwein v Schwab*, 410 US 656 (1973), at 662.
- 3 W. Jethro Brown (1906) *The Austinian Theory of Law*. London: John Murray, p. 291.
- 4 *Brown v Board of Education of Topeka (1)*, 347 US 483 (1954).
- 5 *Plessy v Ferguson*, 163 US 537 (1896).
- 6 *The Constitution of the United States*, Article II, Section 2 (n.d.). Available at <<https://constitution.com>> (accessed 31 July 2020).
- 7 The Thirteenth Amendment abolished slavery (except for those who were in punishment for a crime) and the Fifteenth Amendment prohibited governments from 'denying a citizen the right to vote based on that citizen's race, color or previous condition of servitude'.
- 8 *Brown v Board of Education of Topeka (1)*, 347 US 483 (1954).
- 9 *Reed v Reed*, 404 US 71 (1971).
- 10 *United States v Carolene Products*, 304 US 144 (1938), at 152, note 4.
- 11 *Griffin v Illinois*, 351 US 12 (1956).
- 12 *Gideon v Wainwright*, 372 US 335 (1963); *Douglas v California*, 372 US 353 (1963).
- 13 *Harper v Virginia Board of Elections*, 383 US 663 (1968).
- 14 *King v Smith*, 392 US 309 (1968).
- 15 *Shapiro v Thompson*, 394 US 618 (1969).
- 16 *Sniadach v Family Finance Corporation*, 395 US 337 (1969).
- 17 *Dandridge v Williams*, 397 US 471 (1970), at 487.
- 18 *Wyman v James*, 400 US 309 (1971).
- 19 *James v Valtierra*, 402 US 139 (1971).
- 20 *Lindsey v Normet*, 405 US 56 (1972).
- 21 *United States v Kras*, 409 US 434 (1973).
- 22 *Ortwein v Schwab*, 410 US 656 (1973), at 662.
- 23 *Mathews v Eldridge*, 424 US 319 (1976).
- 24 *The Patient Protection and Affordable Care Act*, Public Law 111-148 – Mar. 23, 2010, 124 STAT 119.
- 25 Article 1, Section 8.
- 26 *National Federation of Independent Business v Sebelius*, 567 US 519 (2012), at 581 and 582.
- 27 *Mapp v Ohio*, 367 US 643 (1961).
- 28 *Miranda v Arizona*, 384 US 436 (1966).
- 29 *United States v Leon*, 468 US 897 (1984).
- 30 *Florida v Bostick*, 501 US 429 (1991). In *Terry v Ohio*, 392 US 1 (1968), the Warren Court sanctioned 'stop and frisk' actions if an officer had a reasonable suspicion that someone was armed and dangerous.

- 31 *Utah v Strieff*, 579 US\_ (2016).
- 32 *Harris v New York*, 401 US 222 (1971).
- 33 *Oregon v Mathiason*, 429 US 492 (1977).
- 34 *King v Illinois*, 406 US 682 (1972).
- 35 *Ross v Moffitt*, 417 US 600 (1974).
- 36 *Strickland v Washington*, 466 US 688 (1984); Marshall quote at 710.
- 37 *Lockyer v Andrade*, 538 US 63 (2003).
- 38 *Brown v Board of Education of Topeka (1)*, 347 US 483 (1954), at 493.
- 39 *San Antonio Independent School District v Rodriguez*, 411 US 1 (1973), at 50. Also see *Miliken v Bradley*, 418 US 717 (1974); *Board of Education of Oklahoma City Public Schools v Dowell*, 498 US 237 (1991).
- 40 *Parents Involved in Community Schools v Seattle School District No. 1*, 551 US 701 (2007).
- 41 *Civil Rights Act of 1964*, Pub. L. 88-352, 78n Stat. 241.
- 42 *Ledbetter v Goodyear Tire and Rubber Company*, 550 US 618 (2007).
- 43 *Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. 111-2, Stat.181.
- 44 *Griggs v Duke Power*, 401 US 424 (1971).
- 45 *Wards Cove Packing Company v Antonio*, 490 US 642 (1989).
- 46 *Civil Rights Act of 1991*, S. 1745 – 102nd Congress (1991-1992).
- 47 *Gross v FBL Financial Services*, 557 US 167 (2009).
- 48 *Wal-Mart Stores v Duke*, 564 US 338 (2011). Also see *Comcast v Behrend*, 569 US 27 (2013).
- 49 *Vance v Ball State University*, 570 US 421 (2013).
- 50 *The National Labor Relations Act of 1935*, Pub. L. 74-198, 49 Stat. 449, Definitions, Clause 2.
- 51 *National Labor Relations Board v Bell Aerospace Co*, 416 US 267 (1974); *National Labor Relations Board v Yeshiva University*, 444 US 672 (1980); *National Labor Relations Board v Health Care and Retirement Corporation of America*, 511 US 571 (1994).
- 52 *National Labor Relations Board v Mackay Radio & Telegraph Co.*, 304 US 333 (1938).
- 53 Karl E. Klare (1978) "Judicial Deradicalization of the *Wagner Act* and the Origins of Modern Legal Consciousness, 1937-1941." *Minnesota Law Review*, 62, p. 265-339.
- 54 Also see Julius G. Getman (2016) *The Supreme Court on Unions: Why Labor Law Is Failing American Workers*. Ithaca and London: Cornell University Press.
- 55 *Lechmere v National Labor Relations Board*, 502 US 527 (1992).
- 56 *Abood v Detroit Board of Education*, 431 US 209 (1977).
- 57 *Janus v American Federation of State, County, and Municipal Employees, Council, 31*, 585 US \_ (2018). Also see *Knox Service Employees International Union*, 567 US – (2012); *Harris V Quinn*, 573 US 616 (2014).
- 58 *Palm Beach County Canvassing Board v Harris*, 772 So. 29 1220 (2000).
- 59 *Bush v Gore*, 531 US 98 (2000). Also see *Bush v Palm Beach County Canvassing Board*, 531 US 70 (2000).

- 60 *Vieth v Jubelier*, 541 US 267 (2004); *Rucho v Common Cause*, 588 US \_\_ (2019).
- 61 *Crawford v Marion County Election Board*, 553 US 181 (2008).
- 62 *Husted v A. Philip Randolph Institute*, 584 US \_\_ (2018).
- 63 *Voting Rights Act of 1965*, Pub. L. 89-110, 79 Stat. 437.
- 64 *Shelby County v Holder*, 570 US 529 (2013), at 529.
- 65 *Federal Election Campaign Act of 1971*, Pub. L. 92-225, 86 Stat.3.
- 66 *Buckley v Valeo*, 424 US 1 (1974).
- 67 *First National Bank of Boston v Bellotti*, 435 US 765 (1978).
- 68 *Austin v Michigan Chamber of Commerce*, 492 US 652 (1990), at 652.
- 69 *Federal Election Commission v Wisconsin Right to Life*, 551 US 449 (2007). Also see *McConnell v Federal Election Commission*, 540 US 93 (2003).
- 70 *Citizens United v Federal Election Commission*, 558 US \_\_ (2010). Also see *McCutchen v Federal Election Commission*, 572 US 185 (2014).
- 71 *United States Postal Service v Council of Greenburgh Civic Associations*, 453 US 114 (1981).
- 72 *Members of the City Council of Los Angeles v Taxpayers for Vincent*, 466 US 789 (1984).
- 73 *Arizona Free Enterprise Club's Freedom Club PAC v Bennett*, 564 US \_\_ (2011).
- 74 Nancy MacLean (2017) *Democracy in Chains: The Deep History of the Radical Right's Stealth Plan for America*. Melbourne and London: Scribe.
- 75 *Honda Motor Co. v Oberg*, 512 US 415 (1994).
- 76 *BMW of North America v Gore*, 517 US 559 (1996), at 560.
- 77 *State Farm Mutual Automobile Insurance co. v Campbell*, 538 US 408 (2003).
- 78 *Philip Morris USA v Williams*, 549 US 346 (2007).
- 79 *Exxon Shipping Co. v Baker*, 554 US 471 (2008).
- 80 *The Federal Arbitration Act*, Pub. L. 68-401, Stat. 449.
- 81 *Gilmer v Interstate/Johnson Lane Corporation*. 500 US 20 (1991); *Age Discrimination in Employment Act of 1967*, Pub. L. 90-202.
- 82 *Green Tree Financial Corporation-Alabama v Randolph*, 531 US 79 (2000).
- 83 *AT&T Mobility v Concepcion*, 653 US 333 (2011).
- 84 *American Express v Italian Colors Restaurant*, 570 US 228 (2013).
- 85 *Epic Systems Corp. v Lewis*, 584 US \_\_ (2018).
- 86 *Civil Rights Act 1866*, 14 Stat. 27-30; *Civil Rights Act 1875*, 18 Stat. 335-337.
- 87 *Civil Rights Cases*, 109 US 3 (1883).
- 88 *Plessy v Ferguson*, 163 US 537 (1896).
- 89 Eric Foner (2019) *The Second Founding: How the Civil War and Reconstruction Remade the Constitution*. New York: W. W. Norton.