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Contemporary Significance of an Article by Mitchell Franklin on Two Earlier Wars on Terror

Gene Grabiner and James Lawler

We dedicate our introduction/guide to this watershed article by Professor Mitchell Franklin to jurists, legal scholars and teachers, and practitioners of American law. The scope of Professor Franklin's scholarship, his trenchant prose, and unique and contemporary formulations all reveal him to be the unsung dean of American legal philosophy. The reader will encounter a major international Romanist and civil-law thinker who reveals how the understanding of the U.S. Constitution as a paradigm and fountainhead for the rational codification of law in general may be used both practically and theoretically to clarify, strengthen, and defend civil liberties in this period of social and legal crises and incipient fascism.

—*the authors*

I

Mitchell Franklin's essay, "Concerning the Influence of Roman Law on the Formulation of the Constitution of the United States," appeared in 1964 during the still-oppressive reverberations of that earlier war against alleged terrorists known as the McCarthy period. This was also a time of civil libertarian struggles

against racist segregation in the U.S. South. Hence the article has a twofold focus on Article Four, Section Four, of the “First Constitution” and on the Fifth Amendment of the Bill of Rights. Franklin argues that the Bill of Rights or first ten amendments constitute a qualitatively distinct “Second Constitution.” While these two themes are concerned with the content of the law, a third central theme of this article is that of legal method, as expressed in the Ninth Amendment. Content and method are intimately connected and their relation is of crucial importance to an authentic understanding of the Constitution as a whole, which incorporates also a “Third Constitution”—the Thirteenth, Fourteenth, and Fifteenth Amendments issuing from the Civil War. Discussion of method raises the issue of the historical nature and orientation of the American Revolution as a social revolution, not only a war of national liberation.

It is amazing that, while we have just entered the fourth century of the Enlightenment, feudal mystification and legal method now dominate national consciousness, legislation, and executive and judicial practice. Consequently, the people are still far from being fully aware of the rights that are theirs and the need to reawaken and reassert these rights. That is what this article is about: matters of particular importance to legal practitioners, scholars of the founding of the United States, and popular forces.

Material examined here shows that the revolutionaries whose thought decisively impacts central features of the Constitution had turned from English legal thought, epitomized by the empiricism of Hume, to the so-called rationalist thought prevailing on the European continent, where Locke’s conception of natural law was radicalized by Enlightenment thinkers and put in the service of eighteenth-century European social transformations. Hume’s empiricism coincides with his defense of the common law method—deferring to the complex intricacies of a judicial tradition of interpreting an unwritten law as formulated by nonelected judges. However, the continental Enlightenment rejected what amounts in the historical context to deferral to the feudal past and feudal tradition and instead insisted on rational formulations of the law in written codes resting not on tradition but on nature or

natural law or reason. Such codes obtain their legitimacy by being enacted in legislation by representative governments legislating in the name of the people.

Reference to the importance of the English philosophy of John Locke is not an argument for an English fountainhead to the Constitution. For not only were Locke's conceptions of natural law and social contract taken up by the continental Enlightenment (such as Rousseau), but his conception of law as the product of a representative legislature contradicted the English feudal common law tradition with its conception of the sovereignty of independent judges over legislation. Locke, like Hobbes before him, reflected bourgeois revolutionary forces that wanted to break decisively from this feudal system of law. Because of the compromising character of the English revolution, however, the outcome was instead a subordination of feudal legal form to bourgeois content, leaving the feudal form essentially intact. Rather than Locke, it was David Hume (who died, in fact, in 1776) who reflected and endorsed, both explicitly and in his empiricism, the prevailing English conception of common law at the time of the American Revolution.

Hence, the American revolutionaries rejected the English tradition of an unwritten constitution dominated by common law judicial process and powerful judges, and opted to formulate in writing a rationally organized system of public law that would obtain its authority from the ratifying conventions of the particular states. This very scenario, however, in which the authority of the national government would depend on its acceptability to independent states, threatened to reintroduce a feudal element into a decentralized system of federalism that would be especially vulnerable to Southern slave states. There was a danger that a federal system would be created similar to that which obtained somewhat earlier in Poland, in which the independent constituents of the government, including the feudal princes, had the individual power to veto legislation and so to "interpose" a single will against that of the rest. Hence the crucial importance of Article Four, Section Four, which authorizes the national government to guarantee a republican form of government in the particular states and thereby

establishes the sovereignty of the national, republican government over state particularism or feudal federalism or what we know as “states’ rights.”

It was this hitherto sleeping power of the national government that Franklin in effect evokes during a time of uprising on the part of the Southern segregationist states against such interference with their racist traditions as the U.S. Supreme Court decision of *Brown v. Board of Education* (1954), which rejected the segregationist school systems of the South. Article Four, Section Four, authorizes the national government to “interpose” against the legislation of the particular states in order to guarantee the existence of republicanism as defined by the U.S. Constitution. This power was previously invoked in the Civil War and also during the Eisenhower and Kennedy administrations (the latter two occasions for enforcement of school desegregation).

II

The historical and theoretical materials assembled in this article, especially the writings of the Abbé de Mably, show clearly the true meaning of this “*lex Mably*”—i.e., Article Four, Section Four—and justify its application in support of the civil rights movement of the sixties.

In the present context, however, the significance of Article Four, Section Four, is to guarantee a republican form of government at the national center itself. Today the locus of democracy has shifted to local governments and popular movements that insist on restoring republicanism in a national government that has been captured by concealed private forces and special interests. Because of the persistent historical problem of the shifting locus of democracy and the unresolved conflict between enlightened bourgeois and feudal-federalist (neofascist) forces around the property question, the present period is one in which the struggle is to guarantee a republican form of government at the national level, at the center. Madison demonstrates a succinct awareness of this problem with his dialectical conception of *lex Mably*, where he remarks that the “republican form of government” must be guaranteed to the “extended republic”—that is, to the entire American fabric, both to the states *and* to the national center.

A selection from his 1787 correspondence with Jefferson raises the issue in relief. In writing to Jefferson 24 October on Republicanism, particularly on the concept of the “extended republic,” Madison affirms that the republic must be “sufficiently *controuled* itself from setting up an interest adverse to that of the entire Society.”¹ That control, of course, must be the unalienated people or what Franklin calls the Public Opinion State, which is the authentic historical meaning of the three U.S. constitutions. Today, many neo-“Virginia and Kentucky”² resolutions have been passed in opposition to the Patriot Act, including at the time of this writing three state legislatures and the cities of Philadelphia, Baltimore, Chicago, Detroit, Austin, San Francisco, Los Angeles, and New York.³

It is not a coincidence that exacerbation of racism coincided at the time of Franklin’s article with raising the specter of Communist terror against the society. Sounding the alarm against this alleged terror, the McCarthy trials of suspected Communist terrorists effectively suspended civil liberties in a genuine reign of terror instituted by the government. The law, along with psychological tactics, was employed as a chief instrument of this terrorism in a reign of state-sponsored infamy. The critics of national policy were personally infamed—i.e., held up to scorn, branded, or effectively banished from civil society—by identifying them with a foreign power said to threaten the security of Americans. In this context, there was a compromising of freedom of thought, speech, and education, as well as of religion, as the United States entered the frigid period of social and political conformism of the fifties and early sixties. In response, one should not overlook the important roles of Islam and the Black Christian churches—under the leadership of Malcolm X and Martin Luther King Jr., respectively, as a rejection of a cryptic religious establishment in the United States—in the movement for civil liberties among Blacks in the sixties and seventies.

It is well known that individuals accused of collaborating in the alleged Communist conspiracy attempted to defend themselves by evoking the clause of the Fifth Amendment that protects against being compelled to testify against oneself. Reliance on this clause alone reflects a lack of knowledge of the full scope of the

Fifth Amendment; although some individuals appropriately and constitutionally condemned the inquisitors, remarking that *they* had no standing. What was not well known was the fact that the entire Fifth Amendment is a condemnation of precisely the kind of infaming program that was being enacted through various operations of the antidemocratic, antirepublican central state. Franklin's writings succeed in unearthing this buried meaning.

In *Ullmann v. United States* (1956)⁴ Justice Douglas cites Franklin as having demonstrated this understanding of the Fifth Amendment. Justice Douglas's dissenting opinion shows the organic linkage between the Fifth Amendment condemnation of unconstitutional mass infamy (first clause of the amendment) and the absolute right to silence (the more well-known third clause of the amendment, the right against "self-incrimination").

Hence Franklin's essay draws on historical, philosophical, and legal materials to show that the U.S. Constitution, particularly the Fifth Amendment, condemns the method of isolating, imprisoning, terrorizing, and executing individuals as a result of their having been rendered infamous by a political operation of the state. Although at that time there were no explicit racial connotations to this "war," the fear campaign against Communists suggested that the opponents of American policy were no true patriots and were under the thumb of an evil foreign power. Such branding of individuals as an alien menace naturally extended to the civil rights movement then arising in reaction to the exacerbation of racism fostered by the over-arching chauvinist-nationalist mentality. In turn, the deeply rooted infaming treatment of African Americans was a potent force against all quests for civil liberties. The radical rejection of this general miasma, implicitly evoking the Enlightenment standards of freedom and equality, ushered in a new era of American and ultimately global consciousness.

Resistance to the attack against the First Amendment, which Franklin called the keystone of the Public Opinion State, as well as against general constitutional freedoms, therefore intertwined with resistance to the age-old American scourge of racism. In this connection too, the formulations of the Fifth Amendment, properly understood, provide inspiration and ammunition for advancing

American society. Despite the fact that it was developed during the time of slavery in the United States, the Fifth Amendment draws on the antifederal and antislavery struggles of the eighteenth century as these were expressed in the Enlightenment legal thought of the time. That such contradictions are possible constitutes what Franklin calls the ambiguity, or historical possibility, of the Constitution. Ambiguity, as the existentialist philosopher Jean-Paul Sartre argued, means real possibility. Rival social forces and agendas therefore can struggle over the authentic meaning of the Constitution.

III

At the time Franklin wrote this article, aid to progressive movements came in the form of decisions by the U.S. Supreme Court under the leadership of Justice Earl Warren, epitomized by the 1954 landmark decision *Brown v. Board of Education*. Such exemplary decisions, which applied an expanded understanding of the Constitution against reactionary contemporary politics, naturally drew the ire of conservative forces anxious to preserve the status quo of racial, class, and gender inequality. We are now in a period in which the narrow majority of the Supreme Court has succumbed to such forces. Therefore it is vital for the democratic and progressive movements to understand that the present direction of the Supreme Court itself constitutes a subversion of constitutionality. Such an understanding requires grasping the authentic method of reading and applying the Constitution. This method consists in recognizing that the U.S. Constitution arose as the revolutionary American leadership turned away from repudiated English legal thought and toward that of the progressive Enlightenment currents in continental Europe, including France, Germany, Italy, and elsewhere. The distinction between English common law methodology and that of the Roman-law tradition of continental Europe that issued in the great civil codes of France and Germany is vitally important for this authentic understanding—hence the title of Franklin’s article.

While raising seemingly remote matters such as the Roman law, this is no piece of abstract scholarship but a contribution to

the resolution of burning social issues that have reached a point of extreme crisis during our own time of global world transformation. Inasmuch as the Supreme Court, in conjunction with the reactionary presidency that it directly brought to power in a soft coup, is a major force in these events, it becomes more necessary than ever to reexamine the nature of the U.S. Constitution in its historical context, both in terms of its underlying socioeconomic roots and its ideological background. The writings of Mitchell Franklin provide democratic and progressive scholars and activists with a vital and illuminating understanding of the basic law of the land. This understanding is capable of exposing the vast and truly traitorous deception that is today being perpetrated on the American people.

It must be recognized that it is the U.S. government that is employing the weapons of terror in connection with racial stereotyping and profiling. Such terror invites terror in return, even as it claims to be a response to terror, in an endless downward spiral that must be broken if the world is to advance beyond the crises of profound readjustment that represent birth pangs of the new global age. The evocation of antiterrorist hysteria to mobilize our society for war is fueled by the state-sponsored terrorizing weapon of infamy—i.e., declaring whole groups of people outside the pale because of a racial, ethnic, religious, and/or political amalgam of attributes. Although such infaming techniques are adroitly concealed behind language that claims to separate the good from the bad individuals in the identified amalgam, the infaming stereotype is in this very way effectively highlighted. Moreover, actions speak louder than words.

The incarceration of individuals within this terrorizing framework without the right of trial (in the Guantánamo naval base), the passage of legislation (the Patriot Act) that expands such methods, together with the practice of harassing individuals at borders and airports for no other reason than for belonging to the identified and excoriated amalgam or being on the proscribed list of travelers or organizations (echoing 1950's Attorney General Brownell's list of subversive organizations), constitutes governmental infaming of a whole segment of the population protected by the Constitution,

whether citizens or not. Noteworthy in this context is that the Bush regime has used the mantra of “war on terror” instead of criminal investigation and/or prosecution relative to 9/11 (hence fictionally avoiding the two jury protections of the Fifth and Sixth Amendments and putatively enabling military tribunals to be used against “enemy combatants,” etc.). Public opinion and some firm democratic lawyers and jurists have made that difficult to a degree. Indeed, two of these “combatants,” Yaser Esam Hamdi and Jose Padilla, are American citizens and are soon to have their cases reviewed by the Supreme Court.

The Fifth Amendment requires that individuals who are alleged to be guilty of an “infamous” crime—i.e., publicly charged with actions that arouse the infaming consciousness of society—must be indicted for specific crimes by a jury of their peers and (in accord with the Sixth Amendment) convicted of specific crimes by another jury of peers. It is thus evident that our present period, with its secretive sequestering of alleged criminals and deprivation of normal legal rights, reeks of unconstitutionality. It is clear that a derelict Supreme Court will turn a blind eye to such wholesale violation of the Constitution. But an informed public will recognize, today more than ever before, that, in the words of Jefferson from the Declaration of Independence, “all men are [all humanity is] created equal,” and that dividing the human family through the terror of racial, religious, or political infamy condemns our world to catastrophe.

IV

In the intellectual battle over the authentic interpretation of the U.S. Constitution, Mitchell Franklin brings forward the importance of the philosophical struggle in early nineteenth-century Germany between Hegel and Savigny. Hegel defends the same Enlightenment body of philosophical and legal thought that became embedded in the U.S. Constitution, a theory that in the words of the French Declaration of the Rights of Man and Citizen declares that citizen rights are human rights, and that there is no separation of human being and citizen. Savigny, by contrast, developed the nationalist and implicitly racist theory of the *Volksgeist*,

the isolated, separated people whose traditional understanding is brought to consciousness through the acumen of the interpreting judge as an arbitrary reader of the legal entrails who stands outside of history and is not fettered by any humanist or humanitarian code of law passed by democratic legislation. As the law is said to reflect the folk—the separate isolated people whose sanctified traditions are said to make up the unspoken and unwritten law of the nation—there is implicit separation of the peoples of the planet by national, ethnic, racial, religious, and political-ideological identities. As it becomes clear that the U.S. Constitution does not embody *proto-volksgeist* theory, but constitutes a heightened expression of the humanist doctrine of the Enlightenment and of Hegel that the folk theory opposes, any narrow emphasis that opposes citizen and alien is constitutionally disavowed.

V

When a body of law expresses a particular idea in a specific context, it emphasizes by this very particularity that what is being expressed is an exception to a general rule. So when the Constitution states that the President must be born in the United States, it is making an exception to the rule that otherwise all individuals in the American social space, whether foreign or native born, are protected by the Constitution. The mention of American birth in this specific case highlights the implicit understanding that “the law of the land” does not otherwise make such a distinction, and applies equally to all abiding in it. Nor does the Fourteenth Amendment compromise this understanding by declaring individuals born in the United States to be citizens of the United States. This stipulation was necessary to reverse the explicit exclusion of slaves from citizenship and so must be understood as an expansion of the earlier understanding of citizenship and the protection of constitutional law rather than a restriction of it.

Franklin’s article links the terrorist methods of the McCarthy period to the earlier terrorism of the Alien and Sedition Acts at the end of the eighteenth century. It was precisely antiforeign hysteria and the alleged threat to security by foreign-based violence that led to this late-eighteenth-century version and arch-prototype of

today's Patriot Act. Jefferson won the presidency in 1800 in an electoral campaign based on opposition to the Alien and Sedition Acts. This victory prevented the stillbirth of the Bill of Rights and so energized the First, Fifth, and other amendments as rights for all individuals dwelling in the American social space. Directing massive legislation against foreign-born noncitizens and native-born or naturalized citizens violates the basic principles governing the law of the land and the rights of both the human individual and the citizen. Reaching almost to a parallelism with "alien and sedition" (on the basis of which the United States almost went to war with France), Bush's national-security strategy may be seen as, among other things, a brief for preemptive war. War as "national security" again provides a pretext for replacing the constitutional method of criminal investigation and prosecution with the inherently terrorist methods accompanying warfare and so justifies the suspension of Amendments 1, 2, 4, 5, 6, and 8 (and the rest, for that matter).

VI

Franklin not only directs his criticism at right-wing theory, but also against what for that time was considered a bulwark of the Left—the class-based, economic-determinist interpretation of the Constitution advanced by Charles Beard. If the U.S. Constitution is a narrowly circumscribed bourgeois legal text as Beard argues, why should progressive democrats seeking a broader base for U.S. democracy be interested in defending such limiting ideas? Moreover, if the Constitution is regarded as an expression of a fluctuating play of historical forces, does its present-day interpretation not continue to be so? And if this is the case, how can there be, as Franklin insists, any possible "objective" interpretation? Hence "critical" legal theorists and postmodernists reduce legal determinations to arbitrary decisions that are imposed on the basis of power struggles.

This approach precludes the evocation of the rich and still-untapped possibility or potentiality of the Constitution. This potent possibility has been covered over by extralegal methodology through which Supreme Court decisions effectively

replace the Constitution itself. It is essentially such methodology that was repudiated by the revolutionary Founders in the drafting of the Constitution in Philadelphia (the First Constitution) and the subsequent adoption of the first ten amendments (the Second Constitution). But this extralegal methodology current in constitutional interpretation today has also been implicitly and unwittingly adopted by many who truly want to advance progressive social agendas and who think that, in order to do so, supposedly constitutional limitations must be denied by a theory of arbitrary determinations based on abstract morality. Part of this problem stems from American law-school education itself, which is steeped in Anglo-American common law and holds the Constitution in the thrall of “judicial review,” in which the Supreme Court as national jurist interprets the law, arbitrarily limiting or “allowing” the Constitution. A full understanding of problems of judicial review must therefore be preceded by a study of Franklin’s writings on this topic.

But such allegedly critical understanding of the Constitution fails to recognize the uniqueness of the U.S. Constitution as the most important—because legally enduring and binding to this day—expression and high-water mark of the social struggles of the early modern age and their reflection in Enlightenment thought. To secure such a high-water mark for future generations, to prevent the subversion of their revolutionary principles by juridical obfuscation and manipulation, the Founders opposed the application of Anglo-American methodology and supported its replacement by the methodology of the civil law. This is the reason why, instead of continuing in the vein of the “unwritten constitution” of England, which is, in effect, no constitution at all, they opted to write a constitutional code of law that would have the sanction of democratic legislation when adopted by the states. Such adoption only became possible when certain elitist conceptions of the First Constitution, where limitation of arbitrary power was supposed to be assured by the checks and balances—i.e., conflict or power struggles—between the powers of government, were dialectically overcome by the Second Constitution, which, with the First Amendment as its keystone, installed what Franklin calls the Public Opinion State.⁵

And it must be said that the Second Constitution is also a practical consequence of the class conflicts occurring prior to the Revolution and persisting afterward with explosive force—after the First Constitution but before the Bill of Rights. Shays’s Rebellion (1786), cryptically mentioned by Madison in his 1788 *Federalist No. 43* as a “a recent and well-known event among ourselves,” was succeeded by other uprisings in the mid-1780s by farmers and debtors in Connecticut, New Hampshire, Vermont, Rhode Island, New Jersey, Pennsylvania, Maryland, Virginia, and South Carolina.⁶

VII

It is the Ninth Amendment⁷ that enshrines authentic constitutional method by which stated rights, as well as new rights historically gained by the people under new circumstances, are to be preserved and generalized. So it serves popular forces against feudal forces or a refeudalization, whether through “states’ rights” theory or through the supremacy of private property, in a tattered constitution. Ninth Amendment retention of rights by the people is a Romanist methodological amendment that preserves enumerated as well as historically gained rights. It explains stated rights as expanding historical possibilities, allowing for the development of rights on the basis of future historical requirements. Along with or seen as part of the rest of the Bill of Rights text, its phrasing asserts that the rights we claim are absolute rights, implying that they are “natural rights” possessed by human beings. This is consistent with the view that the Enlightenment struggle from the eighteenth century onward produces higher levels of development ever approximating toward a more fully human condition, the rights of emancipated humanity in the conception of Jefferson’s First Inaugural Address of 1801.⁸

State-directed infaming techniques and laws are being used today in the “war on terror” against individuals of Arabic ethnicity and visible-minority members of the Muslim faith in general as well as against various “suspect” democratic and progressive political and social activists and organizations. Franklin taps the rich potentiality of the Fifth Amendment as an anti-infamy text

that requires, for “capital and otherwise infamous crimes,” no less than two jury trials, one for indictment and one for conviction, for all cases involving infaming judgments. As the Sixth Amendment requires, such trials must be brought forward in a timely manner. It is such legal procedure and expedition that guarantee the security of the population, and not the secretive sequestering of individuals for years without rights, which only fuels the fires of hysterical fears.

That the alleged crimes of terror are “capital and otherwise infamous crimes” is evident. That they are infamous, i.e., infaming, crimes is clear. A distinctive ethnic identity is held up for revilement and a recognizable amalgam of people is implicitly accused of harboring in its midst enemies of the American people. That they are “capital” crimes is equally clear not only from the fact that the alleged crimes can warrant the death penalty (“capital” punishment), but because of the extended meaning of capital crimes as explained in Roman legal theory. By the infaming procedure of the secretive imprisonments in Guantánomo, and by the very legislative provisions of the Patriot Act, individuals are branded with *capitis diminutio media*, which Franklin translates as “reduction of the legal personality, of the citizen” or “legal diminution of the personality” involving either the direct privation of citizenship or the treatment of human beings as outside or unworthy of the rights of the citizen—contrary to the Enlightenment identification of the rights of human being and citizen that is enshrined in the Constitution.

Indeed, Bush regime “legality” may be viewed as part of a continuum linked to Clinton’s 1996 Anti-Terrorism and Effective Death Penalty Act, which suspended *habeas corpus* for over one thousand suspects.⁹ Yet, it all deepens with the Bush regime in this period of the global crisis of capitalism. Indeed, under the proposed Patriot II law, the attorney general is granted the power, under “legal” pretext, to void native-born or naturalized American citizenship. So, with the Bush regime, the arbitrary existence of *capitis deminutio media* persists and may be widely generalized. Individuals who are branded by act and legal provision as potentially subversive are in effect regarded as lesser persons with

lesser legal status—just as, in the text of the First Constitution before it was subordinated to the Third Constitution, Black slaves were regarded as equal to three-fifths of a white person. This damage was inflicted by highlighting for public contempt their status as noncitizens as well as by denying them their rights under international law as citizens of other countries (including Canada).

Buffalo, New York

NOTES

1. “Madison to Jefferson, New York, 24 October 1787,” in *5 Writings of James Madison*, 17, 23 [Hunt ed. 1904], cited in accompanying Franklin article, note 34. Our emphasis.

2. In the fight against the Alien and Sedition Acts of 1798, Jefferson drafted the Kentucky Resolutions and Madison drafted the Virginia resolutions. These resolutions sought to “nullify” the effect of Federalist antidemocratic, anti-foreign, putative antiterror, antiliberty and chauvinist legislation issuing from the central government in the name of authentic republicanism. And their deeper meaning is defense of the Bill of the Rights, with particular focus on defense of the First Amendment. These resolutions cannot therefore be regarded as bases for later nullification efforts on the part of racist slave states against national republicanism.

3. Elaine Scarry, “Resolving to Resist,” *Boston Review*, February/March 2004, pp. 8-13.

4. *Ullmann v. United States*, 350 U.S. 422 (1956).

5. See James Lawler, “Originalism, Moralism and the Public Opinion State of Mitchell Franklin,” in James Lawler, ed., *Dialectics of the U.S. Constitution: Selected Writings of Mitchell Franklin* (Minneapolis: MEP Publications, 2000), 1-30.

6. Raphael, Ray. *A People’s History of the American Revolution*, New York: Harper Collins Perennial, 2001, pp. 390-391.

7. “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”

8. “During the throes and convulsions of the ancient world, during the agonizing spasms of infuriated man, seeking through blood and slaughter his long-lost liberty, it was not wonderful that the agitation of the billows should reach even this distant and peaceful shore; that this should be more felt and feared by some and less by others, and should divide opinions as to measures of safety. But every difference of opinion is not a difference of principle. We have called by different names brethren of the same principle. We are all Republicans, we are all Federalists. If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety

with which error of opinion may be tolerated where reason is left free to combat it. I know, indeed, that some honest men fear that a republican government can not be strong, that this Government is not strong enough; but would the honest patriot, in the full tide of successful experiment, abandon a government which has so far kept us free and firm on the theoretic and visionary fear that this Government, the world's best hope, may by possibility want energy to preserve itself? I trust not. I believe this, on the contrary, the strongest Government on earth. I believe it the only one where every man, at the call of the law, would fly to the standard of the law, and would meet invasions of the public order as his own personal concern. Sometimes it is said that man can not be trusted with the government of himself. Can he, then, be trusted with the government of others? Or have we found angels in the forms of kings to govern him? Let history answer this question." 4 March 1801. <http://www.bartleby.com/124/pres16.html>.

9. See David Cole, James X Dempsey, and Carole E. Goldberg, *Terrorism and the Constitution: Sacrificing Civil Liberties in the Name of National Security*, New Press, 2002.

Concerning the Influence of Roman Law on the Formulation of the Constitution of the United States

Mitchell Franklin*

I

What is called the Constitution of the United States in reality is three constitutions, each of which declares through legal formulations the outcome of vital historical changes in American social history. If Roman law has been a force in American constitutional law, this is true primarily in connection with the First Constitution, prepared at Philadelphia in 1787, and in connection with the Second Constitution of 1789, consecrating the Bill of Rights by means of the first ten amendments to the original text of 1787.

Roman law could have been an influence in the First and Second Constitutions only through the power of the French Enlightenment in the United States because, in general, American law has developed out of English legal history, which both in form and content largely has been outside the scope of the history of European Roman and civil law. It is partially for this reason that American legal science ignores the problem whether Roman law was a source or the origin of constitutional texts. Nevertheless, since the French Enlightenment was a force in the United States late in the eighteenth century when the First and Second Constitutions acquired the force of law, it may be suggested that Roman law enjoyed a role in the preparation of these texts.

If it can be established that certain constitutional formulations have a Romanist meaning or significance, the American constitution in the future may be more clearly and more firmly understood as consecrating the advanced legal thought of eighteenth-century bourgeois history. Because it has not been admitted that *Encyclopédisme* influenced American constitutional conceptions, American constitutional thought becomes vulnerable to the ideas of Professor Charles Beard, who in effect maintained that the First Constitution reflected solely the power of reactionary bourgeois forces. Such theory is grounded in economic conceptions, from which the really basic class antagonisms obtaining in the United States after the Revolution have been abstracted. Consequently, the political weakness of the American bourgeoisie of that period in the face of grave dangers which threatened its power is essentially ignored. Among such acknowledged dangers were the fear of Negro slave revolts, the fear arising from revolt by white non-bourgeois people, revolt of the western territories, Indian wars, dread of aggression or internal subversion by one or more European national states and termination of European immigration. Consequently, it may not have been realized that the American bourgeoisie, in alliance with the bourgeois-influenced Southern slaveholders, retreated to *Encyclopédisme* in formulating the Constitution, or created constitutional ambiguities (and hence future possibilities), in order to maintain their power.¹

There are at least three theories which signify that the Enlightenment and hence the Romanist legal ideas of the Enlightenment may be disregarded as a force in eighteenth-century American constitutional history:

(1) As has been said, the dominant theory is that the American constitutional texts have, almost exclusively, a meaning flowing from English legal history. Dean Pound, the greatest American legal scholar, is a protagonist of this position. He attaches great importance to English medieval legal history.² A variant of Pound's thought signifies that the American Revolution was not a social revolution, and therefore conceives of American constitutional texts as merely conserving, continuing and consecrating medieval English and American colonial ideas. Such thought has

been maintained in effect by two influential and extraordinarily brilliant scholar-judges, Justice Felix Frankfurter of the Supreme Court of the United States and Judge Learned Hand of the United States Circuit Court of Appeals for the Second Circuit.

(2) In academic circles the theory of Georg Jellinek, the nineteenth-century German legal theorist, has been influential for many decades. His racist theory of the American bills of right, according to which these constitutional texts were essentially Germanic in origin,³ diverted attention from the French Enlightenment and hence from consideration of the possible influence of Roman law on the various American texts, including those of the eighteenth-century American state constitutions.

(3) The most recent denigration of the role of the Enlightenment in the United States during the eighteenth century is consciously attempted by Professor Daniel Boorstin, who is both a jurist and a professor of American history at the University of Chicago. He holds that the American Enlightenment is a "myth."⁴ His thought seems to be derived from the *Lebensphilosophie* of Dilthey.

Although Justice Black, probably the most distinguished member of the present Supreme Court of the United States, seems to understand the First and Second Constitutions as consecrating a revolution,⁵ his conception of the American Revolution owes little to the thought of the French Enlightenment. Hence, he also does not recognize the possibility of discovering Romanist influence in the First and Second Constitutions. However, Justice Douglas, in a dissenting opinion which was inspired by doctrinal writing, has acknowledged that certain texts of the Constitution must be understood as texts of the European Enlightenment,⁶ thus expanding the force of such formulations to satisfy more fully the requirements of the American bourgeois revolution.

II

Through the power of the Enlightenment, it is ventured that Roman law affected some aspects of the First and Second American Constitutions in three different ways:

(1) Roman law touched the content of certain texts; (2) Roman law influenced the form or legal method by which the content or

texts were interpreted or developed; (3) certain texts are a dialogue or conversation with aspects of Roman legal history.

These problems will be briefly considered.

III

The meaning of the fifth amendment, which is a text of the Second Constitution, is lost unless it is understood as a Romanist text criticizing European feudalism. This amendment, which has aroused world-wide interest during the last decade, is not merely a text condemning English feudalism alone.

The pertinent words of the amendment may be thus abstracted:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .”

The phrase “infamous crime” means “infaming crime,” and is a reference to the institution of infamy, as it had developed largely in Roman law and later in feudal Europe, but not as such in England. In Roman law the idea obtained that a person could be civilly unworthy, disgraced or infamed (Bentham mentions about thirty-three English synonyms for infamy) as a result of a judgment against him or even without a judgment against him. Under feudalism the Roman conception of infamy was maintained. The force of the text of the fifth amendment relative to “infamous crime” is to confine the role of infamy to the formulated criminal law, and to end the power of the state as such to infame by confiding the determination of infamy to popular forces acting through the jury system.

Thus the fifth amendment reflects the anti-feudal ideas of the Enlightenment. The *Encyclopédie*⁷ said that punishment could affect “life, body, esteem or property. . . .” In his *Lettres persanes*⁸ Montesquieu referred to the ruinous force of infamy in feudal Europe, saying that “the hopelessness of infamy causes torment to a Frenchman condemned to a punishment which would not deprive a Turk of a quarter hour of sleep.” Eden, the English criminal jurist associated with the Enlightenment, explains the power of civil degradation, writing that “virtue, though of a social nature,

will not associate with infamy.”⁹ However, the great name in the struggle against feudal Romanist infamy was Beccaria, the Italian jurist who was the theorist for the *Encyclopédistes* in their attack on feudal criminal law throughout Europe.¹⁰ In the United States Jefferson studied Beccaria’s discussion of infamy in the Italian text, as his extracts from Beccaria show.¹¹ Professor Adhémar Esmein says that Beccaria’s pamphlet “was a petition which Europe used to present to its sovereigns.”¹² Because the United States had no sovereign, it may be said that Beccaria’s writing was presented to its Constitution by means of the fifth amendment. Hence the fifth amendment may be called the *lex* Beccaria.

The medieval Roman law of infamy admits in juridical language the existence of the class struggles of feudal Europe. Jean Hyppolite, the scholar of French existentialism, indicates such general historical significance to the struggle of the Enlightenment against feudal infamy. In considering Hegel’s *Phenomenology of Spirit*, there is perceived the antagonistic existence of “the noble consciousness and the base (or infamed) consciousness (*la conscience noble et la conscience basse [ou infâme]*),”¹³ each involved with and yet confronting the other. As each consciousness was the “truth” of the other, the noble consciousness was also a “base” consciousness. Thus, the Enlightenment directed itself against the general “baseness,” the general infamy. This states the historic mission of the fifth amendment.

As has been said, the essence of the American constitutional attack on state-imposed infamy is the requirement of two concurring juries (one of which at least also determines its concurrence with the other jury by its own principle of unanimity).¹⁴ This, then, is the eighteenth-century American outcome of the revolt of the Enlightenment against Romanist feudal infamy. Therefore, it excludes presidential and congressional infamy, such as has developed in the United States since the ending of the Second World War. This system of state-imposed infamy is now also employed in the Southern states, where it is directed by the segregationist state governments against the Negro people, who are struggling to have their constitutional rights as American citizens acknowledged. Such unconstitutional governmental action in the United

States has been possible because the fifth amendment has not been understood as a text of Roman law.

The fifth amendment also requires the concurrence of the two juries in order to impose responsibility for a “capital” crime. This word does not merely have the ordinary signification of destruction of physical life, but also that of the legal diminution of the juridical personality of the living person. This word refers to the *capitis deminutio* of the Roman law. Among the degrees of *capitis deminutio* in Roman law was *capita media*, or loss or deprivation of citizenship. But because the Supreme Court of the United States turns its back on Roman law, or is unaware of its role as received through *Encyclopédiste* constitutional formulations, it has had unnecessary difficulty in disposing of problems arising out of congressional legislation depriving citizens born in the United States of citizenship for voting in foreign elections, etc.¹⁵ It remains to be discovered that the fifth amendment, with its disposition relative to capital crime, together with the fourteenth amendment, forbids such *capitis deminutio media*, although this discovery almost occurred in 1963 in *Kennedy v. Mendoza Martinez*.¹⁶

IV

In the nineteenth century Savigny developed the first comprehensive and systematic conception of the force of the texts of the Roman law relating to juridical method or form.¹⁷ This was a fundamental accomplishment because of antagonistic Kantian and Hegelian ideas of the role of form in regard to content. It is not here necessary to discuss fully the differences between Kant and Hegel regarding these. With Kant the form of the subject was independent of the content or object and dominated or legislated for it. With Hegel form and content were a unity of opposites, the content being primary. The self-revulsion of the content posited its opposite, the form, which in turn dominated the content until further self-revulsion of the content created new form. These references to the rival ideas of Kant and Hegel suggest the importance of the role of historical legal form or of historical legal method relative to the historical legal content.

One side of the legal method, which in general developed in the history of Roman law, was essentially a method of interpretation of the content or of the texts and also of developing such texts by analogy to solve the problem of the historically unprovided for or unhistorically unanticipated case. Such legal method was required during the eighteenth century in order to satisfy the needs of the new, bourgeois, anti-feudal Romanist civil codes. But similar Romanist legal method has not developed in the Anglo-American legal world. Here the historical legal method largely has been a method of invoking or of overcoming or of developing the force of prior judicial decisions. As this is not a method of developing formulated texts, such as codes or legislation, to meet new situations, the historical legal methods of Roman law and of Anglo-American common law confront each other hostilely.

However, the question may be asked whether the texts of the Second American Constitution of 1789, consecrating the Bill of Rights through the first ten amendments, were subjected to the emasculating and weakening effect of Anglo-American legal method or whether such formulations consecrated Romanist legal method designed to protect and to develop the texts. Without discussing the above problems and considerations, the American answer for over 150 years has been to assume that the texts are dominated by Anglo-American juridical method or form. But if the Bill of Rights states the requirements of a bourgeois revolution and if the formulation of such Second Constitution is influenced by the Romanist legal ideas of the eighteenth-century Enlightenment, the assumption that such texts of the Constitution should be subjected to Anglo-American common law ideas of legal method must be rejected. This confrontation is justified by the ninth amendment, which reads as follows: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Although the ninth amendment in time precedes Savigny's systematization of the legal method of the Roman law as well as Hegel's discussion of the relation of form and content, and although Kant was probably unknown in the United States in 1789, the amendment requires Romanist legal method as described above.

Nevertheless, the force of the ninth amendment as a text consecrating Romanist legal method has been overcome. It is understood as a text concerned, not with form or with legal method, but with the content of the law. It is suggested that the amendment receives its content from natural law.¹⁸ But such unformulated natural law, described as content, would introduce arbitrariness into the very heart of the Bill of Rights. This contradicts a basic aim of the legal theory of the Enlightenment, which was that of overcoming feudal arbitrariness. Indeed, if the ninth amendment is to be understood as a text of eighteenth-century natural law, it is not a text consecrating the content of indeterminate or empty natural law, but a text consecrating the legal method of Romanist natural law, in effect similar to article 21 of the Louisiana Civil Code. Thus, *lex* 11 of the French *projet* of texts concerning interpretation of the civil code, formulated in the Year VIII (1800), said that “In civil matters, the judge, in default of a precise statute, is a vicar of equity. Equity is a resort to natural law or received usages in the silence of positive law.” But this is merely an eighteenth-century Romanist natural law mode of justifying the Romanist juridical method already discussed above.¹⁹

V

As the American Revolution drew to a successful conclusion the *abbé* de Mably, the French utopian socialist, published a series of letters to John Adams, later to be president of the United States, warning the American bourgeoisie that vast class struggle impended in the United States. The *abbé* was the intimate friend both of Adams and of Jefferson, and his book was made known to Franklin and there is evidence that it was known to Madison.

In order to mitigate the harshness of the class struggle, which he foresaw, Mably recommended that American state power should be retained by the Continental Congress, the legislative body, composed of a single chamber, which had successfully conducted the revolution. Although Mably was devoted to the ancient world, he explicitly recommended this in preference to the tribunitial power which had obtained in early Roman legal history. The Roman plebeians had won the power to concur in or to veto

patrician determinations affecting them. This was the principle of *intercessio*. "With you," Mably told John Adams, "the authority of the Congress must supply the place of tribunes, provided you give to this assembly the form and credit which it ought to hold. The rich, when they perceived a body impowered to sit in judgment upon their actions, would prove guarded in their enterprises; and the people would, certainly, feel less disquiet and suspicious. . . . [E]ither the hope or fear of a juridical decision would calm the ragings of sedition in America."²⁰ Thus Mably gave power, not to Roman tribunes, but to a single-chambered continental congress having "the official dignity of a supreme court of judgment."

Furthermore, Mably gave the Continental Congress the power of interposition against anti-democratic state governments. This proposal is embodied in article 4, section 4 of the Constitution, which requires the United States to "guarantee" a republican form of government in the states. In *Federalist No. 43* this text of the First Constitution is described by Madison as the power of "interposition of the general government." This text of the Constitution, which does not have an English origin, might appropriately be called the *lex Mably*.

Because Mably entertained a conception of American life as founded in class struggle, it must be asked why he rejected the Roman idea of *intercessio*. The answer probably derives from Mably's studies of the feudal Poland of his time, where the idea of *intercessio* or of the *liberum veto*²¹ of the Polish nobility, in part, caused the ruin of that state. John Adams followed Mably in condemning the *liberum veto*, although he was the leading American theorist of separation of powers.

But, as has been declared, Mably gave the Continental Congress the power of interposition against the states; and this idea is consecrated in the Constitution. This justifies the tribunitary or cassational power of the national government in regard to the states. Nevertheless, it is the racist, anti-Negro Southern states which today unconstitutionally claim that under the tenth amendment²² they may interpose the tribunitary power of the states against the national government in order to maintain racist segregation and oppression. Indeed, this claim was asserted by John

Calhoun, the Southern political theorist, before the Civil War. He explicitly invoked Roman tribunitian ideas and history to justify the co-equality of the slave-holders with the anti-slavery bourgeois social forces. It is possible that the struggle of the Negro people of the United States today will not be won until the government of the United States in plenary manner exercises its Romanist power of *intercessio* against such racist states, as it should do under the guaranty clause. However, the *lex Mably*, which developed out of the history of Roman law, is presently ignored or reputed as not written by the national government.

VI

The *abbé* de Mably makes it possible to discuss in greater depth and with greater generality whether certain texts of the Bill of Rights reflect Romanist ideas as transformed by the French Enlightenment instead of English legal ideas exclusively. As has been indicated, this conclusion has been rejected or ignored, among others, by Pound, Frankfurter and Learned Hand. Professor Chafee, who may be regarded as the founder of American scholarship pertaining to civil rights and civil liberties, also should be mentioned here, because under the influence of Jellinek he denied French *Encyclopédiste* influence, though unlike Jellinek, he adhered to an English rather than a Germanic conception of the Bill of Rights.

If only English legal ideas are reflected in a bourgeois American constitution, theorists of such conception of the First and Second Constitutions are required to consider—as they have not done—whether feudal ideas can serve a bourgeois society. Hegel introduced this problem when he invoked Montesquieu in writing that law “is to be treated not as something isolated and abstract but rather as a subordinate moment in a whole, interconnected with all the other features which make up the character of a nation and an epoch. It is in being so connected that the various laws acquire their true meaning and therewith their justification.”²³ Thus, he presents the possibility that feudal English public law may have acquired a bourgeois meaning, as has indeed much of English private or common law, at least in content. However,

Mably in his letters to John Adams rejected the possibility that English feudal legal ideas could serve as the public law of the American Revolution. This was because such English feudal legal ideas were a qualitative aspect of English feudal history to which the Americans were alien. "I shall, perhaps, he told that the laws of America are borrowed from the laws of England, the wisdom of which has proved a theme of praise and admiration to a multitude of writers," Mably said. "I grant the fact; but, for the sake of *your* happiness, I wish that it were possible to disprove it. In *your* laws do we perceive the spirit of the English laws; but, let me intreat you to take notice of the prodigious difference which exists between *your* situation and that of England."²⁴ Mably continued: "The English government received its form in the very midst of the barbarism of the fiefs. It was imagined that William the Conqueror and his successors alone possessed the whole public power; and so far were the People from not supposing that they were born to servitude, that even the barons conceived that they held their prerogatives as dependent upon the munificence of their prince. It is a truth which cannot be disputed, after an attentive perusal of the Great Charter which the barons extorted from John Lackland, and became, at once, the principle of all the convulsive motions experienced by the nation, and the rule of conduct to which it has adhered even to the present time, for the purpose of establishing the liberty it still enjoys. Thus, by slow degrees, was formed the national character of the English. Each became gradually habituated to the station which he fills, and long custom has associated the ambition of the prince and the freedom of the subject."²⁵

In accordance with the need to make his thought understood, Mably then sums up his description of the position of the United States, as distinguished from England, by pointing out that the Americans had turned away from English feudal thought to that of Locke, whose name is identified with bourgeois philosophic and political theory. "The United States of America attained to their present form by a manner totally different; and their laws are not the work of many ages and of a thousand contrary circumstances which have succeeded to each other," Mably told Adams. "The commissioners or delegates, who regulated their constitutions,

adopted the true and wise principles of Locke, concerning the natural liberty of man and the nature of government.”²⁶ Having thus differentiated the role of Locke, Mably in effect directed attention to the force of the rational, natural-law bourgeois thought which passed from Locke to France, where it was developed, refined and culminated in the Enlightenment.

Paine supported the implication of Mably’s position. “Europe, and not England,” he wrote in *Common Sense*, “is the parent country of America. This New World hath been the asylum of the persecuted lovers of civil and religious liberty from every part of Europe.”²⁷ Furthermore, Paine strengthened the import of Mably’s presentation by writing that “Not one third of the inhabitants, even of this province [Pennsylvania], are of English descent. Wherefore, I reprobate the phrase of parent or mother country applied to England only as being false, selfish, narrow and ungenerous.”²⁸ It may be added that after the American Revolution and before the outbreak of the French Revolution John Adams from his position in Europe regarded the social situation throughout Europe as explosive and therefore of significance to the newly created United States, which was anxious to attract European immigration in order to people its empty lands. Within the constitutional convention at Philadelphia in 1787, Franklin warned that a constitution should be formulated which would attract Europeans to the United States.

But if English feudal ideas of civil rights were embedded in a feudal American constitution, the problems discussed in this paper relating to Romanist-*Encyclopédiste* influence on the Constitution would not be important. Professor William Appleman Williams recently has suggested that the First Constitution, formulated in 1787, was feudal because it was federal. He quotes Madison as having said in that year that the Constitution “presents the aspect of a feudal system of republics, if such a phrase may be used. . . .”²⁹ Professor Williams himself says that a “cardinal principle of feudalism was the very backbone of English colonization in North America. It is essential to realize that the republicanism of the 16th and 17th centuries was a political theory clearly derived from feudalism.”³⁰ Furthermore, he says that late feudalism rested on

Physiocratic economic theory. "In the United States, as well as in France and England," Professor Williams writes, "physiocracy represented a concerted effort to sustain the life and economy of feudal medievalism in an age of science, commerce, and industry. . . . It was . . . the idea and ideal of a 'feudal utopia' transferred to the 18th century."³¹

Because he chose to be unmindful of the rivalry between bourgeois philosophic materialism and feudal philosophic idealism,³² Hegel believed that the Enlightenment was ambiguous in confronting feudalism.³³ It would therefore be possible to deny or to miss the bourgeois core and meaning of certain aspects of the thought of the Enlightenment; and to hold that it, too, is feudal. This will not be pursued here. However, concerning the problems presented by Professor Williams the following may be said.

(1) Article 4, section 4 of the Constitution or the *lex Mably*, which was formulated in the late eighteenth century and which Madison justified in *Federalist No. 43*, requires the United States to guarantee republican form of government within the particular states. Federalism, whether feudal or otherwise, is subordinated to bourgeois republicanism. This seems to appear also in Madison's presentation referred to by Professor Williams, which is assumed to come from Madison's letter to Jefferson, written in New York on October 24, 1787. This was Madison's first letter to Jefferson after the ending of the Philadelphia proceedings, and it stated the result of the constitutional convention. It was dated three days before the first of *The Federalist* papers was published. This lengthy text is one of the most remarkable documents in the history of American culture. It indicated that social forces had collided at Philadelphia. Madison's discussion shows that the feudal force, as he called it, was strong enough to introduce federalism into the First Constitution, but that such historically backward or feudal power nevertheless had been subordinated to historically advanced bourgeois republican social forces, which reflected the outlook of the Enlightenment, and thus also, objectively, the interest of non-bourgeois social forces which had not been admitted to the proceedings in Philadelphia and which threatened the weak social forces present at the convention.

In this letter Madison told Jefferson his own view that “a check on the States appears to me necessary. . . . Without such a check in the whole over the parts, our system involves the evil of imperia in imperio. If a complete supremacy somewhere is not necessary in every Society, a controuling power at least is so, by which the general authority may be defended against encroachments of the subordinate authorities, and by which the latter may be restrained from encroachments on each other. . . .”³⁴ He continues: “A constitutional negative on the laws of the States seems equally necessary to secure individuals against encroachments on their rights. The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most stedfast friends of Republicanism. . . . It may be asked how private rights will be more secure under the Guardianship of the General Government than under the State Governments, since they are both founded on the republican principle which refers the ultimate decision to the will of the majority. . . . A full discussion of this question would, if I mistake not, unfold the true Principles of Republican Government, and prove in contradiction to the concurrent opinions of the theoretical writers, that this form of Government, in order to effect its purposes, must operate not within a small but an extensive sphere. . . . The great desideratum in Government is, so to modify the sovereignty as that it may be sufficiently neutral between different parts of the Society to controul one part from invading the rights of another, and at the same time sufficiently controuled itself, from setting up an interest adverse to that of the entire Society. . . . In the extended Republic of the United States. [*sic*] The General Government would hold a pretty even balance between the parties of particular states, and be at the same time sufficiently restrained by its dependence on the community, from betraying its general interests.”³⁵

In suggesting that the national government was capable of objective judgment concerning the genuineness of the republicanism of the states, Madison was following Mably. As has been shown, the *abbé* had proposed to John Adams that the Romanist interpositional or tribunitial power (*intercessio*) be given exclusively to

the Continental Congress, because it would exercise its authority in accordance with legal method. This was another way of stating the conception of the eighteenth-century Enlightenment that the unhistorical prince, enlightened because he was in a state of nature, would alienate feudal or historical alienation through his power of rational education. In his letter to Jefferson, Madison in effect strengthens justification for national interposition because the states were arbitrary and hence were incapable of determinations inspired by juridical method. They were not to be given their own power of interposition against the United States. Madison explained such arbitrariness by theory of social classes and by theory of interest, the latter of which seems to derive from Helvétius. In condemning the arbitrariness of the states Madison was pursuing another basic thought of the Enlightenment, the legal ideas of which were, as has been said, directed against feudal arbitrariness. "It remains then to be enquired," Madison told Jefferson, "whether a majority having any common interest, or feeling a common passion, will find sufficient motives to restrain them from oppressing the minority. An individual is never allowed to be a judge or even a witness in his own cause. If two individuals are under the bias of interest or enmity agst [*sic*] a third, the rights of the latter could never be safely referred to a majority of the three. Will two thousand individuals be less apt to oppress one thousand, or two hundred thousand one hundred thousand?"³⁶

Moreover, in his letter to Jefferson, Madison also seems to justify his own view that, because of federalism, the United States had the responsibility, if necessary, to use practical means, both positive and negative, to maintain republicanism within the states. "It may be said," he wrote, "that the Judicial authority, under our new system will keep the states within the proper limits, and supply the place of a negative on their laws. The answer is that it is more convenient to prevent the passage of a law than to declare it void after it is passed; that this will be particularly the case, where the law aggrieves individuals who may be unable to support an appeal agst [*sic*] a State to the supreme Judiciary; that a State which would violate the Legislative rights of the Union, would not be very ready to obey a Judicial decision in support of them,

and that a recurrence to force, which, in the event of disobedience would be necessary, is an evil which the new Constitution meant to exclude as far as possible.”³⁶ In effect Madison here seems to tell Jefferson that which he later stated, with more reserve, in *Federalist No. 43* relative to the responsibility of the United States to guarantee republican form of government within the states. There he said that the guarantee clause requires that the states “shall not exchange republican for anti-republican Constitutions. . . .” It followed that “if the general government should interpose by virtue of this constitutional authority,” Madison added in *Federalist No. 43*, “it will be, of course, bound to pursue the authority.” Thus, Madison subordinated federalism to republicanism, both in theory and practice. The negative power of interposition given to the United States against the states may be exercised either generally or particularly. It is given the power to supersede an “anti-republican” state regime in regard either to all or to particular aspects of its authority.

Furthermore, the power of supersession of the United States also justifies correlative positive power, general or particular, to replace the negated “anti-republicanism” with republicanism. Although Madison directed primary attention in *Federalist No. 43* to the negating or negative moment of the tribunitial *lex* Mably, the United States, he also said, was “bound to pursue the authority. But the authority extends no further than to a *guaranty* of a republican form of government, which supposes a preexisting government of the form which is to be guaranteed.” As he had indicated in his earlier letter to Jefferson, Madison himself desired positive power correlative to the negative power. This plenary goal may be regarded as consecrated by article 4, section 4 of the Constitution, though this may not, even by Madison at the time of his letter to Jefferson, have been perceived, because in general the eighteenth century was a period of mechanical materialism.

The national negative power dialectically presupposes and requires its opposite, that is, the national positive power which is the truth, the meaning and the justification of such negative power. The positive content of this truth is bourgeois republicanism and republican virtue. It was said in 1952 that “both Mommsen and

Bonfante are in error in holding that the negative, cassational, inspectional, tribunitial power of *intercessio* was not also a positive power, producing positive law. Contrary to Mommsen, it may be said that the distinction between negative and positive law is not absolute, but relative. Negative law is the opposite of positive law, but dialectically negative law is also implicit positive law. Possibly Montesquieu perceived this, but, among modern [Romanist] jurists, Wenger has been most clear in understanding the positive force of negative law, though he stated no principle thereof.³⁸ In *Bush v. Orleans Parish School Bd.*, the Supreme Court of the United States reiterated that Coriolanian state interposition against the United States is “illegal defiance of constitutional authority.”³⁹ If the negative or “defiance” is “illegal,” the correlative positive moment of “attack,” potential or implicit in the illegal negative, such as the criminal law of the interposing state, may also be condemned as “illegal defiance of constitutional authority.”⁴⁰ The distinction between the illegal interposition and the positive criminal law collapses because the positive is the necessity of the illegal negative, and the illegal negative is the justification of the positive. Both are illegal.

The legal positive power implicit or potential in the legal or constitutional power of national interposition is made firmer by the Third Constitution, based on the three legal Civil War amendments. The legal positive force of the *lex Mably* is recognized by reading it in the context of the complete text of article 4, section 4, which in one sentence says that “the United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature or of the Executive (when the Legislature cannot be convened) against domestic Violence.”

Because he conceived that federalism was feudal, Madison realized that a decisive struggle for supremacy between the national government, representing bourgeois republicanism, and states representing feudalism, was inevitable. “And what has been the progress and event of the feudal Constitutions?” he asked Jefferson in his letter of October 24, 1787. “In all of them a continual struggle between the head and inferior members, until a

final victory has been gained in some instances by one, in others, by the other of them.”⁴¹ Madison thus fully anticipates what Hegel was in effect to say later. If the powers of state become self-subsistent, he said, “the destruction of the state is forthwith a *fait accompli*. Alternatively, if the state is maintained in essentials, it is strife which through the subjection by one power of the others, produces unity at least, however defective, and so secures the bare essential, the maintenance of the state.”⁴²

Madison’s presentation seems to suggest, in effect, that in the inevitable struggle between bourgeois republicanism and feudal federalism, article 4, section 4 stated the legal justification and legal means, general or partial, positive or negative, for achieving the victory of republicanism over federalism. “I mean,” he continued in his letter to Jefferson,⁴³ “not by these remarks to insinuate that an *esprit de corps* will not exist, in the National Government or that opportunities may not occur of extending its jurisdiction in some points. I mean only that the danger of encroachments is much greater from the other side, and that the impossibility of dividing powers of legislation, in such a manner, as to be free from different constructions by different interests, or even from ambiguity in the judgment of the impartial, requires some such expedient as I contend for.”

Madison’s fear of the destructive consequences of feudal federalism was well founded, and was dreaded precisely because it seemed feudal for, as Hegel said later in discussing forms of government, “it is quite idle to inquire which . . . is most to be preferred. Such forms must be discussed historically or not at all.”⁴⁴ Thus, in weak, feudal Germany Heubner writes⁴⁵ that “The rule, namely, became gradually recognized that the more special should take precedence of the more general law. . . . As men were wont to express the rule in a legal proverb: ‘Arbitrariness breaks town law, town law breaks provincial law, and provincial law breaks general law.’ (*Willkür bricht Stadtrecht, Stadtrecht bricht Landrecht, Landrecht bricht gemein Recht.*) In this predominance . . . of local and special law, the persistent decentralization of German law found its clearest expression.” Enlightenment-century feudal Poland disappeared from the scene of world history during the

epoch in which the United States emerged on the stage. Both countries aroused the deepest interest of the French Enlightenment and of the French Physiocrats. Mably justified what later was to become article 4, section 4 of the Constitution or the *lex Mably*, because it gave the Romanist power of *intercessio* solely to the national government and denied it to the particular states. As has been suggested, Mably may have been inspired to withhold such interpositional or tribunitial power from the particular American states because the *liberum veto* of the feudal Polish nobility had proved fatal to the very life of that state.⁴⁶ Hence although John Adams is the leading American defender of the principle of separation of powers, he nevertheless condemned the related idea of veto through interposition as “the most absurd institution which ever took place among men.”⁴⁷ The instance which Adams had most fixedly in mind was the veto power (*liberum veto*) given each noble of the feudal Polish state. “One fool,” Adams said,⁴⁸ “or one knave, one member of the diet, which is a single sovereign assembly, bribed by an intriguing ambassador of some foreign power, has prevented measures the most essential to the defense, safety, and existence of the nation. Hence humiliations and partitions.” The Polish *liberum veto*, Adams said,⁴⁹ “has been ruin to that noble but ill-constituted republic.” For the same reason John Adams attacked the government of the seven provinces of the United Netherlands which “have been driven to demand unanimity instead of a balance.”⁵⁰ He concludes his discussion with the question: “But what kind of government would that be in the United States of America, or any one of them, that should require unanimity, or allow of the *liberum veto*? It is sufficient, to ask the question, for every man will answer it alike.”⁵¹

In truth Madison’s fear of the dissolving effects of federalism was not exclusively a general historical fear of the role of what he regarded as feudalism in a bourgeois republic. It already has been stated that the social forces assembled at the Philadelphia convention in 1787 were weak because they confronted many grave threats, including the threat of aggression or internal subversion by one or more European states.⁵² This threat would be more serious if American feudal federalism were not subordinated

to bourgeois national republicanism. Madison makes this very clear in his justification for article 4, section 4 in *Federalist No. 43*. He asks: “[W]ho can say what experiments may be produced by the caprice of particular states, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers?” Madison’s question could on be answered by acknowledging that under the *lex Mably* the United States has plenary power, general or partial, negative or positive, to secure bourgeois republicanism and republican virtue within the particular states.

“France alone,” Henry Adams wrote,⁵³ “could not greatly disturb the repose of Jefferson; but France, acting through Spain on the hopes and fears of the Southern States, exercised prodigious influence on the Union.” Such a threat is what Madison had anticipated in stating his defence of the *lex Mably* in *Federalist No. 43*. What now must be asked is whether Madison, in his letter to Jefferson, was condemning feudalism, not only as content, but, abstractly, as method. Southern slave-holding power required federalism in order to enjoy the interpositional method of feudalism. Hence in condemning feudalism in his epistle to Jefferson, Madison indirectly may also have been attacking slavery. He could not attack slavery as such because the relatively weak bourgeois forces and the relatively weak bourgeois-oriented slavery forces has indeed united to formulate the Philadelphia Constitution. Hence, Madison’s presentation, save when it is openly reassuring to the slave-owners, tends sometimes to be euphemistic, disguised and esoteric, as has been suggested elsewhere.⁵⁴ Behind his attack on feudalism in his letter to Jefferson and behind his attack on aristocracy and monarchy in *Federalist No. 48*, Madison may also have been directing his fire against slavery, and may also have been asserting the incompatibility of the rival social forces to exist permanently in a bourgeois republic. “The more intimate the nature of such a union may be,” Madison said in *Federalist No. 48*, “the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained. But a right implies a remedy; and where else could the remedy be deposited, than where it is deposited by the Constitution?”

(2) It is to be reiterated that the idea of the republic consecrated in the guarantee clause is not feudal, but bourgeois. The American constitutional idea of the republic, embodied in the *lex Mably*, is related to the qualitatively new, bourgeois conception of republican virtue presented by Montesquieu, who “said that the principle of monarchies is honor, whereas the fundamental principle of a republic is *virtue*,”⁵⁵ thus distinguishing feudal and bourgeois consciousness.⁵⁶ “This virtue,” Montesquieu said “may be defined as love of the laws and of our country. As such love requires a constant preference of public to private interest, it is the source of all private virtues. . . . This love is peculiar to democracies. In this alone the government is intrusted to private citizens.”⁵⁷ Paine wrote in *Common Sense* that “it is easy to see that when republican virtues fail, slavery ensues.”⁵⁸ Because Montesquieu’s theory of republican virtue was a bourgeois theory, it was not a theory of innate virtue, but a theory in which virtue was taught. Because feudalism had alienated or appropriated consciousness, it was necessary to change the feudal circumstances which had created such feudal consciousness. It was necessary to alienate the alienation if bourgeois consciousness were to be created. This was the task of public education, and this explains the emergence of the theory of public education which developed during the Enlightenment. Accordingly, Montesquieu continues his discussion of republican virtue, adding “Now a government is like everything else: to preserve it we must love it. . . . Everything therefore depends on establishing this love in a republic; and to inspire it ought to be the principal business of education.”⁵⁹ Enlightened bourgeois legislation and codification were principal aspects of education.

The crisis of the present day bourgeois world has centered about the failure of the idea of republican virtue, according to which men could pursue particular interest in their economic relations, but nevertheless were to pursue the general interest within and with the state. This crisis haunts Hegel’s intellectual career. But Alexander Hamilton anticipated and, unlike Paine, welcomed the subordination of republican virtue to private interest. “As riches increase and accumulate in a few hands; as luxury prevails in society,” he said on 21 June 1755 in a speech before the New

York convention to ratify the constitution, “virtue will be considered only as a graceful appendage of wealth, and the tendency of things will be to depart from the republican standard.”⁶⁰

(3) The thought presented justifies the theory that the Bill of Rights of 1789 introduced a Second Constitution; for it further subordinates, or should have been understood to do so, the federal element in the First Constitution, which Madison conceived to be the feudal core of that constitution. Because the First Constitution is qualitatively different from the Bill of Rights, they are two constitutions. And these two constitutions are qualitatively different from the Third Constitution, founded on the three Civil War amendments. These three constitutions are articulated by the tribunitial *lex* Mably, which reciprocally is articulated by the others. More specifically, the national tribunitial power, *Encyclopédiste* in scope and meaning, gains not only certain content and determination, but also certain power, both negative and positive, from the Second and Third Constitutions. This was perceived in effect by Justice Frankfurter in his dissent in *Baker v. Carr*,⁶¹ but he regretted that he had to make this acknowledgment.

(4) Although Physiocratic economic theory, which seemed primarily concerned with immovable property, was feudal in form, it was bourgeois in content and meaning.⁶² As such it was also attractive to the Southern slave-owners, who were subject not entirely to feudal, but to bourgeois influence through their role in the world market, and who could and did enter into an alliance with the American bourgeoisie through the First Constitution of 1787.

John Adams in his attack on canon and feudal law, published in 1765, suggests that the American revolution would be a bourgeois revolution. Adams regarded the seventeenth-century English revolution against “the execrable race of the Stuarts” as a struggle against the “confederacy” of “ecclesiastical and civil tyranny which I use as synonymous expressions for the canon and feudal laws.”⁶³ Because the United States was settled during this period, Adams conceived that the colonies, at least Massachusetts, began in the seventeenth century as bourgeois societies. “It was this great struggle that peopled America,” he wrote. “It was not

religion alone, as is commonly supposed; but it was a love of universal liberty, and a hatred, a dread, a horror, of the infernal confederacy before described, that projected, conducted, and accomplished the settlement of America. It was a resolution formed by a sensible people—I mean the Puritans—almost in despair.”⁶⁴

However, if American social life began as part of a bourgeois revolution during the seventeenth century, John Adams had to consider whether the coming American revolution during the eighteenth century would be a social revolution, or a war for national independence. In the latter situation Romanist-*Encyclopédiste* legal ideas would not be so likely to emerge. But Adams conceived of the impending struggle with England as American bourgeois resistance to English plans to introduce feudalism into the already bourgeois American colonies. “There seems to be a direct and formal design on foot, to enslave all America. This, however, must be done by degrees. The first step that is intended, seems to be an entire subversion of the whole system of our fathers, by the introduction of the canon and feudal law into America. The canon and feudal systems, though greatly mutilated in England, are not yet destroyed. Like the temples and palaces in which the great contrivers of them once worshipped and inhabited, they exist in ruins; and much of the domineering spirit of them, still remains.”⁶⁵ Thus, John Adams suggests that the American revolution was something of a prototype of the anti-colonial struggles of the twentieth century, directed against the feudal colonial regimes established or supported by bourgeois metropolitan states. In 1958 Professor Wolfgang H. Kraus wrote that “as the concept and practice of the old regime’s authority crumble under the impact of Enlightenment and Revolution, they are, in a sense, put together again to function within the rapidly expanding system of colonial rule over nonwestern peoples.”⁶⁶

In the struggle against the project of English imperialism to introduce feudalism into the bourgeois colony of Massachusetts, Adams required, as an aspect of the resistance to such force, an intense development of American bourgeois constitutional ideas. In effect, he thus prepared the way for the reception of the public law ideas of the Enlightenment, including conceptions based on

anti-feudal Roman law. He justifies this constitutional demand, in accordance with the ideology of the period, by invoking natural law, which in itself was empty and devoid of content. "Let the bar . . . inform the world of the mighty struggles and numberless sacrifices made by our ancestors in defence of freedom," Adams wrote. "Let it be known, that British liberties are not the grants of princes or parliaments, but original rights . . . that many of our rights are inherent or essential . . . even before a parliament existed."⁶⁷ In 1812, Jefferson, more firmly than Adams, tells how American thought veered from an exclusively English justification for the revolution into its opposite, a natural law justification, which, of course, could connote justification for the reception of Romanist legal ideas as transformed by the French Enlightenment so as to have more profound bourgeois meaning and force. Hence in a letter to Tyler, Jefferson said "I deride with you the ordinary doctrine, that we brought with us from England the *common law rights*. This narrow notion was a favorite in the first moment of rallying to our rights against Great Britain. But, it was that of men who felt their rights before they had thought of their explanation. The truth is, that we brought with us the *rights of men*; of expatriated men."⁶⁸

When the revolution was ending in American victory almost twenty years after John Adams had attacked feudal law, the *abbé* de Mably, the friend of John Adams and Thomas Jefferson, perceived more clearly than Adams that the American revolution had been a bourgeois revolution and not a national liberation. Hence Mably saw that the bourgeois American revolution had resulted not only in the defeat of England, the metropolitan power, but had precipitated new social struggles between the American bourgeoisie and the popular forces which had supported the former during the conflict, because it had been a social revolution. "If it be true," Mably wrote Adams, "that, as a natural result of your connection with England, a seed of aristocracy has arisen amongst you, which will continually endeavor to increase and to extend itself, does it not follow that you have acted rather with imprudence by attempting to establish too unqualified a democracy? This were to throw the laws and manners into a state of contradiction against each other. In my opinion, you would have adopted a less exceptionable plan,

if, instead of awakening, by the intimation of splendid prospects, the ambition and hopes of the people, you had simply proposed that they should emancipate themselves from the yoke of the court of London. . . .”⁶⁹

In other words, Mably told John Adams that class struggle impeded because the American struggle had been a social revolution rather than a narrow national liberation movement. Mably discusses this outcome at length: “Long has the political system of Europe, founded upon a thirst for gold and the unlimited extension of commerce, driven from amongst us, all the ancient virtues; nor could I venture to affirm that a war of seven years has proved the instrument of effecting their revival in America. Be this as it may, I dread lest the rich should become inclined to form themselves into an order apart, and to take possession of all power whatsoever, whilst the others, pluming themselves upon the expected attainment of that equality with the prospect of which they had been flattered, would not consent to such innovations; and hence must necessarily result the dissolution of that government which the opulent shall have endeavored to establish.”⁷⁰

It is out of this antagonism that the Second Constitution of 1789 or the Bill of Rights, with certain Romanist-*Encyclopédiste* texts, emerged. These texts subordinated the federal or First or Philadelphia Constitution of 1787, and stated, or should be regarded as stating, some of the qualities of the republican form of government guaranteed by the Philadelphia Constitution. In his letters to John Adams, Mably asked “Has not more been promised than you are either inclined or able to perform?”⁷¹ The consecration of the Second Constitution, including its Romanist-*Encyclopédiste* texts, approximately six years after Mably had asked this question, shows that the objectively weak bourgeois forces and their allies, the bourgeois-oriented slave-holding forces, were forced to fulfill their promises. They retreated to the Enlightenment and to the method of existential constitutional ambiguity.⁷² The reasons for this retreat have already been stated.⁷³

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NOTES

*W. R. Irby Professor of Law, Tulane University. Part of this study was prepared as a contribution to Scritti Arangio-Ruiz (Naples 1964).

1. Franklin, "Interposition Interposed: II," 21 *Law in Transition* 77, 102 (1961).

2. Pound, *The Development of Constitutional Guarantees of Liberty* 26, 111 (1957).

3. Jellinek, *The Declaration of the Rights of Man and of Citizens* 97 (Ferrand transl. 1901).

4. Boorstin, *America and the Image of Europe*, ch. 3 (1960). For general background, see *The Eighteenth-Century Revolution: French or Western?* (Amann ed. 1963). Thought, in effect somewhat similar to Professor Boorstin's, but stated with more reserve, seems to be found in Bailyn, "Political Experience and Enlightenment Ideas in Eighteenth-Century America," 67 *Am. Hist. Rev.* 339 (1962).

5. *Green v. United States*, 356 U.S. 165, 212 (1958) (Black, J., dissenting).

6. *Ullmann v. United States*, 350 U.S. 422, 450 (1956) (Douglas, J., dissenting). [Ed. note: "Douglas invoked the Fifth Amendment as applicable to circumstances in which 'public opinion casts a person into outer darkness as happens today when a person is exposed as a Communist,' and when 'the government brings infamy on the head of the witness when it compels disclosure. That is precisely what the Fifth Amendment prohibits.' In support of the Fifth Amendment as an anti-infamy amendment, Douglas wrote: 'The Fifth Amendment was designed to protect the accused against infamy as well as against prosecution. A recent analysis by Professor Mitchell Franklin of Tulane illuminates the point.' (457)."] From James M. Lawler, Introduction: "Originalism, Moralism, and the Public Opinion State of Mitchell Franklin," in *Dialectics of the U.S. Constitution: Selected Writings of Mitchell Franklin*, edited by James M. Lawler (Minneapolis: MEP Publications, 2000), 1.

7. 12 *Encyclopédie ou dictionnaire raisonné des sciences, des arts et des métiers* 197 (1751).

8. Montesquieu, *Lettres persanes* [1721] (Brackhausen ed 1913).

9. Eden, *Principles of Penal Law* 52 (1771).

10. Franklin, "The Encyclopédiste Origin and Meaning of the Fifth Amendment," 15 *Law. Guild Rev.* 41, 43 (1955). [Ed. note: reprinted in Lawler, ed., *op. cit.*, 139-184.]

11. *Ibid.*

12. *Ibid.*

13. Hyppolite, *Etudes sur Marx et Hegel* 57 (1953). See also Hegel, *The Phenomenology of Mind* [1807] (Baillie transl. 1931); Hyppolite, *Genèse et structure de la phénoménologie de l'esprit de Hegel* 385 (1946).

14. Ed. note: In addition to requirement of the Fifth Amendment for a Grand Jury indictment for "a capital, and otherwise infamous crime," the Sixth Amendment requires conviction by a jury, whose decision must be unanimous,

for some clearly defined offense of the criminal law. Hence, two juries must concur in such cases. There is an exception to the scope of the Fifth Amendment for “cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger. . . .” This clearly enunciated exception narrows the extent to which these requirements can be neglected by the armed forces in time of war or public danger. In this present time of “war on terror,” current laws seeking to suspend these constitutional rights attempt to broaden the scope of this exception. However, a principle of Romanist and civil law interpretation that Franklin justifies elsewhere is that only general principles can be so expanded, not exceptional clauses, as exceptions do not state a general rule. Similarly, there cannot be expansion of particular clauses, such as the age at which individuals become eligible to vote. Franklin explains the Romanist method of interpretation, formulated in the Ninth Amendment, in “The Ninth Amendment as Civil Law Method and its Implications for Republican Form of Government: *Griswald v. Connecticut*; *South Carolina v. Katzenbach*,” *Tulane Law Review* (1966) 40:487-521. For other texts by Franklin on this question of Romanist and civil law method of interpretation see notes 15 and 17.

15. Franklin, “The Relation of the Fifth, Ninth, and Fourteenth Amendments to the Third Constitution,” 4 *How. L. J.* 170, 185 (1958).

16. 372 U.S. 144, 168 n.23 (1963), 37 *Tul. L. Rev.* 831. Justice Goldberg, writing for the majority, said that Roman law, along with English feudal law, was here “peculiarly appropriate. Though not determinative, it supports our holding” The majority opinion thus ignores the suggestion that Roman law, as recast or reconsidered through the Enlightenment of the eighteenth century, may have been embodied in a constitutional text and thus have acquired the force of law. The opinion ignored the dissenting opinion of Justice Douglas in *Ullmann v. United States*, 350 U.S. 422, 450 (1956), and the doctrinal writing of Franklin, *supra* notes 10 and 15. Justice Goldberg therefore partially inspired himself, in the usual way, by a text from Magna Carta and the 1957 edition of the *Encyclopaedia Britannica*. 372 U.S. 186.

17. “See Bobbin, “*L’analogia nella logica del diritto*,” R. Università di Torino, Memorie dell’istituto giuridico, serie II, Memoria XXXVI, 1, 67 (1938); Franklin, “A Study of Interpretation in the Civil Law,” 3 *Vand. L. Rev.* 557, 558 (1950).

18. Patterson, *The Forgotten Ninth Amendment* 2-3 (1955). [Ed. note: Currently, Ronald Dworkin takes a similar “moral reading” of the Constitution to justify the introduction of arbitrary interpretation based on the current moral conceptions of the Supreme Court justices. Such an approach is countered by the opposing doctrine of “strict construction” or “originalism,” as in the ideas of Robert Bork. Hence the importance of recognizing that the Ninth Amendment formulates Romanist and civil law methodology, rather than referring to an unformulated natural or moral law. This conception requires basing Supreme Court decisions on the “original” texts of the Constitution, but authentically understood in their full historical import as texts with Romanist and Enlightenment and not Anglo-American method and content. In this way the historic meaning of the original texts can legitimately be expanded to apply to cases not explicitly

mentioned originally. For a discussion of these ideas, see Lawler, "Introduction," *op. cit.*]

19. Ed. note: I.e., the method of "of developing such texts by analogy to solve the problem of the historically unprovided for or unhistorically unanticipated case." Franklin argues in articles on the legal methodology of the Ninth Amendment that in the historical situation of the writing of the French Civil Code, expressing the force of the French revolution, appeal to equity, morality or natural law does not overcome the text of the legislated law but sanctions its development in particular cases where the positive law is silent. In this context it is understood that natural law has been expressed in the legislated code itself, and therefore it is the written code of the revolutionary regime that provides the best guide to what natural law requires. This is quite different from appeal to natural law in the pre-Revolutionary situation where its function is to negate the positive law of the reactionary regime. See Franklin, "Laws, Morals and Social Life," *Tulane Law Review* 31:465-478.

20. Mably, "Remarks Concerning the Government and the Laws of the United States of America," in *Four Letters Addressed to Mr. Adams* 183, 241 (Eng. transl. 1784).

21. Mably, "Du gouvernement et des lois de Pologne" [1771] in 8 *Collection complete des oeuvres de l'abbé de Mably* 1, 16, 260-67 (1794-1795).

22. Ed. note: The Tenth Amendment states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

23. Hegel, *Philosophy of Right [Law]* [1821] 16 (Knox transl. 1942).

24. Mably, "Remarks," *op. cit.*, 28.

25. *Ibid.*, 29.

26. *Ibid.*, 30.

27. Paine, *Common Sense* [1776], in 2 *Life & Works of Thomas Paine* 93, 127 (Van der Weyde ed. 1925).

28. *Ibid.*, 128.

29. Williams, *The Contours of American History* 149 (1961).

30. *Ibid.*, 57.

31. *Ibid.*, 151.

32. See 3 Hegel, *Lectures on the History of Philosophy* [1840] 381 (Haldane & Simon transl. 1896).

33. See Hegel, *The Phenomenology of Mind* [1807] 581 (Baillie transl. 1931).

34. "Madison to Jefferson, New York, 24 October 1787," in 5 *Writings of James Madison* 17, 23 (Hunt ed. 1904).

35. *Ibid.*, 27. On the meaning of the Kentucky and Virginia Resolutions of 1798, see Franklin, "The Unconstitutionality of Interposition," 16 *Law. Guild Rev.* 45, 48 (1956).

36. *Ibid.*, 29.

37. *Ibid.*, 30. Concerning Mably's ideas as to the use of force against a "delinquent" state, see Mably's posthumous work, "Notre gloire ou nos rêves," in 13 *Collection complete des oeuvres de l'abbé de Mably* 353, 457 (1794-1795).

This seems to have been written during the American Revolution, but apparently was not made known until 1790. Mably died in 1785.

38. Franklin, "Concerning the Mission and Contemporary Force of Romanist 'Intercessio,'" in 2 *Studi in honore di Vincenzo Arangio-Ruiz* 269, 280 (1952). The reference to Montesquieu is to his statement that "the plebeians, who had obtained the Tribunes for defense, employed them for attack." Montesquieu, *Considerations on the Causes of the Grandeur and Decadence of the Romans* [1734] 166 (Baker transl. 1882). Cf. Seeberger, "The Political Significance of Hegel's Concept of History," 48 *Monist* 76. 93 (Dove & Dove transl. 1964). Seeberger writes:

"[I]f knowledge concerning the lawfulness of Being, and therewith knowledge concerning the essential nature of dialectic, were more widespread in the Western World, and if one were to consider all the ramifications of the fact that the dialectic unexpectedly transforms something negative into a positive and something positive into a negative, many a political gamit would have been executed differently than it has in fact been performed. It then would also have become apparent that the force of negativity, which need not necessarily be a destructive force, can, in a thoroughly positive sense, also prove to be a powerful driving force in the realm of politics, a fact which can be readily demonstrated in the consequences of every great revolution."

Bonfield writes:

"But two other arguments are ventured as justifications for judicial abstinence under section 4. First, that although the Court might invalidate an unrepugnant provision, it could not force its proper replacement. An extreme illustration of the possible consequences which might flow from such an inability is a judicial declaration of the unrepugnant nature of a state's legislature which would leave it without a law making body. Since the Court cannot itself affirmatively create a new one, it is argued that the Court should abstain in the first instance from any such adjudication. But that argument fails by its misconstruction of the judicial process. By its very nature, the judicial process operates in a negative manner, constantly voiding arrangements that it could not affirmatively replace. It contemplates securing positive action from the parties themselves, or in their default, from the other branches of the government." Bonfield, "The Guarantee Clause of Article IV, Section. 4: A Study in Constitutional Desuetude," 46 *Minn. L. Rev.* 513, 561 (1962). See text accompanying note 62 *infra*.

Hegel himself says:

"Negation is just as much Affirmation as Negation, or that what is self-contradictory resolves itself not into nullity, into abstract Nothingness, but essentially only into the negation of its particular content, that such negation is not an all-embracing Negation, but is the negation of a definite somewhat which abolishes itself, and thus is a definite negation. . . . Since what results, the negation, is a definite negation, it has a content. It is a new concept, but a higher, richer concept than that which preceded for it has been enriched by the negation or opposite of that preceding concept, and thus contains it, but contains also more than it, and is a unity of it and its opposite." Hegel, *Science of Logic* [1812] 65 (Johnston & Struther transl. 1929).

39. *Bush v. Orleans Parish School Bd.* 364 U.S. 500, 501 (1960). See also *ibid.*, 803.

40. Franklin, "Interposition Interposed: II," *21 Law in Transition* 77, 90 (1961).

41. 5 *Writings of James Madison*, *op. cit. supra* note 37, 25; of. *Knight v. Mississippi*, 161 So. 2d 521, 523 (Miss. 1964):

"Within a decade novel constructions have nullified settled constitutional questions. Segregation in schools and in all means of public transportation has been declared at an end by judicial fiat. . . . Large numbers of people, in this broad land, are steeped in their customs, practices mores and traditions. In many instances, their beliefs go as deep or deeper than religion itself. If, in the lapse of time, these principles, sacred to them, shall be disproved, then it may be accepted that truth will prevail. But, until those principles have been tested in the crucible of time, no abject surrender should be expected, much less demanded." (Lee, C.J.)

Pound writes: "Professor McIlwain has shown us the origin of the federal idea in the balance of central government and local self-government achieved in medieval England." Pound, "Law and Federal Government," in *Federalism as a Democratic Process* 23 (1942).

42. Hegel, *op. cit. supra* note 23, 176.

43. "Madison to Jefferson, New York 24 October 1787," in 5 *Writings of James Madison* 17, 23 (Hunt ed. 1904).

44. Hegel, *op. cit. supra* note 26, 177.

45. Huebner, *A History of German Private Law* 23 (Philbrick transl. 1918). Professor Philbrick's translation of *Willkür* is "by-law," and of *gemein Recht* is "common law." Gierke, *Natural Law and the Theory of Society 1500 to 1800* [1913] 47, 110, 127, 188, 246-47, 322, 324 (Paiher transl. 1934). He directs considerable attention to Fichte's defense of the interpositional Spartan ephorate, *Ibid.*, 133, 248, 328, but ignores Hegel's condemnation of Fichte. Hegel, *op. cit. supra* note 23, 17; cf. 2 Tocqueville, *Democracy in America* [1835, 1810] 317 (Reeves transl. 1877); Bendix, *Max Weber* 463 (1962); Lively, *The Social and Political Thought of Alexis de Tocqueville* 151 (1962).

46. Mably, *op. cit. supra* note 24.

47. Adams, *A Defense of the Constitutions of Government of the United States of America (1787-1788)* in 6 *The Life and Works of John Adams* 1, 63 (Adams ed. 1851).

48. *Ibid.*

49. *Ibid.*

50. *Ibid.*

51. *Ibid.*

52. See text accompanying note 1, *supra*.

53. 1 Adams, *History of the United States of America* 337 (1889).

54. Franklin, "Interposition Interposed: II," in *Law in Transition* 77, 106 (1961).

55. Mirkin-Guetzévitch, *De l' "Esprit des lois," à la démocratie moderne*, in *La pensée politique et constitutionnelle de Montesquieu, Bicentenaire de l'Esprit des lois, 1748-1948* 11, 20 (de la Morandière ed. 1952).

56. Writing of Montesquieu, Hegel said:

“As is well known, he held that ‘virtue’ was the principle of democracy. . . . Montesquieu goes on to say that in the seventeenth century England provided ‘a fine spectacle of the way in which efforts to found a democracy were rendered ineffective by a lack of virtue in the leaders.’ And again he adds ‘when virtue vanishes from the republic, ambition enters hearts which are capable of it and greed masters every one . . . so that the state becomes everyone’s booty and its strength now consists only in the power of a few citizens and the licence of all alike. . . .’ The fact that Montesquieu discerns ‘honour’ as the principle of monarchy at once makes it clear that by ‘monarchy’ he understands, not the patriarchal or any ancient type . . . but only feudal monarchy, the type in which the relationships recognized in its constitutional law are crystallized into the rights of private property and the privileges of individuals and Corporations. . . . [I]t is not duty but only honour which holds the state together.” Hegel, *op. cit. supra* note 26, 177-78.

See also 2 Hegel, *The Philosophy of Fine Art* [1935], 333 (Osmaston transl. 1920); note 13 *supra*. Because honor was the principle of feudalism, the fifth amendment excludes feudal, state-imposed Romanist loss of honor or infamy, as the text of the amendment indicates by the bourgeois fetters it imposes on punishment for “infamous” crime. Tocqueville writes:

“The peculiar rule, which was called honour by our forefathers, is so far from being an arbitrary law in my eyes, that I would readily engage to ascribe its most incoherent and fantastical injunctions to a small number of fixed and invariable wants inherent in feudal society. . . . The state of society and the political institutions of the middle ages were such, that the supreme power of the nation never governed the community directly. That power did not exist in the eyes of the people: every man looked up to a certain individual whom he was bound to obey; by that intermediate personage he was connected with all the others. Thus in feudal society the whole system of the commonwealth rested upon the sentiment of fidelity to the person of the lord: to destroy that sentiment was to open the sluices of anarchy. . . . To remain faithful to the lord, to sacrifice oneself for him if called upon, to share his good or evil fortunes, to stand by him in his feudal undertakings whatever they might be—such were the first injunctions of feudal honour. . . . The treachery of a vassal was branded with extraordinary severity by opinion, and a particularly infaming name was created for the offence, which was called *felony* [*félonie*]. . . . The rules of honour will therefore always be less numerous among a people not divided into castes than among any other. . . . Thus the laws of honour will be less peculiar and less multifarious among a democratic people than in an aristocracy. . . . Among a democratic nation, like the Americans, in which ranks are identified, and the whole of society forms one single mass . . . it is impossible ever to agree beforehand on what shall or shall not be allowed by the laws of honour. . . . Consequently the dictates of honour will be there less imperious and less stringent; for honour acts solely for the public eye—differing in this respect from mere virtue, which lives upon itself contented with its own approval.” 2 Tocqueville, *op. cit. supra* note 48, at 248, 249, 254, 255, 256 (translation slightly altered for sake of exactness).

In writing that honour “acts solely for the public eye,” Tocqueville is paralleling or following Hegel’s fundamental conception of recognitive being. Hegel had said, “Inasmuch, then, as honour is not only a semblance in me myself, but must exist also in the mind and recognition of *another* which again on its part makes a claim to a similar honorable recognition, honour is the extreme embodiment of *vulnerability*.” 2 Hegel, *The Philosophy of Fine Art* [1835] 335 (Osmaston transl. 1920). This may be veered into what may be called the bourgeois meaning of infamy indicated by the Second Constitution because the first amendment consecrates the Public Opinion State, the fifth amendment shields American public opinion from “vulnerability” by means of state-imposed infamy or of loss of honor.

“The mission of the Fifth Amendment may now be seen as that of suppressing infamy, whether Roman, feudal or American colonial, save in criminal law under the conditions stated in the amendment and as excluded by the force of the First Amendment. The Fifth Amendment blocks and excludes mass infamy. In short, the Fifth Amendment fortifies the First Amendment by protecting forces of American public opinion from intimidation and elimination. It thus appears that contemporary American presidential or congressional infamy represents an illegitimate assault on the Public Opinion State created by the Bill of Rights.” Franklin, “Infamy and Constitutional Civil Liberties,” 14 *Law. Guild Rev.* 1, 9 (1951). [Ed. note: reprinted in Lawler, ed., *op. cit.*]

On feudal felony, see Bloch, *Feudal Society* 217, 229 (Manyon transl. 1961); Plunkett, *A Concise History of the Common Law* 442 (5th ed. 1956). On Hegel’s conception of recognitive being, see Franklin, “Monadic Legal Theory and the Perspectives for World Law,” 16, *Philosophy and Phenomenological Research* 201 (1955); Franklin, “The Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution,” 4 *How. L. J.* 170, 191 (1958); Sartre, *Being and Nothingness* [1943] 237 (Barnes transl. 1956).

57. Montesquieu, *The Spirit of Laws* 37 [1748] (Nugent transl. 1878).

58. Paine, *op. cit. supra* note 27, 122.

59. Montesquieu, *op. cit. supra* note 57; cf. *Cooper v. Aaron*, 358 U.S. 1, 20, 25 (1958) (Frankfurter, J., concurring); Bonfield, *supra* note 41, 569.

60. Lynd, “Capitalism, Democracy and the United States Constitution: The Case of New York,” 37 *Science & Society* 385, 114 (1963). Hamilton seems to be echoing Mably. See Mably, *Entretiens de Phocion, sur le rapport de la morale avec la politique*, in 10 *Collection complete des oeuvres de l’abbé de Mably* 25, 196 (1794-1795); Mably, *Principes de morale*, in 10 *Collection complète des oeuvres de l’abbé de Mably* 235, 275 (1794-1795). Cf. de Conde, “William Vans Murray’s Political Sketches: A Defense of the American Experiment,” 41 *Miss. Valley Hist. Rev.* 623, 632 (1955).

61. [On Frankfurter’s dissent see] 369 U.S. 186, 297 (1962); 36 *Tul. L. Rev.* 853, 856 (1962).

The method described by Learned Hand in 1958 seems weakened in consequence of the decision in *Baker v. Carr*:

“As we all know, the Supreme Court has steadfastly refused to decide constitutional issues that it deems to involve ‘political questions’—a term it has never

tried to define. . . . I shall not try to enumerate all the occasions when the Court has stood aloof, but these are a few. The United States expressly guarantees to every state 'a Republican Form of Government,' but the Court will not determine whether an amendment to a state constitution has made it no longer 'Republican.' Section two of the Fourteenth Amendment requires that 'representatives shall be apportioned among the several States according to their respective numbers,' but the Court will not decide whether they have been properly apportioned." Hand, *Bill of Rights* 15 (1958).

62. See Kuczyuski, "Zur Theorie der Physiokraten," in *Grundpositionen der Französischen Aufklärung* 29 (Herausgegeben von Krauss und Mayer 1955).

63. Adams, *A Dissertation on the Canon and Feudal Law* [1765] in 3 *The Works of John Adams* 445, 451 (Adams ed. 1851).

64. *Ibid.*

65. *Ibid.*, 464.

66. Kraus, "Authority, Progress, and Colonialism," in *Authority* 145, 151 (Friedrich ed. 1958).

67. Adams, *supra* note 63, 463.

68. "Jefferson to Tyler, Monticello, 17 June 1812," in 6 *The Writings of Jefferson* 65 (Washington ed. 1854).

69. Mably, "Remarks Concerning the Government and the Laws of the United States of America," in *Four Letters Addressed to Mr. Adams* 31 (Eng. transl. 1784).

70. *Ibid.*, 37.

71. *Ibid.*, 31.

72. See text accompanying note 43, *supra*.

"The notion of ambiguity must not be confused with that of absurdity. To declare that existence is absurd is to deny that it can ever be given a meaning; to say that it is ambiguous is to assert that its meaning is never fixed, that it must be constantly won. Absurdity challenges every ethics. . . . [I]t is because man's condition is ambiguous that he seeks, through failure and outrageousness, to save his existence." Beauvoir, *The Ethics of Ambiguity* 129 (Frechtman transl. 1948).

"Ambiguity . . . has already established itself in the understanding as a potentiality-for-Being, and in the way Dasein projects and presents itself with possibilities." Heidegger, *Being and Time* 217 (Macquarrie & Robinson transl. 1962).

"Freedom is possibility. Abstractly, of course, possibility is neither positive nor negative, neither good nor bad. More than anything else it is a question. Like uncertainty, it simply means that something is not yet decided, that the future is open." Barnes, *The Literature of Possibility* 365 (1959).

"I call it an overstatement to characterize Merleau-Ponty's thought as a philosophy of ambiguity. But it is nevertheless true that there is in his phenomenology a tendency to leave the phenomena in an atmosphere of indefiniteness which results in blurring the issues and the decisions. Thus the attempt to fuse the difference between consciousness and the non-conscious by the introduction of a term like 'existence,' which is never explicitly clarified, is apt to bring about a

confused mixture instead of a synthesis." 2 Spiegelberg, *The Phenomenological Movement* 460 (1960).

"No man, in Kant's view, is born with a moral character. He is endowed at birth with neither the actuality nor the potentiality of one. If he is to have a character at all, he must create it. It is a possibility which confronts him, but again not as anything determinate. He has no model to guide him, but must construct it. The model is the form in which he represents himself to himself under the idea of freedom. If he takes the model too seriously, he negates the freedom which it was intended to serve and instruct. To use Kant's terminology, the model is a schema and functions symbolically. It gives expression to the ideal in concrete form and thus provides a rule for action; but at the same time it refers beyond itself as does the work of art. A morally good life, like a work of art, must be taken as the symbolic expression of freedom." Schrader, "The Philosophy of Existence," in *The Philosophy of Kant and Our Modern World* 25, 42 (Hendel ed. 1957).

"The code, which the lawmaker or authentic power of the state has created out of its own *projet* is, so to speak, for the Existentialist only the *projet* ('*Entwurf, pro-jet*') by which the Existentialist jurist creates himself and his power." Franklin, "A Study of Interpretation in the Civil Law," 3 *Vand. L. Rev.* 57, 559 (1950).

Wild and Edie say, "Nothing historical ever has just one meaning; meaning is ambiguous and is seen from an infinity of viewpoints. Everything is always becoming meaningful . . ." Merleau-Ponty, *In Praise of Philosophy* [1953] xix (Wild & Edie transl. 1963). They say that "This current of thought is being developed in different countries by thinkers of very different backgrounds, and it goes by many different names including *phenomenology* and *existential philosophy*. In our own country, William James called it pragmatism, and, later, radical empiricism, and there is little question that he would feel very much at home in this philosophical climate if he were alive today." *Ibid.* xi. Sève calls this "an holy alliance of reactionary idealism against the progressive traditions of each national culture. . . ." Sève, *La philosophie française contemporaine et sa genèse de 1789 à nos jours* 237 (1962).

Perhaps there now may be developing in the United States an attempt also to absorb Hegelian dialectic within theory of ambiguity. See Schrader, "Hegel's Contribution to Phenomenology," 48 *Monist* 18, 26, 33 (1964). For prior background, see Franklin, "On Hegel's Theory of Alienation and its Historic Force," 9 *Tulane Studies in Philosophy* 50, 92 (1960).

73. See text accompanying note 1, *supra*.

The U.S. Embargo against Cuba: A Violation of International Law

Kim Malcheski

After the triumph of the Cuban Revolution in 1959, the United States imposed a trade embargo against Cuba in response both to its nationalization of American-owned properties, and to the growing alliance between Cuba and the Soviet Union. Even after the collapse of the Soviet Union and the end of the Cold War, the embargo against Cuba was strengthened with the Cuba Democracy Act of 1992 and the Helms-Burton Act of 1996, which extended the extraterritorial application of the embargo to foreign companies and foreign subsidiaries of U.S. companies doing business with Cuba. The extraterritorial extension of the embargo to foreign nations has been condemned by the United Nations and most international-law experts.

The subjects to be addressed here are the history of U.S.-Cuban relations and how the embargo came about; why the embargo continues long after the collapse of the Soviet Union and the end of the Cold War; whether the embargo violates fundamental principles of international law; and whether the extraterritorial application of the embargo to foreign corporations and nations through the 1992 and 1996 acts violates the United Nations Charter, the Organization of American States (OAS) Charter, and the General Agreement on Tariffs and Trade (GATT).

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History of U.S.-Cuban relations and the Cuban Revolution

The United States has had a neocolonial economic and political policy toward Cuba for the past century. Beginning in the late nineteenth century, the United States had extensive economic investments in Cuba in the sugar industry. America long considered Cuba to be within its sphere of influence under the Monroe Doctrine. Cuba was a Spanish colony until U.S. military intervention in 1898, after the U.S. battleship *Maine* was mysteriously blown up in the harbor of Havana. U.S. military intervention quickly led to the defeat of Spain, which signed a treaty handing over Puerto Rico, Cuba, and the Philippines to the United States (Williamson 1992).

The United States occupied Cuba from 1898 until 1902, when the U.S. forced the new Cuban Constitutional Convention to accept the Platt Amendment, which gave the United States the “right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty.” The Platt Amendment also gave the United States a naval base in Guantánamo, Cuba. U.S. sugar companies continued to dominate the Cuban economy, and Cuba was ruled directly by U.S. proconsuls between 1906 and 1909, and U.S. troops were sent to Cuba four times between 1909 and 1921. The United States supported the repressive, corrupt dictatorships of Machado and Batista for decades. Those dictatorships engaged in widespread human-rights violations but were tolerated by the United States because of their support for American economic interests in Cuba. The United States did not impose an arms embargo on Batista until March 1958 (Williamson 1992, 445–49; Zinn 1998, 17–19).

By 1959, Cuba had become a playground for American tourists; the U.S. Mafia openly controlled hotels and casinos in Havana. All of that came to an end when the Cuban guerrillas entered the capital on 1 January 1959, and Batista quickly fled the country. The new government, under the leadership of Castro and Ché Guevara, enacted an Agrarian Reform Law in May 1959, which nationalized all large farms owned by American companies

and individuals. Cuba also nationalized large foreign-owned companies, industries, banks, and utilities. In February 1960, Cuba entered into an important trade agreement with the Soviet Union to supply Cuban sugar for Soviet aid credits. Cuba nationalized American-owned oil refineries after they refused to process Soviet crude oil. In response to those nationalizations, President Eisenhower withdrew the U.S. quota for Cuban sugar and then placed a total embargo on exports to Cuba in October 1960.

In the context of the Cold War between the United States and the Soviet Union, relations between the United States and Cuba quickly became polarized, with Cuba moving closer to the Soviet Union and the socialist bloc. Internal U.S. politics played a major role in the growing polarization. Presidential candidate John F. Kennedy openly characterized Eisenhower's trade embargo as "too little too late," and called for armed intervention in Cuba. Even Republican candidate Richard Nixon called Kennedy's proposal "shockingly reckless" (Kaplowitz 1998, 41–43). The U.S. policy at that time was to destabilize and overthrow the revolutionary Cuban government. On 16 April 1961, CIA-trained Cuban exiles supplied by the United States invaded Cuba at the Bay of Pigs. Contrary to U.S. expectations, there was no general uprising against Castro; the invasion was defeated after only three days. That "indirect" U.S. invasion of Cuba was a violation of Article 15 of the charter of the Organization of American States, which provides that no state "has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State" (36–45).

The U.S. embargo against Cuba

The embargo against Cuba actually began on 20 October 1960, when President Eisenhower announced an embargo against Cuba under the authority of the Trading with the Enemy Act (TWEA), and the Export Control Act. By January 1961, the United States had cancelled the Cuban sugar quota, banned exports, severed diplomatic ties with Cuba, and banned all travel to Cuba by U.S. citizens. The ban on travel to Cuba was later overturned by the U.S. Supreme Court (Kaplowitz 1998, 36–45).

After the failure of the CIA-sponsored Bay of Pigs invasion, the United States began a policy of engaging in covert economic sabotage against Cuba, which lasted throughout the 1960s. The covert actions included sabotage of oil refineries, bridges, sugar mills, communications systems, railroad tracks, utilities, and burning sugar cane fields. The United States also engaged in acts of biochemical warfare by having chemicals spread in sugar cane fields, which sickened Cuban cane cutters. A CIA operative also introduced the African swine fever virus into Cuba, causing the death of hundreds of thousands of pigs. The most notorious of these covert actions were attempts to assassinate Castro, by a variety of bizarre means including explosive devices and poison pens. These covert actions have even been described by a former U.S. official as “a kind of state-sponsored terrorism” (Perez 2002; 244, n42; Zinn 1998, 318–19; Kaplowitz 1998, 50–53). These covert actions violated the UN charter and the OAS charter.

Even after the collapse of the Soviet Union and the socialist bloc in 1990–91, the embargo against Cuba was strengthened and extended to foreign companies and foreign subsidiaries of U.S. companies by the so-called Cuban Democracy Act of 1992 (CDA) (Heitzer 1998, 76–79). The CDA was introduced by New Jersey Representative Robert Torricelli with the express purpose of seeking an end to the Castro government, while invoking the doctrine of human rights. The act encourages the president to persuade foreign countries to restrict their trade and credit relations with Cuba. The law prohibits ships from loading or unloading any cargo in U.S. ports for 180 days after the ship has left a Cuban port, and prohibits foreign corporations that are U.S. subsidiaries from doing business with Cuba. Most trade with Cuba at that time was in food, medicine, and medical supplies. The law does permit foreign subsidiaries to sell medicine or medical supplies to Cuba, but only upon special license by the U.S. government, which must be allowed to verify by on-site inspection that those supplies are used for the “benefit of Cuban people.” Those limitations effectively blocked the shipment of necessary medicines to Cuba (Heitzer 1998, 75–79).

In 1996, the embargo was further tightened by the passage of the so-called Cuba Liberty and Democratic Solidarity Act, commonly

known as the Helms-Burton Act (22 U.S.C. §6021). That act again declared that its goal was the restoration of “democracy” in Cuba and the creation of a “transitional government” that would not include Fidel and Raul Castro. The law requires the United States to work to deny Cuba aid or credits from the International Monetary Fund, and allows the United States to eliminate foreign aid to third countries that grant preferential treatment to Cuba. The law further extends the extraterritorial application of the embargo by excluding foreign nationals from America if they are officers in foreign companies that trade with Cuba or benefit from “trafficking” in property nationalized by Cuba. The law also allows former Cuban nationals who are now U.S. citizens to sue in U.S. courts “any person that . . . traffics in property which was confiscated by the Cuban government” (22 U.S.C. § 6082[1][A]). That “trafficking” by foreign nationals may occur entirely outside the borders of the United States, which means a company that does business in Cuba involving nationalized property could be sued in U.S. courts for monetary damages (Dhooge 1997). An amendment to the law that would have allowed the sale of food and medicine was defeated by Congress (Heitzer 1998, 79).

In 1999–2000, Congress considered a compromise amendment to the embargo to allow food and medicine to be shipped to Cuba. The final compromise version of the bill allowed the sale of food and medicine, but Cuba was denied any government or private financing to purchase food or medicine. The bill was also amended to strengthen the ban on travel to Cuba. The net effect of those amendments actually was to strengthen the embargo (LeoGrande 2000, 35–41).

The strengthened embargo has had an adverse effect on the health and welfare of Cubans. The American Association for World Health, after an investigation into the embargo’s effect on the Cuban health system, found that it “caused a significant rise in suffering—and even deaths . . . and patients going without essential drugs or doctors performing medical procedures without adequate equipment.” The ban on trade with Cuba by foreign subsidiaries of U.S. pharmaceutical companies and the strict licensing provisions of the 1992 act have negatively affected Cuba’s ability to obtain critical medicines and medical

equipment. While Cuba has an excellent universal health-care system, the embargo on medicines and computerized medical equipment has directly affected the health of Cubans (Heitzer 1998, 80–83).

Why does the embargo continue after the end of the Cold War?

With the collapse of the Soviet Union and the socialist bloc in the early 1990s, even more people question the need for the continuation of the embargo. After the collapse of the socialist bloc, Cuba lost 85 percent of its foreign trade, and its economy nearly collapsed. Cuba, which has never been a military threat to the United States, is certainly not a threat to the national security of the United States; it has never directly invaded another country. The ultraconservative Cuban-American political lobby in Florida seized upon the opportunity to strengthen the embargo in an unsuccessful attempt to drive Castro from power. Despite the strengthening of the embargo in 1992, 1996, and 2000, Castro and the Communist Party remain firmly in control in Cuba, and the economy is slowly recovering with the introduction of market reforms.

The question then becomes: Why has the embargo continued and even been strengthened after the end of the Cold War and the collapse of the Soviet Union? The reasons can be summarized as follows: First, there are internal political reasons for the continuation of the embargo due to the undue political influence of the ultraconservative Cuban-American lobby in Florida, and the uniqueness of the U.S. electoral college, which gives an inordinate amount of votes to “swing” states like Florida. Second, the embargo continues as an ideological holdover from the Cold War and U.S. pathological hatred of Castro, who continues to be a vocal opponent of U.S. policies in the Third World and the globalization of free-market capitalism. Third, the embargo is a continuation of the Monroe Doctrine and U.S. hegemony in the Caribbean since the Spanish-American War. Fourth, the embargo serves the ideological purpose of sending a message to other Latin American and Caribbean countries that, if they

follow the revolutionary path of Cuba, they will suffer a punishing U.S. economic embargo, along with overt and covert military interventions.

Professor William LeoGrande has written that the strengthening of the embargo derives from the “political and financial power of conservative Cuban-Americans, organized most effectively in the 1980s by Jorge Mas Canosa in the Cuban American National Foundation . . . [that] gave the [Cuban American] community virtual veto power over U.S. policy.” He explains how the well-organized and well-financed Cuban-American community, which is based in the key electoral states of Florida and New Jersey, has an inordinate influence over Congress and both Democratic and Republican presidents. The Cuban-American lobby is able to dictate foreign policy toward Cuba, despite the interest in the U.S. business community in trading with Cuba (LeoGrande 2000, 45–41).

Professor Louis Perez has a different view, that the embargo is “a product of social circumstance, culturally derived and ideologically driven . . . by the United States . . . deepening antipathy toward Fidel Castro” (Perez 2002, 228–29). He writes that U.S. presidents have had a near pathological obsession with and hatred of Castro, beginning with Kennedy, who was furious at Castro, who humiliated him by defeating the CIA-organized invasion at the Bay of Pigs. The embargo was an extension of the Monroe Doctrine and was especially applicable to Cuba where the “United States had historically imposed its will and got its way [which] deepened the insult of the injury.” The United States and Cuba are, according to Perez, bound together by geography and history and cannot escape each other (250–53).

New Left Review editor Robin Blackburn has written that the issue of Cuba’s human-rights record does not justify the embargo, and that it is hypocritical for the United States to justify continuing the embargo on human-rights grounds when it has extended preferential trade status to China, which has a much worse human-rights record. Blackburn points out, however, that, from the Washington point of view, “there is nothing irrational about the continuing vendetta against Cuba. The regime in Beijing was

for many years a strategic partner of the United States against the USSR . . . and has since welcomed big U.S. corporations into its markets” (2000, 32).

Cuba has continued to draw the ire of the United States because of its continuing support, at least until recently, for revolutionary and national-liberation movements in the Third World against U.S. policies, and because of Cuba’s continuing attacks on globalization. America’s continuing hostility towards Cuba extends from the original Monroe Doctrine itself, because the United States has treated Cuba as an “offshore annex” (Schwab 1999, 7).

Fidel Castro got to the essence of the matter in 1969 when he proclaimed: “What the imperialists cannot forgive . . . is that we have made a Socialist revolution under the noses of the United States” (cited in Schwab 1999, 7).

The embargo against Cuba, besides being a total and complete failure, has survived the end of the Cold War because of the undue influence of the Cuban-American political lobby and because of the continuing ideological hostility toward Castro and the Cuban Revolution. However, those political and ideological reasons for continuing the embargo are entirely problematic because the embargo is inhumane, ineffective, a relic of the Cold War, and in violation of international law.

The embargo against Cuba is a violation of international law

The embargo must be looked at in the historical context of unilateral U.S. economic and military covert and overt actions against Cuba since the Revolution in 1959, and must be analyzed in terms of whether the extraterritorial application of the embargo through the 1992 and 1996 acts violate the fundamental principles of international law contained in the UN Charter, OAS Charter, and the GATT.

Article 2, par. 4, of the UN Charter provides: “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.” Article 51 states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if

an armed attack occurs against a member” (Krinsky and Golove 1993, 236–37).

The OAS Charter provides in Articles 15 and 16:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against a personality of the State or against its political, economic, and cultural elements.

No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind. (236)

The GATT, to which both Cuba and the United States belong, was established to eliminate unfair trading practices in the international market. Article 5 specifically provides for the “freedom of transit” of goods in international trade “through the territory” of each member nation regardless of where those goods originated. Article 11 prohibits any member nation establishing limitations or restrictions upon the importation of products. Article 21 provides for an exception, only to protect the “essential security interests of a nation in time of war or other emergency in international relations.” The embargo’s strict limits on the export and import of goods from Cuba clearly violate Articles 5 and 11 of the GATT. The “essential security interests” exception of Article 21 does not apply because the United States is not in a state of war with Cuba, and Cuba is not by any means a military threat to the United States. Cuba has never interfered with the U.S. naval base on the Cuban island (Cain 1994, 380–96).

For the reasons stated in more detail below, most legal commentators who have analyzed the embargo in the context of international law have concluded that the embargo violates the UN Charter, the OAS Charter, and the extraterritorial principle of international law (Cain 1994, 380–96; Krinsky and Golove 1993; Bell 1993, 77; Herd 1994, 426; Bourque 1995, 192; Solis 1997, 709; Long 1997, 467).

The UN and OAS charters generally codify the fundamental principles of international law that one nation shall not interfere in the internal affairs of another. A related principle is that a nation has the authority to impose laws regarding events that occur within its territorial jurisdiction and involving the conduct of its citizens, wherever they may be. Concomitantly, nations have the general right to choose with whom they trade or conduct business, but they cannot generally interfere with the trade of other countries. The principle of “extraterritoriality” is generally defined by international law as prohibiting a nation from legally reaching outside of its territorial borders and imposing its will on other countries, companies, or individuals not legally under its jurisdiction (Cain 1994, 384–86; *Restatement* 1987, §401–3).

There are three exceptions to the general principle that prohibits the extraterritorial application of one nation’s laws. First, a nation has jurisdiction over unlawful acts that occur within its territory, regardless of the nationality of the actor. Second, a state has jurisdiction over the conduct of its citizens, regardless of where that conduct takes place. Third (and the only exception that theoretically could apply to the U.S. embargo against Cuba), a state has jurisdiction over an act that occurs outside of its national territory, “that has or is intended to have substantial effect within its territory” (Cain 1994; *Restatement* 1987, §401[1][c]; Long 1997, 472; Bourque 1995, 212–13). When a state attempts to exercise jurisdiction under this “substantial effects” exception, the exercise of that jurisdiction must be “reasonable,” and each state has an obligation to evaluate its own as well as the other state’s interest in exercising jurisdiction” (Long 1997, 473).

Several provisions of the 1992 and 1996 acts that extend the embargo to foreign companies violate the extraterritorial principle of jurisdiction. One of the original causes of the embargo was Cuba’s nationalization of U.S. properties and lands owned by U.S. companies and individuals. Those nationalizations occurred over forty years ago in 1959–60, and had minimal effect on the U.S. economy and the companies involved. The United States is unquestionably the largest economic, political, and military power

in the world today, while Cuba is a poor, struggling Third World country whose economy nearly collapsed in 1990.

The immediate target of the sanctions imposed by the 1992 and 1996 acts are *foreign companies and subsidiaries doing business with Cuba*. While the ultimate goal of the embargo is to bring down the Cuban government, the immediate targets of the embargo are foreign corporations engaged in perfectly legal business practices. One Spanish company was forced into bankruptcy because of sanctions obtained by the United States for alleged violations of the embargo (Bourque 1995, 215).

Although the ultimate goal of the sponsors of the 1992 and 1996 acts was to force Castro out of power, the embargo—besides having negative effects on the health and welfare of Cubans—directly affects the rights of foreign corporations to do business with Cuba. The “trafficking” in nationalized properties by foreign nationals referred to in Title III of the 1996 act occurs *outside the borders of the United States*, and has a minimal effect on the U.S. economy (Long 1997, 474–75). This alleged “trafficking” in nationalized property does *not* have a “substantial effect” on the United States; thus, the “substantial effects” doctrine does not give the United States extraterritorial jurisdiction over foreign companies conducting legal trade with Cuba outside of the U.S. boundaries.

On the contrary, there is a strong U.S. business lobby for ending the embargo because the U.S. business community wants to take advantage of the potential markets in Cuba. It has been estimated that, because of the embargo, U.S. businesses have lost potential business in the range of \$1 to \$15 billion annually, and that 100,000 jobs could be created in the United States if the embargo was removed and free trade began between the two countries. If anything, it is the embargo itself—and not foreign trade with Cuba—that is harming the U.S. economy (Kaplowitz 1998, 186–87).

The United States cannot justify the embargo by claiming that it faces a military threat from Cuba, or that it has a legitimate “national security” interest in defending itself against Cuba. The Cold War is now over and there is no military threat from Cuba. The United States is now a close ally of China and has even furnished emergency food aid to North Korea. Former U.S. officials have admitted

that Cuba is not a military threat to the United States (Bell 1993, 115). The claim of “national security” to justify the embargo is not credible because the publicly stated reasons for the 1992 and 1996 acts were to bring down Fidel Castro (Perez 2002, 246–47).

The embargo has been widely condemned by international-law scholars, the United Nations, the OAS, the European Union, and even the Pope himself (Kaplowitz 1998, 184–85). In 1999, the UN General Assembly voted 143 to 3 with 17 abstentions to condemn the continuing embargo against Cuba. In 1998, the vote against the embargo was 157 to 2, with 12 abstentions (Schwab 1999, 173).

The continuing embargo against Cuba violates fundamental principles of international law, as well as the UN and OAS charters, and GATT, to which the United States is a signatory nation and with which it is bound to comply. Unfortunately, the United States has taken an expedient approach to the UN and international law; the United States only complies with international law when it is in its perceived interests, but when it is not, ignores the UN and international law.

For example, the United States waged a proxy war against Nicaragua in the 1980s by funding and training the “Contras” to wage a protracted war against the Sandanista government. In 1984, the United States covertly mined the harbors of Nicaragua. Nicaragua filed a claim with the UN International Court of Justice, which, in 1998, ruled in part in Nicaragua’s favor that U.S. support for the Contras and the mining of a Nicaraguan port violated the international-law prohibition on the use of force. The U.S. support for the Contras was an unlawful intervention in the internal affairs of Nicaragua (Krinsky and Golove 1993, 246–47). The Reagan administration ignored the UN court’s ruling. Likewise, the United States has violated the UN Charter and international law by waging covert economic and military warfare against Cuba, as well as allowing Cuban-Americans to conduct terrorist actions against Cuba (Perez 2002; Schwab 1999, 134–50).

Conclusion

The embargo is unquestionably a violation of international law. It has been internationally condemned by legal scholars, as

well as political and religious leaders. Even inside the United States, vocal opposition to the embargo has been led by members of the religious and business community.

The embargo has survived the Cold War only because of the excessive political influence of the ultraconservative Cuban-American political lobby, and the political cowardice of leaders in Washington who have kowtowed to that lobby. The embargo continues because Cold War warriors still have an inordinate amount of influence in the halls of Congress and the White House.

The embargo cannot be justified by the United States by invoking the ideal of human rights. While there certainly have been human-rights violations by the Cuban revolutionary government, those violations cannot legally justify the punitive and interventionist embargo against Cuba. For better or worse, internal human-rights violations not amounting to genocide do not justify the extraterritorial nature of the embargo.

It is also hypocritical for the U.S. government to invoke the ideal of human rights when the United States has long supported brutal, repressive military dictatorships throughout Latin America. The United States has provided considerable military and economic aid to dictatorships in Guatemala, El Salvador, Chile, Brazil, and Argentina; those dictatorships resulted in the deaths of hundreds of thousands. Even after the political assassination of Catholic Archbishop Oscar Romero in El Salvador, the Reagan administration dramatically increased military aid to the Salvadoran dictatorship. Under Castro, there have never been reports of death-squad killings or extralegal political assassinations (Zinn 1998, 359–69).

The United States itself has a long history of violating the basic human rights of minorities, prisoners, immigrants, and political and religious activists in America. For years, people of color have been beaten, abused, and killed by police officers in the United States. Innocent people have been sent to prison and executed under the arbitrary and discriminatory death-penalty laws in America (*United States of America: Rights for All* 1998).

It is disingenuous for U.S. political leaders to invoke human rights to justify the embargo, when the real reason for

the embargo is to remove the Castro government from power, and in its place insert a U.S.-dominated government that would institute a free-market system. It is hypocritical for the United States to continue the embargo when it is the leading proponent of international free trade and open markets for a new global economy.

The embargo, quite simply, is not only illegal under international law, it is inhumane as it is inflicting suffering upon the Cuban people who are in need of medical and food aid and trade. History will not absolve the United States for its illegal, inhumane, and unjust embargo against the Cuban people.

San Francisco

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Of Slime Molds and Marxist Ideology: Expansive versus Constrictive Thinking

Len Yannielli

On a recent walk in a forest, I watched a slime mold “climbing” a tree. That’s right. Slime molds move. Some of those greyish white blobs we see on the ground or tree trunks that many mistakenly think are lichen are actually organisms that “creep” along the forest floor and up trees. While it may seem next to incredible now, slime molds were once considered plants.

Up to the mid-1960s, students in biology classes were told that all life fits into two neat categories. From microscopic bacteria to elephants, from mushrooms to giant redwood trees, all life was shoehorned into the animal kingdom and plant kingdom. Slime molds were then squeezed into the plant kingdom and were all but forgotten.

It was not until 1969 that a perceptive scientist at Cornell University, R. H. Whittaker, said, “Wait a minute. What does a great horned owl have to do with a one-celled amoeba?” “Not much” was the obvious answer. He devised a five-kingdom system: bacteria, protists, fungi, plants, and animals (Prescott 2002). This was accompanied by a renewed interest in studying non-charismatic organisms such as . . . well . . . slime molds, which were now placed in kingdom Fungi with the mushrooms.

New findings and theories followed this broader view. For example, recombinant DNA techniques, also called genetic engineering, blossomed at this time, using the bacteria, *E. coli*. Placing

human insulin genes into these bacteria meant that this crucial hormone could now be made available to diabetics without worrisome allergic reactions from animal sources of the hormone. It has also raised vexing ethical questions.

A similar phenomenon occurred again in 1977, when Carl Woese recognized that there was much more diversity among microbes than was currently being recognized (Mader 2001). Again the taxonomic system was deemed too restrictive, and Woese came up with the domain system, including Archaea (microbes), Bacteria (microbes) and Eukaryota (some microbes and most of the kingdoms). These, too, have led and are leading to more intense study of microbes. For example, science now recognizes that early multicellular life was much more diverse than previously realized. This has generated new theories, especially an enrichment of early evolutionary theory (Gould 1989).

Much of Marxist theory was developed in the nineteenth and early twentieth centuries through the application of dialectical-materialist approaches to the analysis of specific problems. Powerful ideas such as the materialist view of history, the role of surplus value, and the imperialist stage of capitalism were developed during this time period. After 1940, a marked tendency emerged to impose philosophical principles mechanistically on the individual sciences from outside the field rather than to use the dialectical-materialist scientific methodology as part of the research apparatus within the individual fields. The consequent strengthening of dogmatic tendencies in philosophy gave rise to negative phenomena such as Lysenkoism in biology and attacks on relativity and quantum theory in physics. More generally, this dogmatism resulted in grossly inadequate attention by Marxists to the natural sciences, especially ecology.

Marxism, for example, lays a basis for a solid scientific study of the sciences, but it is striking how little the sciences themselves, especially the life sciences, are represented in introductory books on dialectical and historical materialism. *An Introduction to Marxism* by Emil Burns is typical (1972). While good on basic concepts, it is striking that in the chapter "A Marxist View of Nature," there are almost no examples from . . . nature! In that

chapter about nature, Burns explains the concept of interdependence by using gunboat diplomacy. With so many examples of interdependence available from the environment—for example, wildlife—Burns again and again turns to human examples.

John Somerville's *The Philosophy of Marxism: An Exposition* is somewhat more wide-ranging, but has the same problem (1981). References to science are of two kinds. First, there is some exposition of quantitative and qualitative changes using examples from the physical sciences—water, for example. Second, thought processes are explained with references to the human brain. Examples are mostly limited to the abiotic world, such as water and volcanoes. It is almost exclusively a human-centered approach, in which other life, other beings, do not exist.

Examples abound on the life-science side of ecology of both quantitative and qualitative changes. Insect eggs show the struggle of opposites as they remain eggs yet are in the process of a qualitative change to larvae.

Botflies are another example, while also displaying the species interconnectedness of living organisms. The tropical botfly *Dermatobia* needs the body heat of a mammal for its eggs to transform to the larva stage. But botflies are diurnal, while many mammals are nocturnal. Further, this botfly is large, noisy, and easy for mammals to avoid. Evolution's solution is for a female botfly to glue her eggs to a captured mosquito. She then releases the smaller, nocturnal organism to do its thing with typical mosquito stealth. The mosquito proceeds to nip a mammalian host for a blood meal, and at the same time, the botfly eggs hatch. Botfly larva burrow into the mammal to develop more fully and prepare for its next qualitative change to the pupa stage (Forsyth et al. 1984).

While the theory of political economy deserves a detailed study, it appears that this narrow framework adversely affected it as well. Political-economy books on which 1960s radicals cut their theoretical teeth, such as those by Leontyev and John Eaton, are practically devoid of life-science and environmental references or dismissive of its importance

other than as a freebie source of wealth. Typical is this statement in Leontyev's *Political Economy*:

Nature can be likened to a giant storehouse which holds inexhaustible stocks of the objects of labour. It is the task of the people to make the land and the seas and oceans yield these objects of labour.

The land, its mineral wealth, soils and climates are an aggregate of natural conditions which human society has at its disposal. (1975, 11)

It is no wonder that left U.S. political-economy authors from this period followed with treatises that ignored sustainable development. References to the environment cannot be found in their indexes.

One consequence of this restrictive theoretical framework was that the Left as a whole paid little attention to the environment and environmental struggles and movements. After all, Lenin's dictum that without revolutionary theory there can be no revolutionary movement still applies. A spin-off would read that with a restrictive revolutionary theory there would be a restricted revolutionary movement. A Marxist ecological theory that kept pace with the rising environmental struggles of the 1960s would have been a boon to revolutionary movements everywhere. But it did not happen.

This correlation does not necessarily mean a direct causation. Nor does it rule out multiple causes. Other causal factors certainly come into play concerning outlooks and practices, or the lack thereof, around the environment. The frontier mentality and the technical-fix approaches rooted in bourgeois outlooks seep into working-class outlooks and programs. This is exemplified in the statement by Chinese Marxist philosophers that "science and technology push forward the whole reform and progress of human civilization" (Xinhe and Wulun 2003, 237). This outlook connotes nuclear power as "progress" regardless of nuclear wastes that last thousands of years, not to mention Chernobyl. The idea that science and technology have some innate manifest destiny of their own has been fought by the environmental movement for decades.

Another potent causal factor is Lenin's determined and necessary struggle against the philosophical idealists in the 1920s. Some of these idealists wanted a greater role for ecology in economic planning (Benton 1996). Did this lead among the Left to a diminished view of those who championed the environment in ensuing years? And has the aforementioned restrictive framework aggravated these other factors as well?

Categories create a ballfield, so to speak, and that influences the questions we ask and the answers we seek. The dialectical-and historical-materialist framework should not have contributed to a narrowness of thinking for many people around what constitutes the content of Marxism. In the process, the environment, particularly its life-science side, was left out in the cold. It is not a question here of intentions, although that too should be a topic of debate. Rather, it is what happened. The book *Heroic Struggle!—Bitter Defeat* by Bahman Azad (2000) is a modern case in point. It makes an important contribution to a better understanding of many of the factors that led to the demise of socialism in the Soviet Union. The environment, however, is completely left out of this analysis. Struggles around Lake Baikal and the Aral Sea, both of which were used to support or undermine existing socialism, are not there. The global impact of the disastrous nuclear accident at Chernobyl, as well as the huge propaganda victory of capitalism that followed, is not considered.

What might a broader "taxonomy" of Marxism look like? This is a large topic that deserves much collective input. A materialist view of culture, economics, the environment, history, knowledge, philosophy, and science, with equal weight given to the physical and life sciences, would tend to broaden approaches to the subject matter. It would also tend to give more weight, although not necessarily equal weight, to these topics both in classical and current literature.

The good news concerning the environment is that a modern Marxist ecological view is in development. Marxism is a complete worldview in that it considers all areas of life including the natural sciences. There is a considerable amount of material on the environment in the nineteenth-century Marxist accounts (Foster

2000). Unfortunately, it was buried by the theoretical straitjacket of a constrained dialectical and historical materialism.

An example of a developing theory concerning the environment is what some call the “time” contradiction of capitalism. The crux of the traditional Marxist view is that capitalist crises ensue from the contradiction between production forces and production relations. Ted Benton suggests the addition of the contradiction between production relations and the conditions of production (1996).

Application of these ideas is very important to current struggles and movements. For example, the current thrust in the struggle for immigrant rights has, in part, an ecological basis. Some peasants who grow their own crops tend to nurture diversified crops for their families, take good care of the soil, and tend to be more tolerant of wildlife. Once thrown off the land and hired as farm workers, they toil on monocultured land with an infusion of industrial fertilizers and pesticides. Wildlife, of course, tends not to fare as well under these conditions. Known and unknown ecological connections are disrupted. A market downturn throws some of these workers out of a job and onto migrant pathways. Families are separated and some end up in body bags trying to cross borders.

Reverting to our original example, we find that slime molds are now part of a theoretical tug-of-war. One group feels these organisms, found to have flagella (a structure for movement), belong in kingdom Protista. Slime molds also lack chitin, a key polysaccharide found in fungi. But there are mycologists (those who study fungi) who are not ready to relinquish them. What’s important here is that the broader theoretical base has created the space for new discoveries and new ideas in the life sciences.

Marxism is not a confining framework, but a broad ideological foundation underpinning the work of the political Left. We need to embrace the theoretical space it affords. There is no dearth of data from environmental struggles and other movements such the cultural movement. As one movement leader said recently, taking from the John Lennon song, it’s time to creatively imagine.

Naugatuck, Connecticut

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Book Reviews

Theorizing Anticapitalism—A Review Essay

Ziarhei Zhmurouskii

An Anti-Capitalist Manifesto. By Alex Callinicos. Cambridge/Oxford, UK: Polity Press; Malden, MA: Blackwell, 2003. 192 pages, cloth \$57.95, paper \$19.95.

Critiques of the neoliberal economic theories and policies devised by the big three—IMF, World Bank, and WTO—are currently abundant. Such critiques of the world economic order are many-sided and mainly directed at the social consequences of what is vaguely defined as *globalization*. Inefficiency of the world economy, hopelessness of current social relations, and threats to the environment are at the core of the comments from the Left. Rarely does one work explicitly uncover the consequences of globalization and put forward the steps to undo them and build a new social order locally and globally. Among the most radical recent works is the soundly titled *An Anti-Capitalist Manifesto* by Alex Callinicos.

The author's intent is to demonstrate the viability of the Marxist approach for solving the current challenges of world development. These challenges, as Alex Callinicos reiterates, can be settled only by an anticapitalist drive. This Marxist approach should also be used when discussing problems confronting not only left movements as such, but varieties of antisystemic movements. Strict

Marxist social theory always compels social actions, or at least sets down provocative thoughts. The book considered here will stir readers to action.

An Anti-Capitalist Manifesto contains indispensable parts, each bearing out this characteristic. Three major questions are raised. First, what makes it impossible for all of us to keep on living the way we live? Second, what should we do in order to make the world fairer and more secure? And third, what would be the patterns of such a world order? In what follows, I shall try to review some theses of the author and add my modest arguments to the ones proposed.

How long can the planet survive under capitalism?

Alex Callinicos succeeds in proving the fact that capitalism does work against the survival of our planet. It is next to impossible to deny that neoliberalism has failed to solve the problems confronting the world: (1) fall in economic growth rates, (2) reduction in life expectancy, (3) rise in infant and child mortality, (4) slowing of progress in education and in the eradication of illiteracy. *An Anti-Capitalist Manifesto* richly illustrates these indisputable facts. The point is whether we should restrict the critique of capitalism to illustrating the negative economic consequences of the capitalist system: recession, unemployment, instability for one world coupled with misery and despair for the other. In addition to the problems discussed by Callinicos, other problems are worth considering while corroborating the threats that capitalism poses.

In particular, the psychological impact of capitalism as a social system on public and individual consciousness is important. Put another way, this concerns how people evaluate themselves today and how they perceive impending psychological degradation and threats to their very survival. At least two facts demonstrate this impact: first, psychiatric diseases are growing and tendencies indicate this will continue. Second, the world community has failed to solve environmental problems. Human beings have undeniably answered fewer questions than should have been the case during the last century. A long list of other mounting problems shows that capitalism does indeed work against Earth.

Let us consider the author's premise that "the process of competitive accumulation is responsible for capitalism's chronic tendency towards crises" (65). Does this phenomenon prove the premise? In my opinion the explanation must be broader. Let us take the matter from another angle. Enrollment in the antiglobalization movement is now poor. The effect of this is that the malaise of the public pedals the system, which, as Susan George puts it, is a bicycle "that must always go forwards or fall over . . . before smashing against the wall" (50). It may seem that this race is perpetual, but this is so only at first glance. It is perpetual in the same way that the stock exchange in the United States seemed perpetual until September of 1929. I argue that there is a close link between the fall of economic growth rates and the mounting threat of new crises, which might have far more tragic aftereffects. Moreover, roots of new crises lie in the nature of the modern organization of production based on unrestricted and uncontrolled exploitation of natural resources. Whenever access to resources is hardened for whatever reason—disintegration of the economy caused by social turmoil or increased cost of natural resources—the probability of crises increases.

In considering the failures of capitalism, one must not stop with neoliberal failure to restore the rates of economic growth that the world enjoyed in the fifties, sixties, and seventies of the last century. A logical approach necessitates further theorizing of future developments. The world community must agree to reject the necessity of growth as such. Rates of growth should be defined by demographic and other factors. Economic growth will not always necessarily be a reality. I hypothesize that two points must be added while explaining the causes of declining economic growth in the future: (1) exhaustion of natural resources and the rise of the cost of energy (at least relatively, compared with other goods), and (2) the limit of labor productivity.

Utilization of natural gas, coal, and oil is the cheapest way of getting energy; alternatives will be more expensive. Although we do not confront this trial today, tomorrow's farewell to the habitual burning of natural gas is not only plausible but inevitable. The economic effect of this change may be less economic growth. The

exhaustion of resources does not pose such a threat for human survival if we take into account the feasibility of using alternative sources of energy. But here and now, the time at stake is the key question. It is necessary to win time to make it possible for engineers to discover and implement alternative sources of energy. People must refuse to use natural gas, oil, and other resources to the degree and scope that we do now in the same way that we must not use drugs except in the case of disease. The way natural resources are utilized now is the equivalent of an addiction to drugs. This addiction is like the situation of an addicted person's being doomed to die in his or her thirties or forties. This is a cry to start living a healthy life, to be flexible in using natural resources (even at the price of refusing economic growth) in order to die at eighty or ninety. Nationally and especially globally, capitalism is primarily a system of drug dealers. Dealers clearly intend to involve everyone in the drug business. The system never exposes the drug smuggler from Washington or London, who is always at the top while the seller on the street is always at the bottom. Those who are at the top keep us now in the street; they want us (all of us) to die at thirty or forty.

Is there a limit to labor productivity? Yes, there is. From ancient times until the present, humans have been motivated to productive activity by the desire to attain high living standards. Historically, human society has passed through three stages characterized by different motivations to labor and high productivity. In primitive, classless societies, human motivation was not a result of institutional coercion—the feeling of responsibility and fraternity mainly instigated people. Nor was the motivation to labor merely economic. From the beginning of slavery until early capitalism, the period of noneconomic coercion to labor began; this was institutional coercion. Capitalism ushered in only economic coercion to labor. There was no administrative or institutional coercion.

What will the rejection of capitalism initiate? The new type of motivation will very much resemble the first stage. This has nothing to do with institutional (administrative) and economic coercion, and it is only looming on the horizon. Such speculation is mainly

abstract, but it is not theoretically groundless. Exhaustion of natural resources will force humans to truncate and economize; it will make people aware that many other values besides affluence exist: one, among others, is support of individuals by the society in a way that secures the individual's confidence in the future. The gradual shift from the dominance of individual economic interests to the public interest will be a reality. This last stage will be dictated by the necessity to abandon extreme extravagance; this, in turn, will provide a realistic possibility to distribute values fairly. This is not to say that the average living standard will not be raised. It will rise as a result of a fairer distribution of goods. Significant will be the absence of unproductive expenses, first of all connected with arms production. Nonetheless, a limit is predetermined not only by the rising cost of natural resources but by the fact that the component of human work in the final cost of products is declining or even tending toward zero.

Strategies for world progress beyond capitalism

Possibilities always exist for human madness, but let us leave that scenario aside. The question is how much the strategies of Marxists should be rethought and revised at the beginning of the twenty-first century. A dilemma for revolutionaries today remains much the same as always: revolution or reform. Marx put forward the point-blank solution: revolution. What should Marxism propound today? Alex Callinicos responds to the question of what form revolution may take. The author anticipates that revolution will not be global in scale—not “the accompaniment of the ‘global accident’, a catastrophic economic collapse.” Rather it will be the “extension of democratic processes of self-government” (142).

Indeed, the revolutionary anticapitalist process will not be homogenous. In G7 countries, it will be shaped primarily by the dialogue between labor and employers. In the developing world, it may assume much more diversified forms and even require an armed struggle. An anticapitalist solidarity movement raises the question of winning the workers' consciousness. Ideas are a real force when they become the convictions of masses. In this regard, the question is what should be done in order to expand the ranks of anticapitalist fighters. One way to do this is to reveal the flaws of

capitalism. This task demands an access to media. Followers of the anticapitalist movement must demand that governments deliver alternative views on world developments to the public. This task is one of the most basic for the existence of an anticapitalist world, and this actuality was not mentioned in the transitional program of *An Anti-Capitalist Manifesto*. Understanding the world economy will impel masses to recognize the need to abandon the current social system. The declining rate of economic growth and profitability, as well as the exhaustion of resources, will make people reevaluate their views on social systems, and thus their participation in social transformation will be more feasible.

Less attention in *An Anti-Capitalist Manifesto* is given to the issue of which strata can be moved into the anticapitalist movement. The author suitably stresses that “the organized working class still is the decisive agent of social transformation” (85). The history of the last two centuries has proved this, and it seems that near future will also prove it. On the other hand, the anticapitalist movement will shortly not be so homogenous. Future economic crises will distress many strata. Not all will join the movement at once, but the most affected are likely to expand the ranks of anticapitalist fighters. Accordingly, revolution will attract not only workers but also an absolute majority of the population.

The question of the tactics of the anticapitalist movement is probably the most important for revolutionaries for two reasons. First, the movement must target the financial interests of the transnational corporations and reveal their destructive (for the majority) ideology. Second, the formulation of the tactic should not only correspond psychologically to how humans perceive the challenges today, but also include potential developments that might appear tomorrow. The author defines the tactics of capitalism in the following way: “the established powers can respond to major challenges from below in two ways—repression or incorporation” (86). The anticapitalist movement must also move in the same way: open public dialogue with the governments and exert pressure against them. Dialogue is required not to induce those in power to accept transformation, but to win mass support and unearth the facts that threaten the health of the public, facts that

are so dexterously covered up by the prevailing media. The question of pressure is most sensitive. Pressure and threats of armed force do not seem humanistic tactics. But addiction to power and the maniacal hatred of the lower classes demonstrated by the rulers of the world can only be treated in this way. Can there be another way? History corroborates—no. History proves that a few concessions have so far been achieved, but human patience and natural resources are not limitless. For the majority of the world, the alternatives are to win in struggle or to lose in poverty. There is no other way. Pressure does not necessarily mean the use of arms. It may include rejection, demonstrated in different ways, of government policy. The threat of using arms can be much more practical than the very use of arms. But an empty threat is nonsense. So that is the choice of revolutionaries.

Therefore the new revolution is on the agenda. As always in history, a new revolution will acquire new features. As the revolutions of the last century were different in their forms from those of the nineteenth century, the coming one will acquire new forms and features. But one thing is certain; in the developing countries, the new revolutions will resemble the revolutions of the previous centuries—mass mobilization against the old political regime and a fight for a new regime. They will look a bit different in the G7 countries. There will be demands for the genuine control of state-owned property by the masses—that is, forming bodies that would exert such control, discounting the role of government bureaucracies. They will also include for the masses greater access to the media funded by the governments, or, to be more precise, by taxpayers. Installing the new alternative production with collective ownership and support of this production by consumers may be seen as the main tactic, and as a step toward installing the new anticapitalist system.

Basic principles for a noncapitalist world

Alex Callinicos assumes that four major principles should be the basis of an anticapitalist world: justice, efficiency, democracy, and sustainability. Notwithstanding the fact that his scheme of noncapitalist construction looks detailed, much of what is

propounded proves to be a bit ambiguous. Let us consider justice, for example. Justice is not a mathematically calculated set of proposals. Justice is what the majority agree on, and it cannot be defined once and forever. Still, although justice may clash with the demand for efficiency and sustainability, it cannot be in contradiction to the demand for democracy.

In the nation-state, liberty, equality, and solidarity are all related to justice. Justice in the worldwide context is no more and no less than support of diversity of development. Of course, there must be no denying that distribution of resources should be just; for instance, one-fourth of the world's population should not consume three-fourths of the energy produced. The present world order is a consequence of interference of one-fourth into internal affairs of nations constituting three-fourths of the world's population and a result of a diktat by the former against the latter. Guarantees of noninterference will secure diversity and alter the status quo. Such guarantees will not result in the equal consumption of energy and resources, but will make access and consumption fairer. Significantly, the steps made for installing an equal exchange of goods and resources valued by future long-term worth will establish new ethical standards. One cannot underestimate the importance of the claim put forth by G. A. Cohen: "a just society requires more than a just social structure: it embraces also a social ethos through which individuals are motivated to behave justly towards each other" (108).

The next necessary alternative (and here, in my view, the author comes to the point) is to achieve efficiency.

It may be that sustainable development is inconsistent with the existing range of needs that humans have acquired over the past two centuries of industrial capitalism. This is an open question. [This "may be" is crucial. It really *is* an open question.] . . . The right conclusion is that we *should prefer* the economic system that supports the widest extension of human productive capacities—widest over time and not just at any given moment—that is consistent with requirements of justice, democracy, and sustainability. To that extent efficiency matters. (110)

I have added the emphasis on *may be* and *should prefer* to stress the vagueness of the author's thesis. Precisely what does "efficiency" mean? For now and in the near future, an anticapitalist perspective will allow "the broader productive capacity" to make a "greater range of choices available to people." But this "may be" will certainly turn out in time to be inconsistent. I refer again to the stages of human motivation to labor. The future will lay down noneconomic and noninstitutional coercion to labor, new socially ethical rational motivation when "just motivation towards one another will be dominant and will push out all other motivations." Still, we can anticipate both ethical progress of individuals and disappearing abundance of resources. In the same way, primitive people were not able to utilize nuclear energy, the new generations will abandon making use of resources in the way we do now even to the detriment of efficiency and sustainability. The likelihood of the fourth stage will be illustrated by refusal to secure capital that is the basic principle of capitalism. This is not the perspective of tomorrow, but of remote ages. The historical analogue is the way people in primitive societies abandoned piling up necessities. They did not cache the necessities except for their own consumption. Possession of necessities was not a means of distinctive social status in society.

Such logic is grounded on social ethical evolution of individuals, and, secondly, is explained by the fact of an exhaustion of natural resources. However much we try to compensate for nonrenewable resources by alternatives in order to achieve higher productivity, new attitudes and new social relations will, sooner or later, be a reality. Sustainability and efficiency are not the ultimate goals. They are only directions. They cannot be achieved until new sources of energy are discovered, and should not be achieved at the price of destructive climate change and ecological disasters.

As far as democracy is concerned—while installing an anti-capitalist order, democracy should be considered as a process, not as a goal. Getting closer to direct democracy, the society attains more accountability of bureaucracy. The more we recognize the necessity of social ethical values, the less society suffers: fewer victims, fewer losses. Democracy is the means that paves the

way to broader participation of people in politics. The slogan of the democratization of the economy must embrace diversity of ownership. Overwhelming participation in decision-making would change the construction of power institutions: direct, not representative, democracy opens the gate to the abolition of division of power. This axiom has no alternative. Otherwise we will have varieties of representative democracy, or varieties of capitalism.

The author says about market socialism and planned economies: "To be effective socialist planning must operate at the international level" and "an alternative economic framework must therefore be constructed on an international scale" (123). There is more truth than falsehood in these statements. But anticapitalists must first define what must be done, and when an economic system can be said to operate properly. A socialist economy at the international level is a utopia. It cannot be installed worldwide in a short time. Planning is needed to demonstrate the efficiency of democratically approved decisions, to determine which result in economic efficiency, and what is partially a result of the absence of nonproductive expenses and the highest productivity of labor. To accept the thesis that a socialist market economy is doubtful means not to see the socialist perspective as feasible at all. Competition under effective control from the society increases productivity and higher individual income for the winners. Socialism presumes effective control of individual incomes, but smoothing inequalities across the economy. It does not contradict what Callinicos says himself:

Economic power would be vested in negotiated coordination bodies for individual production units and sectors on which would sit representatives of the workforce, consumers, suppliers, relevant government bodies, and concerned interest groups. (125)

As for a transitional program, anticapitalism can include all the proposed steps. States are vulnerable to political pressure from below. A transitional program is a list of steps to be implemented first on the national level, and then globally. National pressure weakens the chains of what constructs global capitalism, or global

capitalization of the economy. Nevertheless, deglobalization is on the agenda for anticapitalist movements on the international scale. Globalization transfers the main burden of exploitation to the shoulders of the workforce of the underdeveloped world. It permits higher profits as a result of more added value in the underdeveloped world. Measures aimed at undermining the global economy must be implemented. One of them is installing a new world currency that allows the establishment of fair-trade relationships among nations, and which would be imposed in the interests of those who produce the main part of resources, but not items for excitement of human emotions. That is what globalists should spurn and resist. It might be the first deadly blow against the existing system. The Tobin tax [tax on foreign-currency transactions—Ed.] is a half measure, and even it is a reactionary one, if viewed from the perspective of effectiveness of anticapitalist struggle.

An Anti-Capitalist Manifesto is a provocative polemic. It sets forth the ultimate goal; it proposes ideas for those who are responsible for the future of humankind. The author intends to prove that the anticapitalist movement is resuming in practice. It is no exaggeration to say that anticapitalist theory in a strict Marxist parlance is also resuming. For this, we must thank Alex Callinicos.

Belarus State University
Minsk, Belarus

The Need for a Balanced Reappraisal of the USSR—A Review Essay

Erwin Marquit

Socialism Betrayed: Behind the Collapse of the Soviet Union. By Roger Keeran and Thomas Kenny. New York: International Publishers, 2004. 236 pages, cloth \$25.00, paper \$14.00.

The authors of *Socialism Betrayed* state in their introduction: “This book is about the collapse of the Soviet Union and its meaning for the 21st century” (1). Placed in this perspective, the book can be viewed as an effort to use the experiences of the first attempt at socialism as a warning against the current efforts of China, Vietnam, and to a lesser extent Cuba to pursue policies of socioeconomic development within a framework that the Vietnamese call a *market economy with socialist orientation*. “Given the actual history of market socialism under Gorbachev,” write Keeran and Kenny in their concluding remarks, “it would seem that the real lesson of the Soviet collapse leads . . . to the conclusion that socialism requires central planning, public ownership, and restricted markets” (194).

The authors open their discussion of the collapse as follows:

The collapse of the Soviet Union did not occur because of an internal economic crisis or popular uprising. It occurred

because of the reforms initiated at the top by the Communist Party of the Soviet Union (CPSU) and its General Secretary Mikhail Gorbachev. It goes without saying that problems must have existed in the Soviet Union, otherwise no need for reforms would have arisen. (14)

Keeran and Kenny argue that the history of the CPSU from the earliest days of the 1917 October Revolution is a history of struggle between the Left and Right. After Lenin's death, the leading figure on the left was Stalin. At crucial moments in the history of the USSR, the leading figures on the right were Bukharin, Khrushchev, and Gorbachev. The principal conflict that characterized the division between Left and Right was a socialist planned economy versus opening up the economy to market forces. In the view of authors, the prelude to Gorbachev's betrayal was the growth of the second economy, which Keeran and Kenny define as legal and illegal "private economic activity for personal gain" (53). "After being restrained under Stalin, it [the second economy] emerged with a new vitality under Khrushchev, flourished under Brezhnev, and in many respects replaced the primary socialist economy under Gorbachev and Yeltsin" (53).

I shall argue in this review that growth of the second economy was the unplanned consequence of the utopian model of a centrally planned economy, which was introduced prematurely in the Soviet Union and which, in its necessary interaction with the world economy, proved unable to match the pace of market-driven technological development in the West. Keeran and Kenny give insufficient attention to the shaping of the Soviet economy in the 1920s and 1930s. A more detailed analysis is necessary to understand the damage done to the Communist Party by the mass extermination of veteran Bolsheviks, and the subsequent failure of the postwar leadership to overcome the bureaucratization of the structure and practices inherited from the Stalin period. This latter failure prevented serious consideration of a shift to a market economy with socialist orientation along the lines being pursued today in China and Vietnam.

Ignoring the progress of industrialization under Lenin's New Economic Policy (NEP), Keeran and Kenny focus on Stalin's policy of crash industrialization and collectivization initiated with the

first two five-year plans that began in 1928, in the course of which the Soviet economy was almost fully socialized—industry being firmly consolidated in the state sector and agriculture divided between the state and collective (cooperative) sectors.

According to Keeran and Kenny, Bukharin viewed the concessions in Lenin's New Economic Policy "to the peasants, the market, and capitalism, as long-term policy: Stalin viewed them as a temporary expedient that the revolution had to jettison when able" (18). It would have been useful here for the authors to have provided more background to the NEP, which was introduced by Lenin in 1921 at the end of the Civil War.

The NEP replaced the extreme measures known as "war communism," under which, in Lenin's words, "the confiscation of surpluses from the peasants was a measure with which we were saddled by the imperative conditions of war-time" (1965, 187). Under NEP, confiscation of the surplus was replaced by a tax in kind that amounted to only a portion of the surplus, so that the peasant would have the assurance "that, while he has to give away a certain amount, he will have so much left to sell locally" (187). In this way, market relations were reestablished in the countryside.

Lenin felt that these market relations were needed until the infrastructure for a fully socialized economy was established. "Since the state cannot provide the peasant with goods from socialist factories in exchange for all his surplus, freedom to trade with this surplus necessarily means freedom for the development of capitalism." He did not view this as "dangerous for socialism as long as transport and large-scale industry remain in the hands of the proletariat" (457). He also supported joint ventures with foreign capitalist firms provided that the state-owned industry remained dominant. He saw these as only temporary measures that would obtain "extra equipment and machinery that will enable us to accelerate the restoration of Soviet large-scale industry" (458).

Developments in the 1920s following Lenin's death shaped, to a great extent, what was to come in the 1930s. Keeran and Kenny's discussion of this period is far too brief, ignoring the ideological battles in the Soviet Party and the way they were handled. I shall therefore sketch briefly here some of the ideological history, which is essential for understanding the later events.

The Left Opposition

Until his expulsion from the Party in 1927, Trotsky was the leading figure in the opposition to the policies put forth by Stalin. The policies in dispute covered every problem in socialist construction: relations with the peasantry, pace of industrialization, relationship of the state and the Party, nature of the dictatorship of the proletariat, implementation of democratic centralism, possibility of building socialism in one country, and policies of the Communist International in regard to the social democrats and divisions in other Communist parties.

Trotsky continually formed oppositional factions on issue after issue despite the ban, instituted in Lenin's time, on factional activities in the Party. Nevertheless, in 1925–26, two members of the Politburo, Lev Kamenov and Grigory Zinoviev, concerned about Stalin's growing dominance, consolidated an oppositional faction with Trotsky, formalizing it in 1926. After a personal attack on Stalin's leadership at the Party's Fourteenth Congress in 1925, Kamenov was reduced to candidate member of the Politburo, and Mikhail Kalinin and Kliment Voroshilov were added as full members (Conquest 1991, 136). The initial focus of what became known as the Trotsky-Zinoviev bloc or Left Opposition was to attack Stalin's thesis of building socialism in one country (McNeal 1988, 96). Kalinin, Voroshilov, and the other members of the Politburo—Nicolai Bukharin, Aleksei Rykov, Mikhail Tomsky—supported Stalin's position, which was then overwhelmingly reaffirmed by the Party's Central Committee in 1926, with only a handful of Central Committee members opposing (Conquest 1991, 137). Thereupon Zinoviev was removed from the Politburo; a few weeks later Trotsky was also removed from that body and Kamenov from Politburo candidate membership. The Trotsky-Zinoviev bloc persisted in their opposition, switching from one issue to another, determined to gain a victory against Stalin.

The Central Committee continued the tradition established by Lenin that those taking a position strongly opposed by the majority should continue to retain positions of responsibility as long as they were willing to implement Party policies. In July 1927, Stalin placed the question of the expulsion of Trotsky and Zinoviev on

the agenda of a Central Committee meeting, but lacked the votes and had to settle for a warning to them (McNeal 1988, 104). He raised the question again in October in view of their continued factional activity. Trotsky and Zinoviev were then removed from the Central Committee, but not from Party membership (105). In November, Stalin claimed that reliable evidence showed the opposition had been planning a coup for 7 November—during the celebration of the tenth anniversary of the October Revolution—but called it off because the Party was ready to deal with it. The Trotskyites and Zinovievites did, however, join the main street demonstrations on 7 November, both groups bearing their own slogans (Conquest 1991, 139; *History* 1939, 285). On 14 November, the Central Committee expelled Trotsky and Zinoviev from the Party; Kamenov and other members of the opposition were expelled from the Central Committee. Later in November or early December, the Politburo rejected Stalin's subsequent call for their arrest (McNeal 1989, 105–6).

Ideological issues were a prime concern of the preparations for the Fifteenth Congress of the Party in December 1927. The Trotskyites and Zinovievites illegally printed and distributed their own programs. A key issue was their assessment that the October Revolution was the completion of the bourgeois revolution in Russia rather than a socialist revolution. They rejected the notion of an alliance with the middle peasantry and called for accelerating the pace of industrialization (super industrialization) by increasing the demands on the peasantry. "During the discussion in the ranks of the Party, which preceded the Congress, the opposition received about 6000 votes as against 725,000, who voted for the theses of the Central Committee (Popov 1932, 323).

The Fifteenth Party Congress in December 1927 (which lasted about two weeks) again overwhelmingly rejected the position of the Left Opposition. Seventy-five leading members of the opposition (including Kamenov) were expelled from the Party. The next day, the Zinoviev group, but not Trotsky and his supporters, submitted a statement in which they acknowledged their violation of party discipline and the incorrectness of the view that denied the socialist character of the revolution, the socialist character of state industry, the socialist path of development of

the countryside under the conditions of the proletarian dictatorship, and the policy of the alliance of the proletariat with the great masses of the peasantry on the basis of socialist construction and proletarian dictatorship in the USSR. They did not, however, say that these were their views (Popov 1934, 327–38).

The Congress replied that reinstatement to Party membership would require individual statements, after which six months time must pass to ensure that they were conforming to pledges of compliance with Party policy (328).

In 1928 Trotsky and many of his supporters who did not request readmission under these terms were deported to Siberia and other regions of the USSR (Trotsky to Kazakhstan). In 1929 Trotsky, not abandoning his efforts to maintain an organized opposition from afar, was expelled from the USSR.

The Fifteenth Congress laid out directives for the path of economic development. It decided that

with respect to the elements of private capitalist economy which have increased absolutely, although to a lesser degree than the socialist sector of economy, a policy of even more determined economic squeezing-out can and must be pursued. (Popov 1934, 344)

The socialist sector was to be strengthened through the drafting of a five-year plan, rapid industrialization with special emphasis on heavy industry, and the collectivization of agriculture.

As one can see from these events, there was still collective leadership on the level of the Politburo, which was still accountable to the Central Committee in a meaningful way. Strong disagreements were tolerated without personal recrimination. Within the Party, Stalin's emerging tendency to physical repression of opposition was constrained by the Politburo.

The Right Opposition

As Keeran and Kenny point out, Bukharin emerged as the leading figure of the Right Opposition. After the defeat of the Left Opposition, the Stalin leadership had to confront what it considered to be a danger from the right, in domestic and international policies.

The international side of right-wing tendencies was the prime concern of the Sixth World Congress of the Communist International (Comintern), convened in July-August 1928 under the chairmanship of Bukharin. The Congress gave very strong support to anticolonial struggles. It served as a forum for African American Communists who were sharply critical of the lip-service given to antiracist struggles by the right-opportunist leader of the CPUSA, Jay Lovestone. But it also adopted the position put forth by Stalin—couched in the phrase “class against class”—that the greatest enemy of the working class was not the capitalists, but the social democrats, the left social democrats in particular, who were the principal agents of capitalists in the working-class movements. During the First World War, Lenin had referred to the social democrats who supported their imperialist governments as *social imperialists*. The term *social fascists* was now to be applied to the social democrats. This proved to have disastrous consequences throughout the world Communist movement, leading to the underestimation of the fascist danger. It was bad enough that the leaders of the Social Democratic Party of Germany were not interested in forming an antifascist alliance with the Communists, but it would be quite impossible to pursue an antifascist united-front strategy with the rank-and-file social democrats if one referred to the organizations to which they belonged as social fascist. The extreme that it took in the United States is exemplified by the 1930s Gropper cartoon in the *Daily Worker* in which Floyd B. Olson, the Minnesota Farmer-Labor Party candidate for governor, was labeled a social fascist. A left-populist leader widely supported by progressives, Olson is characterized by a mainstream source as follows:

Olson won national attention in 1933 by threatening to declare martial law and confiscate private wealth unless the legislature enacted relief measures to deal with depression conditions. A strong supporter of the New Deal, he . . . ordered a two-year moratorium on mortgage foreclosures of farms, secured relief for the unemployed, and openly sided with labor in a series of strikes that occurred after 1934. (*Columbia Encyclopedia* 2001)

At Georgi Dimitrov's urging, the Comintern abandoned the "class against class" concept at its Seventh World Congress in 1935 to adopt the successful strategy of the Popular Front. In Minnesota, the Communist Party brought forces into the Farmer-Labor Party and succeeded in electing a Communist Party sympathizer, John Bernard, to the U.S. Congress in 1936. (Bernard actually joined the Communist Party at his eighty-fifth birthday celebration in Minnesota in 1978, on which occasion he disclosed that he and American Labor Party Congressman Vito Marcantonio sang the *International* on the steps of the Capitol after their arrival in Washington.)

In line with the decisions of the Fifteenth Party Congress, the first Five-Year Plan, 1928–32, was put into effect, calling for intensive industrialization. The goal for grain production was set at 250 percent of the preplan level. The plan envisaged that 20 percent of peasant households would join collective farms.

Bukharin favored a slower process in agriculture and industry and became the leading ideological figure among those who opposed Stalin's policies of rapid economic development. Keeran and Kenny note that "Bukharin viewed the NEP concessions to the peasants, the market, and capitalism as a long-term policy; Stalin viewed them as a temporary expedient." In 1927–28, "Bukharin wanted to rely on the free market and to encourage peasants to grow more grain by offering them more consumer goods." Further, "Bukharin opposed speeding up industrialization if it meant adversely affecting the peasants" (18–19).

Keeran and Kenny mention the subsequent forced collectivization merely in passing, ignoring its consequences and its character as a turning point in the way Stalin was allowed to deal with opposition to his policies.

The move to collective farms at this time had a twofold purpose. The lack of products on the market led many peasants to produce only for family consumption. Where they had a surplus, they would try to hide its size to avoid state appropriation of the surplus and also held it off the market to get higher prices. The state needed agricultural products to feed the workers and as a resource for industrialization. In the case of collective farms, it

would be easier for the government to determine the size of the harvest and where it was stored. A second aspect, probably considered as of equal importance, was the role of collective farms in the development of a socialist consciousness among the peasantry. A resolution at the Sixteenth Congress of the CPSU in 1930 considered the collective farms to be

only the beginning of a new social discipline, of the task of teaching the peasants socialist construction. In the collective farms, the peasants will not finally outlive their petty proprietor psychology, the desire for private accumulation, inherited from generations of small private owners, except as a result of years of persistent work directed towards placing the collective farms on a basis of large-scale mechanised farming, of persistent work for the creation of cadres from the ranks of the collective farmers and for raising the cultural level of the whole mass of collective farmers. (Popov 1989, 422)

The results were immediately disastrous. The local authorities set quotas for procurement that were implemented by seizure of the crops on the basis of their own assessments of what the peasants should have harvested. Since the incomes of the peasants entering the collectives were to be based on work-day units and were independent of the size of the land or amount of livestock they brought into the collective farm, the peasants, not generally motivated by socialism as an ideological cause, often slaughtered their livestock prior to entering the collective farm.

Moreover, in light of the more recent experience of China and Vietnam, one must consider what advantage there was likely to be in the creation of collective farms under conditions of the low level of mechanization that persisted in Soviet agriculture through the 1950s. Vietnam in 1981 (and subsequently China) decreed that its collective farmers could choose to remain in the collective farms (or communes) or return to family farming. Overwhelmingly, the farmers chose family farming. In the case of grain production, even in the highly mechanized agriculture of the United States, Canada, and Western Europe, the dawn-to-dusk labor available on a family farm proves to be more advantageous than the labor of

rural proletarians on a large-scale corporate farm; thus corporate farms are still a rarity in grain production.

Keeran and Kenny do acknowledge, citing Vietnam and China's shift away from collective farming, that "agriculture may be the great exception to the general rule that in the first stage of socialism, the socialist state works to restrict the market over time." Without any attempt at explanation in the entire book, other than their statement that Stalin felt that to make an exception would encourage petty capitalism among the peasantry (20), they say that the Soviet Union did not have this luxury (198). An argument for collectivization put forward by Lenin was that it would solve a real problem that arose in the wake of the land reform that followed the October revolution: the decrease in the average size of the individual peasant holdings as the land was divided up among the siblings after the death of the parents. The way this problem was dealt with in socialist Poland, which only minimally collectivized its agriculture, was to pass on the land to the oldest child, who was obligated by law to compensate his or her siblings for their shares unless they were willing to switch roles in the inheritance.

Accompanying the plan for collectivization was a program for restricting the role of the kulaks, the richer peasants. Richard Conquest notes that in 1927, the most prosperous peasants had two or three cows and up to twenty-five acres of sowing area for an average family of seven people (1991, 144). The richer peasants were generally more skilled in farming, and although some exploited peasant labor when additional hands were useful, the poorer peasants often relied on their assistance during bad harvests because of drought, floods, or other disasters.

The strategy for collectivization provided no substitute for the kulak's role as a cushion for the poorer peasant in hard times. The risk of premature elimination of the wealthier peasants in a patriarchal rural economy is borne out by the experiences of the Marxist-led government in Afghanistan. An East German acquaintance who served as an adviser to the Afghan government and accompanied the Afghan military officers to the villages during the struggle against the CIA-supported counterrevolution described to me the grave mistakes made by these officers, who were sent

to the villages to distribute the land of the bigger landowners to the poorer ones. She said the lectures they gave the poor peasants about class struggle fell on deaf ears because so many of the peasants felt that there was a symbiotic relationship between them and the Afghan variety of kulaks. The peasants would then end up aiding the counterrevolutionaries, especially since many of the mullahs were from the “kulak” families.

Three members of the Politburo—Bukharin, Rykov, and Tomsky—and many lower-level Party leaders were greatly concerned about the strong push toward collectivization and the preparations for a struggle against kulaks. They proposed lower goals for industrial and agricultural production and greater utilization of market forces. Their proposals for dealing with the peasantry would have led to a much greater agricultural output than did in fact result under Stalin’s agricultural policies. Despite their call for a slowdown in industrialization, their proposals for dealing with the peasantry would actually have made more grain available to allow for an even greater pace of industrialization during the five-year plans.

While there was strong support for the call of the new opposition to give more freedom to market forces in the countryside, their demand to slow the pace of industrialization found little support among other members of the Politburo and especially in the lower levels of the Party. As the arguments continued through 1928 and 1929, relations between Bukharin and Stalin worsened, and what was to become a Right Opposition to Stalin’s economic policies coalesced around Bukharin. Despite the fact that Stalin at a joint meeting of the Politburo and the presidium of the Central Control Commission in February 1929 accused Bukharin of seeking “a bloc with the Trotskyists against the Central Committee,” the concern about political stability in the potentially explosive situation in the countryside was strong enough in April that Stalin had to settle for a relatively mild rebuke, namely removal of Bukharin and Tomsky from their non-Party posts—Bukharin from the editorship of *Pravda* and head of the Comintern and Tomsky from the head of the Trade Union Council—but they retained their membership in the Politburo (McNeal 1989, 120–24).

The idea of accelerating the socialization of production relations in the countryside, where the majority of the population

lived, was attractive to Party members everywhere. The initiative for collectivization was bound to come from the working class and its party, and not from the peasantry. Once the process of collectivization was begun, the temptation to push ahead with it in any way possible was strong among the workers, even if it violated the principal that that process was to be a voluntary one. Despite the limited goal of 20 percent in the Five-Year Plan, the desire to exceed the plan took hold among Party officials in many regions of the country, causing peasants to slaughter their livestock before being herded into the collectives. At the beginning of 1930, fourteen million peasant households—voluntarily and by force—joined the collective farms (Conquest 1991, 160).

On 2 March 1930, an article by Stalin entitled “Dizzy with Success” was published “as a warning to all who had been so carried away by the success of collectivization as to commit gross mistakes and depart from the Party line, to all who were trying to coerce the peasants to join the collective farms” (*History* 1939, 308). Shortly afterward, the assigned quotas for collectivization were reduced; nine million peasant households were allowed to leave the collective farms; the statute governing collective farms changed the character of the collectives from *communes*, in which all tools and livestock were held in common, to *artels* (McNeal 1989, 128; Conquest 1991, 160), “in which only the principal means of production, chiefly those used in grain growing, are collectivized, while household land, dwellings, part of the dairy cattle, small livestock, poultry, etc. are not collectivized” (*History* 1939, 308).

Toward the end of January 1929, Stalin had already announced the change of policy from *restricting* the kulak to *eliminating* the kulak. The kulaks were to have their property confiscated; the kulak families, including the less prosperous “subkulaks”: were deported to remote areas, kulaks considered less pernicious were resettled on smaller plots outside the collective farms (McNeal 1991, 128–30; Conquest 1991, 158–61).

Stalin presented the rationale for eliminating the kulaks as follows:

The last hope of capitalists of all countries, who are dreaming of restoring capitalism in the U.S.S.R.—‘the sacred

principle of private property'—is collapsing and vanishing. The peasants, whom they regarded as material manuring the soil for capitalism, are abandoning en masse the lauded banner of 'private property' and are taking to the path of collectivism, the path of Socialism. The last hope for the restoration of capitalism is crumbling. (cited in *History* 1939, 305)

It is worth noting that the economic development of Yugoslavia and Poland, without collectivization of agriculture, was not retarded in relation to the other socialist countries. There was very little capitalist accumulation among the peasantry arising from their privately held homesteads.

The kulaks, of course, resisted the expropriation of property by every means possible, including destruction of their own livestock and harvested grain, sabotage, bribery, and even murder, exacerbating the chaos already being produced by forced collectivization. To offset the decrease in agricultural products available to the state sector through the normal sale at regulated prices and taxation, the forced collectivization was resumed—the goal being tripled in relation to the original plan so that the grain would be more readily accessible for seizure, in amounts that did not always leave the peasants the minimum needed for subsistence. To prevent the flight of the peasants to the towns, a system of internal passports was introduced for the workers, but passports were not given to the peasants—in effect, the peasants were reduced to semifeudal status. Millions perished in the resulting famine in 1932–33. In the 1920s, Stalin, in rejecting the proposals of the Left Opposition and Right Opposition, urged moderation in regard to the peasantry in the spirit of Lenin's NEP policy of alliance of the working class with the peasantry in which the power of the kulaks would be restricted. In 1930, Stalin, in launching his policy of elimination of the kulaks and forcible collectivization, discarded Lenin's policy of alliance and replaced it with what turned out to be a class war against the peasantry.

At the end of the first five-year plan, grain production was lower than before the October Revolution, while livestock holdings had dropped in half. The published figures on the fulfillment

of the plan, as Khrushchev was later to reveal, had been falsified by a change in the way agricultural statistics were handled, and even through the early 1950s, grain production had barely risen above the pre-Revolutionary level.

By the end of the second five-year plan, agriculture was still stagnating, but vast improvements were achieved in the living conditions of the working class. The great advance in industrialization increased the availability of consumer goods and provided resources for the extension of social services in education, health care, and culture. As mentioned earlier, however, the experiences of China and Vietnam showed that with low levels of mechanization collective farms cannot match the productivity of family homesteads, so that the opportunity for still greater advances in industrialization in the USSR was wasted. The alienation of the peasantry—not their commitment to socialism—was increased.

The implementation of target goals for collectivization required the use of extreme brute force. From then on, Stalin increasingly used incarceration and extermination as the means for dealing with opposition to his policies.

The usual rationale for the forced collectivization is that it facilitated the seizure of the crops from the peasantry as a principal resource for industrialization. But there is no reason why taxation of individual homesteads could not have been used for the same purpose.

Khrushchev

Nikita Khrushchev follows Bukharin in Keeran and Kenny's roster of the principal betrayers of socialism in the USSR. The authors quite sweepingly assert that "all of Khrushchev's major domestic policies failed to produce the results intended" (27). They cite too many examples to discuss one by one here, and it is true that by the time of his removal from Party leadership, Khrushchev was associated with what were characterized as "hair-brained schemes." One of these that Keeran and Kenny mention is his call for a spectacular leap forward in the production of milk, meat, and butter in order to surpass the West in three or four years (26). They might have compared Khrushchev's

boast with Stalin's failed boast that with his plan for large-scale collective farms "our country will, in some three years' time have become one of the richest granaries, if not the richest, in the whole world (Conquest 1991, 156).

Some of Khrushchev's policies for which he was criticized were actually not unreasonable if they had been implemented correctly. Keeran and Kenny fault Khrushchev for the "dismantling of state tractor stations" (2004, 27), which they regard as an ideological repudiation of "Stalin's last statement on the Soviet economy." They state that "Stalin had said that the direction of Soviet development should be toward the enhancement of the state sector (rather than the collective farms)." They conclude that the policy of shifting the machinery to the collective farms "amounted to an unadulterated failure" (29). Two issues are involved here. One is related to productivity in agriculture. Although perhaps implemented in the USSR without adequate preparation, collective ownership of farm machinery cannot be viewed as a hair-brained scheme. Czechoslovakia, the German Democratic Republic (GDR), Hungary, and Bulgaria all did the same thing shortly afterward with no subsequent complaints that it did not enhance production. Albania and Romania retained state ownership of the machine and tractor stations and their agriculture was a disaster.

The second issue—the transfer of state property to collective property—is raised as an ideological one. The state-owned machine and tractor stations were first established after the collectivization process got underway because the machinery provided to the collectives was being damaged by the peasants owing to their lack of skill with machinery. Each machine and tractor station was staffed with trained workers whose services were then contracted for by the collective farms. In the absence of market forces or competitive alternatives, the stations—with staffs on fixed wages and salaries—had no material incentive to provide efficient services on the dawn-to-dusk schedule that grain production required. Khrushchev therefore proposed turning over the machinery to the collective farms, since by that time skilled operators had come from the ranks of the cooperative. These operators would have a material interest in providing good service because

their incomes could be more related to the results of the work they performed. In Keeran and Kenny's view, the formal status of the property should have taken priority over the increase in production. In their mechanistic view of socialist construction, turning over state property to a farming collective is a retreat toward capitalism despite any possible economic benefit.

Keeran and Kenny identify the cultivation of virgin lands as one of the centerpieces of Khrushchev's agricultural initiatives (27). They state that "as a policy, the virgin land campaign was a disaster" (29). Here is what one encyclopedia says about it:

The Virgin Lands campaign had its faults. It was expensive in labor and machinery, and droughts left the harvest far below target levels several times. Still, the program succeeded in permanently increasing the USSR's grain production, which rose from an annual average of 84 million metric tons from 1950 to 1954 to an annual average of 131 million metric tons from 1960 to 1964. With the additional grain, the USSR had more feed for livestock, and meat and dairy production increased rapidly. Food consumption for the entire Soviet population increased. In 1970 the new lands still supplied 35 to 40 percent of the country's total grain crop. (*Microsoft Encarta Encyclopedia* 2002)

High on Keeran and Kenny's list of Khrushchev's treasonous acts is his "exaggerated, one-sided, and incomplete" treatment of Stalin at the Twentieth Congress of the CPSU. They write:

In 1956, Khrushchev concentrated on Stalin's alleged repression of Party leaders and claimed that half of the delegates to the Seventeenth Party Congress and 70 percent of the Central Committee were killed. Stalin's biographer, Ken Cameron, concluded that it is "difficult to believe that Khrushchev's figures are correct." (Using the recently opened Soviet archives, scholars have numbered the total of executions from 1921 to 1953 at 799,455, far below the millions estimated by Robert Conquest, Roy Medvedev, and other anti-Soviet scholars.) (27)

I cannot understand how it is possible for Keeran and Kenny to downplay or justify the murder of hundreds of thousands of Communists (not to mention ordinary citizens who were not in the Party) with phrases above like “alleged,” and “difficult to believe” or even the suggestion that 799,455 instead of the figure of millions make these mass murders more acceptable. I cannot understand how Keeran and Kenny can cite sympathetically the views of Molotov, Malenkov, Kaganovich, and Voroshilov (themselves signatories of lists containing execution orders for tens of thousands of people) that Khrushchev’s report was unbalanced because it gave Stalin no “credit for his positive contributions nor acknowledged the legitimacy of some repression” (23). Actually, Khrushchev did say, “We must affirm that the party had fought a serious fight against the Trotskyites, rightists and bourgeois nationalists, and that it disarmed ideologically all the enemies of Leninism. This ideological fight was carried on successfully, as a result of which the party became strengthened and tempered. Here Stalin played a positive role” (Khrushchev 1962).

In his speech at the Twentieth Congress, Khrushchev stated:

It was determined that of the 139 members and candidates of the party’s Central Committee who were elected at the 17th Congress, 98 persons, *i.e.*, 70 per cent, were arrested and shot (mostly in 1937–1938). What was the composition of the delegates to the 17th Congress? It is known that 80 per cent of the voting participants of the 17th Congress joined the party during the years of conspiracy before the Revolution and during the civil war; this means before 1921. By social origin the basic mass of the delegates to the Congress were workers (60 per cent of the voting members).

For this reason, it was inconceivable that a congress so composed would have elected a Central Committee a majority of whom would prove to be enemies of the party. The only reason why 70 percent of Central Committee members and candidates elected at the 17th Congress were branded as enemies of the party and of the people was because honest Communists were slandered, accusations against them were fabricated, and revolutionary legality was gravely undermined.

The same fate met not only the Central Committee members but also the majority of the delegates to the 17th Party Congress. Of 1,966 delegates with either voting or advisory rights, 1,108 persons were arrested on charges of anti-revolutionary crimes, *i.e.*, decidedly more than a majority. This very fact shows how absurd, wild and contrary to common sense were the charges of counterrevolutionary crimes made out, as we now see, against a majority of participants at the 17th Party Congress.

Khrushchev might have also mentioned that of the seven members of the Politburo in 1924, Stalin was the only one who died of natural causes; he was responsible for the execution or suicide of the other six.

On what basis can Keeran and Kenny cite Kenneth Cameron as an authority to show that Khrushchev exaggerated the number of Central Committee members and Congress delegates that that were executed? In the reference they cite, Cameron states that from a speech by Andrei Zhdanov at the Eighteenth Congress of the CPSU in 1939

it seems clear that a number of pro-socialist people were imprisoned and some of them were executed. . . . But there is no indication in Zhdanov's speech or the proceedings of the Congress of anything of this magnitude. . . . The positive note struck by Molotov was the dominant note. Is it possible, then, in view of the obviously high morale of the Congress and its support for the Party leadership, that Khrushchev's figures are correct? (Cameron 1987, 130–31)

Here Cameron is citing the high spirits of two Soviet leaders closely associated with measures of physical repression as evidence of Khrushchev's exaggeration! I do not know how many execution orders Zhdanov signed. According to Conquest, the 383 lists (mentioned also in Khrushchev's report) containing thousands of names of people to be executed were countersigned by Molotov—on 12 March 1937, the two of them approved 3,167 death sentences (1991, 203). Kaganovich alone signed death

warrants for some 36,000 individuals (Davies et al. 2003, 35). Cameron does not mention Kaganovich, but I am sure that he too shared the high spirits of Zhdanov and Molotov.

In the three pages of Cameron that precede the pages cited by Keeran and Kenny, we find a pitiful defense of the massive executions carried out in the Soviet Union in the 1930s, in which Cameron merely repeats the charges in the indictments against those executed: “wrecking machinery, making the wrong parts, sending materials to the wrong places, planning railway sabotage to build up to the immobilization of the railways in the coming war . . . sabotage that appears to have been the most massive in history, was coordinated with Nazi and Japanese war plans and with terrorism” (Cameron 1987, 129). Cameron ignores the fact that the defendants were denied the right to legal counsel and that no corroborating evidence was introduced to support the charges other than the confessions extracted from some of the defendants through physical and psychological torture.

Khrushchev stated in his report that most of the executions of the members of the Central Committee and the participants in the Party Congress that elected them occurred in 1937–38. He presented the background to the trials as follows:

After the criminal murder of Sergei M. Kirov, mass repressions and brutal acts of violation of socialist legality began. On the evening of December 1, 1934 on Stalin’s initiative (without the approval of the Political Bureau (which was passed two days later, casually), the Secretary of the Presidium of the Central Executive Committee, Yenukidze, signed the following directive:

“1. Investigative agencies are directed to speed up the cases of those accused of the preparation or execution of acts of terror.

“2. Judicial organs are directed not to hold up the execution of death sentences pertaining to crimes of this category in order to consider the possibility of pardon, because the Presidium of the Central Executive Committee of the U.S.S.R. does not consider as possible the receiving of petitions of this sort.

“3. The organs of the Commissariat of Internal Affairs are directed to execute the death sentences against criminals of the above-mentioned category immediately after the passage of sentences.”

This directive became the basis for mass acts of abuse against socialist legality. During many of the fabricated court cases, the accused were charged with “the preparation” of terroristic acts; this deprived them of any possibility that their cases might be re-examined, even when they stated before the court that their “confessions” were secured by force, and when, in a convincing manner, they disproved the accusations against them. (Khrushchev 1962)

There is ample evidence that force was used to extract phony confessions in major trials starting with the Shakhty trial of fifty Soviet and three German engineers in 1928 (McNeal 1988, 115). Although the practice was common without official sanction, it was given official status when the Stalin leadership had the Central Committee of the Party specifically authorize torture for the trials that began in 1937. That was the year of the open trial of Bukharin and other formerly prominent Communists. Again, their conviction on charges of sabotage, assassination, espionage, and conspiracy with Japan, Germany, and Poland to exchange Soviet territory for their support was based entirely on the confessions obtained by physical and psychological torture without other corroborating evidence. A circular from the Central Committee to the NKVD and some Party bodies in 1939 reads:

The party central committee explains that the application of methods of physical pressure in NKVD practice is permissible from 1937 on, in accordance with permission of the party central committee. . . . It is known that all bourgeois intelligence services use methods of physical influence against the representatives of the socialist proletariat and that they use them in the most scandalous forms. The question arises as to why the socialist intelligence service should be more humanitarian against the mad agents of the bourgeoisie, against the deadly enemies of the working

class and of the collective farm workers. The party central committee considers that physical pressure should still be used obligatorily, as an exception applicable to known and obstinate enemies of the people, as a method both justifiable and appropriate. (Cited in Conquest 1990, 122)

We know from the discussion around the use of torture in Iraq and Guantánamo that many intelligence people doubt the reliability of information obtained as product of torture. But its usefulness to impress the gullible like Cameron is apparent. It is now well established that what we are dealing with here is the use of torture to force the victims to confirm confessions fabricated by the torturers.

Keeran and Kenny fault Gorbachev for his rehabilitation of Bukharin (2004, 115), convicted in another trial in which torture was used to extract confession. Although the trial was not mentioned by Khrushchev in his speech at the Twentieth Congress, here is what he wrote in his memoirs:

Just before the Twentieth Congress, I summoned the State Prosecutor, Comrade Rudenko, who had been involved in many cases during the purges of the thirties. I asked him, "Comrade Rudenko, I'm interested in the open trials. Tell me, how much basis in actual fact was there for the accusations made against Bukharin, Syrtsov, Lominadze, Krestinsky, and many, many other people well known to the Central Committee, to the Orgbureau, and to the Politbureau?"

Comrade Rudenko answered that from the standpoint of judicial norms, there was no evidence whatsoever for condemning or even trying those men. The case for prosecuting them had been based on personal confessions beaten out of them under physical and psychological torture, and confessions extracted by such means are unacceptable as a legitimate basis for bringing someone to trial.

Nevertheless, we decided not to say anything about the open trials in my speech to the Twentieth Party Congress. There was a certain ambiguity in our conduct here. The reason for our decision was that there had been representatives of the fraternal Communist parties present when Rykov,

Bukharin, and other leaders of the people were tried and sentenced. These representatives had then gone home and testified in their own countries to the justice of the sentences. We didn't want to discredit the fraternal Party representatives who had attended the open trials, so we indefinitely postponed the rehabilitation of Bukharin, Zinoviev, Rykov. (1970, 352–53)

The Stalin leadership group was apparently fearful that many of the veteran Bolsheviks in the military high command might be apprehensive about the unbridled power they were accumulating. Suggestions of involvement of some military were inserted into the proceedings of the open trials in an apparent effort to lay the basis for extending the purges to the military. The story now takes a strange twist.

For reasons that have not yet been clearly established (perhaps involving his enmity with the German high command), Reinhard Heydrich, the head of the German Security Service (*Sicherheitsdienst* or SD), arranged for forged correspondence containing the signatures of Soviet Marshal Mikhail Tuchachevsky, Jakob Suritz (the Soviet ambassador to Berlin), Trotsky, and the German generals Hans von Seeckt and Kurt Hammerstein-Equord to reach the Soviet government. From German archives, the details on how the documents were forged—even the name of the forger—are now known (Erickson 433–36, 456–57). The arrest, trial (with confessions beaten out of Tuchachevsky and others), and execution of the most of the seasoned Soviet military commanders immediately followed. The senseless extension of the arrests and executions to the Red Army severely weakened the defense capability of the USSR. By December 1938, three out of five marshals were executed, all 11 deputy commissars of defense were eliminated, 75 of the 80 members of the Military Soviet were executed, almost all of the most senior naval commanders were shot, as were 57 of the 85 corps commanders and 110 of the 195 division commanders (Erickson 1984, 505).

Keeran and Kenny criticize Khrushchev for the “relaxation of censorship” that allowed the publication of some previously banned novels. “This openness,” they say, “brought an inevitable

underside in the spread of bourgeois economic ideas to Soviet academic circles” (31). Actually, literature by Western economists had long been available in special libraries open only to academics or government researchers, but not made available even to economics students. The so-called “thaw” was a very limited one. Even as late as 1980, as a visiting professor at Moscow State University, I asked the deputy editor of a leading philosophy journal, *Filosofskie Nauki*, if he could direct me to recent literature on the dialectical law *negation of the negation*, stating that I thought there were interesting political implications in the aspect of the law known as *spiral development*. His reply was, “It is best to stay away from political issues in philosophy.” The atmosphere of censorship was particularly heavy in the technical fields, even when completely unrelated to military questions, inhibiting international exchange among scholars. Well after the Twentieth Congress, working in socialist Poland as a physicist in a field that had nothing to do with possible military applications, my colleagues and I found it nearly impossible to exchange information with Soviet colleagues except through personal contact at conferences or exchange visits.

Although Khrushchev introduced a limited decentralization, which apparently initially caused some havoc, no introduction of market forces in the state sector was associated with it. The reason for the decentralization was that the principal *from each according to one’s ability, to each according to one’s work* could not be implemented because workers too often remained idle while the factories waited for supplies that the planners had (or had not) planned for without adequate forethought about where they would come from.

The second economy

A large part of *Socialism Betrayed* is devoted to discussion of the growth of the second economy. This growth was not due to a growing influence of the Right in the CPSU, as Keeran and Kenny would have us believe, but to the inability of the planned economy’s service sector to provide *necessary* goods and services to the working population, whose needs increased along with their education, occupational skills, and culture. Already in the mid-1970s, the infant mortality rates vanished from the statistical

yearbooks as they began to rise because of problems in the health- and child-care services. Owing to the continuing lag in fodder for livestock, the planned delivery of meat products to the state food shops could not be maintained, so that many families turned to the second economy to meet their needs. On a conference visit to the USSR, I found that the only way to get an urgently needed replacement of a heel on my shoe was to make my way, with the help of a Soviet friend, to a third-floor apartment whose occupants were using their flat for surreptitious shoe repair. The state shoe repair required a wait of thirty days.

The final blow

I do not disagree with Keeran and Kenny about their assessment of the treachery of Mikhail Gorbachev in carrying out the *coup de grâce* that ended in the dissolution of the Communist Party of the Soviet Union and the restoration of capitalism in the USSR. In retrospect, it is clear that the economies of the Soviet Union and the European socialist countries were in crisis at the time Gorbachev came into the leadership of the CPSU. One can only speculate whether or not it was already too late to save the socialist system with the model that we now see in China and Vietnam. According to Keeran and Kenny, continuation of the reforms associated with Yuri Andropov in the early 1980s could have put the Soviet economy on the right track. Andropov's reforms, however good they were, were still constrained by a centralized planning that could not replicate the incentives for market-driven technological development that we see in the capitalist economies.

It was unfortunate that the most vocal opposition to Gorbachev was left to the ultraleftist wing of the Communist Party, which exacerbated, rather than impeded, the collapse. For example, Yegor Ligachev, the leading opponent of Gorbachev in the Politburo, allowed himself to be drawn into the defense of Nina Andreyeva's letter of 13 March 1988 in *Sovietskaya Russia*, in which she vigorously defended Stalin and attacked Khrushchev as the arch villain. Keeran and Kenny write:

When the Andreyeva crisis over the letter ended a month later, Gorbachev had routed and discredited his left wing

opponents on the PB. Hence, the Nina Andreyeva crisis constituted the decisive turning point in the transformation of perestroika from an Andropov-inspired reform effort within the traditional context of Soviet socialism to an open attack on the major pillars of socialism—the Communist Party, socialized property, and central planning. (116)

It is true, as Keeran and Kenny say, that Gorbachev used Ligachev's support of the Andreyeva letter as a pretext to strike at Ligachev and throw the opposition into disarray.

Nina Andreyeva subsequently became general secretary of the ultraleftist All-Union Communist Party of Bolsheviks. She views the Democratic People's Republic of Korea (DPRK) as a model for socialist construction, praising Kim Jong Il for convincingly leading the Korean people in the socialist cause, giving full play to the people's intelligence and strength under the banner of the *juche* idea (KCNA 2000). She rejects any association of Stalin with a cult of personality. In a 1992 lecture at Kim Il Sung University in Pyongyang, she maintained, as do Keeran and Kenny, that "*the starting point of the degeneration of the Communist Party of the Soviet Union into opportunism was its 20th Congress.*" She continued, "The ideological prelude and ideological premise here was the anti-Stalin campaign, which was launched under the false slogan of the criticism of the 'Cult of Personality.' . . . Comrade Kim Il Sung rightly says that the driving force of the revolution and socialist construction is 'none other than the unity of the leader, the party and the masses'" (1992). Here she is actually justifying the cult of the individual as reflected in the slogan *unity of the leader, party, and people* that has been embodied in the DPRK *juche* philosophy to sustain the DPRK variant of the cult of individual (for a discussion of the philosophically idealist character of the *juche* concept, see Erickson and Marquit 2002).

Keeran and Kenny deny that Andreyeva's letter was anti-Semitic. Use of anti-Semitism by the dogmatic wings of the Communist parties in the USSR and Eastern Europe was not uncommon after the World War II. It was used openly in the Rudolf Slansky trial in Czechoslovakia in 1952. I saw it used in a leaflet distribution at a Polish factory to turn workers against a Jewish

Communist who opposed the dogmatists during the Party crisis in 1956. In his memoirs, Khrushchev tells of Stalin's strong remarks against Jews in private conversations, including derision through exaggerated mimicking of Jewish accents in speech. Stalin's daughter writes that after the purges of the old Bolsheviks, many of whom were Jews, "anti-Semitism was reborn on new grounds and first of all in the Party itself. To this my father not only gave his support; he even propagated a good deal of it himself" (Alliluyeva 1969, 153). The Stalin leadership's most notorious manifestation of anti-Semitism was in the dissolution of the Jewish Antifascist Committee in 1948, the secret murder of its president (the actor Solomon Mikhoels), the subsequent secret trial and execution of twelve more leaders of the Jewish Antifascist Committee in 1952, and the imprisonment of the other leaders and members—mostly long-time Communists and world-famous cultural figures and scholars (Jennick 1999). The near execution of the nine doctors, six of whom were Jewish, in the Doctor's Plot in the Soviet Union was stopped only by Stalin's death.

Keeran and Kenny say that "Andreyeva's letter fell far short of a 'rabidly anti-Semitic,' 'frontal attack' on perestroika from a 'neo-Stalinist nationalist point of view'" as portrayed by "Gorbachev, his apologists, and many Western commentators" (116). Keeran and Kenny assert,

The charge of anti-Semitism came from American journalists who saw a hidden meaning in her use of the word "cosmopolitan" to criticize "nationality-less 'internationalism.'" (117)

I am sorry that that Keeran and Kenny's sense of urgency to defend Ligachev's position on the letter interfered with their ability to give Andreyeva's letter a careful enough reading.

There is no *hidden* meaning in the Russian use of the word "cosmopolitan"; its meaning would have been clear to all. In 1948, it started to become a code word for Jew, to present Jews as an ethnic group unlike any other Soviet people—that is, a people not associated with any national territory in the Soviet Union (Pincus 1988, 150–60). If "cosmopolitans" could not be considered Zionists, then they were presented as cloaking their national

rootlessness in a fictitious “internationalism.” In her letter she used both devices. She used the second device by invoking the Jewish ethnic background of Trotsky as follows:

Another peculiarity of the views held by “left-wing liberals” is an overt or covert cosmopolitan tendency, some kind of non-national “internationalism.” I read somewhere about an incident after the revolution when a delegation of merchants and factory owners called on Trotsky at the Petrograd Soviet “as a Jew” to complain about oppression by the Red Guards, and he declared that he was “not a Jew but an internationalist,” which really puzzled [the] petitioners.

In Trotsky’s views, the idea of “national” connoted a certain inferiority and limitation compared with the “international.” This is why he emphasized October’s “national tradition,” wrote about “the national element in Lenin,” claimed that the Russian people “had inherited no cultural heritage at all,” and so on. We are somehow embarrassed to say that it was indeed the Russian proletariat, whom the Trotskyites treated as “backward and uncultured,” who accomplished—in Lenin’s words—“three Russian revolutions” and that the Slav peoples stood in the vanguard of mankind’s battle against fascism.

Here is something else that also worries me: The practice of “refusenikism” of socialism is nowadays linked with militant cosmopolitanism.”

The term *refusenik* was applied to Jews who were denied (“refused”) employment in certain jobs after applying for exit visas to emigrate to Israel. Cannot Keeran and Kenny understand that she is indeed railing rabidly against Jews? Perhaps another example will convince them. In a 1989 interview with an American journalist, she says:

In our society there are less than one percent Jews. Just a few, fine, so then why in the Academy of Sciences, in all the branches, and all the prestigious professions and posts in culture, music, law, why are they almost all Jew? Look at the essayists and journalists—Jews mostly.

At our institute, people of all different nationalities defend their theses, but the Jews do it illegally. (David Remnick, Gorbachev's Furious Critic, *Washington Post*, 28 July 1989)

Although Jews are often to be found in the professions she mentions, it is nowhere true that they dominate any of them.

In denying Andreyeva's recourse to anti-Semitism, Keeran and Kenny state that "even the Politburo's official rebuttal failed to charge Andreyeva with anti-Semitism" (117). One explanation for this failure was the persistence of a latent anti-Semitism among Soviet political leaders even after the Stalin period, which, despite Andreyeva's assertions, reflected itself, for example, in unpublicized quotas on the admission of Jews to universities and on admission to membership in the Academy of Sciences. No Jews have served on the Politburo since the removal of Stalin's sole Jewish long-term ally Kaganovich in 1957. Around 1980, I participated in a meeting of members of the CPUSA who were associated with publication or distribution of Marxist literature. One of the participants worked at Imported Publications, the principal distributor of Soviet books in the United States. After reading out loud an example from one Soviet book about how the Zionists control the U.S. financial institutions, CPUSA leader Gus Hall demanded that Imported Publications cease distributing Soviet books with an anti-Semitic content.

Dictatorship of the proletariat and socialist democracy

Keeran and Kenny state that Khrushchev favored broadening the idea of the dictatorship of the proletariat to put other sectors of the population on an equal footing with the workers (32). Although the 1970 constitution characterized the Soviet state as the "state of the whole people," it never, in fact, had that character. The state remained a dictatorship of the proletariat in the sense that the class character of the proletariat was reflected in the dominant property relations in which the interests of the working class were given priority. The problem in the Soviet Union and the European socialist countries was that a contradiction existed between the class nature of the state as a dictatorship of the proletariat and the form of the

state, which was a state administered by the Communist Party on behalf of the working class but without its participation. The main dynamic for this situation was the replacement of a democratically elected Central Committee as the highest organ of the Party by a self-perpetuating Politburo that Stalin ultimately ruled with an iron fist. After the Twentieth Congress, the Politburo in the Soviet Union and other European socialist countries retained the same character—self-perpetuating bodies that selected their Central Committees and were not accountable to these committees except under a few special circumstances. Through its extensive membership—one-quarter to one-third of the working population—the Communist parties, in theory, were to reflect the pulse of the working class, while serving as its vanguard. In practice, the rank-and-file Communists were denied this role.

The competing political parties in the bourgeois parliamentary democracies reflect the interests of the different classes and serve to establish a *modus vivendi* among groups in the ruling class with conflicting interests. In the socialist countries, the mass organizations were supposed to be the main vehicle for the democratic expression of the interests of the various overlapping segments of the population: trade unions, women's organizations, associations of cultural workers, youth organizations, athletic associations, etc.—with direct representation, together with the Communist Party, in the legislative bodies. These organizations were not allowed to fulfill their main functions.

The trade-union members had no say over the union agreements or basic working conditions, and the unions were reduced to social-service organizations. During the fifteen years that I spent in Poland and the GDR between 1951 and 1987, I was a member of three different trade unions, even serving a stint as shop steward in the Polish steelworkers union, where my main function was the allocation of wonderful, heavily subsidized vacations, but I never saw a union contract put before the members for discussion or ratification in any of the unions.

The women's organizations were transformed into peace organizations, and were denied elementary information on the wages of women in relation to the wages of men (suppressed from all the statistical yearbooks except Hungary's). I was explicitly denied

this information in the GDR in 1978 when I tried to obtain it for writing that I was doing about common features of the socialist countries. I was told by the Central Committee member responsible for the Party's liaison with the national women's organization, that she could not give them to me because they would be used against the GDR by West German propaganda. Even in Cuba, I was told by the vice chair of the Cuban Women's Federation in 1989 that they had just received this information for the first time. My best estimate was that the average women's wage was generally about 80 percent of the men's wage in all of the socialist countries that I visited, higher than in the United States, France, Germany, Britain, or Japan. But these data were withheld for internal, not external, political reasons—not because of their possible use by Western propaganda, but to prevent the women's organizations from pushing the issue, which was seen as something only to be dealt with from the top down. In actuality, the fact that the ratio of women's to men's earnings was higher than in the capitalist countries was indeed a very positive achievement of socialism.

Keeran and Kenny are right when they say that deficiencies in socialist democracy were not the cause of the collapse. But not for the reasons they cite, because they falsely claim the mass organizations generally played their proper role (215–22). The failure of the mass organizations to fulfill their proper role restricted the ability of the populations to rely on their organizations to reflect their needs, leading to a situation of alienation during the time of political crises. The violation of democratic centralism in the Party prevented the members from effecting the changes in leadership that were necessary to redirect the economies onto a proper path.

Conclusion

The Italian Marxist philosopher Domenico Losurdo has presented a number of good arguments about why the collapse of the Soviet Union cannot be attributed to a betrayal by one or another leader (2003). He views the failed attempt at the construction of socialism in the Soviet Union as a learning experience.

It seems quite apparent that the abandonment of the NEP was premature. In the mid-1920s (just before the first five-year

plan), during which there was also an influx of foreign capitalist investment, the rate of industrialization was comparable with the rate of industrialization achieved during the first and second five-year plans, in the course of which the foreign investment was eliminated (Conquest 1991, 161). As we see from China and Vietnam today, this strategy of economic development could have been successful in the Soviet Union and Eastern Europe. We have seen that the collectivization of agriculture was a disaster from which the Soviet Union never recovered, even when significant mechanization became available. The Chinese and Vietnamese experience with family farming has shown that this too would have been a useful course to pursue.

The fact that all the European socialist countries collapsed, one after the other, indicates that the problem was not just Gorbachev or Khrushchev.

The goal of creating a communist society will be reached only through the replacement of production for private profit by production for need, through the creation of a productive base sufficient to allow distribution by need. Until this is reached, commodity production will continue. In the Soviet model, production, but not distribution, was prematurely based on need, and the commodity form was used only for the distribution of that part of the product of production intended for direct consumption by the people. A market economy with socialist orientation is characterized by commodity production for profit in the socialized sector as well as in the capitalist sector, not only for products consumed by the people, but also by other enterprises. In view of the fact that socialist countries today do not have economies that are developed enough to cut themselves off from a world market dominated by capitalism and the international agencies that govern its rules, they must resort to mixed economies. Recognition that the Marxist principal of dictatorship of the proletariat is the necessary content of the class nature of the state and proletarian democracy is its form will make it possible for the state to guide the direction of economic development toward a growing dominance of the socialized sector. It is premature to speculate about the point at which the curtailment or absorption of the capitalist sector will occur.

Despite its failure, the first attempt at socialist construction in the USSR and Eastern Europe has demonstrated the potential of socialism for advancing the social welfare of the people. The achievements of the socialist countries in free education, free medical care, child care, access to culture, recreation, and adequate pensions were unprecedented. The elevation of the social role of women in society still serves as a model for women's rights activists in the capitalist countries. The liberation of women from their extremely oppressive status of subjugation in the Central Asian republics of the USSR in the face of fanatical opposition from the Moslem fundamentalists was an exceptional achievement. The policy of full employment is still unmatched in the most developed capitalist countries, in which such a policy is quite feasible economically.

These achievements were possible not because of the centralized planned economy free from market forces, which, as it turned out, could not sustain them. Progressives in the capitalist countries are struggling to win these same benefits within the framework of the capitalist market economy. The capitalists are aided in resisting these demands because they control the state. The social-welfare achievements in the USSR and the European socialist countries were possible because of the class nature of the socialist state. And with sufficient development of the economy, they are attainable under the conditions of a market economy with socialist orientation.

Full socialization of the means of production is, of course, the goal of all revolutionary Marxists. With no experience behind them, it is not surprising that the Bolsheviks were eager to fulfill that dream quickly. Words of Fidel Castro in 1976 are appropriate here. Discussing problems caused by the leveling of wages in Cuba, he said:

Revolutions usually have their utopian periods, in which their protagonists, dedicated to the noble task of turning their dreams into reality and putting their ideals into practice, assume that the historical goals are much nearer, and that men's will, desires and intentions, towering over the objective facts, can accomplish anything. It is not that revolutionaries should have neither dreams nor indomitable

will. Without a bit of dream and utopia there would have been no revolutionaries. . . . But the revolutionary also has to be a realist, to act in keeping with historical and social laws, and to draw on the inexhaustible wellspring of political science and universal experience in guiding revolutionary processes. (1976)

Vietnam has already shown that it has been developing economically at a much faster rate with its socialist-oriented market economy than with its previous centralized planned economy (Marquit 2002). China's economic development, despite its many problems, has been phenomenal, as we can read in the daily press. The coming years will be the test of the sustainability of this path to socialist development.

School of Physics and Astronomy
University of Minnesota, Minneapolis

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ABSTRACTS

Gene Grabiner and James Lawler, “Contemporary Significance of an Article by Mitchell Franklin on Two Earlier Wars on Terror”—Through contemporary application of Mitchell Franklin’s ideas in “Concerning the Influence of Roman Law on the Formulation of the Constitution of the United States” (1964), the authors address the danger of a new period of repression under the pretext of a war on terror. Using his theory of Three Constitutions (Philadelphia, 1787; the Bill of Rights, 1791; and the Civil War Amendments), Franklin focuses both on Article Four, Section Four, of the Constitution, which guarantees a republican form of government, and on Fifth Amendment proscription of unconstitutional mass infamy, as repudiation in the American founding of feudal alienation.

Mitchell Franklin, “Concerning the Influence of Roman Law on the Formulation of the Constitution of the United States”—Franklin focuses on Article Four, Section Four, of the “First Constitution” and on the Fifth Amendment. He argues that the Bill of Rights or first ten amendments constitute a qualitatively distinct “Second Constitution.” While these two themes are concerned with the content of the law, a third central theme of this article is that of legal method, as expressed in the Ninth Amendment. Content and method are intimately connected and their relation is of crucial importance to an authentic understanding of the Constitution as a whole, which incorporates also a “Third Constitution”—the Thirteenth, Fourteenth and Fifteenth Amendments, issuing from the Civil War. Discussion of method raises the issue of the historical nature and orientation of the American Revolution as a social revolution, not only a war of national liberation.

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Kim Malcheski, “The U.S. Embargo against Cuba: A Violation of International Law”—The author traces the history of the U.S. embargo against Cuba and details the growing number of principles of international law that are violated in successive revisions of the embargo.

Len Yannielli, “Of Slime Molds and Marxist Ideology: Expansive versus Constrictive Thinking”—A Marxist ecological theory that kept pace with the rising environmental struggles of the 1960s would have been a boon to revolutionary movements everywhere. But it did not happen. Why? The author proposes that a confined or constricted theoretical Marxist framework left out or marginalized the environment and environmental struggles. An analogy is drawn using taxonomic changes in the life sciences regarding slime molds. Marxism affords theoretical space broad enough for a sound ecological theory.

ABREGES

Gene Grabiner et James Lawler, «Signification contemporaine d’un article de Mitchell Franklin sur deux guerres anciennes contre la terreur»—Par l’application contemporaine des idées de Mitchell Franklin dans «Au sujet de l’influence du droit romain sur la formulation de la Constitution des Etats-Unis» (1964), les auteurs abordent le danger d’une nouvelle période de répression sous le prétexte d’une guerre contre la terreur. Appliquant sa théorie des trois constitutions (Philadelphie, 1787; la Loi des Droits, 1791; et les amendements de la guerre civile) Franklin se concentre sur l’article 4, section no 4, de la Constitution, qui garantit une forme républicaine de gouvernement, ainsi que sur l’interdiction—inscrite dans l’amendement no 5—de l’infamie des masses, en tant que reniement de l’aliénation féodale dans la fondation des Etats-Unis.

Mitchell Franklin, «L’Influence du droit romain sur la formulation de la Constitution des Etats-Unis»—Franklin se concentre sur l’article 4, section no 4, de la “1ère Constitution” et l’amendement no 5. Il prétend que la Loi des Droits ou les dix

premiers amendements constituent en fait une “2ème Constitution” distincte. Alors que ces deux sujets concernent le contenu de la loi, un troisième thème central de cet article est celui de la méthode légale exprimée dans l’amendement no 9. Contenu et méthode sont intimement connexes et leur relation est d’une importance cruciale pour une compréhension authentique de la Constitution dans son ensemble, qui inclut aussi une «3ème Constitution»—les amendements no 13, 14 et 15, résultats de la guerre civile. Une discussion sur la méthode soulève la question de la nature historique et de l’orientation de la révolution américaine en tant que révolution sociale et non seulement guerre de libération nationale.

Kim Malcheski, «L’Embargo des Etats Unis contre Cuba : Une violation de droit international»—L’auteur resume l’histoire de l’embargo des Etats Unis contre Cuba et détaille le nombre grandissant de principes du droit international qui sont violé dans les révisions successives de cet embargo.

Len Yannielli, «Myxomycètes et idéologie marxiste: pensée expansive contre pensée contractive»—Une théorie marxiste écologique qui aurait marché de pair avec les problèmes écologiques croissants des années 1960 aurait été une bénédiction pour les mouvements révolutionnaires dans le monde entier. Mais ce n’est pas arrivé. Pourquoi? L’auteur suggère qu’un cadre marxiste théorique confiné a ignoré ou marginalisé l’environnement et les questions écologiques. Il esquisse une analogie utilisant les changements taxonomiques et les myxomycètes en science humaine. L’espace théorique offert par le marxisme est juste assez large pour une théorie écologique saine.