The Rule of Law and the Capitalist State: Bills of Rights in Jeopardy

Anthony Chase

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.stjohns.edu/lawreview/vol65/iss1/6

This Symposium is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
THE RULE OF LAW AND THE CAPITALIST STATE: BILLS OF RIGHTS IN JEOPARDY

ANTHONY CHASE*

I. INTRODUCTION

In this “springtime of peoples” accompanying the sudden collapse of totalitarian regimes, we commonly perceive bills of rights—written or unwritten manifests of legally enforceable, fundamental human rights—as reinvigorated and constitutional liberties seem more secure at home as well as finally attainable abroad.

* Professor of Law, Nova University Law Center. B.A. 1972, Wisconsin; J.D. 1978, Wayne State; L.L.M. 1979, Harvard. This essay was written prior to Iraq’s invasion of Kuwait in 1990, and the subsequent war in the Persian Gulf; the author, however, feels no need to change what he has written here, in spite of these apparently momentous events. On the contrary, President Bush was clearly willing to go to war with or without Congress, once the Russians and Chinese had been adequately solicited; his announcement of an ambitious New World Order may assist the reader in understanding the real concerns that motivate the author’s critical analysis herein.


The above critique is not necessarily “Marxist.” Presumably a Marxist perspective would find that “the masses of people demand social rights” because class struggles spur them on. Neither ideological labels nor formal rights would be sufficient by themselves to stifle revolutionary, working-class social movements. See 1 THE HISTORY OF MARXISM: MARXISM IN MARX’S DAY 166-91 (E. Hobsbawm ed. 1982); G. DELLA VOLPE, LOGIC AS A POSITIVE SCIENCE passim (J. Rothschild trans. 1980). A more satisfying argument asserts that
The widespread call for freedom and rights, emanating from Tiananmen Square, Bucharest, and the Berlin Wall stirs the heart. The promise of international sanctions against recalcitrant pockets of Stalinist tyranny encourages the hope that, this time, the whole world can be gathered under the umbrella of an American-style Bill of Rights.²

Foreign policy associations and international organizations call for a decade of "the rule of law." Even the Russians claim they want to see the United Nations and the World Court given effective power to enforce human rights globally. Just in time for the bicentennial of the first ten amendments to the United States Constitution, everyone else seems, at long last, to have caught on.³

without positive rights, negative rights cannot be realized. See G. DELLA VOLPE, ROUSSEAU AND MARX 113-14 (J. Fraser trans. 1979). Della Volpe's assertion that positive rights are the foundation of effective individual liberty is both original and powerful. However, unless otherwise indicated, I will be referring to the conventional negative liberties when using such designations as "constitutional rights" or "fundamental human rights."

² For the most extreme writers and pundits, the Revolution of 1989 has apocalyptic significance. The headlines proclaiming Communism's "grand failure" signal nothing short of "The End of History." Cf. Alter, The Intellectual Hula Hoop: Why the Hyping of 'The End of History' Says More About Washington Than the Theory Itself, NEWSWEEK, Oct. 9, 1989, at 39 (deputy director of State Department's policy planning sees end of major wars and geopolitical struggles; environmental and technical questions rather than philosophical differences will dominate international discourse). Other barometers of public culture, such as financial editors and legal academics agree. See, e.g., Fund, World's Workers Are Uniting . . . For Capitalism, Wall St. J., Apr. 2, 1990, at A12, col. 3 (Eastern Europeans immersing themselves in "family, career, church or self-improvement," not political questions); Akers, To the Editor, Law & Soc'y News., Mar., 1990, at 2, col. 2 ("desire for freedom and democracy has begun to overtake the communist world, using the U.S. and Western democracies as the model").

Common to these views is their emphasis on the idea of a fundamental break with the past, the plea to finally acknowledge that capitalism has won, and the celebration of the "end of ideology." See Lears, A Matter of Taste: Corporate Cultural Hegemony in a Mass-Consumption Society, in RECASTING AMERICA: CULTURE AND POLITICS IN THE AGE OF COLD WAR 38, 42 (L. May ed. 1989). By midcentury, "the emphasis on national uniqueness and homogeneity.... pervaded postwar social thought. The tendency to see American culture as a monolithic and autonomous entity required a systematic inattention to power relations." Id.

For those who equate the collapse of communist regimes with "the end of history," the rapid spread of free markets closes the debate on "economic justice." Fund, supra. For an alternative to this new edition of "the end of ideology," see V. HELD, PROPERTY, PROFITS, AND ECONOMIC JUSTICE passim (1980) (essays discussing competing theoretical goals of society).


For dissenting or cautionary responses to the "fall of communism," see Maynes, America Without the Cold War, 78 FOREIGN POL'Y. 3, 16 (1990) ("[i]t would be worse than
Yet appearances may deceive. What is being universalized is not democracy, but the capitalist economic system and its attendant form of government—historically antithetical to precisely

ironic if the opportunity to enter into a constructive agreement with the Soviet Union in the field of international law were lost because, at the very moment that the Soviet Union became more lawful, the United States decided to become more lawless ("[g]lobal restructuring has been the leitmotif of the past decade"); Monteiro, Joe Slovo's 'Has Socialism Failed?' (Book Review), POL. AFF. 29 (Apr. 1990); Navarro, Historical Triumph: Capitalism or Socialism?, 41 MONTHLY REV. 37 (No. 6, 1989).

Ironically, an initial skepticism regarding the sudden extension of free market capitalism was sounded by none other than the United States Central Intelligence Agency. See East's Economies: A Bleak Forecast, CIA Predicts High Unemployment and Lasting Consumer Shortages, Int'l Herald Tribune, May 17, 1990, at 1, cols. 1-2 (CIA predicts great financial hardship for Eastern Europe as countries move from centralized, planned economies to market-oriented systems).

4 See Kolko, Global Restructuring and Economic Reforms, in Socialism and Democracy 23, 23-24 (1990) ("[g]lobal restructuring has been the leitmotif of the past decade"); see also Davies, Gorbachev's Socialism in Historical Perspective, 179 NEW LEFT REV. 5, 19-20 (1990). According to Davies, the future of Soviet socialism has four possible directions: radical economic reforms combined with democratization; continued directive planning combined with restructured authoritarian political regime; democratization without radical reform; and radical economic reform without democratization. Id.

Why should the emergence of "the fourth scenario" in the Soviet Union come as a surprise? We should probably expect to witness the development of authoritarian capitalism under post-communist regimes. China provides a splendid example. Despite the massacre at Tiananmen Square, capitalist political leaders around the world restored trade relations with China as soon as possible after the massacre, assuming they had actually suspended such relations. This restoration occurred in the midst of continuing repression of China's democratic opposition. President George Bush and the United States Department of State affirmed the necessity of our maintaining China's "most favored nation" trading status, even should the human rights situation in China further deteriorate. The significance for Western business of "the fourth scenario" in China is not its inclusion of an authoritarian political process (an "internal" matter for the Chinese to work out, according to many) but, rather, its extension of capitalist restoration and Western penetration into the China market (an "external" matter touching directly on Western interests).

Put simply, the universalization of capitalism mandates export of the capitalist state, whether in its liberal or authoritarian formation, but little encourages, let alone guarantees, the spread of democracy and civil liberty. Whether in jail, in hiding, or in exile, this is a lesson the Chinese student radicals have been taught by United States policy-makers. Nevertheless, "the fourth scenario" continues to have advocates in China, as well as in the Soviet Union. Kagami Mitsuyuki of the Institute of Developing Economies, in an interview subsequent to Tiananmen, observed:

Late last year and early this year, a small group of former Red Guards began a debate on how to resolve China's problems. They developed a theory centered on the "new authoritarianism." The theoretical inspiration for this debate came [sic] from Samuel Huntington [Harvard political scientist] and other American intellectuals who spoke of the need to introduce a strongman type of political system in order to overcome the gap between the super-modern China emerging in the coastal areas and the large cities, and the super-underdeveloped China of the remote countryside. They held that it was essential for the state to impose a super-centralized system of political power, and they praised the former south [sic] Korean dictator Chun Doo-hwan, and Taiwan's former leader Jiang Jiangqu. These
those individual liberties at the heart of any fundamental charter of human rights. Anyone who thinks that capitalism's recent, "shadowed victory" will ensure the survival, let alone the vitality, of our own Bill of Rights is taking a large political gamble.

Rather than repeat an important but familiar story of American support for fascist, neo-fascist, and other right-wing governments, I want to unravel the complicated notion of capitalism's politics. Ruling classes entrusted with managing capitalism's affairs of state have resisted vigorously the essential components of the rule of law. I suggest that such resistance is apparent in the politi-

dictators succeeded in stimulating rapid economic growth.

* See Halliday, The Ends of Cold War, 180 NEW LEFT REV. 5, 5-24 (1990); Themes, 180 NEW LEFT REV. 1, 1 (1990) (examining vitality as well as contradictions of capitalism).


First, the law-making power must reside at the point in the system where the most "elected and accountable" institution or body actually functions. From king to parliament, from property-owning males to "universal manhood suffrage" regardless of race, and from there through extension to women of the right to vote, the road to universal suffrage has been long and notoriously violent, with present generations relearning its history from contemporary struggles gripping South Africa, and the world. See Therborn, The Rule of Capital and the Rise of Democracy, 103 NEW LEFT REV. 3, 11-17 (1977); see also Hallisi, Popular Struggle: Black South African Opposition in Transformation (Book Review), 46/47 RACIAL HIST. REV. 388, 388 (1990) (considering "racial domination, capitalist development, and democratic movements" in South African history to understand "character, complexity, and pervasiveness of black resistance to white minority rule").

The spirit of the laws must animate the state and its institutions, thus compelled to "operate within limits which are either laid down in an explicit, written constitution, or take the form of a rather more vaguely conceived body of 'fundamental' laws and customs." A. ARBLASTER, supra, at 72. Only through the institutionalization of universal suffrage and fundamental constitutional rights can the cause of democracy be advanced. Bills of rights,
cally transcendent commitment of Germany, Japan and the United States to a capitalist future; it may well endanger the values of universal suffrage and fundamental human rights.

II. A Reality-Based Methodology

Commonplace to American political science has been the practice of confronting the reality of world communism with merely the idea of liberalism. The "beautiful and enticing picture" of "free world" or "free market" liberty has perpetuated this mismatch between idea and reality. If we confront a Stalinist political

---

7 Most capitalist ideologues do not distinguish between communism in and out of power, i.e., between the communist state and the left-wing social movements in which communists often play a critical role. Failure to make such a distinction surely shortchanges the historical record. See, e.g., Sayle, Broke New World, FAR E. ECON. REV. 32, 33 (1990) (acknowledging unique role of Japanese Communists in anti-fascist resistance).

Vietnamese Communists, like their counterparts in the Japanese resistance to emperor-system fascism, demonstrated unprecedented courage in their resistance to the state terrorism of the American-backed, Diem-Ky-Thieu dictatorships. Yet, it is not only communists "out of power" who have been underestimated by cold-warriors in the West. Halliday, supra note 5, at 9 ("Without [post-World War II] Stalingrad, a Nazi regime might still be in power, not only in Berlin and Warsaw, but in Paris and Amsterdam as well").

Western political leaders sometimes fail to distinguish friends from adversaries if Communists are involved. Funke, Bitburg, Jews, and Germans: A Case Study of Anti-Jewish Sentiment in Germany During May 1985, 38 NEW GERMAN CRITIQUE 57, 57-58 (1986) (discussing President Reagan's visit to Bitburg and former Nazi concentration camp in Bergen-Belsen, seeming to embrace both victims and perpetrators of Nazi-terror); see Lambrose, The Abusable Past, 34 RADICAL HIST. REV. 117, 117 (1986) (President Reagan characterized Americans fighting Spanish fascists as "on the wrong side").


It belongs to the commonest tricks of a certain type of political science to confront the idea of one type of state with the reality of another; to confront the ideology of a political idea with the sociology of an antagonistic theory. . . . The beautiful and enticing pictures painted of the proffered state theory appear of course preferable to a conception of the state whose functioning is depicted in the darkest colours. This struggle with unequal weapons is as regards the public always won by the stronger weapon, the more if this Utopia is helped forward by more or less gentle coercion.

Id.

Especially noteworthy is Neumann's demonstration of how this tactic was developed by advocates of the "corporate state," the "leadership state," and of the "Soviet system," in their struggle against liberalism and its political theorists; how willing the liberals were to
apparatus not with the ideology of the West, but with its reality, we will more likely see the similarities between the two former cold war adversaries. Critical to both systems is the struggle of state power to thwart the efforts of human rights advocates and internal social movements. The future of constitutional rights, now subordinated to the imperatives of a capitalist world-system, is in doubt.

The disappearance of communist movements, if accompanied by diminished international opposition to authoritarianism and inequality, could forge a geopolitical structure resembling that preceding the first World War and the Bolshevik Revolution.1

borrow this same tactic of argument within a post-war world where they maintained the upper hand. See id. However, the tactic is without merit: "[A]n idea can only be confronted with an idea, and a reality only with another reality." Id.; see O. Kirchheimer & F. Neumann, Social Democracy and the Rule of Law passim (1987); F. Neumann, The Democratic and the Authoritarian State 216-56 (1957) [hereinafter F. Neumann, Democratic and Authoritarian State]; Chase, The Left On Rights: An Introduction, 62 Tex. L. Rev. 1541, 1542-53 (1984); Stellner, Franz Neumann, 50 Telos 171 (1981-82).

9 See, e.g., D. Kellner, Herbert Marcuse and the Crisis of Marxism 5 (1984) (discussing Marcuse's criticism of both Soviet Marxism and United States capitalism, especially his excoriation of "new forms of domination, repression and social control").


[T]he contemporary geopolitical constellation [is] moving towards a pattern reminiscent of that which preceded World War I... [T]he rise of nationalism and demands for democracy in the Soviet Union and Eastern Europe bear strong resemblance to the social democratic and nationalist demands within Imperial Germany and Austria-Hungary prior to World War I. The pro-democracy movement in China, similarly, bears a strong resemblance to Czarist Russia's social-democratic movement.

United States, Germany, and Japan would again constitute powerful capitalist states, each dominated by a political regime hostile to the rule of law. Indeed, our own Bill of Rights only gained general application, and universal suffrage national adoption, after


Neither political expediency nor judicial desire was sufficient to change the clear import of the language of the Constitution. The Bill of Rights did not apply to the states—not until 1925, that is... [N]owhere else has the principle of Federalism been dealt such a politically violent and constitutionally suspect blow as by the theory of incorporation.

Id. (footnote omitted). In other words, in spite of the common association of the liberties protected by the Bill of Rights with the founding of the nation itself, those liberties did not find general protection in the United States—to whatever extent they may have become secure—until after the War and the Bolshevik Revolution. See W. Williams, Americans in a Changing World 160 (1978) (President Wilson endorsed a "slow program of reform" partly from fear that Bolshevism—or other left-wing ideologies—would gain force in US).

While an impatient world regarded the very gradual "incorporation" of the Bill of Rights as a necessary program of reform, the Chief Legal Officer of the United States under Ronald Reagan believed that "expansive civil libertarianism" could be "a threat to the notion of... [an] energetic government." See Meese, supra at 464. By the final quarter of the twentieth century, many conservatives have come to regard the availability of federal constitutional rights against state government to be inherently unconstitutional. See Graglia, A Theory of Power, Nat'l Rev., July 17, 1987, at 34-35.

The first ten amendments to the Constitution—the so-called Bill of Rights, adopted two years [after the Constitution]—add a few substantive and several procedural rights, all of which were intended to limit only the Federal Government, not the states. The vast bulk of the modern-era Supreme Court's constitutional decisions, however, involve not federal but state law—to which the Bill of Rights does not apply.

Id.

Thus, rather than celebrate any Bicentennial of the Bill of Rights, it would be more candid, and reflect more sober judgment, for us to acknowledge that the general protection of fundamental constitutional rights in the United States must be measured, at best, in terms of five or six decades rather than two centuries. The constitutional or legal basis of such protection has always been tenuous and tends too often to reflect claims made for "law in the books," rather than "law in practice." See, e.g., J. Cannon, Socialism on Trial passim (1970) (insightful commentary on struggle to secure original liberties against govern-
the Great War. Thus, our most recent historical experience of a world without communism offers little encouragement for those who take seriously the rule of law. We must consider the reality of politics in the capitalist state to evaluate critically current


1 The United States did not even begin to adopt majoritarian electoral institutions, let alone universal suffrage, until the ratification of the nineteenth amendment in 1920, which prohibited electoral discrimination on account of sex. See U.S. Const. amend. XIX. Adult suffrage was extended after Native Americans received the right to vote in 1924. See Pub. L. No. 175, 43 Stat. 253 (codified at 8 U.S.C. §§ 173, 224 (1924)) (declaring all non-citizen Indians born within the territorial limits of the U.S. to be citizens) (repealed 1952). Thus, even the right to vote, afforded a majority of United States citizens, represents a twentieth century modification of an eighteenth century constitution. See, e.g., W. Williams, supra note 13, at 457-58 (describing turning point for enactment of voting rights legislation during Lyndon Johnson's presidency). Universal suffrage in practice had to wait upon the voting rights revolution, an aspect of the civil rights struggle of the 1950's and 1960's. Id.; see Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973f-6 (1990)); see also J. Williams, Eyes on the Prize, America's Civil Rights Years, 1954-1965, 282-83 (1987) ("Recent events in Alabama, involving murder, savage brutality, and violence by local police, state troopers, and posses, have so aroused the nation as to make action by this Congress necessary and speedy") (quoting Congressman E. Celler of House Judiciary Committee). Indeed, Celler stated that passage of the Voting Rights Act prior to the events he described was "inconceivable." Id. Thus genuine universal suffrage in the United States remained unsecured as late as the second-half of the twentieth century. Its ultimate adoption places the United States, in spite of its constitutional history, perhaps but a few decades ahead of South Africa regarding formal juridical recognition and legislative enactment of one person, one vote.

Moreover, the statutory adoption of full voting rights in the United States reflects the general proposition that "the juncture at which mere liberalism, sometimes held together only by the Leviathan's sword, turned into liberal democracy was the breakthrough of universal suffrage." Feher, Book Review, 41 Telos 220, 221 (1979) (emphasis added); see also Hartog, Partial Readings, 5 Focus on L. Stud. 6, 7 (1990) (constitutional history is more than "a body of texts authoritatively interpreted by a specialized elite," and is marked by persistent rights consciousness).

Political sociologist Göran Therborn has defined "bourgeois democracy," at a minimum, as requiring a government elected on the basis of "universal and equal suffrage." Therborn, The Rule of Capital and the Rise of Democracy, in States and Societies 261, 262 (D. Held, J. Anderson, B. Gieben, eds. 1983). Therborn indicated that "bourgeois democracy" was not established in Germany until 1949 (perhaps later), in Japan until 1952, and in the United States until approximately 1970 (after race-based electoral discrimination was prohibited during the voting rights revolution of the 1960's). Id. at 264. Women had not won the right to vote in Belgium, France, Italy, or Japan until after the second World War. Id. at 265. Thus, in the United States, as in Germany, and the capitalist world in general, universal suffrage was essentially an achievement following the defeat of Hitler in Europe and the onset of the Pax Americana. See Rowley, supra note 12.
problems facing charters of human rights. Ideology must be abandoned as a convenient instrument of propaganda ministries and academic (including law school) theorists. The current constitutional predicament requires us to identify the significance and character of the rule of law, the historical development of the capitalist state, and the relationship between these two forces and the struggle to preserve and extend human liberty.

III. EXPLORING THE RULE OF LAW

A. Various Perspectives

No matter how various theorists tend to complicate the rule of law, the notion is relatively simple. Its simplicity can clarify both the political context in which debates over the term are conducted as well as the meaning (and utility) of the term itself. A historically situated conception acknowledges that all laws "have to be formulated by someone." However, it also recognizes that a bill of rights' constitutional guarantees of universal suffrage and enforceable limits on state power are critical to any evaluation of a political regime's regard for and protection of liberty. Against this historico-critical definition there exist two alternative conceptions of

---


See A. Arblaster, supra note 6.


the rule of law.

1. Literalism and Ideology

The first interprets the words literally; it declares law as the sole sovereign, convinced, not only of the possibility, but of the necessity, of "government of laws and not of men." An alternative and opposing perspective conceives of legal rules and systems as important primarily as ideas; legal ideology generally, and the rule of law in particular are understood as "false consciousness,"

"Critical Theory." Professor Tushnet has accurately described the movement's reversal of its earlier critical stance. See Tushnet, Critical Legal Studies: An Introduction to its Origins and Underpinnings, 36 J. Legal Educ. 505, 512 (1986).

The renunciation of the theoretical dimension of the initial project of CLS helps explain an otherwise curious characteristic of recent critical legal scholarship. Although it devotes a great deal of attention to phenomena that occurred in the past, much of the work is relentlessly ahistorical. It focuses synchronically on particular moments in the past or offers a sort of comparative statics, but never gives a diachronic account of transformation over time. I believe that this ahistoricism is linked to the critique of social theory, because diachronic accounts explicitly or implicitly rely on social theory to give them coherence. . . . Having renounced social theory, CLS is barred/precluded from using these standard traditions of historical writing—thus its characteristic ahistoricism.

Id. (footnote omitted); see also Jay, Neumann and the Frankfurt School, Foreword to F. Neumann, The Rule of Law (1986). For further skepticism regarding the deconstructive enterprise, see Chase, Cockburn on Empire, 40 Monthly Rev. 51 (1988); Wiener, Deconstructing de Man, The Nation, Jan. 9, 1988, at 22; Letters: Deconstruction, The Nazis, & Paul de Man, The N.Y. Rev., Oct. 12, 1989, at 68; see also Raskin, Laying Down the Law: The Empire Strikes Back, in How Harvard Rules: Reason in the Service of Empire 341, 357 (J. Trumpbour ed. 1989). The problem with CLS's deconstructivism "is that, in isolation, it leads straight back to the status quo. By itself, it is paralyzing. In any case, revelations in 1987 that the founder of literary deconstruction in America, Paul deMan, was a Nazi collaborationist should be enough to demonstrate that anyone can trash." Id. Raskin argued that CLS should move from a politically conservative position, supportive of the status quo, to a politically radical position, necessarily rejecting the paralytic neo-scholasticism of deconstruction. Id. The history of CLS, however, is precisely the reverse, CLS started with radical politics and gravitated to the right, via deconstruction. Not even the well-intentioned Raskin is likely to turn CLS around.

There is little "critical" left in Critical Legal Studies today, if ever there were. Professor Tushnet's only apparent critic regarding his retrospective assertion of CLS's ahistoricism, presents a somewhat ambiguous complaint. Professor Alan Freeman provided two counter-examples: an (at the time) unpublished essay and a very recent, autobiographical rather than historical essay. The ultimate effect confirms Tushnet's look backward at previous CLS developments. See Freeman, Introduction, 36 Buffalo L. Rev. 211, 214 n.3 (1987).

Cf. F. Neumann, Democratic & Authoritarian State, supra note 8, at 39 ("invocation of the law as the sole sovereign and the dictum that sovereignty is 'a government of laws and not of men' make it superfluous to mention that, in reality, men do rule, even when they rule within the framework of the law").

See Chase, An Obscure Scandal, supra note 18, at 112 n.17 (conflicting views of ideology and false consciousness).
“cooptation,”21 or “demobilizing ideology.”22 These standard labels are likely to be familiar to any regular reader of law reviews. The latter camp ritually exhorts political progressives to comprehend that “the Rule of Law itself . . . is the chief obstacle in the path of the development of class-consciousness.”23 There is, I believe, an increasing tendency today to reject both these standard critiques of the rule of law. Two recent essays, one written before the advent of legal deconstruction as advocated by Critical Legal Studies (“CLS”) scholars and the other after, illustrate this point.

2. Hart-Simpson Critique

Providing an overview of American jurisprudence from a somewhat autonomous cultural perspective, noted English legal scholar H.L.A. Hart has suggested that American jurisprudence is characterized by two fundamentally different conceptions of the nature and function of law which he calls the “Nightmare” and the “Noble Dream.”24 According to Hart, the Noble Dream image of the judge is that of the “objective, impartial, erudite, and experienced declarer of the law,” not to be confused with the very different image of the legislator. The Nightmare is that this image of the judge, distinguishing him from the legislator, is an illusion, and the expectations which it excites are doomed to disappointment.

Calculation, however, can transform this disappointment into something more akin to deception as to what is actually going on, following the views of the ideology critics. The real “nightmare,” then, is that the rule of law, founded on a grand illusion, can be systematically manipulated to secure social cohesion, and even ac-

22 Id.; see also Chase, supra note 1, at 310-11 (referring to socialist suspicion of nature of rights).
24 Hart, American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream, 11 Ga. L. Rev. 969, 971 (1977). Hart’s “Noble Dream” can be usefully related to the literalist camp’s conception of rule of law. See id. at 978-89. Hart’s “Nightmare” may likewise be identified with the ideological camp. See id. at 972-78.
25 Id. at 972 (quoting Lord Radcliffe) (footnote omitted).
quiescence by oppressed groups or classes. Ultimately, rejecting both the Noble Dream of law (as implausible) and the Nightmare (as an overreaction even before CLS sought to rewrite Realism via deconstruction), Hart concluded:

I have portrayed American jurisprudence as beset by two extremes, the Nightmare and the Noble Dream: the view that judges always make and never find the law they impose on litigants, and the opposed view that they never make it. Like any other nightmare and any other dream, these two are, in my view, illusions, though they have much of value to teach the jurist in his waking hours. The truth, perhaps unexciting, is that sometimes judges do one and sometimes the other. It is not of course a matter of indifference but of very great importance which they do and when and how they do it.26

Notwithstanding Hart's matter-of-fact conclusion, another English legal scholar has commented on the same jurisprudential puzzle.27 A.W.B. Simpson contrasts legal ideals with legal iconoclasm, as Hart had done with the Noble Dream and the Nightmare. Duplicating Hart's rejection of the two extremes, Simpson found:

It does not follow from a more realistic way of thinking about judicial decisions which abandons the crude antithesis between will and reason, and which locates them in the practical rather than the ideal world, that the pursuit of the values associated with the notion of the rule of law—predictability, consistency, at a down to earth level not taking bribes—is a futile undertaking, though we need to remember that the rule of law, like other ideals, is not to be thought of as a depiction of reality.28

In other words, according to Simpson, both adversaries in a "battle between the strong iconoclasts and the strong idealists... seem to me to be wrong..."29 I believe the general viewpoint, exemplified by two relatively detached observers of the American legal debate, Hart and Simpson, represents the best judgment we can make when compelled to choose between the two positions staked out by the literalist and ideological camps.

In an important respect, however, the Hart/Simpson critique

26 Id. at 989.
28 Id. at 844.
29 Id.
remains inadequate. Both commentators apparently believe that because Noble Dream/idealism stands at one extreme, and Nightmare/iconoclasm at the other, the truth (or, at least, the wisest juridical strategy) inevitably rests somewhere in between. Such a reading would be equivalent to the assumption that because paranoid schizophrenia and brief reactive psychosis are both extreme mental states, “sanity” must, quite naturally, reside somewhere in between! Indeed, if the historico-critical faculty is the essential component of a coherent construction of the rule of law, then its shared absence within literalist and ideological camps causes these two extremes to be seen as mirror images. Moreover, in both the Legal Realist generation and the Critical Legal generation, psychodynamic factors (in contrast to historical and political ones) underline the symbiotic relation between two positions which, in reality, are only superficially opposed. Criticism of both these abstract and historical conceptions of the rule of law comes ultimately from the perspective of historical materialism, no longer willing to be marginalized in the debate.

3. Popular Misconceptions

If much of the academic debate has evolved through advocacy of two extreme views sharing a common rejection of social theory, much of the popular debate has developed according to misconceptions of the American political experience that significantly distort the relation between liberty and the capitalist state. Advocates of strong government assert that the importance of minority rights

30 Needless to say, it does not. See generally American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987).
32 See Gilbert, Intellectual History: Its Aims and Methods, 100 Daedalus 80, 94 (1971).

Intellectual history cannot claim to be the true or only history; modern intellectual history arose after belief in the control of events by ideas had collapsed. It exists only in connection with, and in relation to, the surrounding political, economic, and social forces. The investigation of subjects of intellectual history leads beyond the purely intellectual world and intellectual history per se does not exist. Id.; see also J. Larrain, A Reconstruction of Historical Materialism 92-126 (1986); A. Wood, Karl Marx 61-122 (1981).
cannot undermine majority rule as the foundation of democratic
government. Advocates of civil liberties counter that democracy
cannot authentically exist without protecting minority rights from
governmental encroachment; they indeed, they assert that the Su-
preme Court historically has functioned to protect the rights of mi-
norities against the tyranny of the majority.

This is simply mistaken. If the United States did not adopt
majority rule until the 1920's, nor universal suffrage until the last
few decades, how can it reasonably be argued that the Supreme
Court has "historically" protected some minority rights against
predominant majority rule? At best, the Court has protected mi-
nority rights against minority rule. Moreover, the Court's protec-
tion of minority rights against majority rule in the 1920's and
1930's extended generally to corporate property against popular
legislative regulation. Finally, ACLU lawyers and legal theorists
have avoided essential questions: Does electoral majoritarianism,
even universal suffrage, ensure that the capitalist state becomes
the instrument of the majority so that it can control its own
destiny? Is there demonstrable empirical evidence, for example,
that the American people control American foreign policy? Have

---

33 Cf. The Federalist No. 10, at 132-33 (J. Madison) (B. Wright ed. 1961) (republican
form of government seeks to secure public good and private rights against danger of majority
factions). "[M]easures are too often decided, not according to the rules of justice and the
rights of the minor party, but by the superior force of an interested and overbearing major-
ity." Id. at 129-30.

34 Cf. C. Black, On the Failure and Success of Courts, in The Humane Imagination
Court); Noonan, The Constitution's Protection of Individual Rights: The Real Role of the
Religion Clauses, 49 U. Pitt. L. Rev. 717, 717-20 (1988) (examining Court's less than full
protection of individual rights in light of constitutional religious liberty).

35 See supra note 14 and accompanying text.

regulation of hour and wage conditions in coal industry); A.L.A. Schechter Poultry Corp. v.
United States, 295 U.S. 495, 550 (1935) (striking down congressional delegation to President
of broad authority in regulation of prices in interstate commerce); Williams v. Standard Oil
Co., 278 U.S. 235, 245 (1929) (striking down state statute regulating gasoline pricing), over-
ruled by Olsen v. Nebraska, 313 U.S. 236 (1941); Tyson & Brother—United Theatre Ticket
pricing), overruled by Olsen v. Nebraska, 313 U.S. 236 (1941); Adkins v. Children's Hosp.,
261 U.S. 525, 561-62 (1923) (striking down statute establishing minimum wage for women
employees), overruled by United States v. Darby, 312 U.S. 100 (1941); Hammer v.
Dagenhart, 247 U.S. 251, 276 (1918) (striking down congressional regulation of interstate
shipment of child-manufactured products), overruled by United States v. Darby, 312 U.S.
100 (1941). But see NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937) (upholding
protection of workers' rights to self-organization in steel industry under National Labor Re-
lations Act).
politicians in Washington, whether through the CIA's actions in Chile or our preference for military aggression in Grenada, Panama, and elsewhere, arrogated to themselves the right to decide the future of other nations and people?

Our Bill of Rights guarantees negative liberties—which protect individuals from the power of the state. As such, it has come to represent a majoritarian—not elitist—agenda for political struggle. Protecting the freedoms of speech, association, and the press, as well as the freedom from unlawful searches and seizures, serves the needs not only of minorities, but also of the majority. Genuine

---


The inquiry should not be confined to the third world. Under the Reagan-Bush administration, American capitalism reached unprecedented levels of corruption (e.g., in the HUD or savings and loan scandals) as the rich looted their own cities and the next generation's future. As child advocates have regularly pointed out, the United States has become the first nation in history to make its children its most vulnerable, even exploited class. See N.Y. Times, Apr. 9, 1985, at A28, col. 1. Within the contemporary history of capitalist inequality, no industrial nation has dared to push the "split-level society" as far as Presidents Reagan and Bush. See K. Phillips, The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath (1990) (describing redistribution of political power and wealth that took place during 1980's). Undemocratic control of the capitalist state enables the devaluation of the interests of the entire national community. Domination of the state by capital permits adoption of the view that the poor do not work because they have too much and the rich do not work because they have too little. Further, subordination of United States' foreign policy to the interests of a narrow-ruling elite results in popular movements abroad being cut off from their own political institutions and aspirations.

National independence requires government by the people, not by businessmen or foreign armies; yet the capitalist state's elevation of power and wealth relegates democracy and the rule of law to secondary status. It instructs others to follow in America's image and to repeat: "I am what I have." Leis, supra, at 6; see Allen, The Politics of Human Rights, in These Times, April 25-May 1, 1990, at 12-13 (discussing sharp criticism by representatives at 1990 meeting of United Nations Human Rights Commission directed at U.S. indifference to law and human rights violations).
opposition is found not between minority rights and majority rule, but rather between the people and the state (and the forces standing behind it). To recoil from candid political dialogue about the relation of money and politics, and capitalism and the state, is to shortchange the democratic principles undergirding the Bill of Rights.

B. Contributions of American Legal Realism

The rise of an historical and critical approach to the rule of law is, in essence, part of the general history of democracy's social and political struggle against ruling classes. Misconceptions embraced by the literalists (and familiar to nineteenth-century theorists), engendered an initial critique. No comprehensive school of thought within American jurisprudence emerged, however, until the “loss of innocence” expedited formalism’s decline. The stock market crash of 1929 and the rising unemployment and economic instability of the subsequent Depression no doubt helped to provoke Professor Karl Llewellyn to challenge an artificial political theory that no longer produced results. For Llewellyn, the crisis of the Great Depression did not present an occasion for radical departures from the existing Constitution; it did not require extraordinary jurisprudential remedies. Rather, it only required that legal theorists acknowledge the reality of American legal process.

In order to forestall misconception: I am not arguing that the

---

38 See Chase, supra note 1, at 315. “Moreover, as the example of Solidarity suggests, our empirical focus must also include the struggle of the left opposition within ‘already existing socialism’ for a more comprehensive recognition of individual rights than any contemporary socialist government has yet been compelled to grant.” Id.


41 See W. Twining, Karl Llewellyn and the Realist Movement (1973) (comprehensive treatment of life and work of Llewellyn and development and significance of realist movement).
United States ought to have the sort of constitution loosely designated as "unwritten." I am arguing that they have such a constitution, and that nobody can stop their having such a constitution, and that whether anyone likes that fact or not, the fact has been there for decades, and must be dealt with by any theory that purports to do a theory's work.\textsuperscript{42}

Professor Llewellyn realized that if the United States were to respond to the deepening social crisis with even a "constitutional revolution,"\textsuperscript{43} the change in political decision making would not affect the legal process. The legal state would in no way be diminished since it did not exist as an autonomous entity in the first place. Rather, Legal Realism simply demanded a shift in perspective regarding the same old, unwritten (or written, but marvelously reread) Constitution.\textsuperscript{44}

Legal Realism strikingly affected the ideas of later legal scholars; there was a profusion of experimentation with ideas and social forms. But Llewellyn, original even among the Realists, dutifully acknowledged the lack of real novelty in his anti-literalist critique of constitutional analysis. He cited Bryce, Beard, and Bentley as precursors, the last of whom "saw and said in 1908 all that should have been necessary to force constitutional law theory into total reconstruction."\textsuperscript{45}

Though a wide-ranging intellectual, Llewellyn seemed unaware of Italian Professor Antonio Labriola's initial essays, also published in America in 1908.\textsuperscript{46} On the relation of reason and law, Labriola, the political philosopher, wrote:

In our century, legislating has become an epidemic; and rea-

\textsuperscript{42} Llewellyn, \textit{The Constitution as an Institution}, 34 \textit{COLUM. L. REV.} 1, 2 n.5 (1934).
\textsuperscript{43} See, e.g., Parrish, \textit{The Great Depression, the New Deal, and the American Legal Order}, 59 \textit{WASH. L. REV.} 723, 726-28 (1984) (discussing change in constitutional analysis that ultimately occurred).
\textsuperscript{44} See Llewellyn, supra note 42, at 39; see also Parrish, supra note 43, at 726 (Parrish argues that New Deal period enabled "important changes in the American legal order" and further that "'constitutional revolution' in 1937 . . . permanently and dramatically changed the role of the judiciary. Instead of invoking the due process and commerce clauses to veto progressive laws . . . the Court retreated to the more secure redoubt of statutory construction, abandoning the attempt to veto national economic policy").
son enthroned in legal ideology has been dethroned by parliaments. In these the antitheses of class interests have taken on the form of parties; and the parties struggle for or against definite laws; and all law appears as a simple fact, or as a thing which it is useful or not useful to do. The proletariat has arisen; and wherever the struggle of the laborers has taken definite form, the bourgeois codes have been convicted of falsehood.... [N]ew legislation has more than once been revised, and the strangest oscillations may be observed in it.... The consciousness of experience has come to us and has given us a formula as precise as it is modest; every rule of law has been and is the customary, authoritative, or judicial defense of a definite interest.... History then has not been a processus for arriving at the empire of reason in law; it has thus far been nothing else than a series of changes in the form of subjection and servitude. History then consists entirely in the struggle of interests; and law is but the authoritative expression of the interests which have triumphed.47

Labriola thus pierced the veil of literalism; he exposed the inherent limitation within concepts such as the “rule of law.” Labriola did not fall victim to deconstruction’s anti-historical focus and conclude, as have many contemporary CLS scholars, that law and legal rights inevitably generate a “false consciousness” of the world.48 After outlining the compromises entered into by the bourgeoisie “in the interest of its own defense,”49 Labriola added what seems to me a remarkable political insight, one with implications beyond the immediate jurisprudential context.50 For Labriola, the struggle for both statutory rights and the franchise creates not

47 A. LABRIOLA, supra note 46, at 198-200 (emphasis in original). Because Labriola’s Essays is currently out of print in the United States, I have provided a sustained reference. 48 See supra note 27 and accompanying text. 49 A. LABRIOLA, supra note 46, at 55. 50 See id. at 56-57.

Whatever be the concessions that the bourgeoisie can make in the present economic order even if it be a very great reduction in the hours of labor, it always remains true that the necessity for exploitation upon which the whole present social order rests imposes limits beyond which capital as a private instrument of production has no more reason for existence. If a concession to-day can allay one form of discontent in the proletariat, the concession itself can do nothing less than give rise to the need of new and ever increasing concessions.... [T]he political struggle in which the proletariat takes part democratizes its habits; still more a real democracy takes birth which, with time, will no longer be able to adapt itself to the present political form.

Id. (emphasis added). Labriola defended the socialist quality of democratic struggles in behalf of expanding human rights and universal suffrage, which, taken together represent the “generic conditions of liberty.” Id.
abandonment of communism, but the new means and conditions confirming its vision. The “apparent deviations from the revolution are, at bottom, the very thing which is hastening it.”51 Ironically, demands for fundamental constitutional liberties and direct political participation in governmental decision making ultimately precipitated the downfall of those who had ruled the Stalinist state apparatus for decades. Nonetheless, the central point remains: nothing—not even the liberalization of capitalist rule nor the failed experiments under non-capitalist regimes—can alter the steady increase in the generic conditions of liberty.52 Nor can liberty’s ultimate incompatibility with any substitute for genuinely democratic rule be disturbed. From the French Revolution to the current phase of political and theoretical reorientation, efforts to assimilate or eliminate democratic opposition have not changed the simple, unyielding material fact that the entire present social order necessarily rests on exploitation.53 As capitalism finally evolves into an all-inclusive world-system, Labriola’s words profoundly challenge our received notions about politics. The universalization of capitalism does not universalize democracy. It only achieves the spread of “anti-systemic movements,” drawn together across borders and cultures to face a common antagonist. Democracy thus can be placed on the agenda in a way with which world capitalism has not previously had to contend.54

IV. LIBERAL v. AUTHORITARIAN CAPITALISM

Capitalism developed in every country according to the internal intensity of previous social structures.55 Despite the uneven flourishing of civil liberties and universal suffrage under capitalist rule, certain elements regularly occur in historical forms of capitalist experience under conditions appropriately understood as “liberal” or “authoritarian.” For countries with “liberal” political traditions, such as England and France, “feudal land property and

51 Id. at 57.
53 For a remarkably current critique from this philosophical vantage point, see G. Lukacs, The Young Hegel: Studies in the Relations Between Dialectics and Economics (1975).
54 See, e.g., G. Arrighi, T. Hopkins & I. Wallerstein, supra note 10, at 114 (predicting realignments of alliances within interstate system, increased economic fluctuation, and increasing class struggle—both geographically and in intensity).
serfdom either disintegrated in the process of the economic development, or were wiped out structurally and categorically in the bourgeois revolution. This enabled a middle class of burghers and independent peasants to emerge. However, in nations with more authoritarian traditions, such as Japan and Germany, "[t]he organisation [sic] of feudal land property remained intact," and the middle class remained underdeveloped.

In Germany and Japan, with their authoritarian traditions, capitalism achieved hegemony within what economist Kohachiro Takahashi calls "an oligarchic system—the 'organic' social structure—designed to suppress bourgeois liberalism."
Germaine Hoston has retrieved Takahashi's contribution to the liberal/authoritarian dynamic driving the politics of capitalism and highlighted his emphasis on Japanese modernization. She pointed out that factors external to Germany and Japan provoked the bourgeois reforms; there, democracy developed from "the accomplishment of an occupying power rather than that of the native bourgeoisie." Hoston further questioned any characterization of the German-Japanese experience as "exceptional." She concluded that European capitalism was the "historical accident," and not the accepted norm.

I wish to underscore these lineaments of liberal and authoritarian capitalism, and draw them forward into an analysis of modern bills of rights accomplished within the auspices of a newly extended capitalist imperium. Our shift away from the orthodoxy that liberal capitalism constitutes an historical norm and that authoritarian capitalism represents the exception can aid in under-
standing the political structure of the contemporary world's three economic superpowers.

The liberal development of American capitalism may have been exceptional, contrasted with authoritarian development in Germany and Japan. These three nations' remarkably parallel economic development during the last third of the nineteenth century, however, represents a foundational moment in the realization of modern industrial capitalist society.

For the United States, that moment occurred during the Civil War with the victory over an unfree labor system in the South won by "the last revolutionary offensive . . . [of an] urban or bourgeois capitalist democracy."[65] Japan, however, experienced its shift through the "Meiji Restoration,"[66] the Tokugowa Bakufu's disintegration and replacement by a revolutionary regime committed to industrialization[67] without embracing democratic ideals.[68] For

---

65 B. MOORE, supra note 56, at 112. The "victory of industrial capitalism over the fetters of the plantation economy, a victory that required blood and iron to occur at all, [was] very persuasive indeed." Id. at 151; see also W. WILLIAMS, THE CONTOURS OF AMERICAN HISTORY 303-04 (1961). For the views of Marx and Engels on the Civil War, see Rumyantseva, Preface in K. MARX & F. ENGELS, supra note 61, at 18 (crediting Marx and Engels for disclosing war as clash between firmly entrenched system of hired labor and predominant system of slavery in South acting to brake nation's overall capitalist development).


67 See, e.g., G. BECKMANN, THE MODERNIZATION OF CHINA AND JAPAN 273-74 (1962). The rapid industrialization of Japan became the primary economic objective of the oligarchs. They considered it a prerequisite not only to the creation of a strong Japan but also to the solution of a number of economic problems, especially the pressure of deficit balances in foreign trade and the devastating effect of imported manufactured goods on handicraft production.

Id. at 273.

68 Id. at 244. Within two decades of the Meiji revolution, [t]he government had made important concessions to those groups that demanded a national parliament, but the Meiji Constitution was essentially a carefully formulated legal justification for a regime in which power was held by a small number of men with minimal responsibility to the people. Their power continued to stem from the doctrine that sovereignty rested in the person of the emperor, not by divine right, but by divine descent. The government made certain that this basic principle was beyond the possibility of constitutional change by providing for uninterrupted imperial succession to the sovereignty of the state in the Imperial House Law, which was regarded as superior to ordinary legislation and could not be amended or supplanted by such.

Id. at 302.

Because the constitution conferred excessively broad executive powers, the emperor, in
Germany (whose recent reunification has fostered international debate regarding issues of security and border sanctity), the “founding of the German Empire or Kaiserreich of 1871” was the critical event.69 In contrast to the American experience, the foundational compromises in Japan and Germany eventually generated fascist regimes.70 Thus, within the universe of capitalist development resided different trajectories with distinct political and legal implications. Presenting this general critique of authoritarian capitalism in a nutshell, social historian Barrington Moore has argued:

The second main route to the world of modern industry we have called the capitalist and reactionary one, exemplified most clearly by Germany and Japan. There capitalism took hold quite firmly in both agriculture and industry and turned them into industrial countries. But it did so without a popular revolutionary upheaval. What tendencies there were in this direction were weak, far weaker in Japan than in Germany, and in both were diverted and crushed. Though not the only cause, agrarian conditions and the specific type of capitalist transformation that took place in the countryside contributed very heavily to these defeats and the feebleness behind any impulse toward Western democratic forms.71

69 F. Fischer, supra note 58, at 37 (emphasis in original). Monarchical-bureaucratic Prussia incorporated its military-state tradition into the founding of the German Empire or Kaiserreich of 1871. This system remained dominant until 1945. As an association of “agrarian-aristocratic and industrial/big-bourgeois power elites,” its primary domestic purpose was to maintain the status quo against the rising forces of democracy and Social Democracy. Id. Moreover, its external objective was to ensure, first, Prussia’s hegemony in Germany, then Prussia-Germany’s hegemony in Europe, as the basis for securing global. Id. at 38. The largely agrarian German Empire developed “on a scale and tempo bearing comparison only with the development of North America, into a modern industrial state.” Id. at 40. The new industrial bourgeoisie achieved economic dominance within two decades, but failed to secure a commensurate share in political power. Bismark’s economic and social policies, and the famous alliance of “steel and rye,” which reconciled the new industrial bourgeoisie with the agrarian-feudal forces. Id.

70 See B. Moore, supra note 56, at 228-313, 413-32.
71 Id. at 433. By “Western democratic forms,” Moore refers to “liberal capitalist
Ironically, this double portrait of modernization potentially undermines the strength of my central assertion (that universalization of capitalism under present circumstances cannot of itself guarantee the safety of individual liberty or the durability of rights). In other words, one could plausibly argue that if capitalism—or its development in “the new Big Three”\textsuperscript{2}—has been predominantly, though not exclusively, authoritarian, its most recent postwar, American-sponsored liberal manifestations nevertheless set the tone for the present world-system.\textsuperscript{73} One might even assert that this “liberalization” of world order is precisely the meaning of the second World War.

V. QUESTIONING THE DURABILITY OF LIBERAL CAPITALISM

Indeed, one familiar perspective suggests that New Deal radicalism, not authoritarian accommodation, determined postwar United States policy-making. But this would require that we speculate about political developments unfolding from a different history than the one we know. For example, if the American military in occupied Japan had not used its power in 1947 to quash a general strike movement, would Japan’s economy today reflect such concentration of private wealth?\textsuperscript{74} If American officials and labor forms,” distinct from “authoritarian capitalist forms.” Once America’s postwar occupation policy had presumably exported the “Western democratic form” to Germany and Japan, it became commonplace to refer to the latter, formerly fascist states, as part of the “Western block.” Inclusion of an Asian nation like Japan in the “Western block” does not necessarily guarantee that “the West” has outgrown its historically pronounced anti-Asian racism. Rather, the designation suggests that Japan adopted the western world’s anti-communism. See \textsc{Trilateralism: The Trilateral Commission and Elite Planning for World Management} 5 (H. Sklar ed. 1980). For a wide-ranging discussion of Japan’s qualified self-perception as “Western,” see J. Hunter, \textit{The Emergence of Modern Japan: An Introductory History Since 1853} (1989); \textsc{Modern Japan: Aspects of History, Literature and Society} 52-66 (W. Beasley ed. 1975); H. Smith, \textit{Kiyochika: Artist of Meiji Japan} (1988); K. Takeo, \textit{Japan and Western Civilization} (1983).

\textsuperscript{77} Rowley, \textit{supra} note 12.

\textsuperscript{73} “Setting the tone for the world-system” has more regularly involved the United States in struggles against advocates of future socialism than against the remnants of authoritarian capitalism in the postwar world. \textit{See, e.g.,} Dower, \textit{E.H. Norman, Japan and the Uses of History, in Origins of the Modern Japanese State} 3-101 (J. Dower ed. 1975) (discussing U.S. policymakers’ desire to mesh “arsenal of ideas” with larger arsenal of American military, technological and economic power to create theoretical framework capable of competing with Marxism); \textit{see also L. Gardner, Safe for Democracy: The Anglo-American Response to Revolution, 1913-1923, at 25-44 (1984) (decline of imperialism led to America “doing the world’s work”).}

\textsuperscript{74} \textit{See J. Moore, Japanese Workers and the Struggle for Power} 1945-1947, at 240 (1983). Despite his unconvincing criticism of Japanese Communist strategy during 1945-
leaders had not been deployed in Germany after the war to frustrate "anti-fascist elements in the German working class" and their "grassroots democratization movement."\(^7\) would the contours of Germany's contemporary economic structure be the same? Perhaps we could even envision a past free of America's tragic war against the Vietnamese people.\(^7\) Despite the attraction of such speculations, we must nonetheless draw conclusions from actual social history.

In short, two of the three superpowers dominant in the emerging capitalist world-system (i.e., Japan and Germany) embraced authoritarian rather than liberal forms of capitalism.\(^7\) In contrast, the United States adopted the liberal mode, primarily because of its pivotal experience of an extremely violent civil war.\(^8\)

1947, Moore provides an insightful analysis of the politics of class struggles during those years. For an interesting account of the influence of Japanese Communist leaders during the Vietnam War, see R. Scalapino, The Japanese Communist Movement, 1920-1966, at 267 (1987) (Japanese Communist leaders perceived Vietnam's struggle against U.S. as important to unifying world communism and "achieving their primary goals: a continuous struggle on behalf of 'correct Marxism-Leninism' [unremitting pressure upon the Soviet Union to abandon all manifestations of the 'soft line' and to rededicate itself to revolutionary leadership]").


\(^7\) See supra notes 56-73 and accompanying text.

\(^8\) See B. Moore, supra note 56, at 152-53 ("the Northern victory, even with all its ambitious consequences, was a political victory for freedom compared with what a Southern victory would have been"). See generally E. Foner, Reconstruction: America's Unfinished Revolution 1863-1877 (1988) (comprehensive analysis of reconstruction); H. Hyman, A More Perfect Union: The Impact of the Civil War and Reconstruction on the Consti-
same time, despite their decisive victory in the 1860's, progressive Northern elements in the United States ultimately compromised with reactionary forces, which delayed universal suffrage until the 1960's (indeed, later than its adoption in Japan and Germany). While the liberal/authoritarian distinction had, by the 1930's, become sufficient to precipitate a world war, it was not immune to political manipulation. As Wallerstein pointed out, "[t]here were many hints... that [the Soviet Union] might find it more comfortable to be diplomatically close to Germany or closer than to the [United States]. This might have been catastrophic for the [United States], and one of Roosevelt's first moves in power was to establish diplomatic relations with the USSR." Thus, in both domestic and foreign affairs, liberal capitalism presented itself as being "left of center"; it not only won popular support at home and abroad, but it also secured the Soviet Union as an ally against Hitler.

Once Germany and Japan had been defeated, however, American policy changed. In terms of the interstate system, the [United States] emerged as the uncontested hegemonic power. Furthermore there were no longer any significant "rightist" governments among the core states. On the world scene, the US quickly shifted therefore from being "left of center" to being the leader of a "free world" alliance against the world left, now dubbed "communist totalitarianism." The very concept "totalitarianism," which sought to put communist and fascist regimes in the same box, was an attempt to create a facade of diplomatic
continuity over the reality of a significant realignment.83

The disparity between liberal and authoritarian capitalism may have appeared greatest during the brief period when the United States presented itself as more "left of center" than its events usually require. Indeed, the rapidity with which the United States supported precisely those authoritarian elements in the administrative and corporate structures of America's defeated enemies (even to the extent of placing reactionary forces back in power despite strong opposition from democratic majorities in their own countries) suggests nothing less.84

We have a right to be worried about the potential authoritarian use of political repression—or the Berufsverbot—under postwar German constitutionalism.85 We have the same right to be

---

83 Wallerstein, supra note 81, at 71. For the argument that this "reverse course" in policy resulted from internal economic and political imperatives, rather than the highly popularized fear of a Soviet threat, see G. Kolko & J. Kolko, supra note 75, at 525.

84 See, e.g., J. Borkin, supra note 75, at 138-39 (cold war made Germany sought after ally); K. van der Pijl, supra note 75, at 150-51 (contrasting politics of American and European labor unions); Graf, supra note 75 (political party and trade union leaders appointed from those prominent in Third Reich as cold war intensified);

By the time the prosecution of the I.G. [Farben] officials began in 1947, a new element had been added to the objections of war crimes trials. The cold war had begun. Germany, the wartime enemy, had become a sought after ally; the U.S.S.R., the former ally, was now regarded as the enemy. Congressman John E. Rankin of Mississippi declared on the floor of the House of Representatives: "What is taking place in Nuremburg, Germany, is a disgrace to the United States. Every other country now has washed its hands and withdrawn from the saturnalia of persecution. But a racial minority, two and a half years after the war closed, are in Nuremburg not only hanging German soldiers but trying German businessmen in the name of the United States."

J. Borkin, supra note 75, at 139-40.

The failure to punish the I.G. Farben executives convicted of savage and criminal conduct, including mass murder (and the gradual rehabilitation of I.G. Farben), represent a horrifying tale of irresponsibility and conspiracy. See id. at 154. For those who wish assistance in decoding the not particularly subtle anti-Semitism reflected in Congressman Rankin's account of German business's "persecution," see two truly exemplary studies: P. Fredriksen, FROM JESUS TO CHRIST: THE ORIGINS OF THE NEW TESTAMENT IMAGES OF JESUS (1988) (historical and scriptural critique of origins of Christian anti-Semitism); G. Mosse, TOWARD THE FINAL SOLUTION: A HISTORY OF EUROPEAN RACISM passim (1985) (general history of anti-semitism in Europe).

85 See Graf, supra note 75, at 192-93.

In popular usage, Berufsverbot refers to the Anti-Radical Decree of 28 January 1972, a joint declaration by the Federal Chancellor and the Länder premiers banning from public service, at the federal, Land, or local level, persons defined as "extremists", "radicals" or "anti-democrats" . . . (S)ince then it " ... has had the active support of a legislature that provides a broad network of legislation, authorizing political repression, of a judiciary that is frighteningly cooperative and
deeply disturbed as do Japanese civil libertarians regarding both the attempted assassination of Nagasaki Mayor Motoshima Hitoshi by a member of a right-wing group and the Japanese government's possible contribution to the incident. But, such violations find their origin in a recent past. The potential shredding of
any credible bill of rights for German and Japanese democracies depends, not on the 1930's, but on the late-1940's and 1950's when both the construction of new constitutional guarantees, and the systematic destruction of civil liberty through the massive purges of the political left-wing took place.87 “[A]nti-Communist discharges [in Japan] reached a total of 22,000 in all, fifteen times the relatively small number the Occupation had purged from the higher levels of the economy in 1947 and 1948—to the acute distress of conservatives.”88 Thousands more Japanese, especially in the labor union movement, lost employment through firings designed as much to send a message as to silence individual employees.89 Ironically, laws that were quickly enacted to guarantee the transition from authoritarian to liberal capitalism were used to justify purges perpetuating the ruling structures of authoritarian power. Consequently, liberal constitutionalism only marginally sought the liberation of most Germans and Japanese in the postwar political environment.

A mistaken reading of these events would be to see them as the obscure victory of reactionary remnants over the best intentions of American occupation liberals. On the contrary, the American command inspired the anti-communist purges;90 if the new domestic political apparatus facilitated their administration, then United States attitudes provided a powerful teaching model. The brilliant American historian of Japan, John W. Dower, described

87 See, e.g., M. Schaller, supra note 75, at 267-68 (crackdown on Japanese left); R. Swearingen & P. Langer, Red Flag in Japan: International Communism in Action 1919-1951, at 242-43 (1968) (same, in Japan); Graf, supra note 75 (same, in Germany).
89 For a detailed account of how selective political terminations affected union organizing and resistance to authoritarianism in postwar Japan, see J. Moore, supra note 74, at 185-240.
90 T. Cohen, supra note 88, at 450 (“although the purge was apparently a completely Japanese initiative, everyone was certain, rightly or wrongly, that the Occupation was behind it all”); cf. M. Schaller, supra note 75, at 267 (stating that MacArthur’s ordered crackdown on Japan Communist Party led to purge of the party leadership). Finally, Cohen and Schaller agree that the purpose of the purges was to silence the most energetic and effective union activists. See T. Cohen, supra note 88, at 450. Although theoretically being a Communist violated no law (the Constitution in fact guaranteed freedom of speech and prohibited discrimination because of “creed”)—a Fukuoka District Court decision in September of 1950 declined to provide these protections to Communists on the basis that “the objective of the Japan Communist Party is the bondage of class dictatorial power’ and ‘the guarantee of fundamental rights in the Constitution does not give the right—even in order to realize a certain ideal—to ignore the basic rights of others.”’ Id.; cf. J. Ardagh, supra note 85 (Berufsverbot is unconstitutional if applied to speech of “mere critics” but constitutional if applied to “subversives”).
American political influence on the policies of postwar Japanese Prime Minister, Yoshida Shigeru:

During his second and third cabinets, he proposed the creation of an “Un-Japanese Activities Committee” in the lower house of the Diet. The [United States] Congress was his obvious inspiration here, and although this did not materialize, in June 1949 the government did create an internal intelligence apparatus devoted to investigation of communists and leftists . . . . This agency, often compared to the American F.B.I., was headed during this period by Yoshikawa Mitsusada . . . who became known to Americans in 1951 when he testified before the Senate Subcommittee on Internal Security (the McCarran committee) in the inquisition of the Institute of Pacific Relations. Many of the personnel who joined the bureau after the Korean War broke out were depurgees formerly associated with the prewar Home Ministry and Special Higher Police.91

American sponsorship of unreconstructed authoritarians after the war does not indicate some sort of abstract moral confusion or failure. On the contrary, it reveals an alarming but profound historical truth: the wall separating liberal and authoritarian legal and political institutions may not be nearly as sturdy as many advocates of democracy had hoped.92

Governments often seek to deploy popular ideology to justify misuse of modern technology. Germany and Japan, of course, were not unique. Since the second World War, Western liberal democracies have begun to display more and more of these same traits for reasons broadly similar though they no longer have much to do with agrarian questions.93 Surely the American use of napalm

92 See Feher, The French Revolutions as Models for Marx’s Conception of Politics, 8 THESIS ELEVEN 59, 70 (1984). “In simpler language the dilemma can be put thus: the moment the ruling classes feel that their property is threatened by the masses, they will introduce anti-democratic, even fascist forms of social and political rule.” Id. Given this dilemma, Feher demands that we recognize “different logics in modernity, among others, a logic of democracy and a logic of capitalism which are, beyond any doubt, at odds with each other.” Id. at 71. If democracy and capitalism are at odds with each other, as Feher insists, the rule of law and capitalism are certain to be as well.

Bourgeois democracy, insofar as it is at all possible after fascism, is worth striving for in the face of fascism as an existing danger. But it seems that precisely this bourgeois democracy has been dismantled and maimed continuously by the bourgeoisie itself and by big capital . . . [E]ven in democracies based on competitive political parties, no particularly great efforts are made, for example, to constrain the arbitrary power exercised by the police.
against the children of Vietnam cannot be excluded from this somber reflection. But how do we prevent this reverse transformation of liberal into authoritarian values and politics? What motivates the United States in its commitment to capitalism at all costs?

Are universal suffrage (and democratic control of the state) as well as the Bill of Rights genuinely in jeopardy in the United States today? Perhaps. In 1989, both houses of Congress passed a bill designed to prevent a repeat of the Iran-Contra affair; it curtailed the executive branch’s ability to pursue any privately funded

---

Id. Marcuse exchanged this comment with his colleague, Jürgen Habermas, who, perhaps more than anyone else, has identified the irreducible core of Marcuse’s “bourgeois democracy” with “principles of formal law and popular sovereignty,” i.e., with Bills of Rights and universal suffrage. For both Marcuse and Habermas, liberal capitalism’s capacity to “cross the line” into authoritarian capitalism is utterly real. Following the kind of warning offered by Marcuse and Habermas, Nicos Poulantzas has argued that authoritarian capitalism, although “[t]he exceptional State form” of capitalism, still belongs to the capitalist type of State, not only in terms of State power, but also in its institutional forms; this also holds for the fascist State as an exceptional capitalist State.” N. Poulantzas, Fascism and Dictatorship: The Third International and the Problem of Fascism 313 (J. White trans. 1974) (emphasis in original). Although distinguishing between the “legal state” and the “police state,” Poulantzas objected to the prevailing view that the “totalitarian State” is the antithesis of the “liberal state.” “This is quite incorrect . . . .” Id. at 320. Under both liberal and authoritarian regimes, capitalist legal institutions remain capitalist. Id.

At the same time, authoritarian capitalist legal institutions have characteristics all their own. Whereas liberal capitalist legal institutions both limit the exercise of State power and regulate that power, under authoritarian capitalism, “[t]he law is no longer the limit,” and legal regulation becomes increasingly arbitrary. Id. at 322. Under liberal capitalism, “[l]aw therefore allows the relation of forces within the alliance in power to be modified without the overthrow of the State, without affecting what Lenin called the State’s envelope. The juridical system thus lays down its own rules of transformation; this is the main role of the Constitution.” Id. at 321 (emphasis in original). Recent political crises in the United States have frightfully strained the orthodox, liberal conception of “rules of transformation,” even normal rules of transition in the executive apparatus of government within American politics. N. Chomsky, The Culture of Terrorism (1988); L. Cockburn, Out of Control 131-63 (1987); L. Evans & A. Myers, Watergate & The Myth of American Democracy (1974); J. Garrison, On the Trail of the Assassins (1988); A. Kinoy, Rights on Trial 1-38 (1983) (analysis of watergate wiretapping); J. Lukas, Nightmare: The Underside of the Nixon Years (1976); B. Movers, Movers: The Secret Government: The Constitution in Crisis 2-4 (Public Affairs Television, Inc., broadcast Nov. 4, 1987). There can be no doubt but that “what Lenin called the State’s envelope” has been opened to a remarkable degree in the United States subsequent to the founding of the National Security state during and after World War II. See G. Kolko, The Politics of War: The World and United States Foreign Policy 143-45 (1988).

---


85 Cf. Chase, supra note 1, at 325-27 (liberalism must ultimately choose between property rights and human rights).
foreign policy. During the floor debate, Senator Jesse Helms of North Carolina conceded the requirement that the President share power in foreign policy; he further argued that it would suffice were the President to share that power with third world countries, corporations, or even wealthy Americans, rather than the legislative branch, so long as the United States Treasury did not have to fund any such activity. Senator George Mitchell of Maine replied:

With all respect, I strongly disagree with that assertion. The President of the United States is as constrained by law as is every other American. The President must obey the law and Congress has authority to make the law. This is a democracy, not a monarchy. The President is not a king.

However, Senator Helms was unpersuaded. He repeated: "If the President can execute the policy without calling on the [United States] Treasury, then the Constitution puts up no barrier."

VI. CONCLUSION

Those who identify Senator Helms as an isolated reactionary, or a backwoods reminder of segregation in the solid South, should note that President Bush ultimately vetoed the bill attacked by Helms. It would seem that the Republican administration perceives super-secret, self-financing, and self-perpetuating "enterprises" to be necessary for the full implementation of United States policy in international affairs. Who, then, can assert that the principle of separation of powers, or the integrity of the Bill of Rights' guarantees, or the efficacy of meaningful universal suffrage remains intact? Have not these foundations of the legal state become more tenuous with each passing invasion, crisis, or scandal? The conflict does not consist in a struggle between democ-

---

97 Draper, supra note 96.
99 Id.
100 Id.
101 Cf. N. Poulantzas, supra note 93, at 327 (describing decline of "parliamentary democracy" and role of legislative branch during slide from liberalism into the executive, interventionist and finally authoritarian state).
racy and monarchy, as suggested by Senator Mitchell, nor, perhaps, between liberal and authoritarian capitalism—however much their opposition has shaped modern political history. Under the new alignments structuring the capitalist world system at the close of the present century, it may well be that the crucial confrontation will occur between essentially authoritarian public and private power, on the one hand, and rights-based anti-systemic movements, on the other—that is, between capitalism and the rule of law.

Fund-raising crises within both state and federal legislatures, the abandonment of congressional leadership in budget submissions and regulation of financial institutions, and the development of parallel power networks (the Plumbers and Cointelpro under Nixon; Casey's and North's Enterprise under Reagan/Bush) may indicate the emergence of "the exceptional state." The considerable elaboration of repressive state policies in the name of a "war on drugs," has surely raised a sufficient number of warning signs.


Bills of rights and universal suffrage may not exhaust the definition of democracy but we can state with certainty: no rule of law, no democracy. The contradiction between the rule of law and authoritarian capitalism, as we have seen, is especially sharp. See E. Hobsbawn, Farewell to the Classic Labour Movement?, in Politics for a Rational Left 159, 165 (1989) (suggesting that capitalism could resort to "the solution of the political right"); see also Lobel, Emergency Power and the Decline of Liberalism, 98 Yale L.J. 1385, 1423-33 (1989) (as America has expanded its imperial power, the rise of emergency power in executive branch becomes increasingly dangerous).