POST-TOTALITARIAN POLITICS

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I. THE CURTAIN PARTS

Forty years a firmament dividing East and West, Left and Right, State and Market, the iron curtain one day crumbled like so much meringue. With it crumbled many realities and realisms that once seemed hard as gunmetal: the determination of international relations by the interests and relative strength of military elites, the total control of totalitarian states over their societies, the pseudosophisticated view that, in Francis Fukuyama’s phrase, “nation-states [are] like billiard balls, whose internal contents, hidden by opaque shells, are irrelevant in predicting their behavior” (p. 248). The shells cracked, the curtain parted, and the intractable reality that force rules politics was, at least for the moment, exposed as mere appearance.

In a chapter of his Phenomenology entitled “Force and Understanding: Appearance and the Supersensible World,” Hegel evokes the vertigo we experience at such moments, when the forces that rule our world are revealed to be contingent interpretive constructs. We need simplifying generalizations to order our world, and living in an ordered world means treating its regularities as real, its particularity as ephemeral, even illusory. But when regularity itself proves ephemeral, we are reminded that our world was always capable of infinitely varied interpretation. At such moments theories abound, interpretive constructs sell for a quarter on every corner, while contingency and change seem like the only constants. Our world inverts and the rainbow seems realer than the laws of optics.2

The experience of this inversion, in which the world suddenly seems much realer than our ideas of it, paradoxically propels us toward idealism. At the moment when the proud mind — its expectations dramatically defeated — might be expected to yield in humility


2. See id. at 197-210.
to events, it is distracted by its own reflection. "How wrong I was," it marvels, "but how powerful. For the past forty years, it is I who have ruled the world — not national interest, not nuclear balance, not military force, not totalitarian bureaucracy — but I who imagined each of these forces."

Just when events clamor for our attention, we become most conscious of the operation of our minds in structuring and interpreting the world of events. The really momentous changes, the real discontinuities, it then seems, are in the realm of thought rather than events. And so our gaze focuses through events, at ourselves.3

Th[e] curtain . . . hanging before the inner world is withdrawn, and we have here the inner being gazing into the inner realm . . . . [W]hat we have here is Self-consciousness. It is manifest that behind the so-called curtain, which is to hide the inner world, there is nothing to be seen unless we ourselves go behind there, as much in order that we may thereby see, as that there may be something behind there which can be seen.4

So today as we gaze in wonder, eastward or westward as geography dictates, at the spectacle exposed by the withdrawal of the iron curtain, we are searching for ourselves. We now see that the curtain was not only the boundary of our world, but the contour of our own minds, a boundary of our own creation, defining the conceivable and delimiting the visible. In a world undivided between communism and capitalism, how will we define ourselves? Where will our new boundaries be?

As if to confirm Hegel's derivation of idealist metaphysics from the experience of contingency, many observers have turned to Hegel for aid in accounting for communism's unforeseen collapse and in imagining the world to follow. This review essay examines two such Hegelian responses to the events of 1989, The End of History and the Last Man by Francis Fukuyama5 and Civil Society and Political Theory by Jean Cohen6 and Andrew Arato.7

Fukuyama reads the collapse of communism as the millenarian triumph of liberalism and the end of meaningful struggle over values in international politics. Following Marx' famous claim to have inverted

3. See id. at 202.

Thus, then, with the process of explaining, we see the ebb and flow of change, which was formerly characteristic of the sphere of appearance, and lay outside the inner world, finding its way into the region of the supersensible itself. Our consciousness, however, has passed from the inner being as an object over to understanding on the other side, and finds the changing process there.

Id.

4. Id. at 212-13.

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the Hegelian dialectic,\(^8\) Fukuyama sets out to show that to discredit Marx' philosophy of history is to vindicate Hegel's. Fukuyama's portrayal of Hegel as the prophet of liberalism is notable for the interest it has excited rather than for the agreement it commands or deserves.

Part II of this essay explains this notoriety by reference to the convergence of two developments: a gradual shift in the public function of the American intellectual from engineer to ideologue, coinciding with the ideological void suddenly created across the American political spectrum by the mutually entailed collapse of communism and obsolescence of cold war liberalism. Both developments have opened America to the influence of European political thought, which maintains a lively engagement with Hegel.

Unfortunately, by caricaturing Hegel as little more than a cold-war liberal, Fukuyama deprives him of much of his ability to fill the ideological void left in the cold war's wake. Part III shows that the liberal values Fukuyama finds implicit in Hegel lose much of their content when removed from the context of the cold war. Fukuyama claims that an innate human drive for recognition, discovered by Hegel, has dictated the triumph of capitalism and liberal democracy over communism. Yet Hegel warned that the demand for recognition could not be met merely by freeing markets or limiting states. Recognition required not only private property, but also social insurance sustaining a network of civil association. Moreover, Hegel warned, such a strategy of insulating civil society from market competition could not be universalized without interfering with the functioning of the market. Hence, Hegelian political theory suggests that recognition demands more than cold war liberalism and occasions intractable conflict. Rather than initiating the ideological innovation we will need to confront these challenges, The End of History denies its necessity.

Civil Society and Political Theory, though destined by its density and bulk to be much less read, is significantly more responsive to the normative restlessness of Fukuyama's readers. In this volume, Arato and Cohen identify the collapse of communism with the revolt of what Hegel called "civil society" against the state. Part IV explains this revival of Hegel's concept by reference to a common frustration experienced by reform movements on both sides of the iron curtain. Both movements reluctantly concluded that seizing the state was both impracticable and undesirable. Yet the emergence in Eastern Europe's command-economy states of a private sector necessarily distinct from the market refuted the cold war's premise that state and market were exhaustive categories. To the West's dispirited reformers, Cohen and Arato bring welcome tidings: the East's "civil society" strategy proves that reform is possible outside the state.

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If Fukuyama pronounces the death of bipolarity in international politics, then Cohen and Arato pronounce its death in domestic politics. In so doing they reassert the relevance of Hegel's emphasis on association as the context for the recognition denied not only by state control, but also by consumer "choice." Part V explicates Cohen and Arato's strategy for reviving civil society, but reasserts Hegel's warning that the simultaneous sustenance of markets and civil society for some may depend upon an international context in which these institutions are not available to all.

Hence, a weakness common to both books is that their appropriation of Hegel is partial and Panglossian. Hegel was not only an idealist who thought the world was made by thought; he was also a realist who knew that social contradiction, for all the artificiality of its origins, could not be wished away. Hegel, like Adam Smith before him and Marx after him, viewed markets as at once liberatory and destructive. He saw a welfare state, mediated by a rich network of civil association, as an ingenious defense against the destructive tendencies of markets, but one that could not be universalized. The nation-state could deflect, but not eliminate, the corrosive force of a global market. In turning to Hegel to explicate the overthrow of utopian Marxism, we risk forgetting how much of Marx — and how little of his utopianism — was anticipated by Hegel.

II. NOT THE END OF IDEOLOGY

In 1989 and 1990 enough popular periodicals to fill a long footnote reported that an obscure official at the State Department had announced the end of history in the pages of a little known neoconservative journal. What made this event newsworthy? Surely not the end

of the cold war which, though newsworthy enough, was, with the fall of the Berlin Wall, plain for all to see. No, the man-bites-dog aspect of the story was the official’s celebration of the collapse of communism in the millenarian language that Marxists might have used to celebrate its triumph. While most Americans read the Eastern European rejection of communism as the ultimate refutation of Marx, Francis Fukuyama saw it as the ultimate vindication of the thinker best known to Americans as Marx’ mentor, Hegel.

Although the oddity lay partly in Fukuyama’s reclaiming Hegel for capitalism, there was a deeper anomaly: For what, at its moment of triumph, did capitalism need Hegel? Thus, the real oddity lay in Fukuyama’s effort to invoke capitalism in support of a tradition of philosophical history more commonly associated with capitalism’s critique.

To appreciate fully this anomaly we have to go back a generation. To the young scholars who peopled American universities in the wake of World War II, the twin enemies of fascism and communism embodied the dangers of ideology. Not the self-conscious aesthetes described by Fitzgerald a generation earlier, nor the restless beats Richard Fariña would later evoke, these were veterans, hardheaded practical men, used to getting with the program, getting the job done, taking orders, and taking charge. They took up posts as disciplined academics rather than intellectuals, convinced that theory merely excused inaction, that ideology exploited inexperience, and that in a democracy dissent implied desertion and endorsed dictatorship. They loved conformity but scorned dogma. The global triumph of liberal democracy, they confidently assumed, would mean the end of ideology.

Symptomatic of ideology to the postwar American scholar was the Europeans’ anthropomorphizing of History as the vehicle of interpersonal social forces engaged in dialectical struggle on behalf of transcendent ideals. Thus the related enterprises of social theory and philosophy of history were ideological enterprises, rationalizing the current sacrifice of individual liberty as necessary to the ultimate reali-


10. F. Scott Fitzgerald, This Side of Paradise (1920).
zation of a wholly chimerical collective freedom.\textsuperscript{14} According to these self-assured officer-professors, ideology was a peculiarly archaic and European kind of softheadedness, a sort of old-world corruption from which hardboiled Americans were blessedly free.\textsuperscript{15} For the consensus historians Louis Hartz,\textsuperscript{16} Daniel Boorstin,\textsuperscript{17} and Arthur Schlesinger,\textsuperscript{18} America had always been a Lockean state of nature — naturally abundant, naturally egalitarian, naturally individualistic, and innately liberal without need of philosophical reflection or political debate. To theorize in the arcane rhetoric of critical philosophy was suspiciously un-American. An honest man had no need for such finery — plain folks are plain spoken.

Against this background, the most natural reading of the Berlin Wall’s fall was that the end of communism represented the long-awaited end of ideology and, by extension, the bankrupt enterprise of philosophical history. A global acceptance of liberalism, capitalism, and democracy was imminent. No longer would politics engage matters of principle; no longer would leaders consign their opponents to the ashheap of history. No longer deluded by ideology, everyone would now proceed with the prosaic business of refining techniques for implementing the new consensus.

The discrediting of ideology is not only a predictable American reading of communism’s collapse, it is very nearly Fukuyama’s reading. Hence the puzzle: Why announce the end of ideology as the triumph of a particular ideology, liberal-democratic-capitalism? Why describe the abandonment of teleological history as the telos toward which all history tended? And why did this repackaging of the conventional wisdom in the gaudy wrapper of idealist philosophy stir such excitement? What, in short, does Fukuyama’s \textit{succès-de-scandale} reveal about the post-cold war predicament of political thought?

I think we can account for Fukuyama’s rhetoric and its reception in light of nine developments. Three involve changes in the American political-intellectual milieu since the original articulation of the end-of-ideology thesis. The remaining six are consequences of the collapse of communism itself.

First and foremost, the events of 1989 came twenty years too late to rescue the end-of-ideology thesis. Postwar universities had staked an enormous claim to public investment as inculcators of consensus

\textsuperscript{14} Three expressions of this point of view are \textsc{Leonard Krieger}, \textit{The German Idea of Freedom} (1957); \textsc{Bernard Yack}, \textit{The Longing For Total Revolution: Philosophic Sources of Social Discontent from Rousseau to Marx and Nietzsche} (1986); and \textsc{Isaiah Berlin}, \textit{Two Concepts of Liberty, in Four Essays on Liberty} \textit{118} (1969). Berlin, though not American, was widely read and admired here.

\textsuperscript{15} \textit{Wills, supra} note 12, at 507-17.

\textsuperscript{16} \textsc{Louis Hartz}, \textit{The Liberal Tradition in America} (1955).

\textsuperscript{17} \textsc{Daniel J. Boorstin}, \textit{The Genius of American Politics} (1953).

\textsuperscript{18} \textsc{Arthur M. Schlesinger, Jr.}, \textit{The Vital Center} (1949).
and servants of an uncontroversial national interest. Science, languages, area studies, even psychology—all came to be seen as defense research. But the very policy relevance of such research brought its objectivity into question once consensus over the goals of public policy broke down. As the Vietnam War eroded that consensus, draft-age students increasingly saw universities not as public servants, but merely as government agents. The ensuing political confrontation incubated challenges to the objectivity of every academic discipline. Suddenly the pragmatism of Kuhn and Wittgenstein could be invoked to undermine the epistemological claims of positivist social science and the social authority of natural science. Consensus history faced challenges on two fronts: intellectual historians advanced a new interpretation of antebellum American political thought as ideological, even paranoid, while social historians attempted to recover the suppressed visions of history’s losers.

If even academic discourse is treated as inherently ideological, a fortiori there can be no such thing as nonideological politics. Hence, in an academic milieu where reference to “truth” has become an index of naiveté, any attempted revival of the end-of-ideology thesis—no matter how well confirmed by events—would have been dead on arrival.

Second, while epistemological relativism drew most of its support from the academic left, even advocates of free enterprise have long since dispensed with the claim to be nonideological. Indeed, we can understand the neoconservative movement as an imitative response to the New Left’s success in “infiltrating” popular culture. The intellectual circles in which Fukuyama travels—his book jacket sports blurbs from Charles Krauthammer, George Will, Irving Kristol, and Alan Bloom—share the academic left’s view of intellectual activity as ideological advocacy. When a neoconservative describes markets as the expression of an ideology, he means to dignify them as intellectually serious and principled.

19. This identification of universities with the machinery of war might seem paradoxical given their function for draft-age students as safe havens from military service. Yet student deferments themselves reflected the view that the university was performing a vital defense function. Moreover, as universities sought to control disruptive protest by expelling students—thereby depriving them of student deferments—they became extensions of the Selective Service System.


Third, if the "end-of-ideology thesis" is less academically respectable than it once was, philosophical history has become more respectable, so long as philosophy is now understood as ethics rather than metaphysics. The stone first rippling the stagnant pond of postwar American philosophy was Rawls' rejuvenation of Kantian Ethics.²⁴ In one stroke, Rawls refuted the commonplace that liberalism had obsoleted normative philosophy and restored the relevance of the Kantian critical tradition to English-speaking philosophy. Waves rippled from this point of impact in three directions. First, in normative political theory, neo-Kantian liberalism begat its neo-Hegelian communitarian critique.²⁵ Second, even as neo-Kantian ethics were being criticized, they were also being applied in the sphere of international relations.²⁶ Third, in descriptive political science, Kant's prediction that the proliferation of liberal democracy would yield "perpetual peace"²⁷ got a second look.²⁸ Perhaps it was only a matter of time before this neo-Kantian philosophy of history would provoke a neo-Hegelian response. In this sense, Fukuyama's pop-Hegelian self-help


manual for statesmen is the frothy crest of a more substantial swell that has been building for twenty years.

In sum, postwar America has experienced a broad and gradual transformation in the cultural function of the intellectual, from technical problem-solver to normative theory-builder. Yet the American intellectual's difficulty is that she finds herself, in Pierre Schlag's charming phrase, "normative and nowhere to go," advocating causes without rebels.

The Eastern European revolution has suddenly alleviated this deficit of disorder. The lifting of the iron curtain seems like an invitation for philosophers to don costumes and step onto the stage of world history.

First, the sudden and simultaneous collapse of the Soviet Union and its satellites calls for global explanation by reference to large-scale social forces. We expect an aggregation of individual decisions to lead to incremental change. Steady erosion might precipitate sudden change in a single country and, perhaps, influence the long-run survival prospects of regimes in other countries. But the simultaneous collapse of nine regimes, the emergence by secession of twenty new states, the reunification of the state that started two world wars, the unification of Europe, the defusing of the nuclear confrontation that has terrorized the world for four decades, the democratization of dozens of states in Latin America and Asia — these are unquestionably world-historical events demanding systematic explanation.

Second, the exorcism of the communist bogeyman has cleared European critical philosophy from suspicion of being an enemy agent, and Fukuyama's neoconservative pop-Hegel signifies continental philosophy's new innocuousness. No longer will every invocation of Hegel and Kant be read as the coded plans for Soviet invasion. Now it is possible to read European critical philosophy for its own sake and judge it on its own terms.

Third, for those seeking to understand Germany and the "Central European" world emerging in its lengthening shadow, engagement with the continental tradition is not just possible, but necessary. Eastern European intellectuals conceived their struggle to liberate civil society from the state in such Hegelian terms not only because that


30. Fukuyama appropriately quotes Hegel's comments on the French Revolution:

We stand at the gates of an important epoch, a time of ferment, when spirit moves forward in a leap, transcends its previous shape and takes on a new one. All the mass of previous representations, concepts, and bonds linking our world together are dissolving and collapsing like a dream picture. A new phase of the spirit is preparing itself. Philosophy especially has to welcome its appearance and acknowledge it. . . .

P. 39 (quoting G.W.F. Hegel, Lecture (Sept. 18, 1806)).

language suited their surroundings, but also because it was part of their surroundings. It represented a way of reestablishing membership in, and enlisting the support of, a European intellectual community. The fragmentation of the Eastern bloc was as integrative as it was disintegrative, reflecting an impulse to join Europe economically, politically, and culturally. Fukuyama’s millenarian message resonates with the American mythology of manifest destiny; but his continental idiom hints the end of the American century.

Fourth, the lifting of the iron curtain has enabled unprecedented intellectual exchange between East and West, which will ultimately prove to be a two-way street. It is tempting to view the squadrons of American academics scrambling eastward to observe, advise, explain, and endorse the new postcommunist regimes as conquering armies, colonial governors sent to civilize the natives. But they come from a country in the grip of governmental gridlock and political cynicism, a country that has lost faith in the welfare state yet has imagined no alternative to replace it. American academics are invited to Eastern Europe to teach and prescribe, but they go in order to learn and listen. The consequence of this migration is less likely to be the defeat of European theory by American pragmatism than the Europeanization of American social thought. Cohen and Arato’s Left-Hegelian account of the Eastern European revolution represents this latter trend.

Fifth, channels of influence have opened for American intellectuals in Eastern Europe largely because of the power of their East European counterparts. The revolt of civil society against the state celebrated by Cohen and Arato has delegitimized, if it has not always disempowered, bureaucratic elites. Unlike familiar revolutionary movements that mobilized armies and supplanted state authority as a result of military struggle, the anticommunist revolution engendered no counterbureaucracy. It was, to an unprecedented extent, a discursive revolution, fortified by espresso rather than Molotov cocktails, fought not with blows, but mit Schlag. Hence, almost in spite of themselves, East European intellectuals find themselves sucked into the power vacuum they helped create, ironically envied by their pampered, prosperous colleagues to the West.

A final reason for the post-cold war return of philosophy is its utility here, as well as there. Contrary to the faith of the officer-professors, the circumstances in which politics can be reduced to technical problem-solving are the exception rather than the rule. World War II was such a circumstance, in which a solidarity unprecedented in American history banished politics and joined Americans from Iowa City to Iwo Jima to defeat fascism. After the war, Americans struggled to sustain that nourishing solidarity by transferring their enmity

to the red menace. The newly coined epithet “totalitarianism” eased this transition by associating together ideologies of the left and the right. It was in this prolonged war against totalitarianism that liberalism, democracy, and capitalism took on uncontroversial and unanalyzed meaning as rallying cries. When a society’s ends are supplied by a foreign threat, ideology is unnecessary and military mobilization supplants political mobilization. With the lifting of America’s long state of siege, however, social choice is no longer, to paraphrase Michael Dukakis, about means alone, but about ends. Now that we have made the world safe for liberalism, democracy, and capitalism, we must decide what these fine phrases mean. In the inevitably political work of deciding which rights will go with what forms of public participation and representation and with what kind of market, we will need a new birth — if not of ideology, at least of ideas.

Here the neoconservative Fukuyama, content to savor victory in the last war, cannot help us. And here, insist neoradicals Cohen and Arato, the cold war’s real victors, the peoples of Eastern Europe, have something to teach us.

III. NOT THE END OF POLITICS

This section explicates and critiques Fukuyama’s claim that history is over. It shows that Fukuyama’s faith in the necessity and perpetuity of the present stems from a commitment to a static human nature quite at odds with Hegel’s historicism. Fukuyama’s naturalism expresses itself in an argument that all political conflict is behind us, enabled by three rhetorical sleights of hand: (1) reading Hegel’s dia-


34. Bruce Ackerman makes a similar point in inverted form:

Given the Marxists’ aim, it made sense for them to use capitalism as an umbrella term. After all, they were trying to convince us that all non-Communist systems were fundamentally bad. But it is wrong for liberal revolutionaries to carry over the capitalist label into their own thinking. Rather than rejecting capitalism for communism, we must recognize that there are many capitalisms, some much better than others.

lectic as a movement toward agreement rather than understanding, (2) finding agreement on values of such indeterminate scope as to encompass the entire political spectrum, and (3) confining politics to the debate over the organization of government rather than that of society or culture.

A. The End of History?

Fukuyama shares the conventional wisdom that capitalism is the most efficient system for allocating resources and liberal democracy is the political regime that best recognizes the dignity of all citizens. What sets Fukuyama apart from the mainstream are his views that these regimes are preferred because they reflect truths of human nature; that their truth makes their acceptance as inevitable as the acceptance of scientific claims; that the mechanism by which human nature compels the acceptance of capitalism, liberalism, and democracy is the struggle for recognition first conceived by Hegel; that the widespread acceptance of liberalism, capitalism, and democracy will eliminate most international conflict; and that such peace is what Hegel meant by the end of history.

Fukuyama's starting point is Hegel's famous dialectic of master and slave in the *Phenomenology of Mind* (pp. 146-52). Two men encounter each other in a state of nature and engage in a struggle to the death, not over any natural good like food, but for the already cultural value of prestige, or recognition. Realizing that the death of either antagonist precludes the recognition of both, one submits to the other. Yet the victor, Hegel argued, still cannot be satisfied with recognition wrung from a helpless captive — meaningful recognition can only come from one recognized in return. The slave, on the other hand, begins the arduous process of winning recognition for himself and the master by mastering himself in the self-discipline of labor.\(^{35}\)

History, according to Fukuyama's Hegel, is the narrative of movement from the disequilibrium of unequal recognition to the stability of equal recognition (pp. 192-98). Yet the motor of history is *thymos*, the individual desire to maximize recognition Hegel depicted in his original allegory of the fight to the death. As there is strength in numbers, the pursuit of this individual desire leads to the dominance of military elites in society. Rivalry among elites engenders the competitive mobilization of all available resources for war. This competition leads to scientific innovation, a cumulative process because the genie of knowledge cannot be stuffed back into the bottle (pp. 73-75, 82-88). The competitive mobilization of resources for war also leads to innovation in what we might call, following Foucault, "technologies of power."

\(^{35}\) *Hegel, supra* note 1, at 229-40.
Ironically, then, we owe society’s movement toward the unheroic values of economic and bureaucratic rationality to a struggle for honor.

More specifically, argues Fukuyama, military competition for recognition propels society toward capitalism and democracy. Why is capitalism historically necessary? For Marx, who coined the term, *capitalism* meant free alienability of labor, commodity production for private accumulation of wealth, and sufficient accumulation of wealth to enable industrialization. Yet Marx’s assumption that industrialization required free alienability of labor and private accumulation of capital was ironically refuted by the success of communist states in developing industry. Hence, “capitalism” proved to be a mythic being long before its triumph.

Fukuyama’s *capitalism* seems to mean nothing more than allocation of resources by competitive pricing (pp. 44, 90-94). Even though markets long preceded industrialization, in Fukuyama’s eyes they have become necessary only with the advent of the postindustrial information economy. The production of complex, computerized technology involving thousands of component parts requires cost calculations beyond the capacity of central planners. Thus, only in the age of Star Wars have markets demonstrated their military superiority (pp. 75-76, 92-96).

To account fully for the inevitability of markets, however, Fukuyama argues that we have to factor in the inevitable development of democracy. Industrialization, enabling the mass production of weaponry, advantages the military elite willing to widen the circle of recognition and arm the masses. Recruiting the remaining populace into the industrial-commercial economy needed to sustain modern warfare requires the inculcation of basic literacy, a common language, work discipline, future-orientation, and all the other traits we associate with modernity. With the resulting advent of a citizen army, universal education, widespread literacy, national circulation of commodities and currency, a popular press, and an informed, articulate public opinion, we find ourselves in the nation-state (pp. 267-69).

Conscripting, coordinating, and motivating the efforts of entire populations, nation-states cannot long avoid empowering and consulting them (pp. 115-17, 205). Because the nation-state relies only on the mobilized portion of its populace, it tends to condition political recognition on participation in the national culture that enables mobiliza-

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37. We might add that industrialization preceded the full freeing of laborers in England by 100 years. See Robert J. Steinfeld, *The Invention of Free Labor* 115, 243 n.36 (1991) (noting that criminal enforcement of labor contracts persisted in Britain until the 1870s). Britain’s first heavy industry, the Scottish coal mines, used laborers who were bound for life, bought and sold. David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823,* at 490 (1975) (discussion of case involving Scottish colliers).
tion. Although more inclusive than the federal state, the nation-state is not all-inclusive. By identifying with a victorious nation, every citizen can be recognized as a master. Yet, because the majoritarian mastery to which nationalists aspire is exclusive of cultural minorities, it is still, Fukuyama asserts, instable (p. 266). Only liberal democracy, by replacing the desire for superior recognition with the desire for equal recognition, enables mutual recognition among fully democratic states, thereby bringing the thymotic dialectic to an end (pp. 200-01).

What is the link between democracy and markets? With the democratization of government, argues Fukuyama, government planning becomes less efficient. Fukuyama acknowledges that authoritarian states in East Asia have implemented highly successful industrial policies (pp. 123-24). But drawing on public choice theory, Fukuyama argues that majoritarian public investment and pricing decisions are likely to be redistributive rather than wealth-maximizing (pp. 124-25). Thus, not only does military competition democratize states, it also moves democracies from centrally planned to market economies. Fukuyama points to recent worldwide trends toward democratization and privatization to confirm his intuitions.

When "liberal democracy" becomes sufficiently widespread, however, military competition ceases. By eliminating the desire for recognition as superior, Fukuyama insists, liberal democracy eliminates the thymotic motivation for war and so switches off the motor of history (pp. xx, 260).

Here Fukuyama offers a variation on the standard argument that popular majorities will not agree to bear the brunt of wars for the aggrandizement of military elites. Recognizing that nationalism identifies popular majorities as the military elites who stand to benefit from the exploitation of other nations, Fukuyama insists only that sufficiently liberal popular majorities will not go to war. As evidence of the pacifying effects of liberal sentiments, Fukuyama cites "a steadily decreasing tolerance for violence, death," and "casualties in the war," as well as the reduced brutality of punishment, particularly in enforcing military discipline (p. 261). He cites the claims of Michael Doyle and other neo-Kantian theorists of international relations that, as an empirical matter, no liberal democracies have ever fought each other.38

Finally, Fukuyama reasons that, with the dissipation of thymotic motives for war, material incentives will become more important. These incentives, however, are likely to discourage warfare in the future. With the development of a technology-intensive economy, Fukuyama argues, the costs of war outweigh its benefits. Military technology is prohibitively expensive, while the land and population

38. See supra sources cited in note 28.
acquired by military conquest add little to the conquering nation's wealth. Even raw materials are probably acquired more cheaply by purchase than conquest (pp. 261-62). War, Fukuyama concludes, has become economically obsolete and is fast becoming thymotically superfluous as well.

In the coming posthistorical era, Fukuyama predicts, almost all states will be pacific liberal democracies, protecting private property, permitting allocation of resources by markets, albeit with varying degrees of regulation, public investment, and welfare. Roughly similar politically and economically, the democracies will remain culturally diverse (p. 233). Borrowing a page from such neoconservatives as Glazer, Moynihan,39 and Sowell,40 Fukuyama expects these cultural differences will determine the relative wealth of nations — those devoted to the Protestant ethic or its Confucian analogue will prosper, Fukuyama seems sure (pp. xix, 234, 237-38). But cultural competition, Fukuyama concludes, is not political conflict and so has no history.41

Let's evaluate Fukuyama's argument: Are universal capitalism, liberal democracy, and world peace inevitable? Not on the basis of Fukuyama's reasoning and not on Hegel's authority. Fukuyama's arguments for the inevitability of universal capitalism and universal peace contradict each other. He shows the obsolescence of political debate over capitalism, liberalism, and democracy only by defining each so vaguely that they are consistent with any plausible policy prescription. Hegel, by contrast, saw democracy and markets as potentially contradictory and judged this tension an intractable source of nationalist feeling and international conflict.

B. Not the End of Ideological Conflict

Consider first Fukuyama's argument for the inevitability of markets, capitalism to you. By his account, the economic superiority of markets becomes manifest surprisingly late in the day — in states already democratic or in authoritarian states confronting military rivals with postindustrial economies. The first difficulty with his idealist analysis is its inability to explain the premature appearance of markets. A second difficulty is the inherent perversity of what amounts to a claim that the economic superiority of markets was revealed by their ability to produce Star Wars. Perverse first, because there is still no evidence Star Wars would have worked; second, because it is not clear we can afford it; and third, because we would be hard put to find a

40. THOMAS SOWELL, RACE AND ECONOMICS (1975).
41. P. 61 (history is competition "between socio-economic systems").
more socialized, subsidized, centrally planned, and inefficient sector of the American economy than military technology.

Even assuming that communism collapsed because of the inability of planned economies to close the microcircuitry gap, this hardly proves the historical inevitability of whatever Fukuyama means by capitalism. Because economic performance matters only as a means to military victory in Fukuyama's idealist analysis, the case for the necessity of capitalism depends upon the accident of postindustrial technology arriving before perpetual peace. If democratization had eliminated international military competition before the advent of the information age, democracies would have had no thymotic compulsion to develop postindustrial technology or to maximize the efficiency of their economies.

Is there perhaps some reason why the spread of democracy must await the spread of capitalism? Democracy was obviously possible before the information age, but perhaps the postindustrial technology developed by capitalist economies nevertheless facilitates democracy. Much might be made of the role of fax machines in thwarting the Communists' attempted coup in the Soviet Union. Yet high technology has an antidemocratic aspect as well, beyond its obvious utility in surveillance. Just as industrialization fostered democracy by making the masses militarily and economically valuable, postindustrialization may render democracy redundant by confining production — and destruction — to a technocratic elite.

If expensive technology does not necessarily democratize society, perhaps the accumulation of wealth in private hands encourages democracy by creating plural centers of power. Jeane Kirkpatrick's notorious claim that authoritarian right-wing dictatorships were more vulnerable to democratization than totalitarian socialist dictatorships may be so understood. Yet Fukuyama rightly concedes that the broad distribution of wealth is more important than its invulnerability to state control in sowing the seeds of democracy. Socialist regimes in Nicaragua and Peru prepared the ground for democracy by redistributing land, and the first Soviet bloc states to move toward reform, Poland and Hungary, had among the most egalitarian distributions of wealth in the world. At the same time, military regimes serving at the pleasure of private concentrations of wealth hardly constitute pluralism.

43. Jeane Kirkpatrick, Dictatorships and Double Standards, COMMENTARY, Nov. 1979, at 34, 37.
44. For Peru, see p. 120.
45. The ratio of the percentage of GNP earned by the top 20% and that earned by the bottom 20% was 3.0 in Hungary and 3.6 in Poland, the lowest reported. U.N. Development Programme, Human Development Report 1991, tbl. 17, at 152-53, tbl. 38, at 186.
One might, taking inspiration from Hegel, argue that state control of society precludes the private association needed to form democratic will. But then one would have to ask, as Cohen and Arato do, whether placing society at the mercy of unrestricted market forces does not equally preclude sociability (p. 24). That perpetual peace must await global democratization in no way implies that perpetual peace must await global capitalism.

Even if perpetual peace required the prior spread of capitalism, that would not imply capitalism’s permanence. Once perpetual peace has been achieved, Fukuyama’s *thymotic* analysis gives democracies no compelling reason to retain markets. It is not enough to argue that the genie of high technology cannot be restored to the bottle, since the motivation to deploy the genie has, *ex hypothesi*, disappeared. Fukuyama’s claims for the military necessity of capitalism and the pacific destiny of democracy must ultimately collide, “necessitating” only an indeterminate future.

At this point, Fukuyama has a tempting reply available, but one that reveals the essentially circular quality of his argument. The tempting reply is that perpetual peace follows the global spread not just of democracy, but of liberal democracy. And liberal democracy by definition requires capitalism.

Now the latter statement is true if we accept Fukuyama’s vacuous definitions of these terms. Fukuyama, as we have seen, uses capitalism to mean nothing more than the tolerance of some market pricing and some private property. Liberalism he defines as limited to the protection of property, worship, and speech (pp. 42-44). If capitalism means nothing more than the protection of some property, and liberalism protects property, than ipso facto liberal democracy must be capitalist.

But neither of these definitions suffices for Fukuyama’s purposes. He is out to convince us that real debate over political values is over because the combination of capitalism, liberalism, and democracy uniquely satisfies the human craving for equal recognition. Capitalism, appearing as an economic weapon in Fukuyama’s narrative of the combat for recognition, must be allocatively efficient. Liberalism, appearing as a corrective to the intolerant, chauvinist tendencies of democracy, must be antidiscriminatory. And democracy, representing recognition, must be meaningfully participatory. And these different purposes place Fukuyama’s three principles at odds, guaranteeing a future of controversy and contingency.

Thus Fukuyama’s bland syllogism finding *capitalism* included by definition in *liberalism* is vitiated by the ambiguity of property. When we associate capitalism with the protection of property, we think primarily of the right to alienate or “market” property that enables its

efficient allocation. But when we associate liberalism with the protection of property, we may be more concerned with securing the right to acquire and enjoy property. Indeed, Hegel saw property as a medium for the expression of personality and therefore crucial to realizing the individual dignity we often associate with liberalism.47 Needless to say, our ability to invest property with personality may be undermined rather than enhanced by its alienability.48

In any case, liberalism's prominent role in Fukuyama's thymotic narrative rests on its commitment to equality rather than property. And by limiting "private discrimination" and redistributing wealth, the vindication of equality may well collide with the protection of property. Fukuyama attempts to cabin this conflict by declaring liberalism committed to the elimination of only "conventional" inequality — unequal treatment — rather than "natural" inequality, or inequality of condition (pp. 290-91). Yet fully eliminating conventional sources of inequality would require eliminating inherited wealth, forbidding discretionary gifts of human capital ranging from education to affection, and defining and rewarding achievement without regard to discretionary — and hence "conventional" — consumer preferences. So even Fukuyama's equal treatment principle, unreservedly applied, threatens to eliminate private disposition and market allocation of resources. Moreover, Fukuyama admits that liberalism is also compatible with an unspecified measure of pure redistribution aimed at correcting "natural" inequality (pp. 44, 291-93).

Next, consider the potential tension between democracy and markets. Fukuyama defines democracy as the right to vote and participate in politics (p. 43). We typically view at least some political participation rights — voting rights paradigmatically — as subject to restraints on alienation and accumulation.49 To the extent we view any entitlement as crucial to political participation — education, service in the military, ownership of productive property in the republican tradition — we may wish to place them outside the market.50 Similarly, to the extent we view any allocative decision as political, we may wish to take it outside the market. To that end, some have argued that the workplace is within the domain of politics and should be managed democratically.

Finally, recall that, in Fukuyama's narrative, liberal democracy is just a means to maximize recognition. Yet Hegel emphasized the ten-

dency of markets to frustrate recognition by eroding the communities within which recognition must necessarily occur. He suggested the need for associations — intermediate between the individual and the state — to confer social identity on individuals, aggregate them into politically effective and articulate interest groups, and provide social insurance. Social insurance itself is an accumulation restraint, while membership in an association may involve noncommodifiable entitlements. Thus, recognition is a fourth value endorsed by Fukuyama that may justify limiting the alienation and accumulation of property.

The emergent ideological “consensus” apparently requires commitment to the potentially incompatible values of allocative efficiency, personal dignity, equality, democracy, and community. Whether Fukuyama’s talismanic label of liberal democracy is capacious enough to encompass all these values is ultimately beside the point. The important point is that different resolutions of the tensions among these values would yield vastly different societies, so that important questions of policy and principle remain ours to debate and to decide.

C. Not the End of International Conflict

If ideological conflict is not yet obsolete, neither is international conflict. The malleability of Fukuyama’s concept of liberal democracy fatally weakens his empirical claim that liberal democracies cooperate, while his prediction of a universal liberal alliance rests on a fundamental misunderstanding of Hegel’s philosophical history. If international conflict is driven by the yearning for recognition, Hegel gives us no warrant for expecting the universal satisfaction of that yearning. Even if liberal democracies do tend to ally, Hegel denied that any such alliance could become universal.

Fukuyama’s empirical case for perpetual peace relies on the progressive development of humanitarian values and the rarity of war between liberal democracies. The first datum need not detain us. Insofar as it is a recent development, humanitarian law is clearly a response to the vastly more destructive consequences of warfare in the modern era. War now involves more soldiers, more civilians in support, and more productive enterprises designated for destruction as military targets by more potent weaponry than ever.

The heart of Fukuyama’s empirical case for optimism is the com-


52. Hegel, supra note 47, at §§ 302, 303, 308, § 290 add. (political voice); §§ 245, 253 (social insurance).

monly voiced claim that liberal democracies, though belligerent toward their ideological opponents, have never fought one another. This claim faces three related difficulties. First, to determine whether liberal democrats cooperate we must distinguish liberal democracy from other ideologies, which Fukuyama seems unable to do. Is liberalism about consumer choice, equal opportunity, or freedom of expression? Some commentators classify Wilhelmine Germany as a liberal democracy, while Fukuyama implies that even contemporary Germany might not qualify as liberal because it punishes hate speech. How do we classify semisocialist Sweden? Pseudorevolutionary Rumania? Beleaguered but bloodthirsty Croatia? The once and future communist regime in Lithuania? Fujimori's intermittent dictatorship in Peru? What about the popularly elected socialisms of Allende, Arbenz, and Ortega, all subverted by the United States? If we laud these as liberal democracies, can we save the perpetual peace claim by classifying the extralegal American responses as departures from democracy?

Second, as the example of Sandinista Nicaragua reminds us, the claim that liberal democracies do not go to war has a circular quality. Inasmuch as warring states inevitably violate humanitarian law by slaughtering civilians, usually suspend civil liberties while delegating political authority to the military, and often face internal subversion, war makes states less liberal and less democratic. In addition, war is a forensic activity, frequently placing the previous liberality or democracy of contending governments in controversy. No state perfectly embodies its own utopian rhetoric, and no situation exposes imperfections so well as war.

Third, if we adopt a sufficiently restrictive definition of liberal democracy to exclude any states that have fought each other, we end up with too small a data set to exclude rival hypotheses. Robert Mearsheimer points out that the last half century of peace among major industrial powers can be as well explained by nuclear deterrence as by the prevalence of liberal democracy, while before World War II liberal democracies were too few and too new to generalize about.

54. John J. Mearsheimer, Why We Will Soon Miss the Cold War, ATLANTIC MONTHLY, Aug. 1990, at 35, 47.
57. See Diana Meyers, Kant's Liberal Alliance, in POLITICAL REALISM AND INTERNATIONAL MORALITY 212, 216 (Kenneth Kipnis & Diana Meyers eds., 1987); Mearsheimer, supra note 54, at 47.
Even if Fukuyama's empirical claim about the tendency of liberal democracies to cooperate were acceptable, it would not by itself imply the obsolescence of international conflict. This conclusion depends on the predictions that liberal democracy will become universal and that liberal democracies will continue to cooperate when they no longer have common enemies. Fukuyama bases these bets on his teleological reading of Hegel's dialectic of recognition. Fukuyama understands Hegel to depict history as a movement from asymmetric, unequal, exclusive recognition to reciprocal, equal, universal recognition. Equating liberal democracy with recognition, Fukuyama reasons that it must become universal in scope. With universal liberal democracy, the drama of history will conclude and the thymotic motive for war will vanish.

The difficulty is that Hegel was aware of Kant's proposal that a universal liberal alliance could banish war, and he emphatically rejected it:

Perpetual peace is often advocated as an ideal towards which humanity should strive. With that end in view, Kant proposed a league of monarchs to adjust differences between states, and the Holy Alliance was meant to be a league of much the same kind. But the state is an individual, and individuality essentially implies negation. Hence even if a number of states make themselves into a family, this group as an individual must engender an opposite and create an enemy.\textsuperscript{59}

Far from predicting perpetual peace, Hegel thought it inherently impossible.

Where does Fukuyama go wrong?

Fukuyama's problems begin with a common misunderstanding of the Hegelian dialectic as a secular eschatology, the itinerary for a journey to a promised land. In light of the instrumental rationality that pervades experience in a technologically advanced society, we expect any philosophy of history to narrate the implementation of a plan. This view of history also resonates with the Augustinian dualism transmitted by Christianity. Against the background of Christian eschatology, if we learn that Hegel is an idealist, we understand him to explain temporal events by reference to ideas that are eternal and transcendental, something like a design in the mind of God.\textsuperscript{60} The secular-

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\textsuperscript{59} Hegel, supra note 47, at § 324 add.

\textsuperscript{60} Pp. 56, 58 (declaring that the concept of History, as used by Hegel, implies progress, which in turn implies a purpose or end that provides a fixed standard of value). Hegel easily lends himself to such a reading. Seemingly endorsing the idea that history is the unfolding of a preordained plan, we find Hegel telling his students that "Reason, in its most concrete representation, is God. God governs the world. The actual working of His government, the carrying out of His plan is the history of the world." G.W.F. Hegel, Reason in History 47 (Robert S. Hartman trans., Liberal Arts Press 1953) (1837). In reading such a passage, however, we must be careful not to ascribe to Hegel an Augustinian notion of God or a Platonic notion of reason. Rather than likening history to these static and transcendental categories, Hegel means to import dynamism and immanence into our conceptions of God and Reason by likening them to history. He introduces the analogy of reason to God as frankly heuristic, strategic, and ironic, drawing
ized version of God’s plan is natural law, while our instrumentalism suggests an image of human nature as a universal desire or need. Thus, both religious tradition and modern science accustom us to representing history as the progressive satisfaction of a naturally occurring desire. Fukuyama interprets Hegel accordingly, as a prophet of utopia, an anti-Marx who credits capitalism with the fulfillment of human nature and the transcendence of all discontent.

Unlike Marx’ material dialectic, however, Hegel’s does not lead us to the promised land of utopia. His is an integrative movement of mind toward the comprehension, rather than the extinction, of conflict. For Hegel conflict is not an impediment to the realization of human nature: it is the enabling condition for the creative striving that makes us human. Humanity’s struggle for recognition reaches no conclusion; there is no pastoral retirement awaiting us at the end of history.

Nor is Hegel’s dialectic a prophecy. It is an interpretive theory, aimed at finding the meaning of an ever-lengthening past in light of an ever-changing present. Hegel’s idealism is no Augustinian dualism in which ideas direct the players from offstage. Not directors of the course of history, ideas are the course of history, intelligible after the

the historical connection of the thought that Reason rules the world with another form of it, well known to us — that of religious truth: that the world is not abandoned to chance and external accident but controlled by Providence. . . . I do not make any demand on your belief in the principle announced; but I think I may appeal to this belief in its religious form

. . . . On the other hand, a difference, indeed an opposition, now appears between this faith and our principle . . . . [T]his faith . . . . is not followed up in definite application to the whole, the comprehensive course of world history. . . . This definiteness of Providence is usually called its plan. Yet this very plan is supposed to be hidden from our view; indeed, the wish to recognize it is deemed presumption.

Id. at 14-15. On one level, Hegel is borrowing the authority of religion to win a suspension of disbelief for the claims of speculative philosophy. On a second level, he is using irony to shame his lazy, skeptical undergraduates into working at the philosophy of history, by pointing out their credulity when it comes to religious mysteries which, because taken on faith, entail no further thought. On a third level, however, he is subverting the conventional view that history’s plan is known even to God in advance of its unfolding. Hegel defines God as “wisdom endowed with infinite power which realizes its own aim,” id. at 15, and reason similarly as “the power capable of actualizing itself.” Id. at 47. Yet because ideas only fully exist when they become actual — hence Hegel’s famous identification of the actual and the rational — reason is not a blueprint for history, but history itself. By extension God, or Spirit, is also the rational order immanent in history. What are “the means . . . Spirit uses for actualizing its concept”? “[I]t is the activity of the subjects in whom Reason is present as their substantial essence in itself, but still obscure and concealed from them.” Id. at 48. In short, Spirit is the order created by the aggregate meaning-making of human beings intelligible after the fact.

61. See Charles Taylor, Hegel 419 (1975) (observing that Hegel rejected the utopian ideal of “total participation” that Rousseau and Marx embraced).

62. Id. at 460.

fact.\textsuperscript{64} For Hegel history is created by the collective meaningmaking of human beings that constitutes Spirit, but not according to any pre-existing design.\textsuperscript{65}

Fukuyama's misidentification of Hegel with Marx' utopianism distorts the crucial allegory of master and slave. Fukuyama misinterprets Hegel's demonstration of the failure of nonreciprocal recognition as a demonstration of the failure of exclusive recognition. In the two-person world of Hegel's fable, nonreciprocity is identical to nonuniversality. But, in the real world, these are not the same and, as commentators have noted,\textsuperscript{66} there is nothing inherently futile about reciprocal recognition within an exclusive elite. Hegel's conception of recognition in fact requires exclusion. We can never be directly apprehended in all our uniqueness: recognition is always mediated by a social identity that joins us with some and differentiates us from others.\textsuperscript{67}

If one lesson of Hegel's allegory of master and slave is the emptiness of nonreciprocal recognition, another is the emptiness of recognition that is coerced rather than earned. Recognition is valued only when conferred for some socially valued accomplishment. Here again, Fukuyama jumps to utopian conclusions, reasoning that, since coerced recognition is dissatisfying, war serves no thymotic function. Although war cannot satisfy the desire for recognition, Hegel saw it as an inevitable outgrowth of the struggle for recognition in a world in which opportunities for socially valued accomplishment are tragically scarce. The resulting competition for these scarce opportunities drives modern states into war.\textsuperscript{68}

Socially valuable labor, Hegel reasoned, requires access to resources. In this way, the institutions of property and contract can facilitate self-expression.\textsuperscript{69} Yet, the aggregate effect of individuals' efforts to seek social recognition for their uses of property is a market for its exchange in which they paradoxically feel anonymous and helpless. Following Adam Smith, Hegel observed that commerce tended to divide labor and concentrate capital, leading ultimately to technological innovation and automation. The resulting decrease in demand for labor, Hegel anticipated, would mean not only declining wages and working conditions, but also reduced opportunities for recognition.\textsuperscript{70}

Technological innovation threatens recognition by displacing

\textsuperscript{64} Hegel, supra note 47, at 12-13.
\textsuperscript{65} Taylor, supra note 61, at 419-20.
\textsuperscript{66} See, e.g., Orlando Patterson, Slavery and Social Death 97-101 (1982).
\textsuperscript{67} Taylor, supra note 61, at 447-48.
\textsuperscript{68} See Guyora Binder, Treaty Conflict and Political Contradiction: The Dialectic of Duplicity 81-84 (1988).
\textsuperscript{69} Hegel, supra note 47, at §§ 41-53 (property as medium of self-expression); §§ 72-81 (contract).
\textsuperscript{70} Hegel, supra note 51, at 232-39.
workers in two senses. First, by rendering workers redundant, technological innovation eliminates opportunities for earning recognition. Second, by inviting the rapid reallocation of capital and labor, technological innovation destroys the communities of work and residence that confer recognition on individuals. Deprived of social identities, individuals have no way to formulate their interests and pursue them collectively, so that the market undermines democracy. Finally, by undermining the democratic legitimacy of the state, the market can threaten the security of property and so self-destruct.

Because Hegel saw that the market included thymotic costs that Fukuyama leaves out of his account of capitalism, he saw the need for corrective institutions that Fukuyama leaves out of his definition of liberal democracy. To counteract the thymotic as well as the economic burdens of unemployment, Hegel proposed a program of public works. To replace the traditional communities of recognition disrupted by market forces, Hegel proposed a network of intermediate associations — guilds, professions, and the like — to educate, to foster and to sustain identity, to spread risk, and to formulate political will. In an effort to counteract the anonymity and ruthless competition of liberal society, Hegel anticipated the macroeconomic strategies of the modern welfare state and resuscitated some of the corporatism of the ancien régime.

These corrective institutions are not costless, however. Hegel worried that public employment will cause overproduction, driving down the prices of privately produced goods and further undermining the economic and thymotic status of other workers. Crises of underemployment and overproduction lead to colonial adventures aimed at developing foreign markets for excess workers and goods. Meanwhile, intermediate associations, in order to play their stabilizing social role, must also be protected against market dislocations. This requires protection against not only domestic but also foreign competition. Each of Hegel’s strategies for sustaining recognition thus forces the state into conflict with other nations.

The resulting conflict need not be universal because alliances can be mutually beneficial; but such alliances can never be universal. Hegel correctly grasped the structure of international relations that would prevail for the century following Waterloo — mutual recognition and peace among a small club of colonial powers underwritten by

71. Hegel, supra note 47, at §§ 197-98.
72. Id. at § 245.
73. Avineri, supra note 46, at 161-75; Hegel, supra note 47, §§ 252, 253, 303, 308, 290 add.; Taylor, supra note 61, at 437, 443.
74. Hegel, supra note 47, at § 245.
75. Id. §§ 246, 248 add.
the nonrecognition and exploitation of the rest of the world. Karl Polanyi argued persuasively that, as more Europeans joined political life between 1848 and 1914, they erected barricades of "social insurance" and "protection" that eventually brought the market to a halt, precipitating a world war and a quarter century of economic crisis. Perhaps with the end of the cold war, we are once again entering a period of great power amity, Kant's liberal alliance rather than Metternich's Holy Alliance. But as long as the contradiction between market alienation and recognition remains unresolved, we dare not assume that such amity will be universal.

Fukuyama is able to prophesy universal amity only because he blinds himself to this contradiction between commerce and recognition. The only cost of markets he is willing to acknowledge is the material inequality they engender, not the feelings of anonymity and ineffectuality, nor their effects on political participation. The only issue he regards as political is the extent of governmental redistribution of wealth. Hence, Fukuyama silently relegates all questions regarding the organization of work, association, the family, childcare, education, communications, and urban space to the "sub-political . . . domain of culture and of society" (p. 213). Movements to reform any of these institutions, no matter how sweeping, therefore cannot count as radical challenges to liberalism (p. 293).

Yet for Hegel, Fukuyama's ostensible mentor, this supposedly "sub-political" realm of culture and society is where identity is conferred and recognized. It is in the realm of culture and society that individual and national interests are formulated, and governments legitimized or discredited. No institutions play a more fundamental role in making us what we are than the institutions of civil society, no reform could be more radical than their reform, and no dispute could be more political than the debate over their future.

IV. THE POLITICS OF CIVIL SOCIETY

This is the premise of Jean Cohen and Andrew Arato's monumental study, Civil Society and Political Theory. Where Fukuyama's argument stresses the discontinuities between West and East, Cohen and Arato emphasize the continuities; and where Fukuyama sees the triumph of reform in the East as a vindication of the status quo in the

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76. See Binder, supra note 68, at 18-22; Morton A. Kaplan & Nicholas deB. Katzenbach, The Political Foundations of International Law 314-40 (1961); Hersh Lauterpacht, Recognition in International Law 158-74 (1947).
77. See generally Karl Polanyi, The Great Transformation (1957).
78. Perhaps Fukuyama is right that postideological and postindustrial powers will be less covetous of third world hearts and mines. But if ex-superpowers will be less aggressive in the "less-developed" world they will also be less interested. In the near future much of humanity will experience not liberal utopia, but Malthusian apocalypse — famine, disease, civil war, anarchy — and the violence of the developed world will be no less violent for being passive.
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West, Cohen and Arato see reform in the East and the West as parallel projects. Interest in civil society as a site of reform arose both in the West and the East over the past quarter century for essentially the same reason — the disappointment and defeat of efforts to achieve reform through the state.

A. The Politics of Civil Society in the West

During the austerity of the 1970s and the privatization process of the 1980s, a variety of factors encouraged European and American leftists to trim their sails. Economic indictments of the welfare state were widely disseminated and seemingly confirmed by the punishment international financial markets inflicted on governments pursuing redistributive programs. A weakening of the trade union movement further undermined political support for the welfare state. While still hoping for capitalism's apocalyptic crisis in some far off “final analysis,” Marxist political economists increasingly conceded that state policy and national politics would remain hostage to international markets for several centuries. The collapse of communism provided conclusive evidence that siding with the state against the market put the left on the wrong side of history.

Finding virtue in necessity, theorists and activists began to question the desirability as well as the practicability of using the state as an instrument of working-class interests. On both sides of the Atlantic, a broad range of academics converged on a critique of the welfare state as the bureaucratic management of those it purported to empower and serve. Activists in Germany complained that working-class-affiliated parties were so corruptly implicated in the military-industrial complex that they were incapable of pursuing the emerging peace and environmental issues. The emerging movement of feminism challenged realism's traditional confinement of politics to the “public spheres” of state and market.

Deeper suspicions began to surface that the left’s traditional dream of a revolutionary utopia was dangerously sentimental and simplistic. Revolution struck poststructuralists as implying the return of power to an original popular sovereign unmediated by representative institutions. They suspected that utopianism similarly expressed an


81. P. 12 (right wing critique of welfare state); pp. 42-47 (German “Greens” attack on party system, as articulated by Claus Offe); pp. 532-48 (feminist critique of state/market dichotomy); pp. 262-68 (Foucaultian attack on welfare state).

82. See Binder, supra note 36, at 2008-12.

unrealistic hope of returning humanity to some unalienated natural state. Poststructuralists came to view all such efforts to resist heteronomy as totalitarian threats to heterogeneity. Post-Totalitarian Politics

8 Others endorsed leftist critiques of the market but felt torn between the competing utopias of meaningful work, cultural community, and participatory politics. Unwilling to embrace the individualism or value neutrality often associated with an ethic of consumption, they nevertheless began to see civil society as a forum in which a plurality of goods could be pursued collectively. A differentiated society, in which success is measured and recognition conferred along a multiplicity of parameters, seems unlikely to be a hierarchical society. To Western reformers, then, civil society has come to represent a setting in which the New Left themes of community and participatory democracy can be pursued at a safe distance from both the embarrassment of Marxism and the demands of capitalism.

B. The Politics of Civil Society in the East

For Eastern reformers also, the turn to civil society began as a prudential strategy. Recalling Soviet repression of both popular revolution in Hungary and government-led reform in Czechoslovakia, Eastern Europeans might well have despaired of achieving any meaningful change. But Polish reformer Adam Michnik instead drew the conclusion that reform might be sustainable so long as it left the state-party apparatus intact. The goal of reform, Michnik concluded, should be to create a vocal, organized, and politically informed public, capable of criticizing, influencing, and legitimizing state policy.

Surprisingly, this strategy met with a measure of encouragement from governing elites in Poland, Hungary, and the Soviet Union. Like the French Revolution, some of the Eastern European revolutions seemed ascribable to the efforts of absolutist rulers to discipline their recalcitrant subordinates by mobilizing public opinion. In the Soviet and Hungarian cases, economic crises induced a new generation of leaders to try market-oriented reforms. As these reforms met with bureaucratic resistance, the new leaders sought popular support, thereby encouraging the emergence of a civic public. In the Polish

86. Pp. 31-32; ADAM MICHNIK, A New Evolutionism, in Letters from Prison and Other Essays 135 (Maya Latynski, trans., 1985).
87. For an interpretation of the French Revolution as the monarchy losing control of its own modernization policy, see SIMON SCHAMA, CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION (1989).
88. Pp. 60-65. For an extensive discussion of the emergence of a civic public in the Soviet Union, see GEOFFREY HOSKING, THE AWAKENING OF THE SOVIET UNION (1990), especially at 50-75, 126-56. For accounts of the Hungarian transition, see Barnabas Racz, Political Pluraliza-
case, an unrepentant regime lost the ability to maintain economic order. Here, too, the government came to see dissidents — already organized by Solidarity and by the Church — less as enemies than as potential partners with whom to negotiate some alternative to anarchy.\textsuperscript{89} Once mobilized, legitimated, and in time even legally protected, the new civic publics could not be confined to commenting on economic policy. Once the principle of popular consultation was thus entrenched, pressure for democratization became difficult to resist.

Had the Eastern European revolutions followed the course of the French revolution, we might have expected a Jacobin moment in which the revolutionary vanguard threw off the shackles of the old regime and constituted themselves representatives of a sovereign. Some have suggested that they will do so,\textsuperscript{90} and some have suggested that they should.\textsuperscript{91} But many Eastern European reformers have expressed a continuing commitment to the civil society strategy and a self-conscious resistance to the Jacobin temptation.\textsuperscript{92} Seeing totalitarian dangers in the invocation of an extraconstitutional sovereign, they have preferred to amend existing organic laws, deficient in popular legitimacy though those laws may be.\textsuperscript{93} By eschewing the fiction that institutions are brought into being by the unitary will of a constituent power, reformers have expressed a commitment to the rule of law, avoided self-apotheosis, and they have welcomed a plurality of political voices into the reform process.

Perhaps dangerously, these voices have often included prior ruling elites. Yet just as these elites were not strong enough to rule without the legitimation of the dissidents, the former dissidents may not yet be strong enough — may not wish to be strong enough — to rule without the supporters of the old regime. By inviting the communists in, the reformers avoid provoking counterrevolution, share responsibility for unpopular austerity programs, and broaden the still narrow civic


\textsuperscript{91} ACKERMAN, supra note 34, at 46-68.

\textsuperscript{92} This preference for a differentiated and institutionalized sovereign over a unitary popular sovereign is a strong theme in Hegel's political theory. See TAYLOR, supra note 61, at 405-06, 412-13, 434.

Motivating the reformers’ self-limiting gestures is the goal of insulating civil society from the state. What is not yet clear is the extent to which civil society will be identified with emergent markets. In Poland, the mobilization of civil society preceded privatization, and there is some evidence that the privatization process is being planned to preserve or foster workplace association by giving or selling enterprises to their workers. In Hungary, on the other hand, considerable privatization had already occurred under communism, and some believe this precipitated the emergence of a reform constituency. While markets were part of the program upon which all the reform movements rode to power, Eastern Europeans cynically expect privatization to benefit primarily former party members with more connections and hard currency. Echoing Hegel, some observers are also concerned about the threat unregulated markets may pose to the solidarity of the very associations that enabled reform in the first place.

Cohen and Arato warn that [democratic] actors will not be able to accept liberal economic policy as anything but transitional, since a fully automatic market would become destructive for the social fabric, for social solidarity. Karl Polanyi’s lesson should not be forgotten, particularly in his native country, and indeed the actors of civil society will certainly relearn it. [p. 489]

Surprisingly, this dual anxiety of Eastern European reformers to insulate civil society from both state and market converges with the recent thought of reformers in the West.

V. A CULTURAL THEORY OF POLITICS: CIVIL SOCIETY AND POLITICAL THEORY

Drawing together the Eastern and Western variants of the civil society argument, Cohen and Arato urge the advantages of civil society’s differentiation from state and market. Principally, they urge that civil society is a more auspicious site for further democratizing contemporary society than either state or market (p. 417).

No review can fairly summarize this epic, eclectic, almost encyclopedic volume, which introduces the reader to the conceptions and

94. Bruce Ackerman offers a similar argument against draconian punishment of prior ruling elites. ACKERMAN, supra note 34, at 69-98.
96. Seleny, supra note 88.
97. See Preuss, supra note 93, at 111.
99. See TAYLOR, supra note 61, at 405.
100. A more completely encyclopedic volume would have given us a fuller introduction to such predecessors of Hegel as Bodin, Locke, Montesquieu, Hutcheson, and Herder; would have
critiques of civil society developed by — to mention only the starring roles — Michnik, Hegel, Parsons, Gramsci, Arendt, Schmitt, Habermas, Foucault, Luhmann, Teubner, Offe, Touraine, Tilly, and Fraser. For our purposes, however, Cohen and Arato's argument is most usefully understood as a challenge to four conventional oppositions in contemporary political debate.

First, by stressing the potential autonomy of civil society, Cohen and Arato challenge the conventional division of society into state and market (pp. 11-18); the authors take particular pains to distinguish civil society from each. Thus they criticize classical democracy's identification of community and polity for politicizing all social life, including questions of culture (pp. 197-200); and they express the concern that Hegel would not sufficiently insulate civil society from given more attention to Hegel's great contemporary De Tocqueville; and would not have neglected Hegel's most important successor, Otto Gierke.

101. MICHNIK, supra note 86.
102. HEGEL, supra note 47.
105. HANNAH ARENDT, THE HUMAN CONDITION (1958); HANNAH ARENDT, ON REVOLUTION (1963); HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1951).
the influence of the state (pp. 233, 248, 249, 411). On the other hand, they object to the Scottish school's identification of sociability with commerce (pp. 89-90) and reject Marx' reduction of civil association to bourgeois bargaining (p. 411).

For Cohen and Arato, the state and the market are distinct subsystems within society (p. 428), best understood as tools or steering mechanisms that aggregate and implement voter and consumer preferences (pp. 471-72). Perhaps alienating, these steering mechanisms are nevertheless useful and inevitable features of modern society (p. 415). Only in civil society does the modern citizen-consumer receive her ration of recognition (pp. 376, 417, 472, 480). While the state is the arena of politics and the market of economics, Cohen and Arato see civil society as the seat of culture. They further divide culture into three aspects: (1) civil society's institutional structure, by which they mean the associations that make up civil society (pp. 428-29), (2) the group identities conferred and recognized within civil society (pp. 376-78, 558-60), and (3) the codes of normative discourse — the shared purposes, perspectives, traditions, and vocabularies — that hold groups together (pp. 435-36, 526). To say that the subsystem of civil society is the seat of culture is to say that it functions within the larger social system to produce the preferences aggregated by the subsystems of state and market.

Second, following Michnik, Cohen and Arato blur the neat distinction between reform and revolution (p. 493). The differentiation of society into several relatively autonomous subsystems implies that change can take place in one without dramatically altering another. Indeed, Cohen and Arato suggest that the successful reform of one subsystem may depend on the stable support of the others. At the very least, reform stands a better chance if it does not simultaneously threaten interests entrenched in all three. Because the goal of total revolution attacks society as an integrated totality, however, it is pragmatically unrealistic and normatively undesirable.

Third, by stressing civil society's artificiality, Cohen and Arato challenge the conventional opposition between liberalism and communitarianism (pp. 8-10). Here, they have four related points to make.

First, following Hegel,\textsuperscript{115} they distinguish the associations of civil society from the traditional ascriptive communities threatened by modernization (pp. 500-03, 524). Many of the institutions of civil society — professional societies, charitable organizations, trade unions — are distinctively modern and wholly voluntary. In addition, many of the characteristic activities of these organizations — meeting, marching, striking, publishing, lobbying, suing — are made possible by characteristically modern legal protections.

\textsuperscript{115}. P. 106; TAYLOR, supra note 61, at 435.
Thus, a second point is that the collective action of civil associations depends upon the civil liberties of individuals (pp. 400-03, 562).

Third, if modern community depends upon liberal rights, liberal individualism also depends upon community. Following Hegel, Cohen and Arato reason that individual identity is conferred by social recognition in the context of community (pp. 377-78). What makes modern society freer than a traditional ascriptive community is not the absence of community, but the availability of multiple communities offering a given individual multiple identities (pp. 433-36).

Fourth, solidarity depends upon and fosters not only the libertarian, but also the democratic aspect of liberalism. Solidarity depends upon democracy because civil society is an artificial construct, not a given. The formation and sustenance of civil associations depend upon a myriad of social and political choices. Hence, we cannot secure solidarity without democratic control over the conditions of civil association. At the same time democracy depends upon solidarity because, as Michael Walzer puts it,

[n]o state can survive for long if it is wholly alienated from civil society. It cannot outlast its own coercive machinery; it is lost, literally, without its firepower. The production and reproduction of loyalty, civility, political competence, and trust in authority are never the work of the state alone, and the effort to go it alone—one meaning of totalitarianism—is doomed to failure.117

A fourth currently conventional opposition Cohen and Arato challenge is the distinction between representative and participatory democracy (pp. 4-8). Partisans often defend representative democracy as a device for consulting and accommodating all interest groups powerful enough to disrupt the social order. Participatory democracy, by contrast, is usually defended as a path to self-realization, deliberative rationality, and group solidarity. But because group interests are formulated in civil society, reason Cohen and Arato, participatory and representative democracy can coexist. Civil society is the context for participation with its attendant educational benefits (pp. 417, 599). The political subsystem is the context for representation, the steering

116. As Michael Walzer points out:
Families with working parents need state help in the form of publicly funded day care and effective public schools. National minorities need help in organizing and sustaining their own educational programs. Worker-owned companies and consumer cooperatives need state loans or loan guarantees; so do (even more often) capitalist entrepreneurs and firms. Philanthropy and mutual aid, churches and private universities, depend upon tax exemptions. Labor unions need legal recognition and guarantees against “unfair labor practices.” Professional associations need state support for their licensing procedures. And across the entire range of association, individual men and women need to be protected against the power of officials, employers, experts, party bosses, factory foremen, directors, priests, patrons; and small and weak groups need to be protected against large and powerful ones. For civil society, left to itself, generates radically unequal power relationships, which only state power can challenge.

WALZER, supra note 85, at 302.

117. Id. at 301.
of policy by interests. Absent broad participation in the formulation of group interests, their pursuit in the crass arena of interest-group politics cannot be democratically legitimate (p. 418). At the same time, if democratically formulated interests are not zealously represented, fairly aggregated, and efficiently implemented, democracy will also be thwarted (pp. 414-15). Hence, representative and participatory democracy are not just compatible, but mutually dependent norms governing the distinct arenas of state and civil society.

Although this collaboration between representation and participation depends partly on the separation between state and civil society, it also links these arenas together. For Cohen and Arato do not simply accept the conventional dichotomy between deliberative participation and adversarial representation. Instead, they regard deliberative rationality as a criterion of legitimacy for all democratic processes, representative as well as participatory. Representative democracy must not only aggregate but also integrate diverse interests by commensurating them to broadly shared principles and purposes (pp. 413, 589). Cohen and Arato suggest that this purpose is best accomplished when the political process is permeated by deliberative bodies in which the associations of civil society are represented (pp. 482, 544, 547). While they are frustratingly vague on how to institutionalize these cultural receptors, we might imagine a proliferation of citizen commissions conducting public hearings and reporting on policy issues. Such a device would enable citizen participation while informing representative deliberation.

In this complex vision of democracy, representative democracy depends upon a participatory civil society not only for the preferences it aggregates, but for the civic culture — the mutually intelligible grammar of argument, empathy, deference, and reconciliation — that enables deliberation (pp. 413, 589). Yet, the achievement of this important contribution to democratic representation constrains civil society. Associations and groups must define themselves as part of a tolerant, pluralist society and must articulate their values in terms intelligible to others if they are to sustain, rather than simply take advantage of, democracy (p. 602).

In sum, seeing liberal representative democracy as necessary but insufficient, Cohen and Arato would subject it to the influence of a relatively autonomous, solidaristic, and participatory civil society.

How can this be accomplished? Cohen and Arato identify two types of reform strategies compatible with their program: social movements that attempt to change power relations by changing culture, and policy reforms that redistribute resources by empowering associations rather than simply transferring wealth.

Sociologists have traditionally explained collective protest either as a mass hysterical reaction to social change (p. 495) or as the exploita-
tion by long-standing interest groups of emergent conflicts among elites (pp. 496-503). Yet these theories have had difficulty accounting for the new social movements of the last three decades — the American civil rights movement; pacifist, feminist, and environmentalist movements throughout the West; liberation theology in Latin America; and prodemocracy movements in Latin America, and Southern and Eastern Europe. The arresting aspect of these movements is that they brought together and mobilized large numbers of previously unconnected people through rational discourse. Cohen and Arato see these movements as examples of discursive action's potential to change policy by changing the interests and self-conceptions of political actors (pp. 503-20, 530).

The authors use the American feminist movement as an example of such a cultural path to political change (p. 548). In deliberately politicizing such "private sphere" issues as contraception, abortion, rape, sexual harassment, domestic violence, childcare, and women's health (pp. 551, 554-55), the practice of consciousness raising affects all the aspects of culture analyzed above. First and most obviously, by developing and disseminating new codes of normative discourse, consciousness raising influences political views. Second, by naming unarticulated grievances, such movements confer new identities. Third, political meetings, consciousness-raising groups, and the like provide solidarity by embodying those identities in new associative structures. Fourth, to the extent raised consciousness alters patterns of association in the "private sphere," it further impacts culture (pp. 526, 550-54).

These cultural changes alter policymaking not only by changing the language of public debate, but also by including new participants, who become receptors of civil society in the political process. At this point winning legal protections against violence and discrimination or for reproductive autonomy becomes possible. Such protections, in turn, further entrench the movement in civil society by fostering new institutions such as abortion clinics, battered women's shelters, rape crisis centers, and daycare centers, and by continuing to restructure the most influential association in civil society, the family.

Social movements win representation in policymaking by mobilizing participation in the realm of civil society, yet policymakers can affect the conditions of civil societal mobilization for better or worse. Cohen and Arato identify the controversial area of social welfare policy as one in which differing approaches can make civil society more or less participatory. Unwilling simply to endorse the repudiation of the welfare state that has recently emerged across the political spectrum, Cohen and Arato distinguish between welfare state reforms that empower and those that weaken civil society:

Surely legal reforms that secure the freedom of wage workers to organize unions and bargain collectively, that protect them from being fired for
such collective action, and that secure worker representation on company boards differ in kind from means-tested grants to single parent households and from social services that "instruct" clients on how to function properly as childrearers and responsible providers according to some preconceived model. The difference between these types of reforms is not fully captured by reference to the genders (or, for that matter, to the race) of the people they target. . . . The former set of reforms, unlike the latter, do not create isolated clients of a state bureaucracy but rather empower individuals to act together collectively, to develop new solidarities, and to achieve a greater balance of power relations because they are addressed to an area that is already formally organized. Such reforms create "receptors" in the economic subsystem for the influence of the norms and modes of action of civil society by putting procedures for discursive conflict resolution into place, thereby asserting control of the latter over the former without dedifferentiating them. The second type of reform does the reverse: It brings the full force of administrative agencies into areas that are not and should not be formally organized. This threatens the communicative infrastructure and autonomy of civil society and undermines the capacities of "beneficiaries" to act for themselves or to settle conflicts discursively. [p. 547; footnotes omitted]

In preferring guarantees of job security, solidarity, and participation to mere transfer payments, Cohen and Arato replicate Hegel's point that social stability and political legitimacy depend upon a broad distribution not of wealth, but of recognition.

Yet this Hegelian analysis of the social welfare problem reveals the greatest difficulty facing Cohen and Arato's cultural theory of politics. For Hegel, you may recall, the social welfare problem was modern society's Achilles' heel: no matter how much wealth markets generate, they can not by themselves generate universal recognition unless they can put everyone to productive, challenging, educative work. But the market's logic of competitive automation sets productivity and labor intensity at odds. Although an advanced, postindustrial economy can easily afford welfare transfers to the marginally least productive laborers, this does not give them the recognition they desire. Productively employing them, however, leads to overproduction — which not only defeats the purpose, but also disrupts the market's efficient allocation of resources. Hence, Hegel's deeply pessimistic claim is that recognition and efficient allocation are ultimately incompatible — that culture and commerce are intractably opposed subsystems.

What is the relationship between culture and commerce in Cohen and Arato's theory? While providing an elaborate and plausible vision of a participatory culture's democratizing influence on the political subsystem, they are frustratingly evasive on the desirability of similarly democratizing the economic subsystem. Cohen and Arato worry that if workplace participation means perpetual meetings, it will im-
pair efficiency. On the other hand, they endorse the representation of workers in corporate decisionmaking (pp. 416-17, 479) without ever explaining how workers are to develop the deliberative, participatory culture that would qualify such representation as democratic. If worker representation is nothing more than bargaining over economic interests ascribed to workers, it is simply another form of commerce, unaffected by culture. At one point Cohen and Arato suggest the conflicting claims of culture and commerce may be left to democratic resolution in the political subsystem (p. 399). But if the representative democracy of the political subsystem depends upon a deliberative, participatory culture, and if the commercialization of association threatens that culture, the political subsystem may lose its democratic character.

At the core of Cohen and Arato's confusion concerning the relationship between culture and commerce is their equivocation on the importance of self-realization through meaningful work. For Hegel, work was a crucial arena for personal development and social recognition. He envisioned the organization of workers into societies admitting members on the basis of proficiency and inculcating skills, ethics, and pride.

The closest analogues to Hegel's guildlike corporations in our postindustrial service economy are the professions, and there is considerable appeal to the idea of professionalizing all service. Bill Simon has suggested that professionalization not only enhances the dignity and interest of service work, but also the recognition and participation afforded service consumers or clients. It also gives both parties a common interest and language, which may be the basis for political mobilization.

But can these cultural benefits be achieved without reducing allocative efficiency? Can a postindustrial service economy universalize recognition without provoking the crises of overproduction that Hegel foresaw for industrial economies? I suspect not. Health care provides the most spectacular example of the spiraling cost of professional services. How much of this cost is ascribable to the Kantian ethic of valuing each patient as an end in herself? The upside of this ethic is its recognition of the patient's uniqueness, and the challenge it affords doctors to test the utmost limits of their skill and compassion. The downside includes the expenditure of resources on high technology and deathbed heroics that would be better spent on preventive public health measures.

Following Hegel, we may think of extraordinary care as a form of


overproduction in the service economy. Psychotherapy, litigation, and education may be services that are similarly overproduced in our society, in self-defeating efforts to close a collective deficit of recognition. The fewer people we can employ making things, the more people we must employ producing human capital; but the more human capital we produce, the more human capital we must productively employ. Hegel's vicious cycle of overproduction and underrecognition seems to survive the passing of industrial society. Even if, as Fukuyama argues, the passing of industrial society has ended state-socialism's challenge to the market, the fundamental, generative conflict of culture and commerce endures.

Unlike Fukuyama, Cohen and Arato recognize the composition of culture as a difficult political issue. But, like Fukuyama, they simply assume the peaceful coexistence of culture and commerce and thereby disguise the issue's real difficulty.

VI. THE CURTAIN REMAINS OPEN, THE STAGE LIT

The cold war fortified the boundary between state and market, enshrouding in iron the cultures constructing each. The parting of that iron curtain reveals the rich array of political choices facing us in the fashioning of culture. In politicizing culture, the end of the cold war broadens political debate from the single dimension of how much the state should regulate commerce to the polydimensional questions of what kind of state and what kind of market we aspire to have.

Fukuyama remains blind to the political complexity revealed by the iron curtain's withdrawal. Recognizing only the cold war's single dimension of struggle, Fukuyama sees its end as the iron curtain's retreat rather than its breach. Hence, he remains blind to the contingency revealed behind the curtain. What marks Fukuyama as a neoconservative is first, that his liberalism is rooted in an invariant conception of human nature, and second, that it is confined to the political and economic spheres. In the sphere of culture, he is conservative. For Fukuyama, culture is an unalterable given, a residue of traditional authority surviving the modernization of political and economic life. It is crucially important, determining rates of productivity and violent crime; but it is beyond political debate, impervious to deliberative and deliberative choice, and outside history. Notwithstanding his appropriation of Hegel, Fukuyama is profoundly antihistoricist. If he now believes history is over, that is because he assumes nothing important could ever be decided by history anyway.

If neoconservatives are cultural conservatives only, Cohen and Arato are neoradicals, confining their radicalism to the cultural sphere. Calling for radical cultural transformation, they see culture as a domain of political struggle and historical contingency. In this sense, they are genuine historicists. The difficulty is that, because cul-
ulture constructs political and economic interests, the politics of culture cannot be so neatly confined to the cultural sphere. Cohen and Arato confront and illuminate the complex linkages between the cultural domain of civil society and the political domain of the state. Here they seem gratified to point out that the cultural construction of politics permits its further democratization. But they leave the linkages between civil society and market in the shadows and evade the question of how much economic change a more democratic culture would require.

We may understand post-totalitarian politics in two ways. We may conclude that the curtain has come down on history and the important political disputes have all been resolved in favor of liberalism. Or, recalling that liberalism garnered much of its meaning and appeal from its confrontation with totalitarianism, we may suspect that liberalism's triumph has drained it of content and consequence. Reminded of history's contingency by the cold war's dénouement, we may speculate that post-totalitarian politics will prove equally unpredictable. Though our conflicts may now be confined to the realm of culture, culture is no refuge from history. It is where history gets made.

The curtain remains open, the footlights beckon, and nothing prevents our stepping onto the stage.
ADMINISTERING JUSTICE IN A CONSENSUS-BASED SOCIETY

Koichiro Fujikura*


I

In Authority Without Power,¹ Professor John Haley² attempts to explain significant Japanese paradoxes:

Japan is notable as a society with both extraordinary institutional continuity along with institutional change; of cohesion with conflict, hierarchy with equality, cooperation with competition, and above all else a manifest prevalence of community control with an equally strong impulse toward independence and autonomy. . . . It is a nation where political rule appears strong but also weak; governance centralized but also diffused; the individual subservient but also achieving; the social order closed but also open. [p. 4]

Professor Haley develops a thesis that Japan’s society and its legal system is one of “authority without power” and “law without sanctions.” His pairing of these words, usually understood as almost synonymous in the Western legal and political lexicon, serves as the key for his analysis of the Japanese legal system. The author has succeeded in constructing a theoretical package to explain those paradoxes of Japanese law and society often puzzling to Western observers, and in doing so he presents a plausible overall picture of the Japanese legal system. To provide a general account and analysis of any legal system is a formidable intellectual undertaking, but Haley’s picture of Japan’s legal system should be quite persuasive to Western readers, and it is certainly fascinating to Japanese readers.

Professor Haley argues that, by the mid-nineteenth century, Japanese society had well-established institutions and processes for three basic paradigms of societal control: “[first] the administrative

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¹ This review reflects views expressed by participants in a minisymposium on Professor Haley’s book held on December 16, 1992, at the University of Tokyo. I am especially indebted to comments made by members of a Western panel: Professor Richard Minear of the University of Massachusetts, Professor Mark Ramseyer of the University of Chicago Law School, and Professor Malcolm Smith of the University of Melbourne Law School.

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processes of a centralized bureaucratic state, [second] the adjudicatory institutions for a system of judicial governance, and [third] arrangements of indirect governance based predominantly on community-based consensual or contractual patterns of social control exemplified by the rural "mura" or village" (p. 18).

Some legal historians are certain to dispute the relevance of Haley's paradigms and interpretations. Nevertheless, many Japanese legal scholars may find his bold attempt revealing, for they generally perceive Japan's contemporary law and legal institutions as the product of a wholesale adoption of Western legal systems since the Meiji Restoration, a time when Japan apparently made a clean break from its own legal traditions and institutions. Haley's paradigms may also be revealing for those who still labor under the popular assumption in the United States that no such thing as "law" exists in Japan.

Haley depicts three paradigms that effectively challenge these elementary assumptions about Japanese law and society. His contribution and the book's strength can be found in the first part, in which he provides, using bold strokes and drawing from existing works, a concise description of Japanese legal history from the seventh century on and develops his dynamic for understanding Japanese law and society. He is less successful, however, in applying this dynamic to his carefully chosen contemporary subject areas in the book's second part. His paradigms, apparently serving their intended purposes, often prove troublesome and unsatisfactory in analyzing the role of law in contemporary Japanese society. In concrete cases, Haley's paradigms seem to prove too much or too little and seem to invoke more than dispel untested assumptions.

Before discussing the three interrelated paradigms and the

3. What is the real importance of the old Japanese law to the modern law of Japan? As will be seen, the modern state law has no connection with the former Japanese law. The modern law considers itself rather as an heir of Western law. . . . It could therefore be said that the history of Japanese law is, for the present at least, a luxury.


4. Other recent and concise works in English on Japanese legal history include: RYOSUKE ISHII, A HISTORY OF POLITICAL INSTITUTIONS IN JAPAN (1980); CARL STEENSTRUP, A HISTORY OF LAW IN JAPAN UNTIL 1868 (1991).

5. The book consists of two parts. Part I is captioned "Continuity with Change: The Historical Foundations of Governance and Legal Control in Japan" (p. 17) and includes historical accounts and an analysis of the development of the Japanese legal system from the seventh century A.D., when Japan began selectively adopting aspects of China's legal system, to the Meiji Restoration of 1868, when Japan, in an apparent abandonment of its traditional system, began adopting features of the civil law systems of continental Europe, drawing primarily from German and French codes.

Part II is entitled "Cohesion with Conflict: The Containment of Legal Controls" (p. 81) and deals with four carefully selected aspects of the contemporary Japanese legal system: "Lawsuits and Lawyers: The Making of a Myth" (ch. 5); "Policemen and Prosecutors: Crime without Punishment" (ch. 6); "Bureaucrats and Business: Administrative Power Constrained" (ch. 7); and "Hamlets and Hoodlums: The Social Impact of Law without Sanctions" (ch. 8).
problems they pose in their application, one must first examine some critical principles that the reader must apply to assess a book of this nature—a book in which the author, from a comparative perspective, tries to construct a general theory for understanding a foreign legal culture within the context of the society’s history, culture, and ideology.

First, any effort to build an overarching, general theoretical framework to explain another society and its law, especially Japan, though inspiring and stimulating, is suspect and bound to produce distortions and myths. In developing paradigms in the historical context, one must always ask critical questions such as what the connection is between history and contemporary Japan and how direct an influence one can see, for example, between a pre-World War I Japanese village and a modern Japanese village. Without establishing a reasonable connection between historical facts and contemporary problems, any general theory tends to produce loose and slippery interpretations.

Second, one faces an evident risk in relying on excessive contrasts and overstatements in any two-sided comparison, especially between Japan and the United States. Any finding of inscrutable nature in one society may reflect extremity in the other. Haley, aware of this risk, tries to broaden his comparisons by referring to Germany, the United Kingdom, and Korea as much as possible. Despite the author’s caveat, however, the book overemphasizes distinctions and peculiarities, rather than similarities and common elements, of Japanese law and legal institutions that reflect opposite characteristics from those found in American law and legal institutions.

Third, the author often relies heavily upon cultural explanations. Granted that “legal systems are themselves self-defining, cultural belief systems” (p. 4) and cultural explanations are useful in developing a general understanding of the Japanese legal system, cultural explanations are difficult to substantiate or disprove. Analyzing cultural differences in terms of rational human behavior and the various institutional constraints affecting individual decisionmaking may prove more productive.

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6. The author’s intention is indeed ambitious and goes beyond a simple two-sided comparison.

As a study of a legal order in a specific context, this book is intended to expand understanding of the function and limits of law in society. Japan’s legal order thus becomes the focus for a broader exploration of the interrelationships of law, social order, and change. . . . The purpose of this book therefore is twofold: to use Japan as a window to law and law as a window to Japan.

P. 4.

7. At the outset, however, it is important for the reader to appreciate the stark contrast with the United States and to guard against a common fallacy of viewing Japan from a totally American perspective. Differences do exist but the United States has no greater claim as model or standard for comparison than Japan. Both societies represent extremes of a kind. Neither reflects the norm, if indeed any norm does exist.

P. 14. One might ask: “If no norm exists, how could there be paradox?”
According to Haley, the historical development of Japan's legal system can be divided into two broadly defined periods. "Each features an abrupt infusion of foreign ideas and institutions followed by a gradual process of indigenous adaptation" (p. 17). The first period, during which Japan developed what the author calls an "ambivalent tradition" (p. 17), is "characterized by the tensions between the ideas and institutions derived from early imperial Chinese law and those forged by native Japanese political and social forces" (p. 17). The second period is characterized as a period of "[r]eception, adaptation, and containment of Western law" (p. 18), starting with the French and the German codes and legal institutions soon after the Meiji Restoration in 1868. During this second period, "Japan experienced the institutional transformation of its legal order into a modern, predominately German-derivative, civil law system as well as the adaptation and ultimate containment of Western legal institutions during the first half of this century . . ." (p. 18). The author maintains that "[t]he process continued in postwar Japan, commencing with military occupation and the imposition of American-inspired constitutional and regulatory reforms" (p. 18).

Haley develops his three paradigms against the backdrop of these two broadly defined periods. The first paradigm is that of the administrative state with pervasive authority but with little coercive power, in which law was public, serving as an instrument of the state, and devoid of moral authority (pp. 19-32). Japan adopted this administrative state tradition from China in its first reception of foreign law during the seventh century. Japan borrowed both the concept of the state as a political unit, with authority to rule vested in an imperial institution, and methods of centralized bureaucratic governance. The imperial rulers wielded enormous authority, but this authority did not carry a consummate degree of state power; state authority tended to be much broader than state coercive power. Also, in the Chinese tradition, law and morality were essentially separated; laws were not, in and of themselves, moral commands. Private law, in the Western sense, was not developed.

Borrowing selectively from this Chinese system, Japan instituted land tenure, taxation, penal codes, and other administrative regulations and procedures. Moreover, Japan began to develop indigenous legal institutions. Beginning with the Kamakura bakufu (literally "tent government") in the thirteenth century and lasting throughout the Tokugawa bakufu in the seventeenth and eighteenth centuries, Japan established an effective and efficient administrative state with well-developed institutional structures and a sophisticated bureaucratic government.

The second paradigm is that of the adjudicatory state, or judicial governance, which began with institutions developed to resolve dis-
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Disputes, particularly among warrior-vassals, and developed into a means by which the Kamakura bakufu and later Shogunates ruled (pp. 33-49). During the feudal period, the “idea of the supremacy of law as command had begun to take hold,” and “[a]dherence to codified prescriptions and procedures of the past and basic elements of procedural fairness had become integral to legitimate rule” (p. 49). Codified procedural rules distinguished between adjudication initiated by petition and persecutions brought by authorities. Thus, civil actions as opposed to criminal actions were recognized for the first time.

With the development of an adjudicatory mechanism, Japanese law and legal institutions began to take on a Western look. Japan’s experience resembled that of other Western European nations where adjudicatory institutions developed after the collapse of a centralized political power — in the Western context, the Roman Empire, in the case of Japan, imperial rule from Kyoto. In Europe, these institutions developed within the Roman law tradition, in which legal systems recognized private civil law. In Japan, well-established adjudicatory institutions with progressive case law and developed procedures grew in the field of private law, resembling the growth of common law in England. However, the government generally discouraged ordinary citizens from using law to resolve disputes, and private disputes were largely left to be resolved by members of the village communities.

The third paradigm is that of the mura: a quasi-independent and quasi-autonomous village (pp. 51-65). The mura, a product of the late sixteenth century, was an exclusive community of peasants. It functioned as a self-contained economic and administrative unit. Village officers were named and became responsible for managing their villages, and the headman was accountable to the ruling authorities for any misdeed by village members. Villagers were subject to registration, tax, public work-labor obligations, and other regulatory controls designed to maximize revenue yields and restrict social and geographic mobility. In reality, however, villages retained a remarkable degree of autonomy in the face of pervasive regulations and controls by the central authorities.

So long as peace prevailed and taxes were paid, there was little to draw official attention and scrutiny.... By suppressing intra-community quarrels and satisfying formal fiscal obligations, a village community could restrain or avoid unwanted official regulation. The consequence was an institutional structure that in allowing evasion of official legal controls also promoted external deference and internal cohesion. In effect the village had the security of the administrative state along with the freedom of the outlaw. [p. 61]

The desire and need to maintain mechanisms of self-governance for social control is substantial when the goal is to maintain independence from a central authority that exercises coercive power. The village community developed its own mechanisms of control, including
the psychological sanction of collective displeasure, ostracism, and expulsion. Community sanctions became real deterrents to wrongdoing in Tokugawa Japan. This community control over sanctions "also meant that the community had a significant degree of control over the viability of legal norms. . . . Only the rules and standards the community was willing to enforce by the threat or application of sanctions could be effectively implemented within its confines" (p. 62).

By the mid-nineteenth century, the mura paradigm was firmly established with its effective mechanisms of informal control to maintain order within the village and to guard against the intrusion of the formal legal sanctions exercised by the administrative state and judicial institutions.

At this point, Japan experienced its second reception of foreign law — European law. The consequence of the Meiji legal reform is of special importance because the Napoleonic code and the German civil code introduced into Japan were primarily concerned with private law and were essentially products of liberal states in nineteenth-century Europe. The adaptation of the civil code created a number of repercussions. First, the civil code introduced a system of rules, based on a very different concept of law, into Japan. The scope of law under the civil code was significantly broader than the Japanese were accustomed to under the traditional law exercised by the administrative state, judicial institutions, and in the informal mura. Japan began imposing legal rules that regulated behaviors previously left untouched, or at least ignored. For example, landlord-tenant relations, never outside the scope of law, were regulated much more comprehensively under the civil code. In addition, the Meiji legal reform introduced law and institutions in which no dichotomy between authority and power existed.

Japan then began the process of absorption and adaptation, a process that produced some intended as well as unintended consequences. In general, however, the reform conflicted with traditional modes of social ordering. Coercive power gradually separated from the state, while the state retained its authority. The reach of civil law and legal institutions was contained by limiting ordinary citizens' use of courts and by utilizing traditional methods of dispute-resolution. Consequently, Japan developed into a state that, by all ostensible criteria, has as broad an authority as any modern industrial state; conversely, in terms of its coercive power and the use of its authority, Japan is relatively weaker than most industrial states. Thus, a vacuum has been created where state authority extends but no coercive power reaches. The vacuum has been filled, in part, by a reemergence of non-legal social controls. This revived traditional scheme relies upon necessity of consensus as the means of decisionmaking and of informal coercion, and on the use of law as a part of the process of reaching
consensus. In this process, law often appears to provide a goal as well as a tool to prompt people to reach a consensus. The paradigm of the mura is still prevalent in contemporary Japan.

II

I find Professor Haley's paradigms difficult to dispute. They are tightly packaged and designed to show that Japan maintains an effective bureaucratic government, sophisticated adjudicatory institutions and procedures, and various means of informal social controls that fill whatever void is created by law without sanctions; that official law's domain is narrow and contained while unofficial group-based controls are pervasive; and that these characteristics of Japanese law and society are traceable to and deeply rooted in its history and traditions.

One has little reason to disagree with the picture that emerges from these paradigms. This picture, needless to say, starkly contrasts with that painted of the United States. According to Haley's characterizations, law in Japan is narrowly contained, divorced from moral or ethical standards, and bereft of enforcement power. His interpretation of these characteristics is generally favorable for Japan, perhaps too favorable for the comfort of some Japanese readers. Nevertheless, I find it difficult either to approve or disapprove of Haley's basic characterizations because his analyses are often based on cultural differences, for which no quantitative evidence is available. He contrasts his characterizations with the United States' legal system, and such characterizations are difficult to prove or disprove; those differences may depend on a particular field of law or problem under comparison, and may be a matter of degree. It may, however, be worthwhile to point out some examples where the author's strokes seem too heavy or overdrawn.

A. "Crime Without Punishment" (ch. 6)

Among major industrial states in the postwar period, Japan alone has shown a substantial decline in its crime rate in almost all categories. However, a relatively small number of judges, prosecutors, and police officers serve its criminal justice system, leading to chronic criminal trial delays. Professor Haley notes that the criminal process in Japan moves along "two parallel tracks," — a key that makes the system work despite its severe institutional constraints (p. 125). The first track involves a formal institutional process governed by the criminal code and procedural rules, similar to other industrial states. Within this formal criminal process, however, considerable discretion is given to Japanese police, prosecutors, and judges. All of them exer-

8. For example, after discussing the "dark side of social controls" and "law as tatemae" in chapter 8, entitled "Hamlets and Hoodlums," the author concludes that "[f]or all the conflict, inefficiency, and dysfunction manifest in so many aspects of postwar Japanese social, political, and economic life, Japan maintains a remarkably just as well as stable social order." P. 191.
cise discretion in such a way that an extremely lenient criminal justice system has evolved.9

The fact that few offenders see the inside of a jail results from the informal "second track" of the Japanese criminal justice system. An emphasis on confession, repentance, and absolution characterizes this track. In addition to such standard considerations as the gravity of the offense, the nature and circumstances of the crime, and the age and prior record of the offender, the following elements may become determinative in the decision whether to report, prosecute, or sentence the offender: "attitude of the offender in acknowledging guilt, expressing remorse, and compensating any victims"; and "the victims' response in expressing willingness to pardon" (p. 129).

Haley argues forcefully that the Japanese second track may contribute to a reduction of crime and the rehabilitation of offenders. He concludes that the Japanese state has, in effect, abandoned the formal institutional process — the most coercive of all legitimate instruments of state control of crime — and has transferred its power to those who control informal social mechanisms (p. 128). "In contemporary Japan these powers thus reside with the society at large and its constituent, lesser communities of family, firm, and friends" (p. 138). He implies that effectiveness and efficiency result when the state abandons the formal criminal process and relies on informal social means of crime control. He clearly exaggerates his paradigms: state authority without power, law without sanctions, and group-based informal controls effectively filling a vacuum created by state institutional incapacity.

A state cannot maintain a legal order without the effective working of formal criminal processes. In Japan, the rate of arresting crime suspects remains high, "[p]revailing conviction rates [of those charged] hover at about 99.5%" (p. 128), and punishments meted out by courts are fairly standard for each crime category. A formal criminal law effectively controls crimes and maintains social order. Informal social controls work within the clearly defined and established legal system. These mechanisms work because of, not in spite of, the existence of the state's adequate enforcement power. Haley's analysis of the second track remains persuasive only insofar as it describes a supplementary role of the second track for the primary track.

B. "Administrative Power Constrained" (ch. 7)

Professor Haley examines what he finds a distinguishing character-
istic of the Japanese legal system: the Japanese bureaucracy carries seemingly limitless authority without even a relatively normal degree of coercive legal power.\textsuperscript{10} He describes the Japanese administrative process as a form of consensual administrative management (p. 144). In the context of contemporary Japan, administrative agencies must achieve consent among those most directly affected by administrative policies and whose cooperation is necessary for the effective implementation of those policies. In this process of consensus forming, the regulators and the regulated negotiate in both the making and enforcement of policy. Those subject to governmental direction may gain a "significant and often determinative voice in the process of formulating and implementing policy" (p. 144). This process, in turn, leads to the legitimization of the consensus-derived policy through the institutional empowerment of the "private" bargainer.\textsuperscript{11} Haley asserts that the prevalent use of administrative guidance reflects authority without power and fits the basic pattern of consensual governance (pp. 160-64).

This chapter describes the distinctive character of administrative agencies as their lack of enforcement power. Without legal power to implement their policies, Japanese bureaucrats cannot act coercively. They remain essentially weak. This characterization contrasts with Professor Upham's description of administrative agencies in Law and Social Change in Postwar Japan,\textsuperscript{12} which characterizes the administrative agencies as active, assertive, and in the forefront of Japanese social change.\textsuperscript{13} Haley concentrates on economic policies, while Upham focuses on such evolving fields as environmental protection and minority rights. Involved government agencies may have acted without legal enforcement powers in each area; however, administrative agencies do not lack legal means to implement their policies to the degree to which Haley asserts.\textsuperscript{14} In addition, agencies can actively seek the passage of

\textsuperscript{10} In terms of authority, governmental activity in Japan tends to be as unlimited in scope as in a command economy. In terms of coercive power, however, government officials have only the legal powers granted to them by statute plus whatever extralegal levers of influence or persuasion may be available." P. 144.

\textsuperscript{11} Haley finds the basic form of consensual management at work in the Japanese government's reliance on cartels and trade associations in prewar and postwar economic policy. Pp. 144-53.

\textsuperscript{12} FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987). For Haley's views on Upham's book, see John O. Haley, Book Review, 11 HARV. J. L. & PUB. POLY. 243 (1988). I find that the two books, despite their different approaches and focuses, complement each other well in presenting the Japanese legal cultural characteristics; both are essential for anyone interested in Japanese law and society.

\textsuperscript{13} Professor Chalmers Johnson expressed a similar view with regard to the leading role played by the Ministry of International Trade and Industry in evolving industrial policy in CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE (1982).

\textsuperscript{14} The Administrative Substitute Execution Act of 1948 is a powerful legal tool that an administrative agency can rely upon when a party under a duty to perform does not satisfy its obligation. Gyosei dai shikko ho (Law No. 43, 1948). The agency itself can perform the duty in substitution or can employ a third party to perform the same duty. In either case, the agency can impose the cost of substitute performance on the original nonperforming party. This law is often
necessary and adequate legislation that enables them to implement their policies effectively. In the field of environmental administration, the Pollution Control Costs Allocation Act\textsuperscript{15} and the Pollution-Victims Compensation Act\textsuperscript{16} exemplify this power. In both instances, administrative agencies of the central as well as local governments assume active roles, backed by legal enforcement power, in assessing pollution control and remedial costs and imposing these costs on polluters.

Haley states that "Japan's dependency on consensus can be argued to have acquired from habit and expectation a particular and self-reinforcing legitimacy. In this context, formal law-making and law-enforcing processes . . . function in large measure as consensus-building processes rather than avenues for command and coercion" (p. 198). I find it difficult to disagree with this general cultural explanation. Nevertheless, I find the statement ambiguous as to how cultural elements matter at the level of individual decisionmaking and behavior. Haley contends that "the Japanese may be more tolerant of informal enforcement than Americans . . . because of shared attitudes or simply habit" (p. 165). He states that such cultural factors matter in situations where

the official or the private party or both would have acted differently out of self-interest but for a cultural imperative. Only if, for instance, the respondent of an official request complies even though doing so runs counter to economic or other gain could an attitude of submission and deference to authority be viewed as determinative. [p. 165]

I am unpersuaded, and troubled, by this statement's implication that a cultural imperative may work against the self-interest of parties involved. Haley makes a similar statement on determinative cultural factors in Chapter Five, to which I will return later.

C. "Lawsuits and Lawyers: The Making of a Myth" (ch. 5)

Haley argues that the Japanese have historically been quite litigious. He is indeed one of the first scholars to question the myth of Japanese nonlitigiousness.\textsuperscript{17} Contrary to Haley's implied projections, however, litigation rates in contemporary Japan continue to decrease

\begin{itemize}
\item \textsuperscript{15} Kogai boshi jigyohi jigyosha futan ho (Law No. 133, 1970).
\item \textsuperscript{16} Kogai kenko higai no hosho ni kansuru horitsu (Law No. 97, 1987), which in 1988 renamed and subsequently amended the original act, Kogai kenko higai hosho ho (Law No. 111, 1973).
\end{itemize}
rather than increase (p. 97). Haley is in a position to explain a curious paradox: the Japanese like to sue, but, in fact, they do not sue, or they are becoming less likely to do so.

Haley explains that the Japanese do not litigate because litigation does not pay. He attributes this trend to three policy and institutional factors: (1) the government discouraged litigation and encouraged mediation, especially in the interwar years; (2) the lack of a jury system and the career judiciary foster a greater uniformity and certainty of result; and (3) the official registry systems for real property and family relationships preclude the need to use the courts in a wide variety of cases, including adoption, divorce, real property transfers, and succession (pp. 114-16). In addition, he relies on two cultural factors: mediation — the availability of third parties who can perform the role of mediator reduces the need to invoke formal judicial intervention — and interdependency — the extent of close interdependency relationships from family ties to business dealings precludes resort to the courts (pp. 115-16).

Haley criticizes the popular image produced by “impressionistic anthropology” that views the Japanese reluctance to litigate as a particular phenomenon of a culture that emphasizes social harmony and cohesion (pp. 114-15). Nevertheless, he feels he must add the above cultural factors to the institutional ones. He states that people go to court when they perceive that the “prospective outcome of a litigated case is more beneficial than other avenues of redress” (p. 116). In other words, people litigate when they have something to gain. However, Haley does not fully explain or justify the decision not to sue when a litigant has something to gain.

The individual decision not to sue involves essentially two scenarios: one does not litigate when it does not pay or one does not litigate even when it does pay. The former is a rational choice and needs no cultural explanation; the decision could be explained by some or all of the various institutional constraints that Haley mentions. The latter case, where one does not litigate even if one may benefit from doing so, seems nonrational or irrational and calls for some explanation, cultural or otherwise. I cannot accept that the latter case of irrational choice exists as a cultural pattern, and without an explanation of such behavior, Haley’s reliance on culture to justify irrationality is unconvincing.

Haley argues that the “use of apology and other customary practices” may preclude “the enforcement of otherwise applicable legal rules” (pp. 117-18). He cites, as an example, past acceptance by Japanese women of unequal treatment despite constitutional and statutory proscriptions regarding gender discrimination (p. 118). In this irrational choice case, “apology and other customary practices” seem inadequate and unsatisfactory to explain the decision not to sue,
especially because this explanation disregards existing institutional constraints that clearly deter a woman from seeking legal redress in such a situation.18

III

Professors Hamilton and Sanders base their book, *Everyday Justice: Responsibility and the Individual in Japan and the United States*,19 on a comparative and empirical study about responsibility and sanctions, which the authors regard as core aspects of legal culture. The book asserts that “it is a fundamental human impulse to seek restitution or retribution when a wrong is done, yet individuals and societies assess responsibility and allocate punishment for wrongdoing in different ways” (book jacket).

Based on the data collected from surveys conducted in Detroit, Michigan and Yokohama and Kanazawa, Japan, the authors compare both individual and cultural reactions to wrongdoing. They find decisions about justice are influenced by whether or not a social relation exists between the offender and victim; Americans tend to see actors in isolation, while Japanese tend to see them in relation to each other. The Japanese, mindful of role obligations and social ties, relate punishment to the goal of restoring the offender to the social network. In contrast, Americans punish wrongdoers by isolating them from the community. The authors suggest two models, “justice among friends” versus “justice toward strangers,” as approaches to analyzing the processes of ascribing responsibility for wrongdoing and judging appropriate sanctions in modern society.20

Though Hamilton and Sanders’ research focuses primarily on social psychology, the book informs and illuminates anyone interested in studying comparative legal culture. Its findings and analysis generally support some of Haley’s assertions while refuting others. Specifically, Hamilton and Sanders view Japanese nonlitigiousness from a different perspective and offer more persuasive explanations.

The authors observe that, in comparing Japanese and American societies, scholars have persistently debated the relative importance of

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20. HAMILTON & SANDERS, supra note 19, at 203.
cultural and structural explanations for observed differences. The de-
bate, the authors believe, has too narrowly centered on the issue of
litigiousness, focusing on litigation rates as evidence of cultural val-
ues. They find this debate, in which Haley has been one of the major
contenders, confusing and misleading because it has failed to specify
the particular decision under discussion. Disputants make many deci-
sions while they move on to different levels in the "disputing pyra-
mid." Haley argues that a nonlitigious ethic is useful in explaining
Japanese legal behavior only if the disputants reach settlements that
do not reflect the expected value of a case. As Hamilton and Sanders
point out, Haley seems to argue that, if culture matters, litigants
should settle for less, and implies that cultural explanations of nonli-
tigiousness predict economically irrational behavior.

Hamilton and Sanders view the issue of litigiousness as one that
distorts the relations between legal culture and legal structure. They
point out that the debate has tended to equate cultural explanations
with microprocesses and structural explanations with macroprocesses,
looking at cultural values within the narrow context of an individual’s
decision whether to sue while looking at the court structure as the
environment within which that decision is made. The authors argue
that "this is an error because it misconstrues the role of legal culture in
shaping a legal system."

According to the authors, the debate focusing on litigation rates
has produced some questionable assertions: the Japanese legal system
is fragile because it is under attack from those who want to litigate,
and it is less than legitimate because the Japanese government elites
have managed the legal system to discourage litigation in order to con-
trol the populace.

Hamilton and Sanders, basing their explanations on the survey
data, provide a different perspective and suggest another possible ex-
planation, which I find more persuasive. According to them, the Japa-
nese express support for a less adversarial process and are more willing
to forgo litigation, in order to create a collective benefit, an atmos-
phere of harmony and compromise. In such a society, the authors
argue, those who insist on their legal rights may be seen as free riders,
exploring the collective benefit, and modern legal reforms in Japan

21. Id. at 188-90.
22. "The disputing pyramid is a metaphor to describe the process by which a large number of
injuries or other unfortunate outcomes become thought of as acts of wrongdoing, are trans-
formed into claims, are pursued through legal or nonlegal channels. Some injuries generate no
claims, some claims are dropped or not otherwise pursued, some are settled before suit, some
suits are settled or dropped before trial, and some decisions are not appealed; the pyramid meta-
phor reflects the fact that the number of cases constantly decreases as claims move up through
the system." Id. at 191.
23. Id. at 189.
24. Id. at 192.
can be interpreted as a "process of constant adjustments to thwart the corrosive impact of litigious free riders on a nonlitigious legal order."\textsuperscript{25}

The authors suggest that Japanese society may choose to focus on citizens' preferences when they are concerned with community values (e.g., harmony, peace) rather than when they are concerned with individual problems. They state that, by doing so, Japanese society is not basing its choices on less valid or less legitimate components of legal culture; rather, the Japanese legal order legitimately attends to citizens' preferences by reflecting the concerns of a contextual self rather than the concerns of an individual self.\textsuperscript{26} I find Hamilton and Sanders' explanation more pertinent to the issue of litigiousness than Haley's cultural factors.

In conclusion, the authors suggest two visions of responsibility and justice, one among friends and the other among strangers, "each originating in the nature and boundaries of everyday social relationships between people."\textsuperscript{27} They find that Americans dispense more justice toward strangers, while the Japanese rely more on justice among friends. However, their data also show that "Japanese judge strangers much as Americans do, and would punish strangers at least as harshly; Japanese simply seem to deal with fewer strangers in their daily routine."\textsuperscript{28} A simple statement like this one, supported by survey data, adequately explains apparent cultural characteristics and inclines toward a more productive comparison of substantive problems and laws between the United States and Japan.

IV

Two strong trends in contemporary Japan should challenge Professor Haley's \textit{mura} paradigm. These are urbanization and internationalization.

Increasing urbanization in Japan has already destroyed many social relationships that existed in the traditional \textit{mura} model.\textsuperscript{29} In urban settings, people are more isolated and alienated. They tend to seek more justice among strangers than among friends. Informal social controls become less effective because the web of personal relation-

\textsuperscript{25} Id. at 193.
\textsuperscript{26} Id. at 195.
\textsuperscript{27} Id. at 216.
\textsuperscript{28} Id. at 217.
\textsuperscript{29} For example, see THEODORE C. BESTOR, NEIGHBORHOOD TOKYO (1989), which describes urban neighborhoods in contemporary Japan and effectively challenges assumptions such as Tokyo as a congeries of villages, displaying direct historical continuity with preindustrial village life, and as urban neighborhoods that are little more than administrative or political units. One should note, however, that the Miyamoto-cho described in the book is a distinctive community quite different from massively developed urban "new" towns and "residential cities" that dominate Tokyo.
ships that once existed is rapidly disintegrating. Business firms and workplace groups cannot substitute for the tightly knit personal relations of the mura. After all, these modern organizations have more definite purposes, such as profit seeking, that require different forms of commitment from, and place different obligations on, their members. Consensus for the good of the community becomes much more difficult to achieve.

Internationalization has also impacted Japan, challenging it to become a more open and transparent society. Increasingly, international transactions force Japan to face incorporation of diverse foreign elements into the society: international firms, foreign lawyers, and workers. The negative side of consensus governance has thus become apparent. Consensus governing has worked and is efficient simply because, once it is formed, participating parties are bound to honor the consensus result, and no formal enforcement costs are needed to implement agreed upon policy. The fewer the participants, the easier to obtain consensus. Consensus governing is effective because its process excludes many parties whose interests are affected once consensus is formed. Unfairness of consensual administration to those who do not have access to the decisionmaking process is apparent, and the costs of correcting unfairness have become great.30 These developments should affect and change legal structural arrangements as well as culturally oriented behaviors based on the traditional mura model.

Some years ago, I spoke to a group of American lawyers attending a Japan-U.S. conference on legal and economic relations.31 After describing the Japanese legal system in terms of several features that do not exist in Japan but are often taken for granted by American lawyers (jury system, contempt of court, a wide range of equitable remedies, pretrial discovery, punitive damages, class actions, and contingent fees, and so forth), one American lawyer stood up and demanded, "How can you do justice in a legal system like that?"

The Japanese legal system is certainly trying to achieve justice without some of the American legal fixtures. Oftentimes, it is indeed difficult to explain how we accomplish this, let alone to convince the American lawyers that a legal system without those basic features could work and be accepted as fair and legitimate.

Haley certainly provides both an answer to the above question and a way to look at Japanese law and society. His basic message is that

30. Misusing coercive legal means in this context may sometimes incur disproportionate social costs. A glaring example of this is the construction of the Narita International Airport, which remains incomplete after 20 years because of organized protest and resistance by landowner-farmers. This example may support Haley's point that consensus forming is important for administrative agencies before implementing certain policies. See DAVID E. APTER AND NAGAYO SAWA, AGAINST THE STATE: POLITICS AND SOCIAL PROTEST IN JAPAN (1984).

there are other ways of administering justice different from those accepted in the United States. His paradigms, rooted in the historical past and traditions of Japan, have produced a persuasive overall image of law in a consensus-based society. Nevertheless, his paradigms may be faulted for attributing too much to culture, which is also subject to change, and for making his overall presentation of Japanese law and society too distinctive. Overemphasizing Japan's distinctiveness incurs a risk of reviving old myths about Japan that Haley effectively has begun to break down, myths based on an assumption that Japan is culturally unique.

I do not deny the usefulness and effectiveness of using cultural explanations, especially when one is presenting an overall view of a foreign legal system. I would adopt a very similar approach as Haley's if I were describing the American legal system. However, I find Haley's heavy emphasis on the distinctiveness of Japanese law and society to be a little dangerous. Also, I suspect that Haley's emphasis on some positive and favorable aspects of Japanese law and society may just be a reflection of his critical view of, and dissatisfaction with, the contemporary American legal system. Or, am I reading too much into or out of this book?

Professor Haley has written one of the most provocative books on Japanese law and society. The book challenges other comparative legal scholars to test, refute, amend, and change the author's general paradigms in each substantive law field as well as to engage in overall studies of Japanese legal culture.

The assertion of that principle at that time, was the word, "fitly spoken" which has proved an "apple of gold" to us. The Union and the Constitution, are the picture of silver, subsequently framed around it. The picture was made, not to conceal, or destroy the apple; but to adorn, and preserve it. The picture was made for the apple — not the apple for the picture.

— Abraham Lincoln

In his earlier work, The Supreme Court and the Decline of Constitutional Aspiration, Professor Gary Jacobsohn compared a number of modern theories of constitutional interpretation with natural law premises such as Lincoln's theory that the Constitution cannot be interpreted without considering the goals of the Declaration of Independence. He asserted that modern scholars' failure to "relat[e] the exercise of judicial power to the broader purposes and aspirations of the [American] polity" was a weakness undermining the validity of their theories. Lincoln's theory, he argued, was more honest and more in tune with Professor Jacobsohn's own theories. Jacobsohn concluded his work by encouraging judges to "ask themselves how it is possible for them, as judges, to interpret — understand and apply — our fundamental law if they reject, or simply are ignorant of, its presuppositions." In Apple of Gold, an analysis of constitutionalism in Israel, he follows the attempts of the Israeli Supreme Court to develop its own constitutional interpretive theory and suggests that the

1. Apple of Gold begins with this quotation. P. 3. It is not the first time, however, that Professor Jacobsohn has used it. The "apple of gold" metaphor appeared in an earlier work that outlined his theory of constitutional interpretation. GARY J. JACOBSOHN, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION ch. 6 (1986). The duplication of the reference is no accident, since Apple of Gold continues to expound upon Professor Jacobsohn's constitutional theory. See infra notes 2-8 and accompanying text. The quotation is attributed to Lincoln, even though he apparently never included it in a speech. P. 4; see also JACOBSOHN, supra, at 102-03. The reference is to a passage from the Bible: "A word fitly spoken is like apples of gold in pictures of silver." PROVERBS 25:11.

2. JACOBSOHN, supra note 1.
3. Woodrow Wilson Professor of Government at Williams College.
5. JACOBSOHN, supra note 1, ch. 7.
6. Id. at 10.
7. Professor Jacobsohn stands among other proponents of departmentalism such as Sanford Levinson and Stephen Macedo. SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY 13 (1992). Departmentalists argue that each branch of government has the right to develop its own, equally authoritative, constitutional interpretation. Id. at 12-13.
8. JACOBSOHN, supra note 1, at 140.
attempt, at least, comports with Lincoln's, and Jacobsohn's, natural law ideals.

Apple of Gold compares Israeli and American constitutionalism and evaluates efforts to transplant American principles to Israel. Professor Jacobsohn uses the Declarations of each nation to provide the framework for analyzing the similarities and differences between the two polities. The American Declaration of Independence embodies the "ethos of individualism" (pp. 4-5). In contrast, the 1948 Israeli Declaration of Independence affirms the existence of the Jewish people as a nation (p. 7). This contrast between individualism and national identity provides the framework for Jacobsohn's reflections.

In the first two chapters, Professor Jacobsohn lays the foundations for his comparisons. In "Two Declarations" (pp. 3-9) and "Two Constitutions" (pp. 9-17), he describes the fundamental distinctions between the two political systems. The American Declaration provides for natural justice principles that "are effectively the basis of nationhood" (p. 9). Those principles, he asserts, officially achieve authority in the Constitution, thereby giving both documents a singular purpose (p. 9). The Israeli Declaration embodies a similar commitment to individual rights principles, but they are not the sole vision of that document. Instead, they share space with the vision of the Jewish people as a nation. The competition between its two visions is why, Jacobsohn asserts, Israel has not achieved a written constitution (p. 9).

Consequently, constitutional development has taken place in the courts and, on a parallel track, in the Knesset. In "Alternative Pluralisms" (ch. 2), Jacobsohn argues that, although both states contain subgroups of diverse origins, the difference in national vision leads to divergent constitutional processes (pp. 18-54). The American process leads to assimilation, and the Israeli process begets stratification. Professor Jacobsohn poses "the one great American counterexample, Native Americans" as a comparison (p. 52). He describes the development of the Indian Civil Rights Act of 1968 as a noble effort, but one doomed to unsatisfactory results because it was "grounded on premises that ignored the essential fact that Native Americans were a minority who did not fit the prevailing model of constitutional and political pluralism" (p. 19). Protecting group autonomy, a "constitutional anomaly" in America, is the norm in Israel (p. 23).

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9. The second section of the Declaration includes the following:
The State of Israel will . . . be based on the precepts of liberty, justice and peace taught by the Hebrew prophets; will uphold the full social and political equality of all its citizens, without distinction of race, creed or sex; will guarantee full freedom of conscience, worship, education and culture . . . .
P. 7.

10. The Knesset is the Israeli legislative body.

does Israel recognize group identities, its government supports their continuing vitality. Accordingly, Israel has a strong sense of community (pp. 35-44) and departs from traditional American-style republicanism (pp. 44-52).

These themes provide the undercurrent for the next four chapters, in which Professor Jacobsohn describes the development of constitutionalism in Israel. In early efforts, the Israeli Supreme Court attempted to define who is a Jew. Jacobsohn infers that, in deciding that a Jew who converted to Catholicism is no longer a Jew for the purposes of the Law of Return but the children of a Jewish father and a non-Jewish mother are, the Court tried to balance the twin bases of Jewishness — religion and individual choice. Although the decisions appear somewhat contradictory, they represented a compromise which chose an objective, secular definition of nationality (pp. 64-66). While the American perspective would demand this effort (p. 71), the Israeli vision rejected it and refused to diminish the religious element of Jewish nationality. Jacobsohn predicts, however, that since "secular, democratic aspirations" are one of the two competing fundamental visions in Israel, they will continue to surface in the debate.

Chapter Four analyzes both Israel's failure to adopt a written constitution and the mechanisms developed in its place (pp. 95-135). Professor Jacobsohn suggests first that America's ability to produce a written constitution was possible because there was consensus on the "set of political principles that would serve as developmental guidelines of the nation" (p. 104). Israel, on the other hand, has multiple visions whose priority has not been settled (pp. 100-06). Thus, Jacobsohn perceives the ongoing constitutional debate as Israel's attempt to solidify its vision.


13. Pp. 70-80 (discussing Shalit v. Minister of Interior, 23(2) P.D. 477 (1970), translated in SELECTED JUDGMENTS, supra note 12, at 35). The halakic (orthodox) definition of a Jew is a person "whose mother was Jewish or converted to Judaism." P. 55 n.1. For commentary on Shalit, see Benjamin Akzin, Who Is a Jew? A Hard Case, 5 ISR. L. REV. 259 (1970).

14. Rufeisen seems to hold that Jewishness is based on religion, yet Shalit finds Jewishness outside of religion. Justice Landau's concurrence in Rufeisen provides some consistency, suggesting that Rufeisen's religious decision "denied his national past." SELECTED JUDGMENTS, supra note 12, at 22 (emphasis added). Shalit's denial of Jewishness' religious basis apparently did not cross the national line.

15. After Shalit, the Knesset amended the Law of Return to require both the Orthodox definition of Jewishness, supra note 13, and nonmembership in any other religion. "In effect, then, the secular position on the separability of religion and nationality was rejected." P. 71.

16. "Unlike the American example, religion in Israel is more than an influence on national identity; it is a constituent part of that identity." P. 79.

17. "The challenge of balancing these commitments in a manner that retains respect for the constitutional sanctity of both of them will doubtless ensure the continuing presence of this issue on Israel's political and legal agenda." P. 80.
Additionally, Chapter Four analyzes the development of judicial review in Israel against the background of judicial review in America (pp. 110-35). Professor Jacobsohn depends heavily on an article by Robert A. Burt, who "maintains that the emergence of judicial review in both countries is best understood as an institutional response to the presence of fundamental societal conflict" (p. 113). As examples of fundamental conflicts in American law, Jacobsohn cites the Federalist-Republican clashes preceding Marbury v. Madison and the divisiveness of slavery leading to the Missouri Compromise and eventually Dred Scott. In Israeli history, he cites the 1967 Six Day War as the conflict preceding the Elon Moreh decision and the political party struggles surrounding the Bergman case. However, while the U.S. Supreme Court used the written Constitution to establish judicial review and judicial supremacy, Professor Jacobsohn indicates that the absence of a written constitution led the Israeli Supreme Court to develop a position of judicial restraint (pp. 124-32). Although its decisions have been central in many divisive political issues, the Court has intervened cautiously, preferring to leave many fundamental decisions to the legislature. Without the certainty of a written document, Jacobsohn favors the prudence of the Court's chosen path.

This position is consistent with the views Professor Jacobsohn introduced in his earlier work, The Supreme Court and the Decline of

19. 5 U.S. (1 Cranch) 137 (1803).
21. Pp. 113-15. In Elon Moreh, the Court invalidated the military seizure of Arab-owned lands. Dwikat v. Israel, 34(1) P.D. 1 (1980), translated in digest form in 15 ISR. L. REV. 131 (1980). Because the decision favored Arab property rights over Jewish settlers, it represented a bold move on the Court's part. See Burt, supra note 18, at 2071. Elon Moreh was the name of the settlement from which the Jewish settlers were evicted.
25. "[T]he Court has already become a principal player in the great issues that divide the body politic." P. 132.
26. Professor Jacobsohn argues that Justice Landau and others did not want to "inappropriately enmesh the judiciary in controversies more amenable to political resolution." P. 130. In this philosophy, one sees the equivalent of the U.S. Supreme Court's "political question" doctrine. See Baker v. Carr, 369 U.S. 186 (1962).
**Constitutional Aspiration**, in which he theorized that “constitutional aspiration” requires the participation of all branches of government, not just the judiciary.\(^2\) The example of Lincoln’s opposition to the U.S. Supreme Court’s *Dred Scott* decision resurfaces in *Apple of Gold*, where Jacobsohn compares Lincoln’s actions (pp. 117-20) to the Knesset’s responses to the early Israeli Supreme Court decisions.\(^3\) He suggests that Lincoln’s behavior was labeled as disobedient because Americans viewed their Court’s power of judicial review as “fully settled” (p. 119). Because the Israeli review power has not been so entrenched, its citizenry viewed the Knesset’s reactions as appropriate. Professor Jacobsohn patently favors the Israeli approach.\(^4\) He even advises the American polity to follow suit, so that “they too can profit from a constitutional arrangement that allows them to achieve a higher level of clarity in the articulation, development, and application of constitutional principle” (p. 135). This is certainly a provocative call for action, but it is unlikely to change almost 200 years of established doctrine.\(^5\)

Chapter Five’s discussion of Israeli censorship law (pp. 136-43) and election law decisions (pp. 150-62) and Chapter Six’s free speech analysis (pp. 177-227) serve as the background for Professor Jacobsohn’s examination of the Israeli Supreme Court’s selective use of American rights-based constitutional theory. Again, he returns to his two themes, the Declaration’s dual aspirations and the absence of a written constitution, to validate the Justices’ choices. When his advocacy of the Israeli Court’s activist pursuit of individual rights appears at odds with his prior criticism of similar behavior by American jurists and scholars, he claims that the Israeli Court’s activism is acceptable due to the shared nature of constitutional interpretation in Israel (pp. 143-62). “[T]he constraints imposed on the courts by the constitutional principle of parliamentary supremacy legitimates a more active role for the courts in construing the law.”\(^6\) Professor Jacobsohn further justifies the Israeli Court’s rights-oriented activist role for its edu-


\(^{29}\) The Knesset did not merely resist “wrong” Supreme Court decisions; it amended Basic Laws to overrule them. P. 71 (discussing amendment to the Law of Return following *Shalit*); see *also supra* note 15 and accompanying text. For one Justice’s endorsement of these reactions, see p. 129 n.94.

\(^{30}\) “A Court pursuing the more libertarian aspirations of the nation’s founding agenda can and ought to be checked by a Knesset that is more sensitive to the other parts of that agenda . . . .” P. 135.

\(^{31}\) This is not surprising, since it follows his own ideas. Professor Jacobsohn “[r]egrettably” recognizes that his “is not a widely shared view, mainly because . . . judges and scholars . . . embrace the teaching contained in the aphorism that the Constitution is what the judges say it is.” P. 134. For more objective reasons why such views are not widely shared, see Burgess, *supra* note 7, at 19-22.

\(^{32}\) P. 152. The absence of a written constitution makes judicial legislation easier because
Again, he asserts that the texts for this pedagogical task of the "republican schoolmaster" (p. 162) have been, and should be, borrowed selectively from America. The educative role is particularly crucial and risky, he asserts, because the Court is developing and interpreting its constitutional text simultaneously (pp. 168-73). On a parallel track, the Knesset also adds "lessons" regarding the sanctity of Israel as a Jewish state. Thus, the Court's desire to educate the populace on democratic individual rights theory must not overshadow the other aspiration of Israeli constitutionalism — the preservation of the Jewish state.

No issue demonstrates the differences between the American and Israeli constitutional visions more clearly than that of free speech. Chapter Six delves deeply into free speech cases from both nations to drive home the distinction (pp. 177-227). In particular, Professor Jacobsohn contrasts the American tolerance of the Nazi march through Skokie, Illinois with the Israeli suppression of Rabbi Meir Kahane. Whereas the American vision requires tolerance, "Israeli law, in its criminalization of various types of offensive speech, resists a Holmesian toleration of what we hate . . ." (p. 219). Viewed from the perspective of its fundamental vision, each nation's approach "can
readily be assimilated into an argument for individual liberty rightly understood" (p. 227).

Professor Jacobsohn concludes as he began: with Israel's continuing tug-of-war over adopting a written constitution, especially a bill of rights (ch. 7). He infers that American critics who chastise Israel's ambivalence as false constitutionalism have ignored once again the twin goals of Israel's political culture. Consequently, Jacobsohn exhorts Israelis to remain deaf to the critics and continue their quest to forge a "picture of silver" that truly fits their "apple of gold."

In his introduction to *Apple of Gold*, Professor Jacobsohn proclaims two goals:

What I have sought to do in this book is contrast particular features of the constitutional cultures of Israel and the United States that are relevant to an assessment of constitutional transplantation. While these two polities constitute the specific focus of the analysis, my hope is to contribute more broadly to an improved understanding of the nature of constitutionalism. [p. 12]

Professor Jacobsohn succeeds admirably in his first goal. His examples are thought provoking and reflect the depth of his research and the stellar sources to which he had access. As a historical account of Israel's constitutional struggles, *Apple of Gold* is both educational and engaging. Regarding his second goal, whether Jacobsohn has succeeded in illuminating the current constitutional discourse depends on whether one finds his theory of constitutional aspiration persuasive. If it is persuasive, the Israeli experience serves as an example of how the exercise of constitutional development is properly shared between the courts, the legislature, and ultimately the people. If it remains unconvincing, one must applaud nonetheless *Apple of Gold*'s energetic efforts to display Professor Jacobsohn's "republican schoolmaster" aspirations.

— Cynthia A.M. Stroman

38. "The raison d'etre of constitutional government is the preservation of liberty; whatever other goals it may have, a regime that identifies itself as constitutional, but fails to pursue this goal, is simply not what it purports to be." P. 231.

39. "[T]he presence or absence of such a document is not essential to a determination of whether constitutionalist claims are legitimate . . . [especially] where a commitment to liberal democratic principles is to be reconciled with the establishment of the state as a homeland for a particular people." Pp. 235-36.

40. In addition to thorough historical and legal research, Jacobsohn interviewed, among others, six former or current Justices of the Israeli Supreme Court.
In Antitrust in a World of Interrelated Economies, Mário Marques Mendes provides an insightful account of the conflict between antitrust and trade policy objectives in both the United States and the European Community (EC). His main contention is simple indeed: antitrust, which aims to promote competition, and trade policy, which aims to protect domestic industry, operate at cross-purposes. Mendes skillfully elaborates this thesis throughout his book, showing the reader how the two policies conflict and how the enforcers of trade policy might better recognize the concerns behind antitrust policy. His book is full of insights into policymaking and decisionmaking at all levels. Mendes traces the history of antitrust and trade enforcement in the General Agreement on Tariffs and Trade (GATT), Organization for Economic Cooperation and Development (OECD), and United Nations Conference on Trade and Development (UNCTAD) as adroitly as he discusses infighting between the Department of Justice and the International Trade Commission. His remarkable ability to discuss two major policies in two legal systems at once is ultimately the real strength of this book.

Mendes divides the text into three parts. The first, "International Trade and International Antitrust: An Overview," summarizes the history of trade liberalization in the GATT and trade protection despite the GATT (pp. 19-26). It then reviews the history of antitrust enforcement, noting that despite its mainly economic bases, one early political motivation for enforcement stemmed from an association of cartels with Nazism (p. 34). Mendes points up the limitations of purely domestic antitrust enforcement and decries the lack of regulation of restrictive business practices on the international level. Others, too, have called for greater international coordination in the antitrust area. Sir Leon Brittan, former Commissioner in charge of competition, called for the inclusion of antitrust

1. Mário Marques Mendes practices law in Lisbon and Brussels and teaches International Trade Law at the Center for European Studies of the Portuguese Catholic University. —Ed.


3. Others, too, have called for greater international coordination in the antitrust area. Sir Leon Brittan, former Commissioner in charge of competition, called for the inclusion of antitrust
discussion of the lack of international antitrust enforcement is slightly out of date in that it fails to mention the 1991 agreement between the EC and the United States to coordinate antitrust enforcement. While currently in force, France is presently challenging the validity of the agreement in front of the European Court of Justice.

The second part of the book, "The U.S. and EEC Antitrust Systems," completes the foundation for the intricate arguments of Part III. Mendes' taxonomy of the interrelationships relevant to his inquiry begins in this part. He skillfully addresses the practical aspects of enforcement in the U.S. and the EC before finding that "all these aspects of antitrust enforcement cannot be looked at separately. They are all interrelated" (p. 68). Mendes further notes that, especially in the U.S., antitrust is not only complex in itself but also constitutes part of a broader economic policy (p. 65). The importance of economic criteria in American antitrust evaluations cannot be underestimated, while economics plays a lesser role in Community decisionmaking. Mendes goes too far, however, when he characterizes the role of eco-

on the agenda of the next GATT round. He said: "An international body with powers to seek out and destroy cartels may come one day, but the international community is clearly not ready to contemplate this possibility yet. For the time being we should think about a clear agreement as to the rules relating to cartels . . . .” Brittan Calls for GATT Code on Competition, AGENCE FRANCE PRESSE, Feb. 3, 1992 (Econews section), available in LEXIS, Europe Library, ALLNWS File.

4. Competition Laws Co-operation Agreement 1991 (EEC-USA), 4 C.M.L.R. 823 (1991). The agreement, signed on September 23, 1991, is not legally binding but sets up a formal procedure for the exchange of information about companies suspected of antitrust infringement. The arrangement does not compromise the independent decisionmaking of each legal system's authorities, but both sides have agreed to abide by the principle of international comity, whereby each side could request that its interests be taken into account by the other. Antitrust authorities from the United States and the EC first met in November, 1991. See Coopers & Lybrand, Trade Relations EC-USA and EC-Canada, EC COMMENTARIES, Apr. 15, 1993, § 5.10, available in LEXIS, Europe Library, EURSCP File.

5. Case C-327/91, France v. Commission (initiated on 16 Dec. 1991 (pending)). A notification of the bringing of the action is published at 1992 O.J. (C 28) 4. France argues that the agreement with the United States is ultra vires because it is not an administrative agreement, but an international agreement under Article 228(1) of the Treaty of Rome that must be concluded by the Council. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 228(1); Competition: France Mounts Court Challenge to EEC-US Anti-Trust Agreement, EUR. REP., Jan. 11, 1992, at 4 (Business Brief No. 1734), available in LEXIS, Europe Library, ALLNWS File; Charles Goldsmith, EC Defends Its U.S. Antitrust Pact, INTL. HERALD TRIB., Jan. 11, 1992 (Finance Section), available in LEXIS, Europe Library, LEXIS, Europe Library, ALLNWS File; see also Alan J. Riley, Nailing the Jellyfish: The Illegality of the EC/US Government Competition Agreement, 13 EUR. COM. REV. 101 (1992) (arguing that the agreement is ultra vires).

6. Ascertaining the precise role economics will play in future competition evaluations in the EC is difficult because of the appointment this year of a new Competition Commissioner, Karel van Miert. The former Commissioner, Sir Leon Brittan, recognized the importance of economic efficiency criteria: "[O]ur approach is an economic, rather than a legal one. Competition law is rightly concerned with substance rather than form." SIR LEON BRITTAN, COMPETITION POLICY AND MERGER CONTROL IN THE SINGLE EUROPEAN MARKET 37 (1991). There are fears, however, that van Miert will deemphasize economics:

In anti-trust issues, Mr[.] Van Miert says, competition should not be the only criterion: industrial, social and other factors also apply. Indeed they do, but they are not the business
nomics in the EC as "minor." In support of his contention, Mendes cites to the Sixth, Ninth, Thirteenth, and Sixteenth Reports on Competition Policy, but he neglects to examine more recent reports that place a greater emphasis on economic efficiency in the EC.8

Having found the goals of antitrust to be superior to those of trade policy by virtue of their promotion of competition and free trade, Mendes defines the useful limits of domestic antitrust policy by commencing a detailed investigation of the vagaries of international subject matter jurisdiction (pp. 86-101). The foreign sovereign immunity, act-of-state, foreign sovereign compulsion, and other defenses may prevent a domestic antitrust policy from functioning effectively in the international arena (pp. 94-101). Mendes notes that where an industry can choose between bringing an antitrust suit or an import relief proceeding, it will invariably choose the latter because the antitrust defenses will not apply (p. 166).

Both legal systems tend to downplay international comity considerations.9 Moreover, both the U.S. and the EC tend to encourage or approve antitrust violations abroad, as the U.S. statute exempting export cartels from antitrust suits illustrates.10 A fuller discussion of the statutory exemptions to the U.S. and EC antitrust laws would have

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7 Mendes claims that, "[i]n a word, economic efficiency considerations when confronted with other concerns, be they market integration, the protection of specific industrial sectors or regions or even that of users and workers, have consistently played a minor role in the context of EEC competition policy." P. 83 (emphasis added).

8 See p. 118 nn.15-17; see also COMMISSION OF THE EUROPEAN COMMUNITIES, XXII REPORT ON COMPETITION POLICY 42 (1992) (noting "one important limitation on the possibility of relying on cooperation and restructuring operations: companies can not be allowed to eliminate effective competition"). Mendes also cites to the earlier reports when he discusses the role of industrial policy in the Commission's decisionmaking. Pp. 241-43. There, he mentions the Sixth, Eleventh, and Seventeenth Reports, but it is striking that the Seventeenth Report is less openly in favor of accommodating industrial policy concerns in competition decisions than the earlier reports. See COMMISSION OF THE EUROPEAN COMMUNITIES, SEVENTEENTH REPORT ON COMPETITION POLICY 51 (1988); see also COMMISSION, XXII REPORT at 42-43. Industrial policy is, however, receiving greater legitimation outside the competition area: the Single European Act of 1986 added Article 130f to the Treaty, which aims to "strengthen the scientific and technological basis of European industry." EEC TREATY art. 130f. If the Maastricht Treaty is ratified by the Member States, an entire title of the Treaty will be devoted to industrial policy. TREATY ON EUROPEAN UNION [MAASTRICHT TREATY] art. G(38) (replacing EEC TREATY Title VI with Title XIII, art. 130).

9 Pp. 86-101. The agreement between the United States and the EC takes comity into account, however. See supra note 4.

been appreciated, especially as the U.S. exemption for export cartels and the EC exemption for crisis cartels seem to accommodate trade policy objectives.

At this point, Mendes attempts a preliminary comparison between the U.S. and EC antitrust systems that rings true in most respects but becomes deeply problematic when he explores it further in Part III. He asserts that "[t]he concentration one finds in the Common Market is in striking opposition to the decentralized U.S. institutional and enforcement structure" (p. 82). This is surely correct. The United States has a greater arsenal of antitrust enforcement agencies and instruments, while in the EC the Commission has greater powers than the Justice Department and the F.T.C. combined. Moreover, the American approach to antitrust is more deeply rooted in concerns of economic efficiency than that of the Community, with its "objective of market integration . . . [as] the most important of the goals of EEC competition policy" (p. 74). Given the centralization in the EC, it is not surprising that "antitrust appears more obviously as one set of principles which has to be balanced against other equally relevant considerations" (p. 138). In the United States, the reconciliation of antitrust with other policies, such as trade, may be achieved through interagency negotiation rather than intraagency decision, as the author's explanation of the LTV-Republic merger case illustrates so well.

The author's logical assumptions in his preliminary comparison between the two antitrust systems in Part II lead to perplexing conclusions when applied in Part III. Mendes finds that, "at least in theory," the reconciliation of trade and antitrust should be easier in the EC

11. Mendes discusses U.S. statutory exemptions. Pp. 70-73. The export cartel exception is the most important. See supra note 10.

12. "Crisis cartels" are organizations of producers in industries under severe economic pressure. In general, the Community has a wider and more flexible range of antitrust exemptions than the United States. See pp. 73-81. The Commission may grant individual or group exemptions for those restrictive practices which violate Article 85(1) of the Treaty, but satisfy the criteria of Article 85(3). See EEC TREATY art. 85. The Article 85(3) criteria are often met, so the number of exemptions granted is quite high. Two of the most utilized group exemptions concern specialization agreements and research and development agreements. Commission Regulation 417/85 on the Application of Art. 85(3) to Categories of Specialization Agreements, 1985 O.J. (L 53) 1; Commission Regulation 418/85 on the Application of Art. 85(3) to Categories of Research and Development Agreements, 1985 O.J. (L 53) 5.

13. See p. 82 (noting in particular that the Commission has the power to grant individual and block exemptions from the antitrust rules, and that its "notices" have greater weight than the Department of Justice's "guidelines").

14. Pp. 239-48. The LTV-Republic steel merger was originally prohibited by the Department of Justice. The Department reasoned that a merger between the third and fourth largest producers would increase concentration in the domestic market and likely lead to higher prices. After the President and the Commerce Department pressured the Justice Department to change its ruling, it upheld the merger, albeit with certain conditions attached. See pp. 239-48; Peter Bruce & Terry Dodsworth, Republic-LTV Deal is Approved, FIN. TIMES, Mar. 22, 1984, at 42; Rescued Merger, Lost Opportunity, N.Y. TIMES, Mar. 24, 1984, at A22.
than the U.S. because of the centralization of power in the Commis-

sion and the fact that all EC trade laws contain “Community interest”

clauses requiring the consideration of other policies and interests

before adopting trade sanctions (p. 168). He goes on to find, however,

that the clauses do not really work; the Commission consistently up-

holds the interests of industry over the interest of the public in free

competition (p. 169). Mendes becomes rather irate with the

Commission:

The rare cases in which it is said that competition considerations were

taken into account do not show a change of attitude on the part of the

Community authorities. The approach is confusing, if not puzzling; the

motivation is poor, if at all existent; the inconsistencies are blatant if one

compares such cases with usual analysis of EC institutions. [p. 171]

He finds that, “[i]n short, what EC institutions are doing is promoting

Community industrial policy. . . . The risk indeed exists, then, that

the promotion of an industrial policy within the Community . . . may
degenerate into a clear expression of outright protectionism.”

The U.S. situation compares favorably with that in the EC. Mendes notes:

Conversely, and strikingly enough, it is in the United States — where

“public interest” clauses in trade laws are ineffective or non-existent, and

where there are not only one but several agencies involved in antitrust

and trade matters — that, through the efforts of the antitrust enforce-

ment authorities, competition arguments have been regularly submitted,
sometimes successfully, in trade proceedings . . . . The fact is that much

more was done, in apparently a not so favorable legal and institutional

environment, than in the EEC, to bridge those differences. [p. 177]

Yet, in the final part of the book, Mendes inexplicably reverses his

position again. The book begins to feel like a detective novel — the

United States is “guilty” because it has no “public interest” clauses,
too many agencies, and the common law tradition. No, actually the

EC is at fault because its “Community interest” clauses have no real

effect. Suddenly, on page 243, the United States is fingered again:

“while in the EEC antitrust is understandably balanced against other

policy concerns, any attempt to adopt the same approach in the

United States . . . may be unrealistic.” Mendes offers little support for

this last reversal. He cites several of the Commission’s Reports on

Competition Policy and Article 130f of the Treaty of Rome, but gives

no practical “in-the-trenches” advice as before on how the system re-

ally works.16 As a result, his conclusion sounds a little hollow: “In

15. Pp. 173-74. Many scholars have accused the Community of using industrial policy to

attain protectionist goals. See, e.g., Derek Ridyard, An Economic Perspective on the EC Merger

Regulation, 11 EUR. COMPETITION L. REV. 247, 252 (1990) (“[C]ompanies based outside the EC

may find that . . . the Commission will be more prone to upholding Member States’ public

interest objections to mergers if the bidder is a US or Japanese firm than one based in the EC.”).

16. Compare the author’s summary conclusions about the EC’s balancing of policy concerns

with his earlier, more measured statement:

Interestingly enough, it is just possible that the evolution in the system of judicial review in
the EEC, a centralized institutional system formulates antitrust rules and principles and enforces them in a flexible way . . ." (p. 265).

To be sure, Mendes’ primary objective is not to compare the antitrust-trade balancing in the U.S. and the EC, but to communicate the need in both legal systems for trade protection decisions to take antitrust enforcement into account. Mendes further hopes that where the relevant authorities do not take antitrust into account, they will be made “aware of their own anticompetitive options and provid[e] those who are thereby affected with clear explanations for such policy choices” (p. 146). Nevertheless, his brief comparison between the two legal systems in Part II and further analysis of each system in Part III lead the reader to expect a more complete comparison of the pluses and minuses of each philosophy for reconciling antitrust and trade objectives.

Mendes notes that there has been and will continue to be a certain amount of “cross-fertilization” between the two approaches to reconciliation (p. 266). Complete harmonization is unlikely and undesirable, given the historical attachment of Americans to economic reasoning and of Europeans to industrial policy. Yet a more thorough account of the way each legal system balances antitrust and trade would enable the reader to decide what kind of cross-fertilization is beneficial for each system and to what extent. It would also help pinpoint what kind of international antitrust cooperation would be practical and successful. Having completed his interdisciplinary analysis, Mendes stops just short of completing a compelling comparative law analysis.

The impressive observations and analyses in this book illustrate how certain trade measures in each legal system contravene the policy goals of antitrust. Mendes’ discussion in Part III of how each U.S. trade law — except countervailing duties — runs afoul of the antitrust laws is superb. Mendes coyly asks “whether there is any fundamental reason for applying antitrust rules and principles in domestic trade while setting them aside in what concerns foreign trade which is dealt with by the import relief laws” (p. 144), before quite convincingly showing that all the fundamental reasons point the other way. He reveals that the only kind of dumping that violates the antitrust laws is predatory dumping, which is also the least likely to occur.17 He admits, however, that scrapping the antidumping laws is not feasible,
given the weakness of domestic antitrust law in the international arena. He finds the escape clause, too, works against competition\(^{18}\) but alleges the greatest difficulties are with section 337 of the 1930 Tariff Act, which is ironically "the one most resembling the antitrust laws and yet the most criticized for the anticompetitive concerns raised by its application."\(^{19}\)

Mendes' analysis of the antitrust problems arising from trade litigation in the U.S. and the EC is also compelling. He finds more similarities than differences between the two systems (pp. 193-97). Some differences persist, however, which Mendes catalogues quite elegantly. In the United States, companies tread a fine line between lobbying and unlawfully exchanging business information (pp. 179-80). Voluntary restraint and similar agreements also pose antitrust risks in the United States after the *Consumers Union* case,\(^{20}\) while these risks are somewhat less in the EC.\(^{21}\)

Mendes writes the first and second parts of his book casually and compactly. They are complete enough, however, to prepare the reader for the more interesting discussion in Part III, where all of the arguments previously developed finally interrelate. Unfortunately, Part III is as brief and casual as the first two parts. The plethora of exclamation points — three on page 170 alone! — can be forgiven. The author, after all, is terribly upset about the Commission's failure to take the Community interest into account when deciding on trade sanctions. Despite being impressed by his fervor, however, after patiently reviewing the history of antitrust and trade in expectation of this final synthesis, the reader wishes to explore some of his arguments in more detail. The two page conclusion is at once simplistic and cryptic.

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20. Consumers Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973). See p. 185. Voluntary restraint and similar agreements typically involve informal negotiations between governments or between government and a foreign industry resulting in the foreign government or industry's "voluntary" decision to limit imports. The court in *Consumers Union* upheld the President's authority to negotiate with foreign companies but denied that he had authority to give "binding assurances" of exemption from the antitrust laws. 352 F. Supp. at 1323-24.

21. [W]hile measures taken in pursuance of trade agreements between the Community and third countries, as acts of external commercial policy, are not caught by Article 85(1) of the EEC Treaty, agreements or concerted practices among foreign producers aimed at restricting exports to the EEC or at regulating their price or quality, unless imposed on such producers by the foreign authorities (foreign sovereign compulsion defense), would fall under the reach of EEC antitrust rules. P. 195 (citations omitted).
In the final analysis, Mendes does an extraordinarily good job of isolating the conflicts between antitrust and trade policy in the United States and the European Community, but he leaves the reader somewhat baffled as to which legal system better resolves these conflicts. He also does not explain how an international agreement might best be structured for effectiveness and acceptance. Mendes ultimately raises as many interesting questions as he answers.

— Alyssa A. Grikscheit