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**CONSTITUTIONALISM
IN EAST CENTRAL EUROPE**

Some Negative Lessons from the American Experience

Stanley N. Katz

*With comments by
Donald P. Kommers and Hartmut Jäckel*

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Negative Lessons from the American Experience:
A Response to Professor Katz

Donald P. Kommers

Comments on
"Constitutionalism in East Central Europe"

Hartmut Jäckel

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Introduction

In the wake of the recent revolutionary upheavals in the states of the former Soviet bloc, the constitutional debates that have often determined the form and character of emerging nations have come to dominate much of the political discourse in Eastern Europe. In their search for precedents and points of orientation to help chart a course in accordance with the newly cherished Western values of democratic constitutionalism, many politicians and political observers are tempted to turn to the United States Constitution as the oldest and most obvious model that has endured for more than two centuries. Historians—constitutional and other—are equally intrigued by the prospects of using the lessons of the past to solve urgent contemporary problems, hoping thus to fulfill their professional aspirations of drawing a connection between the past and the present and demonstrating to a wider public the relevance of historical study.

And yet, as Professor Katz warns us in his lecture, at a time when we observe developments in Eastern Europe with both great expectations and apprehensions, we should not simply engage in the expansionist promotion of Western institutions but recognize the limitations inherent in any attempt to transfer political structures from one context to another. He rejects the notion of democratic constitutionalism as an immutable given and emphasizes instead its adaptability by reminding us of the tremendous changes that the American Constitution has undergone over two centuries. The history of American state constitutions, likewise, confirms the diversity of the various approaches taken rather than the application of a universal pattern, even in the early Republic. In East Central Europe, as well, with its multitude of political, social, and cultural traditions, divergent historical developments should be taken into consideration in the establishment of specific constitutional and political structures. In Professor Katz's view, it is not the form of democratic constitutionalism but its practical application that must be universal.

Stanley N. Katz, president of the American Council of Learned Societies and senior fellow at Princeton University's Woodrow Wilson School, is one of the foremost legal and constitutional histo-

rians in the United States. He has written and edited numerous books and articles in those fields; has been an editor of the American Society for Legal History's series *Studies in Legal History* as well as several other historical journals; and has served, among other things, on the boards of numerous professional organizations involved in legal and constitutional history projects. He was also president of the American Society for Legal History and the Organization of American Historians. Recently, Professor Katz engaged the Ford Foundation and the ACLS in a study of comparative constitutionalism in various parts of the world, which was published as *Constitutionalism and Democracy: Transitions in the Contemporary World* (1993).

Our two commentators, Professors Donald P. Kommers and Hartmut Jäckel, support Katz's argument, elaborating on it from their own perspectives as scholars, teachers, and governmental advisors. Professor Kommers, the Joseph and Elizabeth Robbie Professor of Government and International Studies at the University of Notre Dame and editor of the *Review of Politics*, spent several years in Germany, most recently at the Max Planck Institute of International and Comparative Public Law in Heidelberg. His numerous books and articles include *The Constitutional Jurisprudence of the Federal Republic of Germany* (1989) and his most recent publication, *Germany and the Basic Law: Past, Present and Future* (1993), which he co-edited with Professor Paul Kirchhof, the associate justice of Germany's Federal Constitutional Court. Professor Kommers emphasizes that, for a constitution to work, it must reflect the history and character of the people. He points to the German Basic Law of 1949 as one example of a constitution based on a nation's constitutional precedents instead of the American Constitution and contrasts it with the Japanese constitution, which is, by and large, a copy of the American model. Kommers sees the German case as more instructive for East Europeans, who might learn more from the breakdowns of American constitutionalism than from the seemingly perfect U.S. Constitution.

Professor Jäckel is more skeptical about the progress of democratic constitutionalism in Eastern Europe. Emphasizing the close relationship between economic stability and political democracy, he suggests that, in Russia at least, "a mildly authoritarian system of presidential predominance" might be the more appropriate solution during the present period of transition. Professor Jäckel taught constitutional and comparative law for many years and currently holds

a chair in political science at the Free University of Berlin. He also served as vice-president of the Free University; a deputy minister in the Department of Science and Research of the government of Berlin; and an advisor to the Social Democratic faction of the *Volkskammer* and the Ministry of justice of the former German Democratic Republic after its first free election in 1990. In 1991, he was elected president of the German Society of Political Science. He has written and co-authored books and articles on parliamentary elections, political parties, and the politics of various communist countries.

Given the topic under discussion, it is perhaps inevitable that more questions might have been raised than answered by Professors Katz, Kommers, and Jäckel. However, their stimulating contributions point to the fundamental issues and general principles that are at stake and that will continue to serve as guidelines for measuring the progress of constitutional developments in Eastern Europe.

Washington, D. C.
July 1994

Hartmut Keil

Constitutionalism in East Central Europe: Some Negative Lessons from the American Experience

Stanley N. Katz

Many American experts have urged East Central Europeans to adopt a particular kind of constitution—one resembling the American Constitution. These experts contend that democratic constitutionalism is a universal concept. A valid constitution, they argue, must be a written document. It must include provisions for separation of powers and judicial review, as well as a bill of rights and various other by now historic attributes of American constitutionalism.

The American scholar-journalist Theodore Draper has reflected on the problem in a recent review of Professor Bernard Bailyn's new edition of original materials documenting the debate over the ratification of the U.S. Constitution of 1787. Draper leads off his essay with a reference to a London *Economist* drawing of George Washington: "Underneath the familiar face were these words: `Wanted: A European George Washington needed to draft a new constitution for Europe.'" He goes on to ask the "intriguing" question: "What can Europeans learn from the way that the American Constitution unified 13 sovereign states into a strong central government?"

The danger is that some Europeans, working quickly in a time of political crisis and constitutional uncertainty, will be swept up in American enthusiasm for their unique politico-constitutional situation. Bailyn's edition reproduces the famous words of America's first lexicographer, Noah Webster, who thought the American constitutional moment was like "the promulgation of the Jewish laws at Mount Sinai." Such thoughts were echoed by the great Federalist lawyer, James Wilson of Pennsylvania, who urged support for the proposed framework of government by intoning: "By adopting this system, we shall probably lay a foundation for erecting temples of liberty, in every part of the earth." Draper himself, however, concludes quite sensibly that:

The immediate lesson for Europeans, caught in their own struggle over a new continental constitution, may well be the necessity to make a distinction between what is central and what is peripheral for the purpose of unification.... The American example showed that

constitutions must be given a chance to develop as constitutions change, and that everything cannot be decided in advance.¹

The real question, so far as I am concerned, is what the appropriate starting point for new European constitutions might be. The answer, in my judgment, is to be found in local traditions rather than in the history of the United States during the era of the Enlightenment. American constitutional scholars and lawyers have much to contribute to developments in Europe, but only to the degree that they acquire (and display) an understanding of European history, politics, and law.

My own views on the nature of constitutionalism have been profoundly influenced by the project on comparative constitutionalism that I undertook for the Ford Foundation as its contribution to the bicentennial of the Constitution of the United States in 1987. My ACLS colleagues and I held discussions on constitutionalism in various parts of the world over a period of three years: in Punta del Este, Uruguay; Chiang Mai, Thailand; Harare, Zimbabwe; Berlin, Federal Republic of Germany, and Pecs, Hungary.

I think you can imagine the variety of views presented at these conferences, each of which had participants from virtually all regions of the world, from developed and developing societies, from socialist and capitalist regimes. We heard from those who believed that constitutions must be written, legitimized by bodies other than ordinary legislatures, based on individual rights, and conducted by rigorous, formal limitations on the power of government. We also heard from those who believed that group rights were the essence of constitutionalism, and that the underlying purpose of constitutions was to empower governments to achieve popular ends.

It became obvious that there was no international consensus on the meaning of constitutionalism. In our final publication, we were driven to conclude that an "approximate" definition of constitutionalism was:

a commitment to limitations on ordinary political power; it revolves around a political process, one that overlaps with democracy in seeking to balance state power and individual and collective rights; it

¹ *New York Times Book Review*, October 10, 1993, 3, 25–27.

draws on particular cultural and historical contexts from which it emanates; and it resides in public consciousness.²

Put another way, we concluded that the American and Western European universalistic forms of constitutionalism were not persuasive in many parts of the world, including some parts of Europe. Meaningful approaches in different national contexts require the development of the core meaning of constitutionalism in terms of local cultures. For scholars of comparative constitutionalism, this indicates the need for a more ethnographic approach.

Several months ago, with funding from the Pew Charitable Trusts, ACLS organized a series of conferences specifically intended to address the nature of constitutionalism in East Central Europe. Conferences were held in Warsaw, Budapest, Prague, and Bratislava. Participants included scholars, judges, parliamentarians, and representatives of public and private institutions in each country. Each conference was comprised of three sessions that addressed the following issues: the history of constitutionalism in the respective country, the current situation of constitutionalism, and future prospects for constitutionalism.

The most striking aspect of all of these Pew conferences was the degree to which national and local history, culture, and politics influenced thinking about constitutionalism, even within such a relatively small geographical region. Our participation in these discussions has convinced us once again that, even in Europe, there is no ideal template for either democracy or constitutionalism. In particular, U.S. constitutional forms and practice, are not necessarily a good model for the nations of East Central Europe.

This is not to say that American constitutionalism ought to be deemed irrelevant to the work of the framers of East Central European constitutions. My point is a narrower one: American jurists and scholars who go to East Central Europe to "instruct" the peoples of the region on the true meaning of constitutionalism too often act upon a series of universalist assumptions that do not take into account the multiplicity of historical, ethnic, religious, and political

² Douglas Greenberg, Stanley N. Katz, Melanie Beth Olivero, and Steven C. Wheatley, eds., *Constitutionalism and Democracy: Transitions in the Contemporary World. The American Council of Learned Societies Comparative Constitutionalism Papers* (New York, 1993), xi.

traditions and current realities at work in the different nations of the region.

Interestingly enough, this fact would have been less foreign to the experience of the framers of the American Constitution than it is to many American constitutional experts today. In recent years, a major research interest of mine has been the early constitutions adopted by most of the new American states in 1776 and the years that followed the American Revolution as they emerged from British colonial rule. These early constitutions are remarkable for their diversity. Reading them, one gets a powerful feeling of the importance of local history and culture in shaping notions of democracy and constitutionalism.

Rhode Island, for example, refused to accept the Philadelphia Convention's prescription that the proposed constitution be submitted to a specially-elected ratifying convention, instead putting it in a referendum directly to the people (who promptly rejected it resoundingly). The first Pennsylvania constitution provided for a unicameral legislature. The first South Carolina constitution established Protestantism as the official state religion. The first New Jersey constitution was nothing more than an ordinary statute. Several early constitutions permitted the taking of private property without compensation, provided the state legislature approved.

There was absolutely no consensus on the nature of American constitutionalism, apart from the (indeed universal) agreement that all government was to be feared as inevitably self-aggrandizing and hostile to individual liberties and that, consequently, government needed to be somehow limited in the exercise of power. The Constitution of 1787, America's second constitution, in fact marks an important shift in Americans' understanding of constitutionalism insofar as it represents a decision to fashion a centralized and modestly powerful, yet still limited government. No one who wants to understand the potency of Reaganism and Perotism in the contemporary United States can ignore the persistence of localism and anti-governmentalism in the American tradition. As an aside, it is also worth mentioning that the constitutions of the *Länder* in the Western zones of Germany in 1946–47 represent the same regionalist instinct.

Thus, although it is an obvious truth that the framers of early American constitutions, especially the federal Constitution of 1787, were profoundly influenced by Enlightenment notions of universal

reason, it is also no doubt true that they recognized the significance of local difference. Indeed, thinking about American constitutionalism in this way opens up a whole new perspective on the federal Constitution: we can see it as a document that reflects an attempt to mediate universal reason with local traditions, while, at the same time, accommodating local differences through the federal structure, as well as through the intentional ambiguity of many of its substantive provisions. Here the best example is no doubt the several provisions relating to slavery (a word never used in the constitutional text), which permitted both the legal existence of slavery in the South and the implication that slavery did not exist in the North. Individual liberty, in any case, was not a universal principle for early American national constitutionalism.

The diversity, evident in their constitutions, that characterized the early American states is even clearer in the case of the nations of East Central Europe. As we discovered in our series of conferences, these countries ought not to be seen as a unit. Viewing them regionally is really a legacy of World War II and the Cold War, during which time these nations were under the control of first Nazi Germany and then the Soviet Union. The neat division of Europe into East and West ended with the end of the Cold War. We can now view the nations of East Central Europe with a renewed sense of their different traditions and realities.

To take only a few examples, Hungary and Poland are in the process of developing new constitutional structures in piecemeal fashion; that is, by amending formerly socialist constitutions with changes driven by the force of the transformations taking place in their social and economic relations. The Czech Republic and Slovakia, on the other hand, impelled by their separation into two nations, have drafted new constitutions. Yet, paradoxically, the popular legitimacy of the Hungarian and Polish constitutional orders appears to be stronger than that of the Czech and Slovak regimes. It seems that, particularly in the Hungarian case, a more varied political landscape is better accommodated by this piecemeal approach. And, in any case, the difficulties and dangers of starting to write a new constitution from scratch have made constitutional accommodation a better approach.

Another example is the differing impact of history on constitutionalism. Hungarians tend to take their constitutional past for granted without public discourse, though Kalman Kulcsar, the emi-

ment legal scholar and the last socialist Minister of Justice, has argued that the pre-communist Hungarian constitutional tradition makes the gradual resumption of constitutionalism a practical reality. For Poles, on the other hand, the question of their constitutional history and tradition seems to be self-consciously central to their constitutional legitimacy. For example, during one of our Warsaw conferences, a lively and extended disagreement arose over the significance of the Polish constitution of May 3, 1791, which was never implemented. When I visited the president of the Polish Academy of Sciences during the morning before the opening of our conference, he presented me with a beautifully printed English translation of that constitution, after digging into a stack of copies in all of the European languages. Several participants in our conference pushed the discussion back even further, identifying a pre-1791 constitutional tradition involving obedience to the rule of law as a basis for the current constitutional structure.

Slovaks are also concerned with history, but in a manner almost diametrically opposed to that of the Poles. Slovakia had no history of national autonomy prior to the formation of Czechoslovakia in the aftermath of World War I. Slovakia's only prior history of independent statehood came during World War II, when the Nazis established a fascist Slovakian puppet regime. The fact that the first Slovak constitution was promulgated during this period is a potential source of delegitimization for the current regime. This is especially true given the absence of other historical antecedents for Slovak constitutionalism.

The way in which this issue of constitutional tradition and history can have a marked impact on the development of constitutional structures is illustrated by the case of Poland. In an essay that was prepared for an ACLS-sponsored Comparative Constitutionalism Symposium, Wiktor Osiatynski made several illuminating points about Poland's constitutional tradition.³

First, he noted that constitutions emerged in Poland as grants of privileges from rulers rather than as social contracts with the people. As a result, the principles of separation of powers and balance of power have never been very significant in the Polish con-

³ Wiktor Osiatynski, "Perspectives on the Current Constitutional Situation in Poland," in *Constitutionalism and Democracy*, ed. Greenberg et al., 312–320.

stitutional tradition. This history has resulted, in Osiatynski's view, in a tradition of trust in the authority of a strong leader who grants favors to the people rather than in the notion of the people as holders of inalienable rights.

A second historical factor cited by Osiatynski closely relates to the first: because constitutionalism was not conceptualized as a restraint on majoritarian and legislative authority, Poland lacks a tradition of judicial review and, indeed, of any constitutional review of legislative acts.

A third aspect of Polish history noted by Osiatynski is the fact that the tradition of a limited state never took root in Poland. As Osiatynski sees it, this is a legacy of Poland's unique history of frequent occupations and partitions by foreign powers. Poles tend to view a chronically weak state as having been a contributing factor in this history, one that denied them their basic right to national selfdetermination. A fourth factor that impacts on Polish constitutionalism is the lack of a tradition of strong guarantees of individual rights. Osiatynski wonders whether Poles will be able to accept constitutional schema grounded in the proposition that individual rights limit all authority, including the will of the majority.

Once we acknowledge the fact that national and even local history, culture, and politics are of central importance to the constitutional scheme that develops in a particular place, however, where does this leave us? That is to say, shorn of universals, what is constitutionalism? To my mind, if there is an essence of constitutionalism (and I believe there is), it is not to be found in the structure of the constitutional arrangements and institutions that are established in a particular country. Rather, it is to be found in the *practice* of constitutionalism, in a form of politics that is based on the notion of respect for the rule of law, in which the government, however it is configured, reflects the basic values and aspirations of the community.

That is to say that generic constitutionalism consists in a process within a society by which the community commits itself to the rule of law, specifies its basic values, and agrees to abide by a legal/institutional structure which guarantees that formal social institutions will respect the agreed-upon values.

Indeed, in this regard, the American example is instructive. The text of the United States Constitution has changed little over more than two centuries: We have had only twenty-seven amendments in

more than two hundred years, inducting the first ten amendments adopted almost simultaneously with the original document. But American constitutionalism has gone through a whole series of silent revolutions during that time. One thinks of the development of law relating to the commerce power of the federal government or the development of equal protection law, both of which occurred primarily in the twentieth century, the first permitting the federal government virtually to usurp state control of business activity and the second introducing equality as a substantive constitutional value nearly one hundred years after the Fourteenth Amendment added the words "equal protection of the laws" to the Constitution in 1868. The result of such continual substantive changes through judicial construction and political practice has produced a constitutional system that the original framers of the U.S. Constitution would be unlikely to recognize as their own.

And, in any case, American constitutionalism has from the start been very different from European varieties. The most obvious distinction is that between American notions of separation of powers—that is, the division of lawmaking authority—and the civil law tradition of essentially unitary parliamentary government; that is, the primacy of legislation. Equally important is the narrow U.S. tradition of protected individual rights. The U.S. Bill of Rights concerns rights that are exclusively civil and political; it is a charter of negative, procedural rights. While this approach has had great appeal to the nations of Western Europe since World War II, it is less obviously satisfactory in post-socialist societies in which communist claims of social and economic rights survive as a potential demand for the universal guarantee of a social safety net.

The list of basic differences between U.S. and European political/constitutional traditions is very long. At the very least, it would include the political self-denial of the American military establishment, the practice of dual sovereignty embodied in the American practice of federalism, the rigorous separation of church and state, and especially the U.S. adherence to a consensual notion of citizenship, with all the pluralistic tolerance that it implies for American political life. The problem here, for anyone who would like to import the U.S. Constitution, is the incredible gap between constitution and constitutionalism in the United States.

In this sense, the U.S. Constitution is, as Bronislaw Geremek noted with reference to the Polish constitution in one of our con-

ferences in Warsaw, primarily a point of reference for the sociopolitical system; indeed, the highest point of reference, overriding parochial concerns. Constitutionalism reflects the recognition by all political actors that a particular political process, established democratically, must be respected for valid political activity to take place. Whether this political process includes judicial review, whether it is grounded in notions of individual liberty or group solidarity, whether the constitution stresses political or social and economic rights: none of these is essential to constitutionalism. The crucial element is that, whatever the constitutional structure, it must reflect the will of the people, and it must command sufficient respect from all political actors to serve as an effective limitation on the unprincipled exercise of public power.

It should come as no surprise that a primary concern expressed at each of our conferences on East Central European constitutionalism was the unfamiliarity of the mass of the people of the various countries of the region with basic constitutional values and principles. In each country, the great fear of constitutional scholars, jurists, and others was that the populace at large was not ready to shoulder the responsibility of democratic constitutionalism. In the Czech Republic, members of our conference lamented the pervasive influence of what they called "legal nihilism" derived from the long Czechoslovak experience of a formal and unenforceable constitution, ineffective courts, and a near-total rejection of the notion of individual civil and political rights. In the Czech and Slovak Republics, as well as in Poland, the failure of post-communist governments to carry out constitutional mandates for upper houses of the legislature, constitutional courts, and the like have reinforced these public attitudes that are skeptical of law.

Another ominous note is the regional preoccupation with referenda—most of the constitutions provide for the possibility of referenda on legislation and on governments themselves. Parliamentarians, both government and opposition, fear the possibility of democratic rejection by referendum. This is, of course, an indication of the weak legitimacy of constitutional regimes as well as an expression of uncertainty as to the proper role for the popular voice in the constitutional process.

But the greatest threats to constitutionalism in East Central Europe do not derive from the negativity of skepticism but rather from all-too-positive public sentiments of ethnic, religious, and

national identity. How to cope with the role of the Catholic Church in Poland, the Hungarian minority in Slovakia, or ideas of a "greater Hungary" are the urgent questions, and they are questions for which universal conceptions of constitutionalism provide neither answers nor possible courses of public action. Yugoslavia is the ghost at the table of constitutionalism in most of the formerly socialist countries of East Central Europe and the former Soviet republics.

The dangers are great, and the transition to democratic constitutionalism will not be easy or smooth. Success is not inevitable. If the essence of constitutionalism is, as I have argued, a specific national, political process, really a cultural process, then the transition must be seen as a series of political struggles. Each "new" nation will undergo different forms of struggle that, ultimately, will produce different outcomes. Hopefully, these outcomes will, indeed, reflect the will of the people and their own sense of the rule of law. But with free politics, there are no guarantees, and no certain outcomes.

It may help to think of the area as one entering a post-colonial constitutional process. All of the countries were in some sense "conquered," even if their tyrannical rulers were blood relatives rather than foreigners. As the course of lustration everywhere other than in the Czech Republic and the German Democratic Republic shows, memory itself must be abolished if political development is to take place. And here is the rub. The post-colonial nations of Africa and Asia could at least find some degree of integrative vigor in their rejection of common enemies, but, in East Central Europe, too many of the enemies were domestic.

The Ghanaian scholar Eboe Hutchful (one of our Ford Foundation conferees) has made the similarities in the Eastern European comparison with post-colonial Africa explicit:

As in eastern Europe, the process of liberating civil society and politics has resurrected old social divisions previously suppressed by state authoritarianism. Their first manifestation is the resurgence of ethnic and national chauvinism. Another is the rise of religious fundamentalism as a potent electoral vehicle.... The third is the appearance of conditions of ungovernability—multiplicity of parties, unstable coalitions, civil disobedience, and popular violence. These social divisions in turn threaten the collapse of economic austerity programs that had depended on political authoritarianism and discipline. Democracy and constitutionalism in Africa are thus con-

fronted by an accumulation of crises: national fragmentation, state delegitimation and collapse, and acute economic decline.⁴

I do not believe that the situation in East Central Europe is nearly as bleak as that in Africa, but I do think that the comparison highlights the severity of the challenges facing each region.

Nor, perhaps more relevantly, do I believe that the situation of constitutionalism in East Central Europe is as dismal as that in contemporary Russia. Here I think historical experience may be the crucial difference, since the Russians simply have no history of democratic constitutionalism, and their recent attempts to imitate American constitutionalism, from presidential government and separation of powers to judicial review, have failed because they have neither indigenous roots nor social resonance. Boris Yeltsin's consistent adherence to government by decree, the recalcitrance of an elected parliament that considered itself the sovereign power, and a constitutional court that could not distinguish between law and politics, have constituted a parody of democratic constitutionalism by any definition.

Yeltsin's new constitution in process, having been drafted quickly in the executive branch for approval by a popular referendum, seems even less likely to reflect, much less create, an indigenous Russian constitutionalism. The last sentence was written before I saw an Associated Press dispatch from Moscow, which reported:

We must find a solution [to constitutional problems] today, to publish [the draft constitution] on November 10, a month before the vote is required, Yeltsin told the leaders.

Yeltsin ordered a group of government officials and representatives of the republics to work out a final text of the constitution, but warned he would have the last word if they failed to reach an agreement.⁵

On November 9, the *New York Times* quoted the first line of the Yeltsin preamble to the draft constitution: "We, the multinational people of the Russian Federation . . ." One doubts that this reverential echo of "We, the people of the United States . . ." will

⁴ Eboe Hutchful, "Reconstructing Political Space: Militarism and Constitutionalism Africa," in *Constitutionalism and Democracy*, ed. Greenberg et al., 231.

⁵ *Washington Post*, November 4, 1993.

do the democratic trick in Russia. This suspicion is reinforced by President Yeltsin's attempt to suppress televised discussion of the proposed constitution by candidates for the parliamentary elections on December 12:

"The President's position is that the Constitution should not be involved in this election campaign," said his spokesman . . . " too much nervous and political energy has gone into it. Too many clashes have already occurred over the Constitution."⁶

What gives me hope in countries such as Poland, Slovakia, the Czech Republic, and Hungary, however, is that their historic experiences contain elements of constitutional governance, however weak, and that they are displaying a remarkable contemporary commitment to the development of constitutionalism. Each country has made important strides in the right direction, though of course the project is so new in former Czechoslovakia that the markers of progress are hard to determine. Poland has carried out orderly democratic elections, regardless of how disappointed we may be by the results. Hungary held elections in 1990, and it will probably soon do so again. Significantly, Hungary has begun the most promising tradition of judicial review and constitutional adjudication in the region.

Some of the formal elements are thus in place, but the "new" constitutionalism is extremely fragile. Its course is hard to predict. What sympathetic foreigners must hope for is the development of self-conscious and self-referential local processes in each country, designed to develop popular constitutional consciousness and commitment. But this is a job that East Central Europeans must do for themselves, nurturing their most promising local traditions and institutions. Americans must watch sympathetically, if anxiously, all the while resisting the temptation to urge their own historic accomplishments upon nations creating their own, unique constitutional moments.

⁶ *New York Times*, November 27, 1993

Negative Lessons from the American Experience A Response to Professor Katz

Donald P. Kommers

First of all, my thanks to the German Historical Institute for inviting me here today. I am honored to be sharing this platform with Stan Katz, one of the country's noted constitutional historians. The transcontinental project on comparative constitutionalism, which Professor Katz recently directed, surely qualifies him to speak on the subject under discussion. *Constitutionalism and Democracy* (New York, 1993), the book that emerged from the project, ranks as one of the most comprehensive and sophisticated studies of constitutionalism in the contemporary world.

Professor Katz's paper reflects the wisdom garnered from his global study. The message of the paper is that the United States Constitution, like other constitutions in the world, is the product of historically contingent circumstances, that Americans err when they seek to universalize their constitution, and that foreign constitutionmakers would be well-advised to craft their constitutions out of their own history and traditions. I have no quarrel with this message. By and large, Professor Katz is right. Americans should be cautious in the advice they offer other nations seeking to remake or remodel their constitutions, and other nations should exercise restraint in copying from them. All this seems plain to me. What I will say, then, mainly supports what Professor Katz has said, although here and there I may have a quibble or two with him.

I begin with a minor quibble. Professor Katz might have drawn a sharper distinction between a constitution and constitutionalism. A constitution is a written document. Constitutionalism is a state of mind. Thus one can have a constitution without constitutionalism. But one can also have constitutionalism without a constitution, as I think Professor Katz implies in defining constitutionalism as a "commitment to limitations on ordinary political power." One can have that commitment without a single documentary constitution. The British have it, New Zealand has it, and Israel has it.

I do not think, by the way, that a written constitution is inherently superior to an unwritten constitution, especially if constitutionalism is in the blood and culture of a people and if, at

the same time, that people has a keen sense of its own identity. Some years ago I advised a group of Israeli scholars and officials to move cautiously in writing a constitution for Israel. I asked rhetorically whether there was any need for them to resort to a new text to reestablish themselves as a people. I suggested that Israel is already one people, identified by stories and moral traditions stretching back to biblical times, and that these stories and traditions constitute, to use Professor Katz's words, a "commitment to limitations on ordinary political power." Israel does have a written declaration of independence defining the country as a Jewish state, just as it has other foundational texts, the cumulative effect of which is to recreate a polity marked by limited government and the rule of law. So, once again, I asked rhetorically whether any single documentary constitution could do more. Could a written constitution capture the richness of the Jewish people or the traditions of civility built into their historic ways of life?

On balance, however, I suppose I would prefer a written constitution, probably because I am an American. After all, Americans are intoxicated with the idea of a written constitution, an addiction that, with their cooperation and support, appears to have spread to the rest of the world. But Americans are even more addicted to their own constitution. They are inclined to believe, with the English statesman Gladstone, that it is "the most wonderful work ever struck off at a given time by the brain and purpose of man." It is little wonder that Americans are inclined to believe that their constitution should serve as the inspiration and model for the rest of the world. But, as James Bryce said long ago, and as Professor Katz has suggested, if a constitution is to work, it should express the history and character of the people for whom it was written.

Thus, other nations would be ill-advised to follow the American model too closely. I think one reason why the German constitution has worked so well is because its framers relied on Germany's own constitutional traditions, notwithstanding much American advice to the contrary. In writing their Basic Law of 1949, the Germans copied liberally from their own constitutions of 1849, 1871, and 1919, and then they added institutional modifications that would stabilize the government and keep antidemocratic forces from undermining it, a condition that arguably could not have been achieved under an American-style constitution.

As most of you know, the Americans did impose their constitution on Japan, an egregious example of what I have to call American constitutional imperialism. The Japanese seem to have accepted MacArthur's constitution, but the ethos of liberal individualism that the Americans injected into it seems wholly at odds with the organic character of Japanese society and the "group" values that permeate this particular Oriental culture. One might ask: Has the Japanese constitution worked? Has it been good for Japan? This is difficult to say. Much depends on what it means to say that a constitution works. I am inclined to believe that a constitution is unlikely to work if it is not a prominent part of the political culture. If the Japanese lost their constitution tomorrow, would it make a difference? Americans boast that their constitution has transformed them into one people (*e pluribus unum*). Could the same be said of the Japanese? In Japan, there is reason to believe that the culture is a more powerful adhesive than the constitution. But, more importantly, constitutionalism itself may have a meaning for the Japanese that it does not have for others.

You may be interested in an experiment I conducted when I was a Fulbright lecturer at the University of Tokyo in 1987, forty years after the Japanese received their constitution. In two different classes, I asked my students to tell me which provisions of their constitution they cherished the most and to write down the meaning their constitution had for them. The response was amazing. Hardly any of them referred to separation of powers, civil liberties, the rule of law, equality, or judicial review. Rather, they identified their constitution with peace and the renunciation of war. They were, of course, referring to Article 9 of the constitution, in which Japan renounces "forever" the establishment of a military force that could potentially threaten other nations.

My Japanese students revealed little knowledge of their own constitution apart from the so-called peace article. Constitutionalism to them meant peace and disarmament, a response I suspect one would get from a random sample of the Japanese people as a whole, a not unsurprising result for a people living in the shadows of Hiroshima and Nagasaki. But does that response conform to Professor Katz's definition of constitutionalism? If it does not, is it any less a constitutionalist ideal than a general commitment to a limitation on ordinary power? On the other hand, constitutionalism as defined by my Japanese students may indeed fit Professor Katz's

approximate definition of constitutionalism, because here the constitutional value *limits* one of the most historic attributes of national sovereignty (i.e., ordinary power), namely, the right of a nation-state to establish and maintain an army, navy, and air force.

Thus, when it comes to giving advice to Eastern European nations, one should certainly be cautious. Actually, our Eastern European friends have not rejected their own histories. For them as for us, past is prologue, and, as Professor Katz reminds us, several Eastern countries are relying, at least in part, on their own constitutional traditions. But they are also looking to Western models for help. Bear in mind that the purpose of these new "founding fathers" is to stabilize their new democratic governments and to protect liberty at the same time. That is no easy task. But, in furtherance of these objectives, Eastern European constitution-makers may find Germany's Basic Law far more instructive than the U.S. Constitution. Why would Eastern European nations not find Germany's impressive, mid-twentieth-century constitution more relevant to the demands of a modern democracy than an American constitution crafted in the eighteenth century?

I would not hesitate to advise some Eastern European countries to adopt Germany's constructive vote of no-confidence to strengthen the prime minister's hand, Germany's system of proportional representation with a threshold to keep splinter parties out of parliament, and some form of judicial review, though not necessarily in its American incarnation. I do not think one can ever predict how a given institutional transplant from an outside constitution will work. So why not experiment with the constitutional innovations that appear to have worked so well in Germany? What should be avoided is blind constitutional imitation or the adoption of a senseless or incoherent set of constitutional practices and structures; that is to say, devices borrowed from other countries in an ad hoc and mindless fashion without regard to one's own history or culture.

Unfortunately, Americans often do give constitution-makers abroad bad advice. I know American constitutional scholars and lawyers who have advised foreign constitution-makers to incorporate American constitutional doctrines developed by their Supreme Court into the text of the new written constitutions. I refer particularly to the doctrine of standing with respect to the exercise of judicial power and to some variation of the *Lemon* test with respect to church-state

relations.¹ Tendering such advice seems to border on ethnocentric arrogance.

Earlier this year (1993), I participated in the American Bar Association's Central and East European Law Initiative. American judges and law professors met in various committees with a Russian delegation seeking our advice on a new draft constitution of the Russian Federation. I was assigned to committees dealing with separation of powers and the proposed constitutional court. Well known federal judges on my panel advised our Russian guests to assume a conception of judicial review just like the American, even to the point of suggesting that the proposed court limit itself to deciding controversies that arise in an adversarial context—imposing our notion of "standing to sue" on the Russians. As these judges spoke, I wondered how much Russian legal history they knew. I do know that they totally misunderstood the role of European constitutional courts, which is very different from the historic role played by the American Supreme Court.

For their part, the Russians seemed to misunderstand the American concept of separation of powers. One provision in the draft constitution vested the court with the power to introduce legislation into the parliament. The American members of the committee, myself included, thought this proposal was off the wall. It was only later, upon reflection, that I began to think that the Russians may not have been so crazy after all. Perhaps within the checks and balances system that they were trying to establish, given *their* history and *their* political experience, there might be some sense to conferring limited legislative power on a constitutional court. In fact, the Russian proposal is not too far removed from the power that the constitution of de Gaulle's Fifth Republic confers on France's Constitutional Council.

Why are American advisors to foreign constitution-makers so caught up in enthusiasm for their own constitution? Let me offer this thought: The sense of manifest destiny that has characterized American foreign policy has carried over into its constitutional politics. The Americans believe, with Alexander Hamilton, that they have been singled out to build their constitution on the basis of "reflection and choice" rather than on that of "accident and force."

¹ *Lemon v. Kurtzman*, 403 U.S. 602(1971)

This is the voice of Enlightenment liberalism, the idea that a people can recreate themselves, that they are free to reject their past and to detach themselves from prior allegiances. After all, through the Constitution, they built that great city on the hill where reason would reign supreme. Little wonder the Constitution is an icon, venerated everywhere, like the statuary in churches. Perhaps what Americans need is a good dose of Augustinian realism—or maybe a good, old-fashioned sense of history will do—to offset their belief in the possibility of creating the perfect constitution.

Maybe Americans should be telling their Eastern European friends that there is no such thing as a perfect constitution, and that there never will be. Maybe they should instruct them by focusing on the shortcomings of their constitution. Americans doubtless have a good deal to offer foreign nations just beginning to experiment with constitutional democracy. After all, they do have two centuries of experience to draw upon. In advising others, however, they have emphasized their successes to the neglect of their failures. Perhaps Eastern Europe has more to learn from the failures. Some of these downfalls have been big and tragic, the worst being the Civil War, because of which the Constitution of 1789 could be said to have failed. In the past one hundred years, the country has not had failures as bad as this, but American constitutionalism has had breakdowns. One example is the exponential growth of presidential power in our time, particularly in the fields of foreign and military affairs.

Other possible breakdowns could be mentioned, ranging from the ways in which the American constitution has structured its politics to dear flaws in the area of basic rights and liberties. And, with regard to the latter, Americans might remind themselves that their constitution happens to coexist with the moral breakdown of their society; outbreaks of violence in urban areas; the highest crime rate among advanced constitutional democracies; and massive drug addiction, widespread poverty, and child mortality rates rivaling the deplorable statistics of some Third-World countries. A marvelous tribute, one could say, to the enlightened liberalism at the basis of American constitutionalism.

Let me add, briefly, the perspective of one who teaches comparative constitutional law. Professor Katz points out that Americans who know less history than they should seem unaware of the diversity in their own constitutional tradition. As one who teaches comparative constitutional law, I would like to suggest that

Americans cannot even understand their constitutionalism—whatever they decide that it is—unless they view it in the light of similar values and practices elsewhere in the world. When I teach comparative constitutional law, I deal mainly with constitutional cases; that is to say, judicial opinions of what a particular constitution means. In focusing on constitutional cases, there is always the danger of confusing a constitution with the court that interprets it. However, in constitutional traditions that encourage constitutional change through judicial interpretation, it is hard to speak of constitutions in the absence of their interpretation.

Perhaps my own parochialism comes through here; at least I have been told that, and Stan Katz might agree. I focus mainly on individual rights in advanced pluralistic—mainly Western—democracies with written constitutions interpreted by courts with powers similar to the U.S. Supreme Court. I also focus on problematical areas of American constitutional law—free speech, church-state relations, privacy, and so on—and then compare American judicial opinions in these areas with similar opinions handed down by the high courts of Canada and Germany as well as by the European Court of Human Rights. I have good reasons for "doing" comparative constitutional law in this way. But, as I speak, I can hear Stan Katz groaning, and I know what he is thinking: Kommers is just another example of Hamiltonian ethnocentrism. First, he offends non-Western cultures by associating constitutionalism exclusively with personal rights, and, if that were not enough, he ignores every constitution in the world that omits judicial review from its list of governing principles.

Then again, the comparative enterprise as I practice it is a humbling experience, at least for my students, and actually confirms Katz's agnosticism with respect to the superiority of the U.S. Constitution. First of all, by reading foreign case law, even within the Western tradition, students learn that there exist other visions of liberty and constitutional democracy independent of and apart from those created and privileged by the U.S. Supreme Court. For example, we find the Canadian Supreme Court explicitly rejecting American constitutional doctrine in fields such as free speech and church-state relations, because Canada does not wish to be governed by the highly individualistic vision of society and liberty propounded by the American Supreme Court. If America's cousins to the north, whose democratic constitutionalism matches theirs in longevity and

vitality, cannot abide by their ways, imagine the hutzpah involved in trying to convince other countries with little or no experience with democracy to accept that way of practicing constitutionalism.

My students also find that other countries within the Western tradition offer interesting and competing models of how a court of judicial review resolves the tension between the claims of liberty and those of community; it is the kind of comparison that removes the scales of parochialism from their eyes and induces in them a healthy skepticism, not only about the values that judges have incorporated into the meaning of American constitutionalism but about the capacity and propriety of judges to make such determinations in the first place. Therefore, comparative constitutional analysis can be both challenging and enlightening: challenging because it forces people to confront cherished assumptions about themselves as a people and the deeper meaning of their constitutional values; enlightening because the opinions and insights of foreign courts uncover truths about their own constitutional tradition that they may have only dimly perceived in the past.

I would like to add one final comment. The constitutionmaking occurring in Eastern Europe is historically unprecedented and provides constitutional scholars with a wonderful opportunity to explore the meaning of constitutionalism in different settings and the condition of its success. Stan Katz and his colleagues have made an impressive start with the publication of *Constitutionalism and Democracy*, a book that should guide further work in the field.

In any event, one needs to know more about the social, political, and economic conditions under which democratic constitutionalism is likely to succeed. To what extent can constitutions secure rights, stabilize governments, regularize procedures, promote democratic habits, and create a sense of civic pride and responsibility? Or do these elements have to be present before there can be a workable democratic—or liberal—constitution? Is constitutionalism doomed to failure if it does not incorporate the liberal values of Western democracies? Can one talk intelligibly about constitutionalism in the absence of a mature national state? Or does one need a constitution to develop a state where majorities govern according to the rule of law? Can there be democratic constitutionalism in a state that defines citizenship in terms of ethnicity?

Finally, what alternative conceptions of constitutionalism are emerging in post-communist states? Can a constitution limit the

exercise of ordinary power by subordinating individual rights to collective rights, the value of social cooperation, and the relatively equal distribution of benefits and burdens?

There is nothing abstract about these queries. They are empirical questions, and the study of the experience of post-communist states of Eastern Europe may supply some answers to them as well as lead one to a better appreciation of the meaning of constitutionalism in the United States and elsewhere.

Comments on “Constitutionalism in East Central Europe”

Hartmut Jäckel

I would like to start with two citations from American authors. The first reads as follows:

Political democracy came to the United States as the result of economic democracy.... This nation came to be marked by political institutions of a democratic type because it had, still earlier, come to be characterized in its economic life by democratic arrangements and practices.¹

My second citation transforms this historical, though not distinctively American, experience into a more general observation that we might call a theory:

By viewing democracy simply as a question of political morality, we have blinded ourselves to the fact that, in every country, the system of government is a by-product of the general conditions of life, including, of course, the economic conditions, and that democracy, like any other system, is appropriate for countries where these conditions are suited to it and inappropriate for others with unsuitable conditions, or at least that it is vastly more appropriate for some than for others. Viewed in these terms, there is a strong case for believing that democracy is clearly most appropriate for countries which enjoy an economic surplus and least appropriate for countries where there is an economic insufficiency.²

The quotations are taken from two well-known books published in 1926 and 1954, respectively. Both authors, J. Franklin Jameson and David M. Potter, were able to take into account the successes and failures of numerous attempts to establish political democracy in various parts of the world immediately after World War I and World War II.

Today, after the breakdown of most communist regimes within less than three years, one could easily find plenty of statements by American and European authors as well that fit perfectly into this

¹ J. Franklin Jameson, *The American Revolution Considered as a Social Movement* (Princeton, NJ, 1926), 41.

² David M. Potter, *People of Plenty: Economic Abundance and the American Character* (Chicago and London, 1954), 112.

general theory. Not even a week ago, I attended a seminar at Stanford University held by the director of the Foundation for Market Economy in Hungary, Laszlo Kallay. He added another aspect—certainly a more crucial one—to the main element of David Potter's theory. Talking about the current situation in Hungary, which is not nearly as bad as that in Poland or Romania, Mr. Kallay referred to a widespread feeling among his fellow citizens that can be detected in an often-heard question: "Isn't it easier to reconstruct a crippled economy in a dictatorship than in a democracy?" It seems worthwhile to deal with the impact of this question a bit more closely, and I will do that in a moment.

It has, indeed, become commonplace in almost any serious analysis of the situation in Central and Eastern Europe that the economic odds are against establishing stable democracies in these areas and that, therefore, turmoil is likely and success a distant prospect. It will take time, a lot of time, to develop democratic structures in these countries that only recently emerged from totalitarian communist rule. There exists only one exception: the former German Democratic Republic. It is a rather phony exception because, as is well known, East Germany became, on October 3, 1990, part of the Federal Republic of Germany, thus sharing the constitutional, political, legal, financial, and social forms of an established parliamentary democracy with an efficient and still prosperous economy. This does not mean that the grievances of many East Germans are less painful. Nor does it mean that it is psychologically comfortable to find oneself almost overnight in an ambiance that was made and defined by others. But their outlook for the future is certainly brighter: It is rather safe to say that, by the end of this decade, they will enjoy a standard of living that their eastern and southern neighbors can only dream of. According to a startling prognosis of the European Bank for Reconstruction and Development in London,³ published two months ago, the average income in most of these countries is expected to be, by the year 2000, even lower than it was in 1988–89.

³ The London bank was founded in April 1991 to support the new democracies in Central and Eastern Europe; cf. the article "Allmählicher Aufschwung," *Die Welt* (Berlin), Sept. 22, 1993.

In recent years, I did quite a bit of traveling in communist and post-communist countries, Russia included. I have been to Poland fourteen times when it was under the so-called *stan wojenny* (state of war), and I visited Lithuania when, in August 1991, the people of Vilnius celebrated their country's independence and the Communist Party of the Soviet Union was banned by the Lithuanian government. (Although Lithuania declared its independence as early as March 11, 1990, it took some time before this daring step became effective.) I remember well what my friend Bronislaw Geremek—a close aid to Lech Walesa in the days of Solidarity, floor leader of the Democratic Union in the Sejm, and, last but not least, professor of history—once said: "Looking back, it seems to me that it has been easier to get rid of Communist dictatorship than to make a free Poland safe for democracy."⁴

I confess to having no doubts whatsoever that there is an intimate relationship between political democracy and a decent standard of living. Being a German, I am especially well aware of the fate of the Weimar Republic that ended disgracefully in 1933. Its fall was due not exclusively, but mainly, to the economic hardships of the postwar period. Many millions of Germans, workers as well as large parts of the bourgeoisie, felt cheated and humiliated at the same time, and they were not willing to give democracy a chance. On the contrary, they attributed the pauperization to the ruling of political parties (*Parteienstaat*) and the weakness of the parliamentary system. To be sure, many countries were hit equally hard by Black Thursday, initiating the disaster of the Great Depression, but the average German was already overburdened with additional political, economic, and psychological hardships resulting from the Versailles Treaty as well as the inflation in the early 1920s.

But Weimar is history. Today, the nations of Central and Eastern Europe that have emerged from the collapse of the Soviet empire are struggling and striving for the gradual reconstruction and preservation of a democratic government and, consequently, for laws and a constitution "to be adapted to the various crises of human affairs," as Chief Justice John Marshall once put it. But how can this be done when, at least for now, most people do not care at all about democracy or participation or political issues? How can this be

⁴ Bronislaw Geremek, in *Frankfurter Allgemeine Zeitung*, May 3, 1991.

accomplished as long as they are forced instead to care about jobs, wages, prices, housing, food, and so forth? Under such circumstances, one can take it for granted that there are a large number of political parties, each of which draws its support from a very limited and quite specific part of the population. Thus, parliaments are likely to be fragmented, governments short-lived and quite soon wracked by internal conflicts.

Let me demonstrate this by providing some facts and figures. On October 9, 1990, legislation was passed in the Soviet Union allowing the formation of new political parties. Five months later, the public was told by a secretary of the Central Committee of the Communist Party that there were more than five hundred political parties in the USSR, including twenty with a nationwide membership.⁵ Though most of these parties were skeletal structures with very few members, it is easy to see that such a situation resembles anarchy more than democracy. Something had to be done about it. And, indeed, only thirteen parties were running in the Russian elections of December 12. What happened? How was that reduction brought about? It was brought about by the provision that each of the various blocs and parties had to gather the 100,000 signatures required for participation in the electoral contest. On November 14, 1993, one could read in the papers: "On Wednesday the Central Election Commission announced that of the 21 groups that handed in their lists by the Saturday deadline, eight had been disqualified for irregularities."⁶ This piece of information certainly deserves a short comment. To the best of my judgment, it is simply impossible for most of these splinter parties to gather 100,000 signatures without heavily relying on irregularities, for example, on the listing of a good deal of "dead souls." The requirement itself, as it seems to me, was highly questionable; a requirement of twenty thousand signing supporters might have been more appropriate. But now imagine: the Central Election Commission in Moscow needed only three days to check 2.1 million signatures in order to find out whether and where frauds and other irregularities occurred. How many Russians, being

⁵ Cf. Keesings Record of World Events, vol. 37 (1991), 38491.

⁶ Jonas Bernstein, "Substance Second to Style in Russia's Race for Parliament," *Washington Times*, Nov. 14, 1993, 1.

aware of such a strange selection and admission procedure, will not come to distrust the promise of fair and democratic elections?

When, on June 16, 1991, Boris Yeltsin was elected president of Russia, for the first time in its history of well over one thousand years, a Russian ruler emerged from a popular vote. Yeltsin was sworn in on July 10, 1991, the birthday of a fragile republic. Since most European countries needed many decades, and some even a century, to gradually develop and establish a truly democratic system of government, how can we expect miracles from Russia after just two years?

My second example refers to the recent election of the Sejm, the lower house of the Polish parliament. This election was held on September 19, 1993. In order to avoid a similar fragmentation of the legislature as the one produced by the previous election of October 27, 1991, the election law was amended, giving a bonus to the larger parties at the expense of the smaller ones. The new law made use of the Five Percent Clause, adopted from the German election law, thus barring all but six parties from parliamentary representation. One fifth of the Polish voters came out in favor of renamed Communist Party, placing the Alliance of the Democratic Left (SLD) first. The Polish Farmers' Party (PSL), also having been affiliated with the old regime, ranked second, with a share of 15.4 percent. These two parties, representing 35.8 percent of the electorate, won 303 seats; that is, almost two thirds of the total of 460 seats. The Democratic Union (UD), the party of the foremost Solidarity figures like Mazowiecki, Kuron, and Geremek, fared poorly again, gaining not more than 10.6 percent of the popular vote and 74 seats in the Sejm. The defeat forced Hana Suchocka, the Democratic Union's prime minister, irrevocably out of office.

It is not easy to describe what is behind this disturbing scene. Apparently, a growing number of people in the impoverished post-communist societies are no longer afraid of Communists. They like to think that Communists, after having lost most of their power, are at least still better organized than Liberals and Democrats. Millions of voters are becoming more and more disappointed at the absence of any real progress. To them, almost nothing has been brought about by weak coalitions of half a dozen center-right parties. In Poland, President Lech Walesa found himself in the same position that Boris Yeltsin finds in Russia. Both of them try to strengthen

their executive authority, and both of them are, as it seems to me, right in doing so.

I am far from advocating any type of authoritarian government. On the contrary, I strongly believe that democracy must be valued as an end in itself, rather than being seen as a means to some other goal. But at certain times, under certain conditions, an unlimited parliamentary democracy appears to be much riskier than a mildly authoritarian system of presidential predominance that lacks control by constitutionally provided checks and balances and is tamed, instead, by the somewhat diffuse power of public opinion.

I am well aware that the justification of my position intrinsically depends on having responsible political leaders like Yeltsin, Walesa, and Havel, who are known both for their enlightened political views and staunch resistance to any violation of human rights and civic liberties. This, of course, is of eminent importance. It is the basis for economic progress, too.

Thus, in conclusion: it would be unjust to apply solely our yardsticks when measuring the political and constitutional environment in these developing democracies.⁷ It would be unfair to point most often to shortcomings and deficits. In order to give democracy a chance in Central and Eastern Europe, we must be supportive and indulgent. There is some cause for optimism.

Not too much, though. This, perhaps, is the deepest dilemma of all: The European Union, as envisaged by the Maastricht Treaty, ought to and wants to be open to all European nations willing to join in. But any open-door policy remains wishful thinking as long as the enormous economic disparities between the East and the West continue to exist. Thus, there is only little hope to overcome the silent division of Europe before long. Once again, economic realities are preventing what political reason demands. In the years to come, we will have to live with this dilemma.

⁷ Cf. Alex Inkeles, ed., *On Measuring Democracy* (New Brunswick, NJ, 1991).