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Constitutionalism in Eastern Europe: Alternatives to the Liberal Social Contract

Brad R. Roth*

I. Introduction: Constitutionalism and the Mission of the State in the New Eastern Europe

One of the striking phenomena attending the sudden and dramatic transformations that have swept through Eastern and Central Europe has been a resurgent interest in constitutionalism. This is not to say simply that constitutions are being rewritten throughout the region, though this is certainly true. It is hardly notable that new documents are being devised to give the new order formal confirmation, for that process almost always attends political transformations, as it did two generations ago when “people’s democracy” became the regional watchword. The new and striking phenomenon is constitutionalism—that is to say, constitutions being promulgated not merely as the symbol of the new order, but as the *basis* of it.

A central demand of newly-empowered Eastern and Central European political constituencies has been the establishment (often termed, with varying degrees of accuracy, the “restoration”) of “rule of law.” And “rule of law” is here meant not simply as rule *by* law, the exercise of potentially unlimited authority through a stable and predictable process of legal regulation — however great an advance that might be over the capricious practices of the former regimes. Rule of law, for the East’s former dissidents, means law operating as an actual limitation on the exercise of power by governmental entities. The anchor of rule of law is the concept that the constitution alone provides the source, and thereby the limitation, of governmental authority. The mark of a genuine constitutionalist order is that the constitution, far from merely embodying a program, actually operates as the highest law of the land.

The Eastern European constitutionalist impulse is firmly grounded in the decades of Communist Party misrule that comprise

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the region's recent history. That period was marked by the unbridled exercise of state power, the adverse consequences of which could be seen in nearly every facet of life. Neither individuals nor society as a whole had recourse against arbitrary state actions. Unchecked state power to deprive persons of economic livelihood, liberty, and even life itself rendered individuals largely unable to express themselves creatively, religiously, or politically. Total lack of accountability enabled the "workers' state" to install a new privileged class of party functionaries, to misallocate resources, to desecrate the environment, and otherwise to ignore the public interest in its decisionmaking. Whatever the disagreements regarding remedies for the ills that beset these nations, there can be little disagreement about the need to fundamentally restructure the state so as to restrain state entities from again making war against the individual and society. This is the constitutionalist project.

The generalized demand for constitutionalism in Eastern Europe has been accompanied by a second, distinct phenomenon: the rise of classical liberalism as the theoretical framework for legal and political change in the region. The two phenomena, easily conflated by those trained in the liberal tradition, have in common a call for "limited government." The liberal conception of limited government, however, goes beyond anything necessarily implied by constitutionalism. Constitutionalism regulates and restrains the exercise of power by governmental entities, and thereby places limits on the organs of government. Liberalism, particularly in its classical, free market-oriented form, places limits on the *scope of governance*. From the liberal standpoint, institutional arrangements are well ordered to the extent that they provide for the realization, not of freedom through good government, but of freedom *from* government.¹

Liberalism thus suggests a possible form of constitutionalism, that form most familiar to Americans. All constitutionalism anticipates the possibility that governmental power will be abused; liberal constitutionalism asserts that powerful government is by its very na-

1. See, e.g., Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U. CHI. L. REV. 595, 618 (1991).

The present article's references to liberalism emphasize the approach of classical liberal theorists, whose work developed and extended the thought of John Locke. This approach is often referred to as "nineteenth-century liberalism." It has been suggested to me that my argument ignores or disparages the movement in contemporary liberal thought away from *laissez-faire* and "possessive individualism," and that the proposals of this article in no way contradict the essence of liberalism.

Although I remain convinced of the limits of welfare liberalism and am dubious of recent claims for liberalism's "communitarian" potential, I should happily grant any point that strengthens my essential assertion, i.e., the compatibility of radical communitarianism with constitutionalism. Moreover, whatever the merits of the newfangled "communitarian liberalism," the "nineteenth-century" variant has in fact dominated the current discourse on Eastern European constitutional reform.

ture a detriment to freedom. All constitutionalism complexifies processes for the exercise of power,² especially in providing avenues for the assertion of rights by individuals or groups affected by that exercise; liberal constitutionalism fragments the sources of power and recognizes insuperable rights inherent in the individual, independent of the interests of society.

The rise of liberalism comes at the expense of a communitarian vision of a strong state, embodying the collective will, providing the basis for all sectors of society to enjoy equally a more expansive and affirmative freedom of human activity.³ This communitarian vision, espoused by the anticonstitutionalist leaderships of the Eastern and Central European regimes, is now widely associated with those regimes' abuses of power, and is in considerable disrepute.

Numerous liberal commentators have described the rise of liberalism as the ineluctable and permanent consequence of the collapse of the Communist system, a consequence generalized not just to all of Eastern and Central Europe, but to the rest of the world as well. As Carl Gershman of the National Endowment for Democracy has noted:

It has to be remembered that until recently there was a strong feeling that there was an alternative out there to liberal democracy. There was a belief in a higher form of democracy, one that emphasized results, equality, that could really achieve things.⁴

According to R. Bruce McCollm of Freedom House, "What we're looking at now is the end of utopianism and the all-encompassing model to explain human society."⁵

Polish constitutional scholar Wiktor Osiatynski puts the point more starkly in the Eastern European context:

2. The inelegant word "complexify," as opposed to "complicate," emphasizes that the introduction of complexity is deliberate, and not an unintended by-product of efforts to achieve other ends. It is characteristic of constitutionalism to develop independent organs with overlapping competences, so as to place an institutional check on discretionary authority. The actual configuration of the institutions is secondary, so long as unilateral exercises of plenary authority are avoided.

3. Until recently, the word "communitarianism" was primarily associated with the Christian Democratic movement, which asserted as its project "to convert the state, as rector of the common good, into the maximum expression of communitarian life." MICHAEL FLEET, *THE RISE AND FALL OF CHILEAN CHRISTIAN DEMOCRACY* 57, n.21 (1985) (quoting the Chilean party's platform from its first National Congress in 1959). The word was intended, especially by the movement's left wing, to establish a link between quasi-socialist economic policies and traditional corporatist conceptions of community obligation.

This article's use of the term refers to the link suggested by the Christian Democrats' usage, and is not intended to refer directly to the controversies recently sparked by such theorists as Michael Sandel and Charles Taylor. See, e.g., Amy Gutmann, *Communitarian Critics of Liberalism*, 14 *PHILOSOPHY & PUBLIC AFFAIRS* 308 (1985) (outlining the philosophical debates of the early 1980's on justice and rights *versus* virtue and the common good).

4. Richard Bernstein, *New Issues Born from Communism's Death Knell*, N.Y. TIMES, Aug. 31, 1991, at 1, 1.

5. *Id.*

People are discarding today most of what they deeply believed in only a year ago, such as economic security and the right to work. They are even throwing away the beliefs, including equality and social justice, that led them to fight communism.⁶

"Socialism with a human face," reports Osiatynski, though once widely the goal of Eastern European oppositionists, has been dismissed as "a contradiction in terms."⁷

Nonetheless, there are indications that there remains, at least in much of the region, a deep-rooted resistance to liberal ideas. Despite the spectacular failures of "Third Way" political formations (e.g., New Forum/Alliance '90 in the former GDR, Imre Poszgay's re-vamped ex-Communists in Hungary) in the first wave of elections, and the strong free-market drift of initially victorious groups bearing a significant leftist heritage (e.g., Solidarity in Poland, Civic Forum in Czechoslovakia), attitudes on specific issues, whether of the "bread-and-butter" or more conceptual variety, appear far more equivocal.

As Dr. Osiatynski himself laments, Polish "strikers are defending the very values and mechanisms that hamper the growth of capitalism and free markets, i.e., egalitarianism, agreement to waste, inefficiency, and lack of personal responsibility for the results of one's actions and for one's life."⁸ Anecdotal evidence, polling data, and some recent election results (most notably in the now-independent Slovakia) indicate continuing widespread support for large-scale state intervention in the economy. Even the most liberal of the revised constitutions and constitutional drafts include some version of the familiar panoply of economic rights espoused in Communist constitutions (as well as express qualifications of individual rights).⁹ Further experience with the harsh costs of radical free-market reforms may plausibly reinforce the tendency to see the state as responsible, not merely for order and infrastructure, but also for substantive equality and economic security.

At the same time, and relatedly, it is far from clear that Eastern and Central Europeans regard the essential mission of democracy in liberal terms. As Andrzej Rapaczynski has noted with respect to Poland, there persists a continental European conception of

6. Wiktor Osiatynski, *Revolutions in Eastern Europe*, 58 U. CHI. L. REV. 823, 824-25 (1991).

7. *Id.* at 843.

8. *Id.* at 858.

9. The former Czechoslovakia's Charter of Fundamental Rights and Freedoms (enacted on January 9, 1991) illustrates the point. The Charter establishes rights to, *inter alia*, satisfactory wages and working conditions (Arts. 28, 29), unemployment, old-age and disability compensation (Arts. 26(3), 30), free medical care (Art. 31), and education (Art. 33). It also provides that political rights may be limited by "measures essential in a democratic society for protecting . . . public security . . . and morality" (Art. 17(4)).

the polity that “flies in the face of the oft-repeated allegiance to the ideas of liberalism”; the state is widely accorded the role of articulating a “general will,” obedience to which is equated with freedom — a notion that liberals perceive as dangerously wrongheaded.¹⁰

If what has occurred in Eastern and Central Europe is indeed not “the end of ideology” (or, more precisely, the eternal triumph of classical liberalism over rival ideologies), communitarian bases for constitutionalism become an important subject of study. If Eastern and Central Europeans largely operate from non-liberal assumptions about the role of the state, does it follow that they are doomed to repeat the patterns of the past — the unrestrained exercise of governmental authority and the trammelling of the individual in the purported pursuit of an ideal communitarian vision?

The thesis of this article is that a positive, communitarian conception of the role of the state is consistent with the demand for limitation on oppressive exercises of governmental power. Indeed, such a conception properly incorporates constitutionalism as a fundamental tenet, albeit in a form significantly different from the liberal version.

II. Intellectual Foundations of the Communitarian Vision

A. *The Communitarian Critique of the Liberal Social Contract*

The liberal understanding of the project of governance has its origins in John Locke’s conception of the social contract. In the Lockean imagination, the individual consents to governance only as a means to preserve the better part of his “natural” freedom. The political community, i.e., the state, operates on the basis of a mutual agreement to defend pre-existing (i.e., pre-social) individual rights.¹¹ These rights are solely negative in character — rights against deliberate encroachments upon individual autonomy — and operate to defend the sphere of self-interested activity.

Lest there be any question about this latter point, Locke made explicit the centrality of private property to the very existence of the state, and the incompatibility of redistribution with the state’s fundamental purposes:

10. See Rapaczynski, *supra* note 1, at 617-18.

11. See, e.g., JOHN LOCKE, *An Essay Concerning the True Original, Extent and End of Civil Government* (Ch. VIII, para. 95), in *TWO TREATISES OF GOVERNMENT* 117, 164 (1983):

Men being . . . by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent, which is done by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it.

Id.

[T]he supreme power cannot take from any man any part of his property without his consent. For the preservation of property being the end of government, and that for which men enter into society, it necessarily supposes and requires that the people should have property, without which they must be supposed to lose that by entering into society which was the end for which they entered into it; too gross an absurdity for any man to own.¹²

The primacy of private ends was explicit in Locke's work.

The liberal state's task is to maximize the area in which the individual can act for his private ends, unobstructed by others. The state's challenge is to protect against individual invasion without, in the process, encroaching unduly on the very sphere it exists to defend.¹³ However much more complex the modern liberal state's functions than was foreseen by Locke (or his foremost devotees, the framers of the United States Constitution), the preservation of this balance — "ordered liberty" — remains the fundamental goal of the liberal state, and the focus of liberal constitutionalism.

From the modesty of the liberal state's mission follows the modesty of the role accorded democracy in the liberal conception. Liberalism conceives democracy as a means by which the citizenry checks the power of the state by retaining the option to replace leaders at periodic elections. Since freedom is pursued individually and not collectively, no premium is placed on direct participation in decision-making, nor is democratic participation a norm to be generalized to other realms, such as the workplace. Voters in a democracy have the same influence on governmental decisionmaking as consumers do on business decisionmaking — not by taking an active part in the process, but by rewarding or punishing decisions based on the favorable or unfavorable aggregate results. In judging these results, voters are expected not to rise above their selfish interests but to defend those interests, so that the diverse interests of different sectors of the populace arrive at some equilibrium level of partial satisfaction.¹⁴ The premier liberal constitution, that of the United States, provides further for the fragmentation of state power, so as to minimize the likelihood that any one set of interests can control enough of the government to effectuate an activist state program that would encroach on other sets of interests.

Not surprisingly, liberalism has been most firmly entrenched as

12. *Id.* (ch. XI, para. 138) at 187.

13. See CRAWFORD BROUGH (C.B.) MACPHERSON, *Berlin's Division of Liberty*, in *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 95, 98 (1973); Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

14. See CRAWFORD BROUGH MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* 77-92 (1977) (discussing "equilibrium democracy").

the dominant ideology in early-developing countries where the economic activity of private entrepreneurs was the driving force in industrialization, i.e., the United Kingdom and the United States. These countries' developmental strategies fit naturally with the protection of the prerogatives of private owners of the means of production; the state had comparatively little direct role in the formative period of industrialization, and primarily (though by no means exclusively) pursued laissez-faire policies.

Industrialization in continental Europe, on the other hand, came later and was (not coincidentally) largely state-driven, not just under fascism and Communism but in, for example, late nineteenth-century capitalist Germany.¹⁵ Albeit to varying degrees, the state in continental European countries has been much more activist; all sectors of society have looked to the state for positive accomplishments.¹⁶ It is, therefore, logical that communitarianism, of one form or another, has had staying power in continental European political and legal thought, and the more so the farther one looks to the East.

Often, this communitarianism has been conservative and self-consciously anti-egalitarian, appealing to traditional sources of authority and espousing a corporatist conception of society. In pursuit of the common project, each sector has been assigned a role in the hierarchy, decisionmaking being limited to those best suited to the task. This authoritarian-corporatist version of communitarianism has played a significant role in continental European history, fascism being a malignant offshoot of that tradition.

Equally significant, however, has been the revolutionary conception of community that has animated continental European social movements since the French revolution of 1789, and especially since the uprisings of 1848.¹⁷ This communitarian tradition, to which Jean-Jacques Rousseau and Karl Marx have been the most notable intellectual contributors, rejects both authoritarian-corporatist communitarianism and liberalism in favor of a sweeping program of social transformation that emphasizes equal empowerment and material entitlement.

The goal of this program is the effectuation of what Isaiah Berlin aptly termed "positive" liberty, freedom understood not in terms of barriers against encroachment on the pursuit of private interests,

15. See James R. Kurth, *The Political Consequences of the Product Cycle*, 33 INT'L ORGANIZATION 1, 6-9, 11-12 (1979) (exploring the link between late industrialization, state-driven economic development, and non-liberal politics).

16. See GOSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 58-65 (1990) (contrasting the histories of the Anglo-American and continental European approaches to social policy).

17. See Osiatynski, *supra* note 6, at 823 (attributing the ingrained beliefs of Polish workers and intellectuals to the "utopian" mentality of the 1848 revolutions).

but in terms of the ability to engage in genuinely self-directed activity:

The "positive" sense of the word "liberty" derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer — deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them.¹⁸

Rousseau and Marx, in different but related ways, suggested social arrangements aimed at achieving this ambitious project.

Rousseau assailed the liberal version of the social contract, in which, as he put it, the rich man entreats the poor, "Let us join . . . to guard the weak from oppression, to restrain the ambitious, and secure to every man the possession of what belongs to him":

Such was, or may well have been, the origin of society and law, which bound new fetters on the poor, and gave new powers to the rich; which irretrievably destroyed natural liberty, eternally fixed the law of property and inequality, converted clever usurpation into inalterable right, and, for the advantage of a few ambitious individuals, subjected all mankind to perpetual labor, slavery and wretchedness.¹⁹

The liberal social contract suspends the "state of nature" so as to bring about the unnatural result that "moral inequality, authorized by positive right alone," exceeds physical inequality, that "the privileged few should gorge themselves with superfluities, while the starving multitude are in want of the bare necessities of life."²⁰

Rousseau shared Locke's recognition that man's "natural" liberty is beyond recovery. He denied, however, that Locke's partial concession to sociality could result in anything other than oppression at the hands of those whose private interests are empowered and shielded by the liberal state. The goal of social arrangements must be, for Rousseau, not freedom from encroachments by (or responsibilities to) other individuals and the social whole, but genuine human freedom for all members of the society, i.e., equal freedom of each

18. Berlin, *Two Concepts of Liberty*, *supra* note 13, at 131.

19. Jean Jacques Rousseau, *A Discourse on the Origin of Inequality*, in *THE SOCIAL CONTRACT AND DISCOURSES* 27, 89 (G.D.H. Cole trans. 1973).

20. *Id.* at 105.

individual to act fully in accordance with his own conscious purposes, albeit in connection with others. Sociality, once conceded, must be fully embraced, yet reconciled with maximal self-determination. Rousseau found the resolution in a process by which social decisions are made with the equal participation of, and equally in the interests of, all members of society.

Rousseau's reaction to liberalism relates closely to that of Karl Marx, whose thought was premised on a continental European intellectual tradition that Rousseau had profoundly influenced. Both Rousseau and Marx saw as liberalism's flaw the partial recognition of human sociality, and both shared the communitarian vision of a harmonious and maximal human self-determination.²¹ Marx went beyond Rousseau, however, in seeking, not to harmonize conflicting individual interests, but to transform social relations — a task that requires as a transitional step the equal empowerment embodied in the Rousseauian model — so as ultimately to eliminate contradictory interests, and with them all need of coercive societal authority.

Marx's early essay, "On the Jewish Question," expressed the communitarian critique of liberal constitutionalism. In this essay, Marx examined the conception of liberty contained in the liberal constitutions of the late eighteenth century:

Liberty is . . . the right to do everything which does not harm others. The limits within which each individual can act without harming others are determined by law, just as a boundary between two fields is marked by a stake. It is a question of the liberty of man regarded as an isolated monad, withdrawn into himself . . . [L]iberty as a right of man is not founded upon the relations between man and man, but rather upon the separation of man from man. It is the right of the *circumscribed* individual, withdrawn into himself.²²

According to Marx, the practical application of such an asocial liberty is the right to private property, which consists of

the right to enjoy one's fortune and to dispose of it as one will; without regard for other men and independently of society. It is the right of self-interest . . . It leads every man to see in other men, not the *realization*, but rather the *limitation* of his own liberty.²³

21. The relationship between Rousseau and Marx is illuminatingly explored in LUCIO COLLETTI, *Rousseau as Critic of "Civil Society"*, in *FROM ROUSSEAU TO LENIN* 143-93 (John Merrington & Judith White trans., 1972). That Marx did not acknowledge, or probably even recognize, his indebtedness to Rousseau is testimony to the subtle pervasiveness of the latter's influence on continental European thought.

22. Karl Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER* [hereinafter MER] 26, 42 (Robert C. Tucker ed., 1978) (emphasis in original) [hereinafter Marx].

23. *Id.* (emphasis in original).

This liberal or "negative" conception of liberty has profound implications for political life. Marx noted that the French revolutionary constitutions spoke of the "Rights of Man and of the Citizen." He examined the distinction in this line of thought between man, a member of civil society, on the one hand, and citizen, a member of the political community, on the other. What Marx found remarkable was the thorough subordination of the political community to civil society, to the arena of private interest and egoism. "The end of every political association," stated one of the French constitutions, "is the preservation of the natural and imprescriptible rights of man." Four such rights were enumerated: liberty and property, as explained above, and equality and security. Equality, according to Marx, had "no political significance" in this context. "It is only the equal right to liberty as defined above; namely that every man is equally regarded as a self-sufficient monad." Security, however, was significant indeed:

Security is the supreme social concept of civil society; the concept of the police. The whole society exists only in order to guarantee for each of its members the preservation of his person, his rights and his property.²⁴

Thus, all of the "rights of man," Marx concluded, concern the "individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice."²⁵

A central theme in Marxian thought is the idea of man as a "species being," a being whose very existence is sociality;²⁶ human freedom in isolation is inconceivable. This notion is completely foreign to the liberal "rights of man":

Man is far from being considered, in the rights of man, as a species-being; on the contrary, species-life itself — society — appears as a system which is external to the individual and as a limitation of his original independence. The only bond between men is natural necessity, need and private interest, the preserva-

24. *Id.* at 43.

25. *Id.*

26. See, e.g., Marx, *Economic and Philosophic Manuscripts of 1844*, in MER, *supra* note 22, at 66, 86:

[Even] when I am active *scientifically*, etc., — when I am engaged in activity which I can seldom perform in direct community with others — then I am *social*, because I am active as a *man*. Not only is the material of my activity given to me as a social product (as is even the language in which the thinker is active): my *own* existence *is* social activity, and therefore that which I make of myself, I make of myself for society and with the consciousness of myself as a social being.

Id. (emphasis in original).

tion of their property and their egoistic persons.²⁷

Thus,

we observe that the political liberators [liberals] reduce citizenship, the *political community*, to a mere *means* for preserving these so-called rights of man, and consequently, that the citizen is declared to be the servant of egoistic "man," that the sphere in which man functions as a species-being is degraded to a level below the sphere where he functions as a partial being, and finally that it is man as a bourgeois and not man as a citizen who is considered the *true* and *authentic* man.²⁸

According to Marx, "free, conscious activity is man's species character."²⁹ Realization of true human freedom requires a social transformation that overcomes egoism and harnesses the means of production — no longer privately held — to the creation of the material preconditions to conscious activity. "Human emancipation will only be complete when the real, individual man . . . in his everyday life, in his work, and in his relationships, . . . has become a *species-being*."³⁰ For this "species character" to be realized, the "citizen" — the moral, social person engaging in conscious action — must cease being a mere abstraction, a member of an "allegorical" political community, and become a reality.

Freedom . . . can only consist in socialized man, the associated producers, rationally regulating their interchange with Nature, bringing it under their common control instead of being ruled by it as by the blind forces of Nature; and achieving this with the least expenditure of energy and under conditions most favourable to, and worthy of, their human nature. But it nonetheless still remains a realm of necessity. Beyond it begins that development of human energy which is an end in itself, the true realm of freedom, which, however, can blossom forth only with the realm of necessity as its basis³¹

Marx envisaged post-revolutionary history as proceeding — within an uncertain time frame — toward a final stage of communist society in which no conflicting interests would remain. Advances in productive technology, rationally managed, would not only create sufficient abundance to satisfy all needs, but also transform the nature of labor, so that it would "become not only a means of life but

27. Marx, *On the Jewish Question*, in MER, *supra* note 22, at 43.

28. *Id.*

29. Marx, *Economic and Philosophic Manuscripts of 1844*, in MER, *supra* note 22, at 76.

30. Marx, *On the Jewish Question*, in MER, *supra* note 22, at 46.

31. Marx, *Capital*, Vol. III, excerpted in MER, *supra* note 22, 439, 441.

life's prime want,"³² the expression of human creativity. Each would naturally work according to his ability, and could be remunerated according to his need. All need of coercion having therefore ended, the organization of society would lose its "political" character and take on a "business" character.³³ The state (in the sense of a coercive entity) would thus, in Friedrich Engels' words, "wither away."

Whatever may be said of the "withered" state in the final stage of communist society, the agent of the social transformation was to be nonetheless a decidedly strong state, a "dictatorship of the proletariat," capable of overcoming entrenched class interests and re-orienting the economy and society in a socialist direction. Marx saw this "dictatorship" as an expression of genuine popular sovereignty, with the most direct input by the working people in the decisionmaking and administrative processes of the state.³⁴

Underlying Marx's vision of proletarian dictatorship was a tradition of democratic thought that had as its unmistakable source the writings of Rousseau. Indeed, the Italian theorist Lucio Colletti has gone so far as to assert that "revolutionary 'political' theory, as it has developed since Rousseau, is already foreshadowed and contained in *The Social Contract*," and that Marx and Lenin have added nothing, other than an analysis of the economic prerequisites to the realization of a polity that expresses the general will.³⁵

B. *The General Will*

Whatever the special resonance for revolutionary socialists in Rousseau's conception of the mission of the state, that conception's appeal is not limited to the far left. Indeed, Rousseau, unlike Marx, did not seek a totally undifferentiated society, in which no conflicting interests exist and only the common interest remains. As Rousseau stated: "If there were no different interests, the common interest would be barely felt, as it would encounter no obstacle; all would go on of its own accord, and politics would cease to be an art."³⁶ Rousseau envisaged no "withering away" of the state. Moreover, although he sought to contain private property, he did not seek to abolish it, and thus allowed for the preservation of "particular" interests in tension with the common interest.³⁷

Rousseau described the objective of his version of the social con-

32. Marx, *Critique of the Gotha Program*, in MER, *supra* note 22, 525, 530-31.

33. See Marx, *After the Revolution: Marx Debates Bakunin* (editor's title), in MER, *supra* note 22, 542, 545.

34. See Marx, *The Civil War in France*, in MER, *supra* note 22, 618.

35. Colletti, *supra* note 21, at 185.

36. Jean Jacques Rousseau, *The Social Contract*, in THE SOCIAL CONTRACT AND DISCOURSES (G.D.H. Cole trans. 1973) 164, 185 n.1 (I:9) [hereinafter Rousseau].

37. *Id.* at 181 n.1 (I:9), 204 (II:11).

tract as follows:

The problem is to find a form of association which will defend and protect with the whole common force the persons and goods of each associate, in which each, while uniting himself with all, may still obey himself alone, and remain as free as before." This is the fundamental problem of which the social contract provides the solution

"Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole."

At once, in place of the individual personality of each contracting party, this act of association creates a corporate and collective body, composed of as many members as the assembly contains voters, and receiving from this act its unity, its common identity, its life, and its will.³⁸

Rousseau advocated direct mass participation in decision-making and public service. He derided representative institutions and professional armies, asserting that those who would hire proxies for such vital tasks "end by having soldiers to enslave their country and representatives to sell it."³⁹ Far from sharing the liberal view that the state ought to leave its people to pursue private matters, he asserted: "The better the constitution of a State is, the more do public affairs encroach on private in the minds of the citizens."⁴⁰ In a good state, the common happiness furnishes a greater part of individual happiness, so that one has less need to seek fulfillment through the furtherance of private interests.⁴¹ This situation can obtain, however, only where individuals are precluded from withholding their contribution to the common cause; if persons are allowed to enjoy the benefits of association while shirking the responsibilities, the end result will be "the undoing of the body politic."⁴²

The Rousseauian polity operates on the basis of the "general will." The general will is distinct from the "will of all," which is merely the aggregation of the particular wills of the members of the polity. The general will

is always upright and always tends to the public advantage; but it does not follow that the deliberations of the people always have the same rectitude. Our will is always for our own good, but we do not always see what that is; the people is never corrupted, but it is often deceived, and on such occasions only does

38. *Id.* at 174-75 (I:6).

39. *Id.* at 239 (III:15).

40. *Id.*

41. Rousseau, *supra* note 36, at 240 (III:15).

42. *Id.* at 177 (I:7).

it seem to will what is bad.⁴³

That the people can be said to be deceived, so that their will can be said to stray from the general will, is a central paradox in Rousseau's system.

Where the general will governs, freedom consists in obedience to it, for obedience to the general will is in fact obedience to one's own will. This is true even with respect to those laws that the individual opposed in the assembly. The question put in the assembly is not whether one desires the law, but whether the law is in conformity with the general will. The passage of a law over his objection demonstrates merely that his opinion was mistaken, that what he thought to be the general will was not so. The common interest is served only by the operation of the general will, and one therefore always wills for the general will to prevail; he cannot wish for his mistaken position to have been victorious, as that would have achieved the opposite of his true will, in which case he would not have been free. "This presupposes, indeed, that all the qualities of the general will still reside in the majority: when they cease to do so, whatever side a man may take, liberty is no longer possible."⁴⁴

Under proper circumstances, the general will is derived from the aggregate of the various individual wills. "[T]ake away . . . the pluses and minuses that cancel one another, and the general will remains as the sum of the differences."⁴⁵ The general will can be so derived when each individual makes his own independent decision.

The problem comes when "intrigues arise, and partial associations are formed at the expense of the great association." The rise of distinct interest groups within the polity disrupts the process by which the general will is formed, since

there are no longer as many votes as there are men, but only as many as there are associations. The differences become less numerous and give a less general result. Lastly, when one of these associations is so great as to prevail over all the rest, the result is no longer a sum of small differences, but a single difference; in this case there is no longer a general will, and the opinion which prevails is purely particular.

The only way to safeguard the general will is either to bar such interest groups entirely or, if this is not possible, "to have as many as possible and prevent them from being unequal."⁴⁶

In Rousseau's conception, the general will can operate properly

43. *Id.* at 184-85 (II:3).

44. *Id.* at 250-51 (IV:2).

45. *Id.* at 185 (II:3).

46. Rousseau, *supra* note 36, at 185 (II:3).

only in a society where "no citizen shall ever be wealthy enough to buy another, and none poor enough to be forced to sell himself."⁴⁷ Whereas the liberal-democratic tradition is distinguished by its assertion of democracy's compatibility with an economic system marked by inequality and wage-labor, Rousseau contended that laws, however derived, "are always of use to those who possess and harmful to those who have nothing: from which it follows that the social state is advantageous to men only when all have something and none too much."⁴⁸ Thus, Rousseau's vision, like Thomas Jefferson's, assumes a society of working proprietors, as opposed to either state socialism or oligopoly capitalism.⁴⁹ In contemporary terms, any such vision would presumably require broad economic security and containment of concentrations of economic power.

If the individual seeks to resist the general will, it is quite appropriate that he be "forced to be free." The formula is such that

each man, in giving himself to all, gives himself to nobody; and as there is no associate over which he does not acquire the same right as he yields others over himself, he gains an equivalent for everything he loses, and an increase of force for the preservation of what he has.⁵⁰

The individual preserves his independence by giving himself to the whole on the condition that all others do the same. In carrying out his duty, he serves his own interests, assuming that all others equally fulfill their duties. He thus freely wills the circumstance in which all obey the general will, and thereby pursue the common cause, the common interest. Therefore, when he seeks to evade his duties, he undermines the common cause, and so acts against his own free will.

True freedom, then, is not equated with the ability to do whatever one happens to wish at any given moment. It is not freedom *from* encroachment by others, but freedom *to* be responsible for and to the social whole. The individual learns to recognize true human freedom by internalizing discipline, i.e., by coming to the realization that acting in accordance with one's own true will entails acting in accordance with social responsibilities, as determined by the social whole.

Viewed from the present day, the identification of freedom with obedience to the general will has Orwellian overtones that have not been lost on Rousseau's liberal critics.⁵¹ The potential for abuse

47. *Id.* at 204 (II:11).

48. *Id.* at 181 n.1 (I:9).

49. For a discussion of the material preconditions to varying classical models of democratic participation, see C.B. MACPHERSON, *THE LIFE AND TIMES OF LIBERAL DEMOCRACY* (1977).

50. Rousseau, *supra* note 36, at 174 (I:6).

51. C.B. Macpherson has concisely summarized the problem, paraphrasing Isaiah Berlin

would seem to be exacerbated by Rousseau's own recognition that the stunting and debasing influences of the societal *status quo* impede the capacity of the people, by their own initiative, to remake the society. Individuals, looking to short-term private interests, will not appreciate the desirability of sacrifice. For the people to acquire the requisite understanding to implement beneficial institutional change, "the social spirit, which should be created by these institutions, would have to preside over their very foundation."⁵² Rousseau's model thus relies heavily on the intellectual guidance of the "legislator":

He who dares to undertake the making of a people's institutions ought to feel himself capable, so to speak, of changing human nature, of transforming each individual, who is by himself a complete and solitary whole, into part of a greater whole from which he in a manner receives his life and being; of altering man's constitution for the purpose of strengthening it; and of substituting a partial and moral existence for the physical and independent existence nature has conferred on us all.⁵³

This passage indeed foreshadowed unpleasant historical developments.⁵⁴ Rousseau himself acknowledged the tension in his model between the imperatives of participation and direction. In inducing the body politic to accept the direction of the legislator, rational persuasion is unfeasible, yet forcible imposition is illegitimate. "The legislator . . . being unable to appeal to either force or reason, must have recourse to an authority of a different order, capable of constraining without violence and persuading without convincing."⁵⁵ Rousseau's resolution of this conundrum can, with charity, be char-

as follows:

Liberty as self-mastery becomes mastery of a "higher" or "real" self over a lower, desirous, animal self. Then the "real" self is identified with some social whole of which the individual is a part, and this organic whole is then taken to embody all the real of higher selves or wills of all the individuals. So, in imposing its organic will on individuals, the society, or those who act in its name, is said to achieve a higher liberty for all its members. This is the idealist road (or slippery slope) which ends in coercion: the individual is forced to be free.

MACPHERSON, *DEMOCRATIC THEORY*, *supra* note 13, at 105-06.

52. Rousseau, *supra* note 36, at 196 (II:7).

53. *Id.* at 194 (II:7).

54. In Macpherson's characterization:

Freedom is . . . the (rational) recognition of necessity. It requires a state governed by laws which all men would rationally accept if they were fully rational. But at present most men are not, whether from having been stunted by prevailing social institutions . . . or from some other cause. So it is in most men's (rational) interest that others — those who have attained full rationality or have understood the true forces of history — should impose on them the institutions which will bring them (as far as they can be brought) to full rationality and, therefore, full freedom.

MACPHERSON, *DEMOCRATIC THEORY*, *supra* note 13, 106 (again paraphrasing Berlin).

55. Rousseau, *supra* note 36, at 196 (II:7).

acterized as dubious: the legislator associates his own laws with divine will, and by thus placing religion in the service of politics, accomplishes through faith what cannot be achieved through reason.⁵⁶

The recent history of Eastern and Central Europe provided a more practical resolution of the tension between participation and direction: vanguard rule. In this way, both the communitarian critique of liberal rights and the communitarian conception of the general will were placed at the service of a system that managed to transform the quest for maximal human freedom into the triumph of tyranny and cynicism.

III. The Communitarian Vision and the Communist Party States

A. *Constitutional Consequences of Vanguard Rule*

The Communist Party-controlled states of Eastern and Central Europe drew on the Rousseauian conception of the polity to justify a system in which individual rights were not conceived as a limitation on state power. In the words of one commentator:

[T]he Socialist State, as an incarnation of the totality of the working people, coordinates the interests of society and of the individual and creates the conditions indispensable to the formation of unity between the rights and duties of man and citizen. This unity eliminates the possibility of abusing the law, as the laws can only be implemented in a manner which does not encroach upon social interests. This idea is not new, because it was already advocated by J.J. Rousseau.⁵⁷

Yet this "idea" was indeed "new"; it was the superimposition of a theoretical construct on a problematic reality. Had the statement begun, "the socialist state, *insofar as it is* an incarnation of the totality of the working people," it would have been more theoretically sound and, more importantly, would have left open a question to be resolved empirically. The actual wording was no accident; it reflected the tautological style of reasoning typical of apologia for Communist state practice.

If the relationship between state policy and the general will is taken as unproblematic, there can be little place for individual rights, whether of "man" or of "citizen." Soviet constitutional scholar Veniamin Chirkin (writing in the pre-Gorbachev era) pointed out, in a manner consistent with communitarian theory, that "[t]he essence of true freedom for the individual lies not in his independence from society, but in those material and spiritual possibili-

56. *Id.*

57. Franciszek Przetacznik, *The Socialist Conception of Human Rights*, 13 REVUE BELGE DU DROIT INTERNATIONAL 238, 246 (1977).

ties which are created for him within it.”⁵⁸ “The socialist state,” he argued, “creates conditions [e.g., social consumption funds, free education, free medical services, and the development of culture] in which each member of society is offered genuine freedom of choice as regards the form of his activity, the development and use of his abilities.”⁵⁹

So far, so good. Chirkin then continued:

Thus, in place of the bourgeois individualistic concept of the freedom of the individual, there exists under socialism another, social, dynamic, collectivist concept of that freedom. Marxism-Leninism understands the freedom of the individual to mean the freedom of the individual within society, within the state, within the collective, and not to mean freedom from them. This freedom is seen as inseparably bound up with the unity of the basic interests of society, the state, the collective and the individual⁶⁰

Be this as it may, if the constitutional structure simply *assumes* this “unity of basic interests,” rather than being set up to check the emergence of divergent state interests, the stage is set for unbounded tyranny in the name of maximal freedom.

Yet precisely this assumption was the essential aspect of Communist constitutions. In promulgating the Soviet Constitution of 1977, Leonid Brezhnev put to rest any idea that the Constitution might empower citizens, individually or collectively, against the ruling party:

The Communist Party is the vanguard of the Soviet people, their most class-conscious and advanced segment, inseparable from the people as a whole. The Party has no interests except the interests of the people. To try to counterpose the Party to the people, to talk about the “dictatorship of the Party,” is tantamount to trying to counterpose, let us say, the heart to the rest of the body.⁶¹

It comes as no surprise, then, that under the 1977 Constitution, Soviet citizens were “obliged to safeguard the interests of the Soviet state, and to enhance its power and prestige” (Article 62), that freedom of expression was exercisable only “[i]n accordance with the interests of the people and in order to strengthen and develop the socialist system” (Art. 50), or that freedom of association was exer-

58. VENIAMIN CHIRKIN, CONSTITUTIONAL LAW AND POLITICAL INSTITUTIONS 30 (1985).

59. *Id.* at 31.

60. *Id.* at 31.

61. *Brezhnev's Report on the New Constitution*, in *The Current Digest of the Soviet Press*, Vol. xxix, no. 39, 7 (Oct. 26, 1977).

cisable only "[i]n accordance with the aims of building communism" (Art. 51). In the words of Soviet analyst E.M. Chekharin:

The purpose of the political freedoms which are exercised in the USSR exclusively in the people's interest is to strengthen the socialist system and promote the political activity of the masses. For this reason, these freedoms may not be used to harm the cause of peace, democracy and socialism. That is why in the USSR warlike and national and racist propaganda, agitation and propaganda aimed at undermining or weakening the socialist state, and libel and slander of the Soviet social and state system are punishable by law.⁶²

Nor were these limitations subject to a wide range of interpretation. The Soviet party, according to Chekharin, "maintains the continuity of the general line which it has defended in an uncompromising struggle against Trotskyism, petty-bourgeois adventurism, Right opportunism, nationalism and other anti-Leninist trends and factions."⁶³ The struggle was "uncompromising" in that it did not permit the body politic to be deceived; the citizenry was not afforded the opportunity to make a mistake. The party used a firm hand to prevent ill-advised detours:

Experience has shown how much waste results for society when organizational and economic changes are introduced without a detailed scientific substantiation, preliminary examination and preparation Accordingly, the Communist Party and the Soviet government work out the most expedient ways and means of knowing and utilizing objective laws under concrete circumstances of time and place, introducing unity and purpose to the nation-wide effort to build a communist society.⁶⁴

The legitimacy of party rule was purported to derive from the unidirectional nature of the social transformation. Since socialist society has a preordained direction that is knowable, the argument went, it is possible to identify elements of society that are more "advanced" than others. Their "advanced" nature manifests itself in a consciousness of and commitment to that preordained direction. These advanced elements constitute a "vanguard," the party. Like the Rousseauian legislator, the party must take the lead in building institutions capable of developing human sociality. Unlike the legislator, however, the party is armed with a science of history that imputes to society a set of determinate objectives.

In the Communist Party's deterministic interpretation of Marx's

62. EVGENI MIKHAILOVICH CHEKHARIN, *THE SOVIET POLITICAL SYSTEM UNDER DEVELOPED SOCIALISM* 209-10 (1977).

63. *Id.* at 42.

64. *Id.* at 345.

theory of history, "dialectical materialism" (a term that Marx himself never used) was the key to understanding and predicting all historical developments, the key to uncovering the "objective laws" that govern human activity. Those who had mastered this science were thus deemed uniquely qualified to provide direction.

Within such a framework, there can be no issue of the vanguard being answerable to or checked by the popular will, since the popular will is "less advanced." The vanguard does not owe its leading position to popular approval, however much it may aspire to that and indeed require that to carry out its tasks successfully; it owes its leading position to the fact that its line represents, as an "objective" matter, the best interests of the working class, whether that class knows it or not.

In the face of objective laws, the role of the citizenry cannot but be diminished. The German Democratic Republic (GDR), in a statement before the U.N. Commission on Human Rights, defined the democratic project as follows: "The essence of socialist democracy consists in the moulding of society in conformity with the objective laws of development, with guidance by the State and the enlightened and committed involvement of the majority of the people in that process."⁶⁵ There is nothing indeterminate or free-wheeling about this form of democracy. Society is to be molded, and objective laws determine the way in which this will be accomplished. Those who will be involved in democracy are those who are committed to the project and who are enlightened by knowledge of the objective laws; the uncommitted and the unenlightened need not apply. There is no question of rejecting "guidance" — anyone proposing that is either insufficiently public-spirited or else mistaken.

So thoroughly was the party's will identified with the general will in Communist dogma that would-be Communist dissenters, convinced of the party's error or even corruption, felt duty-bound to subordinate themselves to the party line. Rousseau stated that where the qualities of the general will cease to reside in the majority, "whatever side a man may take, liberty is no longer possible."⁶⁶ So, too, Leon Trotsky, in a speech to the 1924 Party Congress while in the internal opposition (in Isaac Deutscher's terms, the prophet "unarmed" but not yet "outcast"), followed his criticism with this striking concession:

Comrades, none of us wishes to be or can be right against the party. In the last instance the party is always right, because it is the only historic instrument which the working class possesses

65. U.N. Doc. E/CN.4/1984/12 Add. 1, at 2.

66. Rousseau, *supra* note 36, at 250-51 (IV:2).

for the solution of its fundamental tasks One can only be right with the party and through the party because history has created no other way for the realization of one's rightness.⁶⁷

Trotsky, who had as early as 1904 recognized the danger of "substitutism" -- the party's preemption of the role properly belonging to the working class as a whole⁶⁸ — shortly rediscovered the mistakenness of such exaltation of the party, but his 1924 statement accurately reflects the view of subsequent generations of Communists.

The result of this line of thinking was that collective interests and the popular will came to be viewed entirely as abstractions. When the individual was "forced to be free," it was not on the basis of a will to which the individual equally contributed, a will that reflected collective interests as perceived by the people themselves. Rather, it was on the basis of a metaphorical popular will — the "objective" will, as it were, of the working class. And whereas the freedom was metaphorical, the force was not.

Within this framework, there could be no issue of constitutionalism in the genuine sense. There was no basis for limiting the power of the state, for empowering individuals or groups to act in opposition to the state, or for protecting individuals or groups from arbitrary governmental actions. At best, the framework allowed for orderly regulation of the exercise of state power and for protection from the arbitrary acts of renegade functionaries, i.e., for the institution of rule by law. Law could thereby function to make the lowest levels of government accountable to the highest, and in particular to make the bureaucracy accountable to the party. At that point, "socialist legality" reached its conceptual limit.

B. Communist Practices and the Marxian Critique of Rights

It is clear that vanguard rule is irreconcilable with genuine constitutionalism. It has been suggested, however, that the contradiction between radical communitarianism and constitutionalism lies deeper, in Marx's critique of liberal rights and of the liberal dichotomy between political community and civil society.

Martin Krygier has recently argued that the absence of rule of law under the Eastern and Central European regimes can be traced, in significant part, to Marx's analysis of the liberal state and civil society.⁶⁹ He contends that Marx's tendency to view law's role as subordinate to social forces and as a mask for ruling class interests systematically engenders a disrespect for legality:

67. RALPH MILIBAND, *MARXISM AND POLITICS* 147 (1977).

68. *See id.* at 124.

69. Martin Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Communism*, 15 *LAW & SOCIAL INQUIRY* 633 (1990).

Many of Marx's comments on law seek to *unmask* it and its pretensions. As a limit to the power of the powerful it is either illusory and systematically partial — for law is involved in class exploitation and repression — or useful to ruling classes as an ideological emollient and mask for their real social power, a power which, however well disguised, is fundamental — at least, Engels came to add after Marx's death, “ultimately,” “in the last analysis.” It was necessary, not that law fulfill any mythical essence, . . . but that it disappear along with the state, and with the civil society which supported them and which they supported.

. . . That [law] might . . . be *liberating* was only conceded by Marx in comparison with the feudal past or with worse versions of the capitalist present, certainly not in comparison with the socialist and communist future. So to ask Marxist revolutionaries to make space for restraint by the rule of law would be to voice a quaint liberal demand for which they were not *theoretically* — let alone temperamentally — programmed.⁷⁰

It is true — and highly unfortunate — that Marx never had occasion to deal directly with the question of rule of law (let alone constitutionalism) in revolutionary society. It is also true that, in much the way that Rousseau derided the liberal social contract for enshrining inequality and oppression under the guise of mutual benefit, Marx disparaged “political emancipation” and equal rights as bestowing, in essence, a false freedom. But it does not follow that Marx intended — or would even have found tolerable — the abolition of rule of law in advance of the abolition of state coercion.

In Marx's conception, rights, like the state itself, ultimately disappear as a result of historical processes, not mere acts of will. Indeed, even bourgeois economic rights, such as the right to payment according to one's work, remain and cannot be transcended until the development of productive forces and “the all-round development of the individual” make possible the fulfillment of the formula, “[f]rom each according to his ability, to each according to his needs.”⁷¹ It is thus logical to assume that civil and political rights (corresponding to the historical circumstances of socialist revolution) cannot be transcended until all opposing interests, and thus all need for coercion (and therefore for the state), are themselves transcended.

More importantly, for Marx, working class power was not an abstraction. The “dictatorship of the proletariat” entailed the actual control by ordinary people of government operations on a day-to-day basis.⁷² Moreover, such control, as Marx described in his extolling

70. *Id.* at 651 (footnotes omitted).

71. Marx, *Critique of the Gotha Program*, in MER, *supra* note 22, 525, 531.

72. Although Marx intended that communists constitute a “vanguard” in a general

narrative of the 1871 Paris Commune, was not to be limited to the workers, but extended to the peasantry as well, notwithstanding the latter's distinct set of interests:

The rural communes of every district were to administer their common affairs by an assembly of delegates in the central town, and these district assemblies were again to send deputies to the National Delegation in Paris, each delegate to be at any time revocable and bound by the *mandat impératif* (formal instructions) of his constituents While the merely repressive organs of the old governmental power were to be amputated, its legitimate functions were to be wrested from an authority usurping pre-eminence over society itself, and restored to the responsible agents of society. Instead of deciding once in three or six years which member of the ruling class was to misrepresent the people in Parliament, universal suffrage was to . . . [permit the people] if they for once make a mistake, to redress it promptly.⁷³

"The Commune," Marx believed, "would have delivered the peasant of the blood tax — would have given him a cheap government, — transformed his present blood-suckers, the notary, advocate, executor, and other judicial vampires, into salaried communal agents, elected by, and responsible to, himself."⁷⁴ To himself *literally*, it may be added, not merely metaphorically.

This emphasis on accountability can scarcely be conceived without some notion of rights against the state. And indeed, one finds nowhere in Marx's critique of the French Declaration of the Rights of Man and Citizen any attack on the rights of *citizens*, which included the right to "speak, write and publish freely" (Article XI) and the "right to determine the necessity of the public contribution, either in person or by their representatives, to consent freely thereto, to watch over its use, and to determine the amount, base, collection and duration thereof" (Art. XIV).

True accountability of the state apparatus to the working class requires that citizens have rights against that apparatus. This fact was recognized by no less a firebrand Marxist revolutionary than Rosa Luxemburg, in her criticism of the early course of the Bolshe-

sense, he envisaged it as catalyzing rather than supplanting the decisionmaking activity of the working class itself. See Marx & Engels, *The Manifesto of the Communist Party*, in MER, *supra* note 22, at 473, 483 (the Communists "do not set up any sectarian principles of their own, by which to shape and mould the proletarian movement" and "do not form a separate party"). *Id.*

73. Marx, *The Civil War in France*, in MER, *supra* note 22, at 618, 633. Although Marx himself never directly characterized the Paris Commune as the fulfillment of his concept of proletarian dictatorship, Friedrich Engels made statements to this effect, and these have been imputed to Marx. See SHLOMO AVINERI, *THE SOCIAL & POLITICAL THOUGHT OF KARL MARX* 240 (1968).

74. Marx, *The Civil War in France*, in MER, *supra* note 22, 618, 637.

vik revolution:

Freedom only for supporters of the government, only for the members of the party — however numerous they may be — is no freedom at all. Freedom is always and exclusively for the one who thinks differently. Not because of any fanatical concept of “justice” but because all that is instructive, wholesome and purifying in political freedom depends on this essential characteristic, and its effectiveness vanishes when “freedom” becomes a special privilege.⁷⁵

She thus called for “unrestricted freedom of press and assembly,” and faulted Lenin’s failure to allow for “the most unlimited, the broadest democracy and public opinion.”⁷⁶ She recognized that in the absence of pluralism, popular participation is necessarily reduced to the role of rubber-stamping the leadership’s decisions.

Without general elections, without unrestricted freedom of press and assembly, without a free struggle of opinion, life dies out in every public institution, becomes a mere semblance of life, in which only the bureaucracy remains as the active element [What remains is] not the dictatorship of the proletariat, . . . but only the dictatorship of a handful of politicians, that is[,] a dictatorship in the bourgeois sense⁷⁷

Of course, this is precisely what occurred.

None of this is to deny that Marxian theory made little provision for constitutionalism, or that the tension in Marxism between participation and direction, between actual popular control and the preordained process of social transformation, is real. But it is to deny that an anticonstitutionalist resolution of that tension follows naturally either from Marxism or from the more general communitarian precepts (to which Marx substantially contributed) criticizing the liberal conception of rights and advocating an affirmative role for the state in the realization of human freedom.

IV. Communitarianism and Constitutionalism

A. *Rousseau’s Social Contract: A Source of Constitutionalism*

If it is taken as established that communitarianism, even in its radical, Marxian variant, does not necessarily imply the unlimited state authority inherent in the Communist model, it remains to find a source of genuine constitutionalist principles consistent with the basic teachings of communitarianism. A communitarian constitu-

75. ROSE LUXEMBURG, *The Russian Revolution, in THE RUSSIAN REVOLUTION AND LENINISM OR MARXISM?* 25, 69 (1981).

76. *Id.* at 71.

77. *Id.* at 71-72.

tionalism must be oriented toward securing the equal exercise of control by citizens over the decisions that affect their lives, a circumstance that presupposes at least a modicum of economic levelling and material security. Provision must be made for the furtherance of popular participation and for combatting the undue influence of particularist interests. While guaranteeing certain rights exercisable against state authority, a communitarian constitutionalism must reject the notion that rights are fundamentally a bulwark against society, existing to shield the zealous pursuit of self-interest. Communitarian rights, though existing independent of and not subordinate to the state policy of the moment, must carry with them concomitant duties to use them in the service of the common weal.

The starting point for deriving principles of communitarian constitutionalism is none other than Rousseau's version of the social contract. Far from being a totalitarian tract, *The Social Contract* contains within its own logic the fundamentals of a constitutionalist order.

Rousseau's citizen, it is true, reserves no rights against the *Sovereign*, i.e., the united citizenry that articulates the general will. To take this proposition at face value, however, is to be misled. "[T]he Sovereign, being formed wholly of the individuals who compose it, neither has nor can have any interest contrary to theirs."⁷⁸ Nor is the point simply that the Sovereign is incapable of acting against its members as a whole. The Sovereign is also, once again by definition, incapable of acting against its members individually. Since "all continually will the happiness of each one," and every citizen considers "each" to mean himself, every citizen will vote for the good of the whole in consideration of his own good.⁷⁹ This is because "every *authentic* act of the general will binds or favors all citizens equally; so that the Sovereign recognizes only the body of the nation, and draws no distinctions between those of whom it is made up."⁸⁰

This point highlights the crucial difference between the sovereign general will and the "will of all," which, though embodying the majority view, is not sovereign. The Sovereign — in order to have the qualities of the Sovereign — cannot require more of one subject than another, for in such a case, the Sovereign's will would be not general but particular with respect to the individual singled out.⁸¹

78. Rousseau, *supra* note 36, at 176 (I:7). One might satirically — but only satirically — juxtapose this with Leonid Brezhnev's comments on the Soviet Constitution, discussed *supra*.

79. Rousseau, *supra* note 36, at 186-87 (II:4).

80. *Id.* at 188 (II:4) (emphasis added).

81. *Id.* ("the Sovereign never has a right to lay more charges on one subject than on another, because, in that case, the question becomes particular, and ceases to be within its competency").

This distinction between the general will and the will of all suggests a basis for judicial review of majoritarian lawmaking that is not far removed from familiar "equal protection" jurisprudence. True, Rousseau did not propose this solution; he proposed no solution at all. He did, however, make clear that misuse of the legislative power to the detriment of discrete parts of the citizenry is illegitimate and intolerable. Furthermore, as will be noted shortly, an organ of judicial review that traces its legitimacy to an act of the general will does not badly compromise the integrity of Rousseau's system — certainly not as badly as throwing up one's hands and saying "whatever side a man may take, liberty is no longer possible"!

Once judicial review of legislation on equal protection grounds is conceded as a possibility, the floodgates open. First, any issue arising under the ordinary panoply of liberal negative rights can be reconstrued as an equal protection issue in this Rousseauian sense, since the effects of denial of these rights will burden discrete groups disproportionately. While virtually all legislation has disparate effects, the will of the majority is most prone to be "particular" wherever these rights are disregarded: censorship discriminates against the holders of certain opinions; unreasonable searches and seizures discriminate against the targets of police investigations; denial of fair criminal procedures discriminates against criminal suspects; and cruel and unusual punishments discriminate against prisoners. Burdens on these rights pass muster only where one can plausibly will them in contemplation of being oneself subject to them. (Herein lies a link between the Rousseauian general will and the Kantian categorical imperative, which dictates that an act can be morally legitimate only if it embodies a maxim that can be willed universally; fittingly, Kantian moral philosophy is a touchstone of German communitarian jurisprudence.)⁸²

Second, the Sovereign cannot — again, in order to have the qualities of the Sovereign — enact a law that would impair the ability of the general will to be formed. For example, despite Rousseau's clear support for censorship,⁸³ such censorship could not be allowed to impinge on the wide-ranging deliberations leading to the proper formation of the general will, since the citizens, willing always that the general will should prevail, could not will the general will's de-

82. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 88 (52) (H.J. Paton trans. 1964) ("Act as if the maxim of your action were to become through your will a universal law of nature") (emphasis in original). The first article of the German Basic Law (*Grundgesetz*) references the Kantian moral concept of human dignity. Kant is taken quite seriously by German jurists and legal scholars. See generally DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 38-39, 47, 308-09, 312-14 (1989).

83. Rousseau, *supra* note 36, at 266-68 (IV:7).

generation.⁸⁴ (On the other hand, the opinion that the general will itself should not prevail can never form part of the general will, and this view can be excluded — essentially the position taken by the German constitutional doctrine of “militant democracy.”)⁸⁵ Political rights, and civil rights that affect them, are thus logically inferred.

Constitutionalism is further inherent in Rousseau’s conception of the division of powers and functions. Although the *Sovereign* cannot have any interest contrary to that of the people, the same is not true of the *government*. In Rousseau’s terminology, the “Sovereign” refers to the legislative power, which in a “republic” is made up of the whole people and legislates according to the general will. The “government” refers to the executive power. Whereas the Sovereign represents the will of the body politic, the government represents the force.⁸⁶ A republican government may take the form of a “democracy,” an “aristocracy” or even a “monarchy”; these three are merely different modes of *administration*, each appropriate to certain circumstances, but each, in a republic, responsive to the general will.⁸⁷ Each form, however, is prone to abuse, resulting in “ochlocracy,” “oligarchy,” or “tyranny.”⁸⁸ Such abuse occurs when the government

ceases to administer the State in accordance with the laws, and usurps the Sovereign power. A remarkable change than occurs: not the government, but the State, undergoes contraction; I mean that the great State is dissolved, and another is formed within it, composed solely of the members of the government, which becomes for the rest of the people merely master and tyrant. So that the moment the government usurps the Sovereignty, the social compact is broken, and all citizens recover by

84. Some commentators have emphasized Rousseau’s call for the citizens to have “no communication with one another” in arriving at their decisions, *id.* at 185 (II:3), so that they will not “imbib[e] the collective opinions of [their] neighbors in a public assembly.” See Robert Wokler, *Rousseau’s Two Concepts of Liberty*, in *LIVES, LIBERTIES, AND THE PUBLIC GOOD* 61, 85 (G. Feaver & F. Rosen eds. 1987). Although this interpretation might seem to deprecate the need for open debate, Rousseau’s insistence in the same passage on the people “being furnished with adequate information” suggests to the contemporary reader the practical need for such debate. Moreover, the warning against communication arises in the context of the condemnation of “intrigues” and “partial associations formed at the expense of the great association”; it is hardly clear that it applies to the airing of opinions within the great association itself.

85. See Kommers, *supra* note 82, at 222-44.

86. Rousseau, *supra* note 36, at 208 (III:1).

87. *Id.* at 193 & n.1 (II:6). An interesting (and rare) point of departure of Marx’s otherwise largely Rousseauian vision of a participatory dictatorship of the proletariat is the conflation of the executive and legislative functions. Marx, *The Civil War in France*, in *MER supra*, 618, 632 (“The Commune was to be a working, not a parliamentary, body, executive and legislative at the same time”). Marx’s discussion of 1871 Paris was as much descriptive as prescriptive, however, and is in any event difficult to take seriously as a practical matter. Rousseau himself seems generally to have preferred that the executive function be fulfilled by “elective aristocracy.” Rousseau, *supra* 215-25 (III:3-6).

88. Rousseau, *supra* note 36, at 234 (III:10).

right their natural liberty, and are forced, but not bound, to obey.⁸⁹

As to the legislator, any suggestion that Rousseau authorized a Leninist-style vanguard to impose the transformative blueprint is sharply refuted by his insistence that whatever the legislator's moral authority, "only the general will can bind the individuals, and there can be no assurance that a particular will is in conformity with the general will, until it has been put to the free vote of the people." Rousseau placed special emphasis on this point: "This I have said already; but it is worth while to repeat it." He warned that Rome "suffered a revival of all the crimes of tyranny, and was brought to the verge of destruction, because it put the legislative [drafting] authority and the sovereign power into the same hands." If the legislator were to have unilateral authority, "his private aims would inevitably mar the sanctity of his work."⁹⁰

It is conceivable that a constitutional court, like the legislator, would be limited in a Rousseauian system to the role of moral suasion, as are such courts in countries (e.g., Canada) that retain the tradition of parliamentary supremacy. Yet it does not seem illogical that the general will could authorize a body of individuals, not to pre-empt the Sovereign's lawmaking function, but to strike down laws that do not emanate from a truly general will, and thus that do not actually emanate from the Sovereign. Such a body might even be able, within some limit, to force the body politic to take action where inaction itself bespeaks the triumph of a particular over the general will. Herein lies a tension, and perhaps a slippery slope, but this conception of judicial review does not seem logically inconsistent with *The Social Contract*, and is clearly more consistent with it than is unbridled majoritarianism or vanguard rule.

Rousseau's *Social Contract* thus embodies a basis for constitutionalism alternative to that emanating from the Lockean tradition. It illustrates that the idea of a strong, activist state, empowered to exact wide-ranging (and perhaps sharply redistributive) contributions from individuals to the commonweal, is theoretically consistent with limitations on the arbitrary exercise of state power.

Individual rights in this context are not "natural" rights, i.e., preservations of pre-social liberty of self-interest subject to no concomitant obligations beyond recognition of the similar rights of others. Nor are they, on the other hand, rights as conceived in the Soviet bloc constitutions, bestowed upon individuals by the govern-

89. *Id.* at 233 (III:10).

90. *Id.* at 195-96 (II:7). There is no indication that Marx thought any differently on this point. See Marx & Engels, *The Manifesto of the Communist Party*, in MER, *supra* note 22, 473 at 483 (discussed *supra*).

ment as an extension of state policy — rights therefore assertable only in the context of and consistent with whatever state policy happens to be at any given moment, and so never actually assertable against the government. Rather, communitarian rights constitute a third type of right, derived from the transcendent logic of democratic community, founded, as it were, “on the relations between man and man” rather than upon “the separation of man from man.” Such rights are assertable, not against the true social whole, but against the state whenever the state deviates from the general will.

B. Communitarianism in West German Constitutional Jurisprudence

There are no obvious real-world examples of a constitutional jurisprudence based fully on the principles articulated above. These principles find resonance, however, in the constitutional jurisprudence of the Federal Republic of Germany (FRG).

The 1949 *Grundgesetz* (Basic Law) reflects the influence of postwar West Germany’s most important political parties, the Christian Democrats and the Social Democrats. Each adhered to a synthesis of liberal and communitarian ideology, the communitarian component of Christian Democracy being a progressive adaptation of authoritarian-corporatist communitarianism, and that of Social Democracy being an attenuated Marxian socialism. These parties, along with the liberal Free Democrats, erected a constitutional order based on four fundamental principles: *Rechtsstaat* (rule-of-law state), *Sozialstaat* (social welfare state), *Parteienstaat* (political party state), and *streitbare Demokratie* (militant democracy). Although the *Grundgesetz* is in many respects a liberal document, all four principles have unmistakably communitarian components.

The expanse of the *Rechtsstaat* conception is reflected in Article 1(1), the pinnacle of the Basic Law’s hierarchy of values: “The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.” This self-executing provision not only limits the state, but calls upon the state to intervene in civil society to prevent individuals from being treated in dehumanizing ways. The Constitutional Court has gone so far as to hold, for example, that because the constitution conceives “man as an autonomous person who freely develops within the social community,” the state has an obligation to protect the “individual’s right to societal respect and esteem,” even at the expense of others’ free expression.⁹¹

Donald Kommers explains that the Constitutional Court’s

91. *Mephisto Case*, 30 BVerfGE 173 (1971), excerpted in Kommers, *supra* note 82, at 309-12.

jurisprudence

envisions society as more than a collection of individuals moved by self-interest, calculation, or the manipulation of others. The Constitutional Court has never interpreted the human dignity clause as a vindication of autonomous individualism. It defends freedom as individual self-determination but attaches nearly equal weight to the social values of participation, communication, and civility. Human dignity, in the eyes of the Constitutional Court, requires a caring and sharing society marked by understanding and reciprocity among individuals in the presence of definite values.⁹²

Although *Rechtsstaat* stresses individual rights, it recognizes as a limitation the traditional continental concept of "abuse of rights"; rights carry with them an obligation to use them properly, in keeping with responsibilities to others and to society. Duties, no less than rights, are fundamental to the jurisprudence. The "Basic Rights" enumerated in the *Grundgesetz*, though safeguarding the sphere of the individual, have a distinctly social flavor.

Sozialstaat recognizes the activist role of the state in establishing a just social order in which individuals are guaranteed the essential material prerequisites to human freedom, such as work, housing and health care.⁹³ The *Grundgesetz* does not decree any particular model of economic organization, but expressly permits transfer to public ownership of land, natural resources, and means of production "for the purpose of socialization" (Article 15). It guarantees property and the right of inheritance, but with the qualification that "[t]heir content and limits shall be determined by the law" (Art. 14(1)). Most strikingly un-Lockean is Article 14(2): "Property imposes duties. Its use should also serve the public weal." Expropriation does not necessarily require full compensation, but compensation determined on the basis of "an equitable balance between the public interest and the interests of those affected" (Art. 14(3)). The state's redistributive function, though not compelled, is specifically empowered.

The German Constitutional Court recognizes that property's "function is to secure its holder a sphere of liberty in the economic field and thereby enable him to lead a self-governing life," to enjoy

92. Kommers, *supra* note 82, at 313.

93. Kommers, *supra* note 82, at 248, 559 n.5, citing, *inter alia*, *Employment Agency Case*, 21 BVerfGE 245, 251 (1967) (work); *Tenant Security Case*, 18 BVerfGE 121, 132 (1964) (housing); *Muhlheim-Karlich Case*, 36 BVerfGE 237, 245 (1973) (state's obligation to promote and safeguard citizens' health). The *Grundgesetz* does not, however, specifically enumerate economic and social rights. As Kommers notes, the constitution is used less to compel legislation in these areas than to justify such legislation, which in Germany has been very substantial. *Id.* at 248-49.

“the realm of freedom within which persons engage in self-defining, responsible activity.”⁹⁴ Property is much more a right of self-determination and self-definition than of self-interest:

The image of man in the Basic Law is not that of an isolated, sovereign individual. On the contrary, the Basic Law has resolved the tension between the individual and society in favor of coordination and interdependence with the community without touching the intrinsic value of the person The individual has to accept those limits on his freedom of action which the legislature imposes to cultivate and maintain society.⁹⁵

Thus, the state can, for example, compel contributions from some sector of industry to subsidize others,⁹⁶ and require substantial employee participation in the governance of private sector enterprises.⁹⁷

The goal of *Parteienstaat* is to preserve the essence of the Rousseauian process of general will formation, notwithstanding the impracticability of the unmediated popular participation envisaged in *The Social Contract*. Andrzej Rapaczynski has concisely described the continental European conception of parliamentarism as follows:

[Representation is understood] quite literally, as a faithful reflection (*re-presentation*) of the constellation of political forces in society. Social groups sharing a common interest or agreeing on a vision of the public interest should be able to organize in political parties of their own The legislature would then constitute a microcosm of society; each significant social group would have its own voice Only when the parliament contains all the essential ideological ingredients that make up the nation as a whole is the soul of the people present in its pronouncements.⁹⁸

It is on this basis that the *Grundgesetz* officially establishes the role of political parties “in forming the political will of the people” (Art. 21(1)).⁹⁹

94. *Hamburg Flood Control Case*, 24 BVerfGE 367 (1968), excerpted in Kommers, *supra* note 82, at 257-59.

95. *Investment Aid Case I*, 4 BVerfGE 7 91954), excerpted in Kommers, *supra*, note 82, at 250.

96. *Id.* at 249-52.

97. *Codetermination Case*, 50 BVerfGE 290 (1979), excerpted in Kommers, *supra* note 82, at 278-82.

98. Rapaczynski, *supra* note 1, at 617. Rapaczynski contrasts this vision with the liberal view of democracy “as a purely negative device, allowing the voters to cashier a government that they perceive is not doing its job.” *Id.* at 618.

99. The Constitutional Court has noted that previous German constitutions “refused to recognize groups mediating between the free individual and the will of the entire people composed of the sum of individual wills and represented in parliament by parliamentarians ‘as representatives of the entire people.’” *Socialist Reich Party Case*, 2 BVerfGE 1 (1952), excerpted in Kommers, *supra* note 82, at 223. That prior view reflects Rousseau’s warning against “partial associations.”

The constitution itself regulates political parties, requiring that “[t]heir internal organization must conform to democratic principles,” that “[t]hey must publicly account for the sources and use of their funds and assets,” and that they not “seek to impair or abolish the free democratic basic order” (Art. 21(1), (2)). It is a constitutional concern that the parties obtain appropriate amounts of free air time,¹⁰⁰ state financing,¹⁰¹ and most interestingly, representation on all parliamentary committees.¹⁰² This last ensures

that all [legislative] decisions will be [truly] representative in nature and reflect the totality of the people’s [will]. It is precisely this general participation in the formation of the political will of parliament — a process emanating from general intellectual and political discussion and argumentation — which legitimates the inherent right of a parliamentary majority to decide [issues of public policy].¹⁰³

Consistent with this principle, the Federal Constitutional Court, in which is concentrated all power to review the constitutionality of legislation, is chosen by parliament through a process calculated to guarantee that the Court reflects the ideological spectrum.¹⁰⁴

“Militant democracy” reflects the values inherent in *Parteienstaat*. The Constitutional Court is vested (in Article 21(2)) with the power to ban parties “which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence” of the nation. The Court used this power in 1952 to ban a neo-Nazi party and in 1956 to ban the Communists.¹⁰⁵ Interestingly, in the former case, the ban was justified in part on the basis of the party’s internal structure:

In brief, a party must be structured from the bottom up; that is, members must not be excluded from decision-making processes, and the basic equality of members as well as the freedom to join or to leave [the party] must be guaranteed. It would also contravene democratic principles . . . either to promise absolute obedience to party leaders or to demand such a promise.¹⁰⁶

100. *West German Media Case*, 14 BVerfGE 121 (1962), excerpted in Kommers, *supra* note 82, at 218-22.

101. *Party Finance Case I*, 20 BVerfGE 56 (1966), excerpted in Kommers, *supra* note 82, at 205-10.

102. *Green Party Exclusion Case*, 70 BVerfGE 324 (1986), excerpted in Kommers, *supra* note 82, at 175-79.

103. *Id.* at 177-78 (Bochenforde, J., dissenting).

104. See Kommers, *supra* note 82, at 24-26. Justices are appointed for a single fixed term of twelve years.

105. *Socialist Reich Party Case*, 2 BVerfGE 1 (1952), excerpted in Kommers, *supra* note 82, at 223-27; *Communist Party Case*, 5 BVerfGE 85 (1956), quoted in Kommers, *supra* at 227-29.

106. *Socialist Reich Party Case*, *supra* note 104, at 225.

Militant democracy has thus extended to protecting the process of general will formation from internally-undemocratic partial associations. Additionally, Article 18 provides for forfeiture of a wide range of constitutional rights if those rights are abused "in order to combat the free democratic basic order."

The *Grundgesetz* thus does not embody the liberal conception of the limited, neutral state, existing to secure the freedom of the individual to pursue self-interest. There is an unmistakable sense of the state's affirmative social project, and of freedom as realizable *through* the social whole, rather than being based primarily on protection *from* the social whole.

It is therefore noteworthy that the German constitution includes a doctrine for the protection of the individual more expansive than any contained in the United States Constitution: the right to the free development of the personality. This doctrine is not an exception to the German constitution's communitarianism, but a fundamental aspect of it.

Article 2(1) of the *Grundgesetz* provides as follows: "Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code." The concept is not properly characterized as a right to privacy, at least not as understood in American constitutional doctrine or in Lockean theory; it is more limited, yet at the same time broader. The Court has stated:

The term "free development of personality" cannot simply mean development within that central area of personality that essentially defines a human person as a spiritual-moral being [i.e., the Kernbereichstheorie], for it is inconceivable how development within this core area could offend the moral code, the rights of others, or even the constitutional order of a free democracy. Rather, the limitations imposed on the individual as a member of the political community show that the freedom of action [implicit] in Article 2(1) is to be broadly construed.¹⁰⁷

The *Grundgesetz* has "erected a value-oriented order that . . . guarantees the independence, self-determination, and dignity of man within the political community."¹⁰⁸

The notion of free development of personality emanates from the very purpose of the communitarian project — to construct a form of societal organization that permits the individual, in Rousseau's words, "to obey himself alone." As discussed above, Marx maintained that "free, conscious activity is man's species character,"

107. *Elfes Case*, 6 BVerfGE 32 (1957), excerpted in Kommers, *supra* note 82, at 324, 325-26.

108. *Id.* at 327.

from which man in liberal-individualist society is estranged;¹⁰⁹ the very goal of social transformation is ultimately to transcend the "realm of necessity," beyond which "begins that development of human energy which is an end in itself, the true realm of freedom"¹¹⁰ This intellectual tradition strives, much more boldly than does the liberal tradition, to make the human being the subject, not the object, of social life. That it does so, paradoxically, by burdening the individual with seemingly all-encompassing societal obligations does not negate the point.

Yet this paradox threatens the integrity of the communitarian project. If the paradox cannot be resolved within the internal logic of communitarianism, then communitarianism can scarcely evade the judgment that it is the road to hell, paved with good intentions.

A resolution of this paradox can be found in the observation that excessive encroachments on the individual impede the development of human sociality, on which the perfection of the common project depends. The freedom of all and the freedom of the one are intrinsically linked. A healthy society requires healthy individuals, and *vice versa*. When the encroachment of society upon the individual causes the individual to withdraw from full participation in society — to put up a facade of participation while withholding his true energies from the social project and guarding his true opinions from his fellows — society is weakened and the will of all is rendered less general. Cynicism develops toward the social project, encouraging attempts to distort that project to the advantage of "particular" interests, and the body politic, with reduced active participation, is less able to resist. Thus, laws and state practices that encroach too heavily upon the individual are destructive of the community and of the general will.

This proposition is not a mere theoretical musing. Its truth is established by the recent experiences of Eastern Europe. The more the sphere of the individual was disrespected, the less social spirit was exhibited by the citizenry. The greater the demands for utter selflessness, the more ingenious the devices by which individuals contrived to withhold their contribution; the less respect for privacy, the less truth-telling. Most corrupting of all was the pervasive presence, real and imagined, of the secret police in social life, causing individuals to regard one another with suspicion and to withdraw to the private sphere.

Consistent with the Basic Law's communitarian bent, the German Constitutional Court has justified its "free development of per-

109. Marx, *Economic and Philosophic Manuscripts of 1844*, in MER, *supra* note 22, at 76.

110. Marx, *Capital*, Vol. III, in MER, *supra* note 22, at 441.

sonality" jurisprudence in just these terms. Thus:

If [an individual] expects that [the state] will officially register his attendance at a meeting or participation in a citizens' initiative and [believes] personal risks might result from this, this person may refrain from exercising his rights [of association] (Articles 8 and 9). This would not only impair his chances of development *but would also damage the common good, because self-determination is an elementary functional condition of a free democratic community based on its citizens' capacity to act and to participate.*¹¹¹

Free development of personality is therefore held to require, *inter alia*, "informational self-determination." "An individual's right to plan and make decisions freely [and] without pressure or influence from others is crucially inhibited if he cannot predict with sufficient certainty what personal information [the state] will release in a given area of *his social environment.*"¹¹² The emphasis on the importance of social relationships makes all the more pressing the individual's need for reassurance that his public persona is subject to his own control. "An individual has the right to determine," for example, "whether he wants to restrict his utterances solely to his conversational partner or to a certain group, or whether he wants to publicize his remarks."¹¹³ Free development of personality entails "the right to a private, secret, intimate sphere of life, . . . to personal honor and the rightful portrayal of one's own person, . . . to one's image and spoken word, . . . and under certain circumstances, the right not to have statements falsely attributed to oneself . . ." ¹¹⁴ These rights are exercisable against other individuals, as well as against the state.

The more one understands this concept as linked to the unhindered development of the individual's sociality, the broader its potential implications. The doctrine transcends the formal barrier separating public and private life; it protects the sanctity of certain human interactions precisely because they are social.

The constitutional jurisprudence of the FRG has demonstrated that communitarian principles, far from being inimical to constitutionalism, contribute in important ways to the bolstering of protec-

111. *Census Act Case*, 65 BVerfGE 1 (1983), excerpted in Kommers, *supra* note 82, at 332, 334 (emphasis added); *cf.* NAACP v. Alabama, 357 U.S. 449 (1958) (protecting the membership lists of advocacy groups).

112. *Census Act Case*, *supra* note 111, at 334 (emphasis added).

113. *Eppler Case*, 54 BVerfGE 148 (1980), excerpted in Kommers, *supra* note 82, at 329, 331; *see also Tape Recording Case II*, 34 BVerfGE 238 (1973) (barring admissibility of a conversation secretly taped by the other party, on the ground that the information conveyed related to the private sphere of the individual's personality), summarized in Kommers, *supra* note 82, at 340-41.

114. *Id.* at 330.

tions for the individual. The West German experience provides a model of constitutionalism for states that, rather than proceeding on Lockean premises, take it upon themselves to fulfill a broader social function. Much more than the liberal U.S. model, the FRG model lends itself to Eastern and Central European adaptations that may be inspired by more radical communitarian visions.

C. Toward a More Expansively Communitarian Constitutionalism: The 1990 GDR Round Table Draft

The *Grundgesetz* and the jurisprudence thereunder inspired a short-lived but significant constitutional project in the German Democratic Republic (GDR) in the period of dramatic reforms following the fall of the Berlin Wall and prior to the electoral victory of the unificationist forces. Reform-minded Communists and the democratic socialist-oriented dissident movement, negotiating in the so-called "Round Table Talks," turned for advice and expertise to constitutional scholars and jurists associated with the West German Social Democratic and Green parties.¹¹⁵ The result was a constitutional draft, completed (already too late) in April 1990, that expanded on the communitarian aspects of the *Grundgesetz*.

Predictably, the Round Table Draft, in contrast to the vague references to *Sozialstaat* found in Articles 20 and 28 of the *Grundgesetz*, specifically constitutionalized the state's social welfare obligations. The Draft included a right to full social security benefits in the event of sickness, accident, disability, handicap, inability to care for oneself, old age, and unemployment (Art. 23(2)), to appropriate housing (Art. 25), to employment or assistance in securing employment (Art. 27(1)), and to day care (Art. 24(3)).¹¹⁶ Equal access to education and a minimum of ten years of public schooling were to be guaranteed (Art. 24). Environmental protection was elaborately raised to the level of a constitutional obligation, governing both state and private action (Art. 33).

The Draft's property protections were even more detailed and qualified than those of the *Grundgesetz*, with differential protections based on property qualifications. Property for personal use and property of collectives were to be privileged, being subject to full compensation upon expropriation (as is the actual practice in the FRG), whereas compensation for other forms of property was to be susceptible to the same "balancing of interests of the community and those

115. Peter E. Quint, *The Constitutional Law of German Unification*, 50 MD. L. REV. 475, 493-495, 495 n.65 (1991).

116. *Id.* at 495-497, summarizing the Draft as published in Arbeitsgruppe "Neue Verfassung der DDR" des Runden Tisches, Verfassungsentwurf für die DDR (1990). This summary is the source of all Draft citations *infra*. My thanks are due to Veselin Scekic for interpreting the German text and confirming my inferences as to its spirit.

involved" (Art. 29) allowed for in Article 14(3) of the *Grundgesetz*. Formally speaking, then, the Draft's differential standards provided more protection for property than does the single balancing provision found in the *Grundgesetz*, but the practical consequence of differential protection would almost certainly have been to reduce protection of private ownership of productive property.

Moreover, whereas Article 15 of the *Grundgesetz*, discussing socialization of land, natural resources and means of production, has been interpreted as leaving the matter entirely to the legislature,¹¹⁷ the Draft reserved holdings of agricultural or forest land exceeding 100 hectares (approximately 250 acres) to collectives, public institutions, and churches (Art. 32(1)). Land use planning was also constitutionalized, with property owners obliged to compensate local government for the value of favorable zoning changes by conveying to the government a portion of the property (Art. 32(2)). The Draft defended Communist-era expropriations, except insofar as they had been carried out in violation of then-existing GDR law (Art. 131).

On the whole, the Draft appears to have conceptualized private ownership of productive property as qualitatively (though not necessarily quantitatively) secondary and exceptional rather than primary and fundamental; far from the state existing to secure private property relations, private (productive) property was to exist as a conditioned delegation of the state's rightful function. The neutrality of the *Grundgesetz* toward patterns of ownership was to be replaced, not by doctrinaire socialism, but by an orientation that regarded as natural the overarching role of the state and other collective institutions in the economy.

In the realm of participatory rights, the Round Table Draft expanded upon West German practices. Like Article 21 of the *Grundgesetz*, the Draft guaranteed democracy within political parties (Art. 37(2)), but extended the guarantee further to provide for democracy within associations (Art. 36(2)) and unions (Art. 39(3)). The Draft followed the jurisprudence of the FRG's Constitutional Court in extending certain free speech rights to the workplace (Art. 15(1)).¹¹⁸ It went beyond that jurisprudence, however, by constitutionalizing the right of employees to "co-determination," i.e., partici-

117. *Volkswagen Denationalization Case*, 12 BVerfGE 354 (1961) ("one cannot deduce a 'tendency toward socialization' from Article 15, meaning that the legislature, if it wants to regulate property conditions in branches of the economy that may be socialized, can do so only in the direction toward socialization"), excerpted in Kommers, *supra* note 82, at 254, 256.

118. *Cf. Lockout Case*, 38 BVerfGE 386 (1975) (condemning an employer's refusal to reinstate strike organizers as a violation of the right to associate for the improvement of working and economic conditions), and *IG-Metall Case*, 42 BVerfGE 133 (1976) (upholding a constitutional right to distribute political handbills in the workplace as part and parcel of the right to organize to improve working conditions), summarized in Kommers, *supra* note 76, at 283-84.

pation in the governance of firms (Art. 28).¹¹⁹ The Draft also transcended *Parteienstaat* by granting special constitutional protections to grass-roots citizens' movements (Art. 35), by providing every citizen the right to be heard regarding decisions to construct power plants and other large projects (Art. 21(4)), and by allowing for law-making by referendum (Art. 98). The Draft thus embodied a broad conception of popular empowerment.

While more decisively communitarian than the *Grundgesetz* on social welfare and popular participation issues, the Round Table Draft not only retained but amplified the strong protections for the individual inherent in West German human dignity and free development of personality jurisprudence. Reflecting both the traditional West German concerns about data collection¹²⁰ and the special concerns arising from East German secret police files, the Draft guaranteed each individual the right to examine his file, as well as a qualified right to object to and thereby enjoin data collection (Art. 8(2)). Both the death penalty, which is expressly barred in Article 102 of the *Grundgesetz*, and life imprisonment, which has been limited by the FRG Constitutional Court,¹²¹ were to be prohibited (Art. 12(5)), and no extraditions were to be permitted where they might lead to capital proceedings (Art. 7(2)).

The Draft introduced novel rights, such as a right against medical experimentation without consent and a right to die in dignity (Art. 4(1), (2)), and barred discrimination against non-traditional families or "living communities" (Art. 22(2)). Perhaps most interestingly, the Draft eschewed the FRG Constitutional Court's communitarian imposition of a "duty to carry the pregnancy to term,"¹²² expressly guaranteeing women the right to determine whether or not to be pregnant (Art. 4(3)).

119. *Compare Codetermination Case*, 50 BVerfGE 290 (1979) (allowing rather than compelling the legislature to impose this on private employers), excerpted in Kommers, *supra* note 82, at 278-82.

120. *See Microcensus Case*, 27 BVerfGE 1 (1969) (recognizing that an overintrusive census would constitute a violation of human dignity and of the "inner sphere" essential to the "free and responsible development" of personality), *Census Act Case*, 65 BVerfGE 1 (1983) (striking down parts of census legislation that created a possibility that information shared among governmental entities could be used to construct personality profiles of particular individuals), and *Divorce Records Case*, 27 BVerfGE 344 (1970) (enjoining transmittal of a civil servant's divorce court records to an administrative disciplinary body), excerpted in Kommers, *supra* note 82, at 306-09, 332-40.

121. *Life Imprisonment Case*, 45 BVerfGE 187 (1977) (life imprisonment permissible only "when the prisoner is given a concrete and realistically attainable chance to regain his freedom at some later point in time; the state strikes at the very heart of human dignity if [it] treats the prisoner without regard to the development of his personality and strips him of all hope of every earning his freedom"), excerpted in Kommers, *supra* note 82, at 314-20.

122. *Abortion Case*, 39 BVerfGE 1 (1975), excerpted in Kommers, *supra* note 82, at 348-59. The Court deemed the legislature constitutionally compelled to criminalize abortion, although its intricate balancing analysis allowed for exceptions recognizing the woman's right not to be forced to sacrifice her own values beyond reasonable expectations. *Id.* at 356.

Individual rights nonetheless continued to be expressly subordinated to certain community interests. For example, the Draft subjected free speech, a right already expressly qualified in the *Grundgesetz*,¹²³ to the additional restriction that "war propaganda as well as the public declaration of discrimination that injures human dignity is to be prohibited by law" (Art. 15(3)).¹²⁴

The GDR Round Table Draft presented a viable alternative to the classical liberal model of constitutionalism. While responsive to liberal concerns and influenced to no small extent by liberal thought, it embodied a conception of the role of the state that differs fundamentally from the classical liberal model. Drawing from East German socialist values and from West German constitutional jurisprudence, the Draft limited the power of governmental entities without limiting the mission of governance. It recognized a sphere of individual self-determination without enshrining the pursuit of self-interest, and emphasized the role of the individual as *citizen*, a contributor to collective decisionmaking not just in the electoral process, but in social life more broadly. In short, it was a model of communitarian constitutionalism.

It is true that, other than perhaps in the state of Brandenburg (where the Draft is reported to have been taken seriously in the process of drafting a new state constitution),¹²⁵ the political forces behind the Round Table Draft were dealt a severe defeat in the 1990 German elections. It is not clear that this defeat is permanent, however. German unification has raised the possibility that a new, all-German constitution will be prepared to replace the *Grundgesetz*, in which case the Draft may play a role in the constitutional debates,¹²⁶ a rise in the left's political fortunes in the mean time is not out of the question. Moreover, the Draft has the potential to be influential farther to the East, where the Draft's embodiment of ingrained socialist values, combined with its links to the highly reputable FRG constitutional model, may give it currency. In any event, the notorious unpredictability of economic and political developments in the region assure that its influence cannot be written off.

123. Article 5(2) of the *Grundgesetz* states that the right is "limited by the provisions of the general laws, the provisions of law for protection of youth, and by the right to inviolability of personal honor." "General laws" refer "not only to laws that 'do not prohibit an opinion or the expression of an opinion as such' but also to those that 'are directed toward the protection of legal rights which need protection regardless of any specific opinion'; in other words, laws that are directed toward the protection of a community value take precedence over the exercise of free speech." *Luth Case*, 7 BVerfGE 198 (1958), excerpted in Kommers, *supra* note 82, at 368, 373. Moreover, Article 18 prohibits abuse of the right "to combat the free democratic basic order."

124. This provision is based on Article 20 of the International Covenant on Civil and Political Rights.

125. Quint, *supra* note 115, at 495 n.67.

126. *Id.* at 495.

V. Conclusion

Notwithstanding the apparent triumph of liberal forces, constitutionalism in Eastern and Central Europe should not automatically be expected to take a purely or even predominantly liberal form. The deep-seated traditions of much of the region are more consistent with a communitarian ideological framework that asserts a strong state role in patterning social and economic affairs, and that envisages the individual not as autonomous, but as bound up with the social whole. This framework should not be written off as anticonstitutionalist, despite the past association of communitarian ideas with the unlimited exercise of state power. Rather, communitarianism, even in a radical form, should be seen as a potential basis for the creation of a constitutional structure capable of restraining the exercise of state power and maintaining respect for the individual within the social context.

Some constitutional scholars currently involved in the Eastern and Central European efforts to draft new constitutions and to ground constitutional jurisprudence may well dismiss the foregoing analysis as a nostalgic exercise, not so much wrong as anachronistic and irrelevant. To revisit the wellsprings of the radical communitarian vision, and particularly to highlight a defunct state's effort to extend the communitarian aspects of German constitutional jurisprudence in the service of that vision, may strike them as detached from both political and economic reality. After all, the conventional wisdom asserts that even the existing pockets of resistance to free-market liberalism, such as Slovakia, will soon be forced to concede that the vision is not economically viable.

One version of this conventional wisdom asserts that any approach along the lines of the one suggested by this article, however logically coherent and morally attractive, is just the opposite of what is needed. Rather, the argument goes, the new constitutionalism should serve as a free-market "precommitment strategy." Such a strategy would provide the strongest possible protections of property and contractual rights so as to bolster the confidence of foreign investors and domestic entrepreneurs, and would eschew affirmative social-welfare rights that obligate the legislature to interfere in markets. The new constitutions, it is asserted, should be fashioned to help the free-market reform project withstand the deterioration of popular support anticipated to result from the project's harsh initial dislocations.¹²⁷

127. This view, which typifies much of the current thinking, was recently articulated by Cass Sunstein at the January 1993 conference of the Association of American Law Schools. It is noteworthy that Professor Sunstein expressly limits his invocation of these hard-line principles to the Eastern European project; nuanced liberalism is fine for the West, but classical

There are two reasons for regarding this currently-fashionable approach as short-sighted. First, it is based on an economic theory that, though exuberantly held, is quite untested. For the majority of the people affected, the short-run pain of "shock therapy" is certain, but the long-run gain is not. It is not clear what precedent recommends the insertion of backward economies into a highly sophisticated world market without strong state intervention on behalf of the weak sectors. There is no guarantee that inequality and insecurity will serve, in the absence of other propitious circumstances, as the motors of ingenuity and productivity. Moreover, there is an unmistakable dogmatism in attributing the former regimes' economic failures to the socialist ideals that those regimes only occasionally upheld, rather than to the evident lack of democratic accountability, which permitted sclerotic bureaucracy, unprincipled resource allocation and unjustifiable military spending. Irresistible though the free-market initiatives may appear at the moment, competing approaches should not be discounted indefinitely.

Second, even if one accepts the free-market premise, there is no reason to believe that the legitimacy of a classical liberal constitution will outlast the popularity of laissez-faire economic policies. A constitution so greatly at variance with the region's traditions will likely, in times of economic crisis, be seen as having been imposed by the servants of foreign interests and domestic elites. In the absence of long-established habits of obedience to constitutional norms, rigid constitutional guarantees of property and contractual rights are unlikely to be respected at the critical juncture. Worse yet, the rest of the constitution may consequently fall into disrepute, with resulting jeopardy to newly-institutionalized norms of legality. Thus, from a purely pragmatic standpoint, a constitution closely tied to communitarian traditions and concerns might better serve to promote rule of law (and thereby perhaps, paradoxically, the interests of the private sector) than one based heavily on imported liberal tenets.

Efforts to assist in the establishment of constitutionalism in Eastern and Central Europe must take seriously the persistence of communitarian attitudes, attitudes attributable both to pre-Communist traditions and to four decades of life under a statist system that, whatever its failings, inculcated expectations of material security and relative equality that remain widely held. Such efforts ignore at their peril the constitutionalist potential inherent in the communitarian vision. A resurgence of that vision, even in a radical form, is not alto-

liberalism is appropriate to the East. Wiktor Osiatynski has expressed the same position in discussions with this author.

gether improbable in the difficult years ahead; it need not, as the foregoing analysis demonstrates, bring with it a return to the anticonstitutionalist past.