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When Myths Collide: An Analysis of Conflicting U.S.-Japanese Views on Economics, Law, and Values

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WHEN MYTHS COLLIDE: AN ANALYSIS OF CONFLICTING U.S.-JAPANESE VIEWS ON ECONOMICS, LAW, AND VALUES

DAVID BROILES†

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INTRODUCTION

Americans are deeply disturbed by the reports they receive from popular media and from their political leaders regarding United States-Japanese trade issues. Americans hear that Japanese exports to the United States hurt domestic industries, cost workers jobs, and that the Japanese do not allow U.S. firms to freely export to Japan, all of which seems unfair. Scholars in this debate emphasize the differences in the relationships between business, government, social structures, and the legal systems in Japan and the United States to explain these reported facts found so disturbing to Americans, and to explain Japan's economic success.

Americans recognize Japan and the United States are culturally different. There is nothing disturbing about this, after all, India and the United States are culturally different but these differences are not disquieting to Americans. The perception of how the Japanese industrial machine works disturbs Americans because it conflicts with fundamental American beliefs about the individual, the government, and the role of law in the economy and how each of these elements relate to the other in the economy. Japan should not work as well as it does. What disturbs Americans is that the Japanese miracle seems to threaten not only the U.S. economy, but challenges Americans' assumptions about themselves.

The degree to which Americans are disturbed about Japan is reflected in the moral tone of the rhetoric. The moral tone of American concern about Japan's success in foreign trade is reflected in descriptions of the problems discussed and in the proposals for solutions. It has been suggested Americans have come to see the trade deficit as a "national shame" that must be fixed.¹ Some examples of the current trade rhetoric are illustrative.

American manufacturers of televisions and consumer electronic products claimed their market was taken over by the Japanese through an illegal conspiracy designed to monopolize the market, in which a primary player was the Japanese government.²

Between 1958 and 1968 steel imports increased over tenfold, with steel coming from Japan and threatening steel industries in the United States. One of the causes was attributed to "foreign governments" policies of assisting their steel industries.³ The solution to the perceived unfair practices was voluntary export restraints. Quotas were imposed.

1. Holman W. Jenkins, Jr., *Educating Bill: A History Lesson*, WALL ST. J., Apr. 2, 1993 at A8.

2. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

3. *Consumers Union of the United States, Inc. v. Kissinger*, 506 F.2d 136, 138 (D.C. Cir. 1974).

The American machine tool industry claimed it was being undermined by the Japanese because of illegal subsidies to Japanese producers by the Japanese government; the creation of an international cartel; and by discrimination against U.S. commerce. In the United States, machine tool production was considered a "strategic" industry, voluntary restraints were imposed, and domestic production was protected.⁴

U.S. semiconductor producers accused the Japanese of dumping products on the United States and world markets at unfair prices, and contended Japan's own market was restricted, effectively barring U.S. producers. The solution was the negotiation of a semiconductor agreement, which restricted the portion of the American market Japan "could have," and "guaranteed" or set a goal for a twenty percent share of the Japanese market for American manufacturers.⁵ The United States treated this twenty percent share as a commitment, and between 1986 and the end of 1992 its share of the Japanese market increased from about nine percent to twenty percent.⁶

Voluntary export restraints ("VER") have been "accepted" by the Japanese as the prevailing method of protection of U.S. domestic industries from perceived unfair Japanese competition. VERs have been applied to textiles, steel, color televisions, automobiles, machine tools and integrated circuits.⁷ Despite continued U.S. pressure, the Japanese have "rejected the idea of establishing new specific targets for Japanese imports of American goods."⁸

Two concepts permeating U.S. trade protectionism against Japan are "fair trade" and "unfair trade."⁹ Americans, it is argued, can cope with fair competition, but need not tolerate unfair competition. Prohibitions against dumping, or selling at less than a fair price, provide legal redress for some U.S. industries; steel and minivans being the most recent to hope for relief.¹⁰

To eliminate the trade deficit, the United States is attempting to open the Japanese market to U.S. imports. The Japanese, chastened by their experience in semiconductors, thought they made clear in 1991, when President Bush took U.S. auto executives to Japan, that the declarations made by Japanese automakers to buy \$19 billion in

4. CLYDE V. PRESTOWITZ, *TRADERS OR WARRIORS: THE CONFLICT BETWEEN ECONOMIC AND NATIONAL SECURITY IN TRADING PLACES* 217-49 (1988).

5. John C. Kingery, *The U.S.-Japan Semiconductor Arrangement and the GATT: Operating in a Legal Vacuum*, 25 *STAN. J. INT'L. L.* 467 (1989).

6. Paul Blustein & Peter Behr, *Turning Against Trade by Numbers*, *WASH. POST*, Mar. 23, 1993, at D1.

7. John O. Haley, *Luck, Law, Culture and Trade: The Intractability of United States-Japan Trade Conflict*, 22 *CORNELL INT'L L.J.* 403, 415 (1989).

8. David E. Sanger, *Japan Leader Takes Hard Line on Trade*, *N.Y. TIMES*, Apr. 13, 1993, at A10.

9. Carl J. Green, *The New Protectionism*, 3 *Nw. J. INT'L L. & BUS.* 1, 11 (1981).

10. James Bovard, *Commerce's Latest Fair Trade Fraud*, *WALL ST. J.*, Jan 28, 1993, at A14.

auto parts by 1994 was not a legal commitment. The U.S. Trade Representative is now expressing concern Japan is not meeting its “pledges.”¹¹ In the annual report of the U.S. Trade Representative on “unfair trading practices,” Japan was “identified as the biggest offender.”¹²

Opening Japan’s markets to U.S. imports is probably the most significant feature of the Strategic Internal Initiatives (“SII”) Agreement of 1990, particularly reform of the Japanese distribution system.¹³ Although Japan removed nearly all significant formal protectionist barriers in the early 1970s, U.S. companies still have not made significant inroads into the Japanese market.¹⁴ Proof of improper non-tariff barriers seems elusive, but there is still the belief “‘that a very bad thing’ is happening to the United States, and the culprit is Japan.”¹⁵

Japanese successes and American failures in trade are often explained in highly emotive or moralistic terms. Japanese are said to be unfair, conspiratorial, unethical, guilty of imposing stringent quotas, manipulative of the market, engaging in collusive market practices, subsidizing industries, limiting access, biased against imports, and as unfairly limiting product promotion.¹⁶ The message is that U.S. companies would be able to compete with Japanese companies “if the rules are fair. If not, something may need correcting.”¹⁷

This paper examines why Americans so often feel compelled to describe the Japanese in such strong terms. Americans are threatened by Japan. It is not that Japan is stronger, or bigger. The problem is that the Japanese are perceived as different. The difference threatens American assumptions about the American way. This will be illustrated by first reviewing what the problem is between the United States and Japan — centering on the trade imbalance. Then some scholars’ analyses of this problem are reviewed, not to find the cause of the problem, but to identify common themes. The common theme is that Japan and the United States do things differently. The differences are reflected in the way government and business relate, in the different role of law in the two societies and in different perceptions about values inherent in the individual or the community. These dif-

11. Peter Behr, *Officials Warn Japan on Failure to Buy More U.S. Auto Parts*, WASH. POST, Apr. 1, 1993, at B12.

12. Robert D. Hershey Jr., *U.S. Trade Survey Calls Japan Most Restrictive*, N.Y. TIMES, Apr. 1, 1993, at D1.

13. Gary R. Saxonhouse, *Japan, SII and the International Harmonization of Domestic Economic Practices*, 12 MICH. J. INT’L L. 450, 469 (1991).

14. Haley, *supra* note 7.

15. Ryutaro Komiya & Irie Kazutomo, *The U.S.-Japan Trade Problem: An Economic Analysis from a Japanese Viewpoint*, in JAPAN’S ECONOMIC STRUCTURE: SHOULD IT CHANGE? 65, 69 (Kozo Yamamura ed., 1990).

16. Edward Lincoln, *An American Policy Agenda*, JAPAN’S UNEQUAL TRADE, 135-36 (1990).

17. Robert Keatley, *Clinton Grasps Japan Trade Problem and Must Keep an Open Mind to Solve It*, WALL ST. J., Apr. 2, 1993, at A6.

ferences are described, at least as reflected in the scholarly literature on the subjects. Finally, the hope is that by recognizing that the Japanese challenge the American myth about the market economy, and how it should function in terms of individualism and societal relations, one can come to the conclusion that the strong terms used to describe Japanese conduct mask the real problem: that Japan challenges America's myth about itself.

Some words of caution. I conclude that Japanese views about law, rights and duties are different from American views on these subjects. These differences, while ones of degree, are nonetheless important. My conclusions are not empirical. I lack the ability to contrast United States and Japanese history and culture in order to provide insight into how 250 million Americans differ from 115 million Japanese. However, analysis of the assumptions reflected in our debate about each other does not require such an effort. The very debate about Japanese and American relations reflects unarticulated assumptions about both societies. I propose to illuminate one set of those assumptions — those beliefs that form a part of the basic myth about America, which I believe Japan's success, and the means to that success, greatly challenge. Whatever the outcome of the trade disputes between the two countries, America's myth about itself, and the Japanese myth about the uniqueness of the Japanese way, constantly collide. If both change course a little, hopefully collisions will be less frequent, and not violent.

I. THE DISTURBING REPORTS

In 1992 Japan's worldwide trade surplus exceeded \$100 billion. The Japanese were embarrassed.¹⁸ With a \$40 billion trade surplus with the United States, the Vice Minister of the Ministry of International Trade and Industry ("MITI") was quoted as saying "certainly we are not proud of it."¹⁹ Mr. Kantor, the U.S. Trade Representative, told the Senate that "the continuing large Japanese trade surplus" would be "high on our agenda" in 1993.²⁰ Some Japanese have suggested a solution to the trade deficit may be found in increased Japanese government domestic spending, which will cause an increase in domestic consumption thus reducing the surplus. The Japanese government has proposed huge public works programs of between \$93 billion and \$130 billion in response to U.S. pressure.²¹ U.S. firms hope to get a share

18. Jacob M. Schlesinger, *Japan Adopts Embarrassed Mien In Anticipation of '92 Trade Tally*, WALL ST. J., Jan. 21, 1993, at A10.

19. *Id.*

20. *Id.*

21. James Sterngold, *Japan, Still in Slump, Plans 2d Public Works Program*, N.Y. TIMES, Apr. 2, 1993, at D1.

of this market, thus reducing the trade deficit.²² Mr. Kantor “pointed out the importance” of Japanese “set-asides” for U.S. firms.²³ Some Japanese contend that the Japanese trade imbalance reflects the stronger yen.²⁴ The dollar continues to hit new lows against the yen, falling from 135 to below 105, a twenty two percent decline in approximately a year.²⁵

Americans are not short on opinions, but a common contention is “Japan’s fundamentally different system of competition and trade” is at the bottom of it.²⁶ Sony’s Chairman, Mr. Morita, concurs, saying “[i]f Japan persists in clinging to its traditional system, it runs the risk of becoming isolated in the world.”²⁷ President Clinton, described as peeved, said “the persistence of the surplus the Japanese enjoy . . . can only lead one to the conclusion that the possibility of obtaining real, even access to the Japanese market is somewhat remote.”²⁸

Some economists assert that the trade surplus has been caused by Japan’s recession. Although exports rose eight percent in 1992, to \$339.76 billion, the \$107 billion surplus was the result of a recession and fewer Japanese purchases of imports.²⁹ Japanese investors reportedly spent only \$1.92 billion on U.S. takeovers and other deals in 1992, down from “the \$3.85 billion they shelled out in 1991.”³⁰ To some, this looks like a whopping \$5.77 billion of the United States purchased by the Japanese in two years, which when added to approximately \$45 billion purchased from 1987-1990, comes to more than \$50 billion in U.S. assets acquired in six short years. Japanese purchases of real estate in the United States fell to \$807 million in 1992, down from a 1988 peak of \$16.54 billion.³¹ Still Americans worry that the Japanese seem to be buying up the country. While Japanese investment in the United States has declined, it has increased in Southeast Asia, with over \$40 billion invested in the past eight years. If Japan’s exports from Southeast Asia are considered, one analyst estimates Japan’s real trade surplus with the United States at closer to \$60 billion.³²

22. Clay Chandler & David P. Hamilton, *U.S. Firms Press to Get a Share of Japan’s Big Spending Package*, WALL ST. J., Apr. 9, 1993, at A6.

23. Schlesinger, *supra* note 18.

24. *Id.*

25. Kenneth N. Gilpin, *Dollar Hits New Low Versus Yen*, N.Y. TIMES, Apr. 1, 1993, at D1, D20.

26. Schlesinger, *supra* note 18.

27. *Id.*

28. Keatley, *supra* note 17.

29. Paul Blustein, *Japanese Trade Surplus Hits Record \$107 Billion*, WASH. POST, Jan. 23, 1993, at G1.

30. Michael R. Sesit, *Japan’s U.S. Buying Spree Dries Up as Problems Grow*, WALL ST. J., Jan. 27, 1993, at C1.

31. Jim Carlton, *Japanese Investment in U.S. Real Estate Dried Up in ‘92 Amid Problems at Home*, WALL ST. J., Mar. 19, 1993, at A2.

32. Schlesinger, *supra* note 18.

Americans are concerned about the Japanese government's intervention in its economy. A recent example is illuminating. No institution more exemplifies the American ideal of the free market economy than the stock market. It is an American article of faith that the government should never intervene to prop it up. But compare Japan's stock market. After reaching a high on the Nikkei market index of 39,000 in 1989, by August 1992 it had lost sixty-three percent of that value as it plunged to 14,309.³³ The Japanese government reacted, pumping billions of dollars in yen into the market. One commentator called this a "striking illustration of Japanese-style interference in the marketplace aimed at furthering the national interest."³⁴ Stocks surged, increasing twelve percent in a two week period in March 1993 alone, lifting stock values \$199 billion.³⁵ This massive government intervention was variously described as "altogether antithetical to free markets" and as illustrative that in Japan "control is highly valued" and the nation has a "managed trade and managed economy."³⁶ There are those who want the United States to emulate the Japanese method; however, one must "wonder if the United States is equipped to run a successful industrial policy, considering the fact that U.S. business executives lack the collectivist spirit."³⁷ Those who react in horror at such thoughts respond: "A rigged economy usually backfires on its riggers eventually."³⁸

U.S. - Japan relations are to the finger pointing stage. Why does Japan have such a large trade surplus, not only with the United States, but in Europe and Asia as well? Why is its export economy so successful? Why are its imports not larger? Does it act unfairly? Does the government intervene in the economy to give its export businesses an unfair advantage while protecting domestic markets? How can Japan's government pick winners, when it is a fundamental tenet of U.S. beliefs that the free market determines winners. Are the Japanese different? Should we be more like them?

Answers to these questions abound. Not surprisingly, they conflict. But even in disagreement, common themes emerge centering around the relationship between government and business as affecting the economy. Examining these themes will illustrate how the perception of Japan as a planned economy, and what that entails, threatens American suppositions about how things must work, or at least should work. Japan's success challenges the myths we have about ourselves.

33. Paul Blustein, *Japan Makes a Market*, WASH. POST, Feb. 2, 1993, at A1, A18.

34. *Id.* at A1.

35. Quentin Hardy, *Japanese Stocks Surge, But Reasons for Rise Make Some Queasy*, WALL ST. J., Mar. 19, 1993, at A1.

36. *Id.* at A1, A5.

37. Paul Blustein, *Asia's Mixed Results on Industrial Policy*, WASH. POST, Mar. 7, 1993, at H5.

38. George Melloan, *Japan's Economic Machine Needs an Overhaul*, WALL ST. J., Mar. 1, 1993, at A15.

These themes are developed by examining what is called the “Japanese miracle.” I review suggested causes of the miracle, concentrating on the role of the government in the economy, the corporate structure, and some cultural institutions. Common themes about the causes of Japan’s miracle shed light on differences between Japan and the United States involving social institutions like government, business, and law.

II. GOVERNMENT, BUSINESS AND THE MARKET ECONOMY

A. *The Miracle*

Thomas K. McCraw has reviewed the U.S. and Japanese economies since World War II, developing the thesis that “the entire structure and performance of each country, over the span of the postwar period, has been directly affected by two very different sets of business-government relationships.”³⁹ The difference in the two countries is related to the perceived degree of individual freedom in the U.S. economy which is thought not to be present in the Japanese economy. McCraw contends that the difference “must be related to the economic policies pursued by business and government in Japan and the United States.”⁴⁰ Japan’s policy was one of export and survival. Having adopted this strategy, the Japanese had to decide what to export and where. They decided to export capital-intensive and high technology products to America. McCraw characterizes this strategy as one of “breathtaking boldness.”⁴¹ Further, the “Japanese government rejected the option of heavy foreign borrowing” and “Japanese officials rejected a policy . . . of allowing direct foreign investment” therefore “Japanese policymakers fell back on . . . a pay as you go strategy.”⁴² “Government and business planners” then “selected” improved education, invited in some technical companies, purchased technology and reverse engineered to implement the plan.⁴³ The domestic market was protected from imports. Even with all of these decisions and plans, McGraw says Japan never became a planned economy in the socialist sense, but was, and remains, a highly competitive society.⁴⁴

How were these policy decisions made and enforced on those who might not agree? McGraw suggests several answers. First, the bureaucracy in Japan is respected and intelligent. MITI operates primarily through persuasion.⁴⁵ The decisions and plans described above were

39. Thomas K. McCraw, *From Partners To Competitors: An Overview of the Period Since World War II*, in *AMERICA VERSUS JAPAN*, 1-33 (Thomas K. McCraw ed., 1981).

40. *Id.* at 4.

41. *Id.* at 8.

42. *Id.* at 11-12.

43. *Id.* at 16.

44. *Id.* at 19.

45. *Id.* at 24.

the result of consensus building. McGraw says that “[n]owhere is the difference between America and Japan more conspicuous than in the roles played by the judiciary and the legal profession.”⁴⁶ This is because law and lawyers do not play a significant part in the decision making and enforcement mechanism underlying Japanese cooperation. For the Japanese, cooperation is not based on legal coercion.

What has this consensus-building, planning and boldly-deciding society done? It has developed the second largest economy in the world. It has gone from a trade deficit of \$10.9 billion in 1980, to a surplus of \$39.6 billion in 1985, to a \$107 billion surplus in 1992. If that is a miracle for the Japanese, it is perceived by many as a nightmare for the United States, where trade friction may usher in “a new era of Japan versus the United States.”⁴⁷

One broad generalization from McGraw’s work is that the relationship between government and business in Japan is one of cooperation. Japanese business leaders and government bureaucrats make the decisions. Then, based on consensus, they implement them. This relationship is inconsistent with the American perception of a free market economy. The essence of a market economy is that efficiency is the result of each individual deciding what is in his or her own interest. With freedom from government restraint, individuals carrying out their own plans will efficiently produce the products the market desires and needs. Government should not decide what to produce. Government cannot pick winners. It regulates. It attempts to eliminate those not infrequent glitches in the capitalist system. Government’s increased presence is antithetical to the market. If McGraw’s generalizations are accurate, then why do the Japanese have a successful economy?

In order to describe the relationship between business freedom, government interference, and the concept of a market economy, one might think of the relationship between the two in terms of a continuum. An economy with no governmental intervention could be described as a ten. An economy with government controlling all activities would be a zero. This fictional scale may assist in understanding where the differences between Japan’s and America’s approaches to the government-business relationship might be. This is particularly so because the American conception of that relationship focuses on law, and the government creation of rights, duties and privileges in its regulation of business and the market economy. Americans think of government as operating to impede freedom by creating laws. Where the role of law in the economy is less restrictive, individuals or businesses are freer to make their own decisions. Individual free choice is the essence of the free market. This simplistic statement

46. *Id.* at 26.

47. *Id.* at 33.

illustrates how Japan and the United States differ. One difference has to do with the role of law in Japan and the United States. Later, I will describe the role of law in Japan in order to illustrate why Americans perceive Japan as a threat, and why Japan challenges fundamental American beliefs about the market economy.

B. *Pluralism with Consensus*

Hugh Patrick and Henry Rosovsky strike a middle ground on the role of government and business in Japan's economy, describing it as a "market-oriented, private enterprise economic system."⁴⁸ The government's role is characterized "as a mixture of active intervention and benign neglect."⁴⁹ Immediately post-war, government incentives encouraged exports, but as the economy grew, the government bureaucracy envisaged "a shift of emphasis from labor-intensive technologically unsophisticated industries . . . into more technologically advanced industries."⁵⁰ Government policies facilitated this shift. How important has the government been? Patrick and Rosovsky credit it with providing a favorable environment, but "the main impetus to growth has been private."⁵¹ They find nothing unique in Japan about the relationship between government and business — possibly the United States is atypical.

How does the relationship work? They suggest it is simplistic to believe either that government controls business or that business controls government. Nor are government and business leaders a homogeneous and unified force effectively pursuing a commonly perceived national interest. Japanese are no more monolithic in their goals or the means to achieve them than Americans.⁵² They conclude Japan has a pluralistic "distribution of power in economic decision making."⁵³ There are competing interests of big businesses, small businesses, farmers, labor, consumers, et cetera, representing a multitude of interest groups. These statements could describe American society just as well. What then makes Japanese society different?

Patrick and Rosovsky suggest two important factors: "consensus on economic goals and on means of attaining them, and common ideology or values."⁵⁴ A close and harmonious government-business relationship is based in the Japanese "emphasis on group rather than individual, on cooperation and conciliation aimed at harmony, on na-

48. Hugh Patrick & Henry Rosovsky, *Japan's Economic Performance: An Overview, in ASIA'S NEW GIANT, HOW THE JAPANESE ECONOMY WORKS*, 43-55 (Hugh Patrick & Henry Rosovsky eds., 1976).

49. *Id.* at 44.

50. *Id.* at 45-46.

51. *Id.* at 47.

52. *Id.* at 49.

53. *Id.* at 51.

54. *Id.* at 52.

tional rather than personal welfare.”⁵⁵ This contrasts with the American economic model, where individuals freely maximizing their own interests in the arena of free competition — meaning free from government intervention — supposedly leads to the best or most efficient economy.

On the fictional continuum, and the Japanese economy as described above, the relationship between business and government might be a three. The important observation is that though Japan is very competitive and pluralistic, because of their culture, Japanese reach a consensus on goals and means. The underlying difference between the Japanese and Americans is their primacy of the group over the individual. What Patrick and Rosovsky leave unexplored is how modern Japan has achieved cohesion of purpose and united efforts as to means. But they do suggest two important ideas: (1) though pluralistic and competitive, the Japanese reach what looks like a consensus on ends and means, and (2) this is explained by the primacy of the group over the individual. We will come back to these themes.

C. *Plan-Rational vs. Market-Rational Economies*

Chalmers Johnson, one of the best known experts on Japan, probably would place the Japanese economy close to a nine on the fictional scale in his evaluation of the role of government in the Japanese economy.⁵⁶ Johnson finds a fundamental difference between the Japanese and U.S. economies. The Japanese economy is plan-rational; the U.S. economy is market-rational. The differences are not of degree, but defined in the conception “of the state in economic affairs.”⁵⁷

Differences involve comparisons. Here I need to briefly describe the prevalent American myth about what should be government’s role in the economy. The popular articulation of American capitalism presupposes the supremacy of the individual, whose free choices in the economic arena maximizes benefits. The state is the “other”; it takes away freedom by regulation. Laws create duties on those regulated, or give them rights or privileges. Why would an individual subject his or her individual self-interest to the common good? Because of some regulatory duty created by the state. Why obey these regulations? Because the individual’s relation to the state is like a social contract with other individuals. Individuals relinquish some of their freedom, legitimizing state action to promote the common good in those areas where unrestrained freedom might fail. Life without a social contract is not desirable. There are some goods, like protection of property, enforcement of contracts, and regulation for the common good achievable only by concerted effort. Limited government regulation is

55. *Id.* at 53.

56. CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975* 3, 8 (1982).

57. *Id.* at 18.

acceptable, so long as individual freedom is given maximum value. These are jealously guarded areas of relinquished freedoms, and if the state goes too far, and seeks to benefit one economic interest over another, the social contract has been violated, and the state's action is invalid.⁵⁸

This, in a few words, is what I believe to be a basic American myth, from which flows our concepts of the primacy of the individual, the promotion of the ultimate value of individual freedom, and a negative attitude toward state regulation and control. To call it a myth is not to say it is false, but to emphasize it is fundamental, and, of course, not factual. Few would contend that there was a state of nature, or that there is a social contract. These are analytical tools for explanation and justification.⁵⁹ Unfortunately, something about the way the Japanese do things challenges this myth. I hope to show why.

The American myth, the individual-freedom-is-primary model, dominates U.S. assumptions about government and business relationships. Johnson contrasts this with Japan's developmental-orientation-model.⁶⁰ The U.S. regulatory model concerns itself with rules — forms and procedures of economic competition — while the dominant feature of the Japanese plan-rational state is setting substantive social and economic goals. Therefore, in Japan the government gives great attention to the development and implementation of an industrial policy, with the structures of domestic industry promoting the goal of international competitiveness. The United States has no plan at all; regulation and planning not being synonymous.

There is a narrow issue to be focused on here. How do the Japanese get each other and businesses to do what is planned? In the regulatory market of the United States, motivation is achieved through the coercive power of law. Laws create rights, duties and privileges. To say someone has legal rights or duties is to “supply a justification for using or withholding the collective force of the state because they are included in or implied by actual political decisions of the past.”⁶¹ What do the Japanese do in a plan-rational economy? First, Johnson suggests, there is compliance by the citizenry because of the “existence of a powerful, talented, and prestige-laden economic bureaucracy [which] is a natural corollary of plan rationality.”⁶² Second, Johnson sees both systems as concerned with externalities, for example, the unpriced cost of production, such as pollution. Third, the plan-rational system is based upon “the existence of a widely agreed

58. *Lochner v New York*, 198 U.S. 45 (1905); See Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW* 13-37 (David Kairys ed. 1982).

59. For a recent exposition of the Kantian type social contract theory, see JOHN ROWLS, *POLITICAL LIBERALISM* (1993).

60. JOHNSON, *supra* note 56, at 19.

61. RONALD DWORKIN, *LAW'S EMPIRE* 97 (1986).

62. JOHNSON, *supra* note 56, at 21.

upon set of goals for society, such as high-speed growth.”⁶³ Johnson equates “agreed upon” with “a consensus exists.” But an agreement is not the same as a consensus. I think Johnson means to emphasize consensus, because nothing he says indicates he believes there are many agreements made between the principal Japanese players. This will become more clear when we examine administrative guidance in government regulation and conciliation in dispute resolution.

Finally, in Japan decisions are made by the elite bureaucracy, as opposed to the American process of parliamentary policy determination. The institution making the decisions in Japan has been MITI.⁶⁴ MITI has rationalized industrial policy at the micro level, with “state intrusion into the detailed operations of enterprises with measures intended to improve those operations (or, on occasion, to abolish the enterprise).” One cannot imagine such a governmental activity in the United States, outside of the defense industry, which not coincidentally is thought of as the least competitive and least market-oriented segment of business in the U.S. economy.

Johnson contends that the Japanese government has been the inspiration and cause of Japanese economic success. Interventionism and protectionism characterize the means to the successful export-dominant goal. And, if Johnson is correct, the Japanese government does not regulate the economy primarily by means of laws or regulation, the basic means of government involvement in the economy in the United States.

D. *The Visible Hand*

If Johnson approaches a nine on the fictional market economy scale, Daniel I. Okimoto, comes closer to a five.⁶⁵ Okimoto points out that Japanese regulation by laws is not nearly as coercive as is found in the United States. Contrary to conventional wisdom, Japanese industrial policy often lacks consistency, is short sighted, and fails. The recent decline of the stock market, losses in real estate, negative growth in industrial production and the real gross domestic product attest to this.⁶⁶ One commentator even asserts that the Japanese economy is in disarray and “the Government bureaucrats who managed Japan’s economic success appear to be groping” while “the policymakers acumen is being questioned.”⁶⁷

Okimoto defines “industrial policy” in terms of the government’s use of its authority and resources to administer policies affecting specific sectors, not just macroeconomic policies. What distinguishes Ja-

63. *Id.* at 22.

64. *Id.* at 26.

65. DANIEL I. OKIMOTO, BETWEEN MITI AND THE MARKET, JAPANESE INDUSTRIAL POLICY FOR HIGH TECHNOLOGY 1-53 (1989).

66. *World Economies*, N. Y. Times, Feb. 1, 1993, at D2.

67. James Sterngold, *Charting Japan’s Course*, N.Y. Times, Feb. 8, 1993, at D1.

pan and the United States is that in Japan the government acts on the basis of anticipated outcomes, while Washington reacts to problems after they occur. Japan's preventative approach suggests a more active role by government in the economy. How is this done? Okimoto says they "consult closely with private-sector producers in ways that ensure voluntary compliance, if not positive cooperation."⁶⁸ Public policies are implemented "through consultation, consensus, and voluntary compliance."⁶⁹ Unlike the United States, Japanese economic and political institutions are able to fine-tune specific sectors of the economy, to anticipate and direct, in order to avoid or achieve. The Japanese government shows little faith in the invisible hand of the market economy, and therefore establishes specific industrial sector policy goals, assists in development, protects selected industries, organizes or permits cartels, regulates technology, and engages in administrative guidance — a quasi-legal form of administration — to achieve its purposes.⁷⁰

The Japanese government sets specific and long term goals. Like the bonsai in a traditional Japanese garden, nature may be paramount, but the guiding hand of man will enhance the beauty it produces.⁷¹

E. A Different Relationship

The authors discussed above come to different conclusions about the role of government in the Japanese economy. They share, nonetheless, some common themes. Whatever the role of the government, they seem to agree that the Japanese government makes decisions about broad goals, and adopts specific industry oriented policies to achieve them. Businesses aspire to these goals, and operate not as a result of the coercive force of legislatively created obligations, nor as the result of administrative regulations having the force of law, but because they are involved in a consultive dialogue with government, respect and obey the bureaucrats they deal with, and reach a consensus on means and ends.

The Japanese work together, and they operate without the same degree of legalism characteristic of the U.S. government-business relationship. The relationship between the Japanese government and the individuals and businesses it governs is not based on an individualistic concept, which Americans assume to be the basic premise of the market economy. The common theme of the authors discussed above, that government and business in Japan relate to each other differently than the same entities do in the United States, is the feature needing to be explored in explaining why Japan's economy has been so successful. If there is something about the way Japanese relate to each

68. OKIMOTO, *supra* note 65, at 15.

69. *Id.*

70. *Id.* at 23.

71. *Id.* at 49.

other which contributes to the problems set out initially, we would expect to see those characteristics exemplified in other aspects of the economy and society, not just in the relationship between government and business. This is the next task.

III. HOW JAPANESE RELATE: SOME EXAMPLES

A. *Employer-Employee Relations*

The characteristics most often associated with Japanese-style management, the “three pillars,” are career jobs, company unions, and seniority promotions, which together reflect “group approaches to decision making.”⁷² The bonus payments made to all employees motivate them toward the goal of continued adequate financial performance for the company. The objective of the business is the growth and development of the enterprise.⁷³

Career employment, which applies only to men, arguably distinguishes Japanese personnel policies from those in the United States. The attitude that Boeing Corporation is benefiting the company by releasing 28,000 employees during a year might leave the Japanese mystified, just as it must leave 28,000 Boeing employees stupefied. But in Japan, “[t]he mutual obligation is real, not a matter of lip service.”⁷⁴ It has its costs. Market share increase becomes important if employees are not fired in an economic downturn. Older employees are more expensive, but not necessarily more productive.

The enterprise union, the third of the three pillars, is closely identified with management and is non-adversarial.⁷⁵ It is involved in decision making, engaging in extensive discussions with management, in an informal effort to accommodate all views. This consensus building process is another example of the tight integration of the individual in the group, reflecting “an emphasis on group values and behavior” and of “group-centered decisions.”⁷⁶

Some suggest that the “three pillars” employment relationship was caused by government intervention through encouragement of modern personnel practices.⁷⁷ Employers have little incentive to invest in the training of highly skilled and productive employees if they will leave at the first opportunity. Japanese employer-employee practices reflect the value placed on security, as distinguished from valuing a high-risk but high-reward relation.⁷⁸ This contrasts with the basic U.S.

72. JAMES C. ABEGGLEN & GEORGE STALK JR., *KAISHA, THE JAPANESE CORPORATION*, 181-213 (1985).

73. *Id.* at 195.

74. *Id.* at 200.

75. *Id.* at 206-07.

76. *Id.* at 208.

77. James N. Baron, *The Employment Relation as a Social Relation*, 2 J. JAPANESE INT'L ECON., 492, 516 (1988).

78. ABEGGLEN & STALK, *supra* note 72, at 210.

model of employer-employee relations where employees are assumed to “remain in a state of rest unless compelled to change . . . by a stronger force impressed upon them — namely, an optimal labor contract.”⁷⁹ It is assumed employees will go where they receive the most pay. Individual freedom to change jobs, for better pay or more job satisfaction, contrasts with loyalty to the group or company. The employer-employee relationship in Japan is characterized by a commitment between the two not usually found in the United States. While not rising to the level of a legal or contractual obligation, employers and employees in Japan have commitments to each other, allowing them to work together with something less than the adversarial labor-management dichotomy found in the United States.

B. Japanese Corporations: A Familial Relation

Japanese corporations have some distinctive features. Shareholders do not control the company. The Board of Directors is usually made up of management insiders.⁸⁰ The goal of the Japanese corporation is increased market share, a benefit to the corporation, especially employees and managers.⁸¹ Henderson characterizes this difference between Japanese firms and their U.S. counterparts with the phrase “the familial firm.”⁸² The Japanese company is communal. Labor is not just a commodity to be bought at the cheapest price. Companies are run for the benefit of the familial community.⁸³ Even Japan’s largest firms, the keiretsu, are described as interconnected families and are characterized by cross-shareholding, informal ties, management contacts, and meetings with personal exchanges between the leaders.⁸⁴

Mergers and acquisitions, the dominant theme of American financial markets through the eighties, did not play a similar role in Japan. Although there are relevant legal constraints in Japan on mergers and acquisitions, there is also an attitude toward them which illustrates the theme of this inquiry.⁸⁵ One such institutional constraint on mergers and acquisitions is reciprocal share ownership between large companies in Japan. Cross-shareholding is not an arms-length investment decision, but reflects a communal relationship which can be used in times of trouble as an insurance policy, with expectations of support in

79. Baron, *supra* note 77, at 494.

80. Dan F. Henderson, *Security Markets in the United States and Japan: Distinctive Aspects Molded by Cultural, Social, Economic and Political Differences*, 14 HASTINGS INT’L & COMP. L. REV. 263, 276 (1991).

81. Okimoto, *supra* note 65, at 43.

82. Henderson, *supra* note 80, at 280.

83. *Id.* at 285.

84. *Id.* at 289; See also JEI Reports No. 2A Keiretsu and Other Large Corporate Groups in Japan, 1-17, Jan. 12, 1990, at 3.

85. Merit E. Janow, *Mergers and Acquisitions in Japan: A New Option for Foreign Companies*, 26 COLUM. J. TRANSNAT’L L. 573, 586 (1988).

the event of a threat to independence.⁸⁶ These cultural and organizational patterns make a hostile takeover unlikely; indeed, none has occurred. The Japanese corporation is more than the sum of its assets, or even the market value of its shares. Employee well-being, employment security, and a cultural perspective reflecting communal values limit the role of mergers and acquisitions in Japan.

C. *The Closed Society*

The Japanese distribution system is seen as an invisible barrier to U.S. penetration in either the consumer market or support market for Japanese industry. The Japanese are accused of being underachievers in consumption of imports, be it automobiles, finished wood products, semiconductors or steel.⁸⁷ One cause is "the Japanese industrial family exhibits great intra-group loyalty."⁸⁸ Japanese purchasing agents prefer to deal with those they know and trust, often rejecting the opportunity to change suppliers for a lower price. This emphasis on "group loyalty, interdependence, and non-adversarial decision-making may result in market behavior" different from that found in the United States, "where individualism and 'survival of the fittest' are emphasized."⁸⁹ Whereas in the United States long term business relationships are usually based on contracts, in Japan personal relationships, interfirm ties, and mutual trust underlie purchasing decisions.⁹⁰ This is true in even the consumer market, where personal contact in neighborhood shopping is an important social value, not easily offset by cheaper prices.⁹¹

Examples abound of the Japanese market to illustrate it is closed to U.S. products. In some product lines, Hewlett-Packard Co. has sixty percent of the U.S. market, ninety percent of the European market, but only one percent in Japan.⁹² This suggests there is "something unfair and unacceptable."⁹³ The Japanese market is perceived as closed to foreign products. After airplanes, the largest U.S. imports into Japan are maize, raw wood and fish, which reflects that not only the amount, but the makeup of trade is a problem.⁹⁴ U.S. firms are not the only ones who have trouble cracking the Japanese market.

86. *Id.* at 588.

87. ALAN WOLFF, *U.S.-Japan Relations and the Rule of Law: The Nature of the Trade Conflict and the American Response*, in JAPAN'S ECONOMIC STRUCTURE: SHOULD IT CHANGE? 146-56 (Kozo Yamamura ed. 1990).

88. *Id.* at 146.

89. Report to the House Committee on Ways and Means or Investigation No. 332-283 Under Section 332(g) of the Tarriff Act of 1930, Phase 1: Japan's Distribution System and Options for Improving U.S. Access 1-15, at 7 (1990).

90. *Id.* at 9.

91. *Id.* at 13.

92. Keatley, *supra* note 17.

93. *Id.*

94. Clyde V. Prestowitz Jr., *It's Clinton's Turn To Bargain With Japan*, N.Y. TIMES, Apr.15, 1993, at A21.

Honda, Toyota, Nissan and Matsushita Electric all have trading companies which try to fill their ships with goods from the United States so they do not have to return to Japan empty. Their success has been limited.⁹⁵

D. *Summary Observations*

Americans perceive Japan as a problem and threat. The deficit in trade, Japanese successes in imports into the United States and the seeming failures of U.S. businesses to penetrate the Japanese market, have increased tensions between the two nations. The quest for the causes of Japan's apparent successes, and our apparent failures, yields no easy or consistent conclusions. But common themes include: (1) that the Japanese relate to each other in business and government differently from the way we do in the United States; (2) in Japan government and businesses work in a consensual manner, with fewer clearly defined rules spelling out rights or duties; (3) workers and employers develop relationships to mutually pursue the betterment of the company; (4) in the public sector the primary implement of government direction is not legislation and formal rule-making; and (5) in the private sector, what one should do is not usually determined by contractually imposed obligations, but on the basis of something much more personal, something based on established relationships. I next attempt to show how these Japanese attitudes de-emphasize what Americans consider very important: the concepts of obligations and rights. Starting with the private sector, I examine the role of contracts in Japan, then move to the public sphere, to illustrate the roles of administrative guidance in the regulatory process and conciliation in the legal system. Freedom of contract (the private sector) and rule of law (the public sector) are basic concepts in the American myth surrounding government and the economy. The Japanese do not rely on these concepts to the same extent we do. Their success challenges our basic suppositions. That is a problem with Japan — it challenges our basic American assumptions and rhetoric about how things should be.

IV. BETWEEN "IS" AND "OUGHT": DUTIES, RIGHTS, AND PRIVILEGES

A. *Private Sector: Japanese Attitudes Toward Contracts*

Dan Henderson identifies the most distinctive difference between Japanese and American business culture in the respective roles of law and individualism.⁹⁶ American concepts are molded by a view of individualism which gives rise to legalistic concepts of rights and duties, whether arising out of contracts or laws. The Japanese, by contrast,

95. Kathryn Graven, *Japan's Major Exporters Are Striving to Balance U.S. Trade by Filling Ships Going The Other Way*, WALL ST. J., Apr. 9, 1993, at A7.

96. Henderson, *supra* note 80, at 264.

are “normally submerged in, and highly disciplined by, their social groupings.”⁹⁷ Whereas obligations in the United States are often expressed in lengthy contracts between parties to business transactions, and are thought of as voluntarily entered into, in Japan there is less tendency to view obligations as voluntarily incurred based on a manifestation of mutual intent, than to see them as arising from a social context, often associated with the status of the parties and based on hierarchical authority.⁹⁸ Japanese attitudes toward collective activity, with deference to those in authority, permeates attitudes toward contractual obligations.

Iyori Hiroshi argues that the Japanese view contracts differently from Americans. While Japanese believe promises should be honored, “in a strict sense contracts are not considered particularly important, even when concluded.”⁹⁹ It seems natural and obvious to change the contract if the circumstances change. Thus, there are few suits brought in Japan for breach of contract. Takeyoshi Kawashima finds that in everyday life there is a vast difference between Japanese consciousness of contracts, and the concepts of contract reflected in Japan’s westernized Civil Code.¹⁰⁰ One characteristic of the Japanese consciousness toward contracts is the tendency to not clarify whether a contract has or has not been formed by the words and actions of the parties. Clarifying the contract, by reducing it to writing, may be seen as a sign of mistrust of the other party.¹⁰¹

A common feature of Japanese written contracts is the inclusion of “confer in good faith” and “harmonious settlement” clauses. In unforeseen circumstances the parties will confer to reach a cost or burden sharing solution to the problem, and if they disagree they will settle harmoniously. These provisions, when included in Japanese contracts, reflect the tentative nature of the rights and duties, and that it is desirable to fix problems by ad hoc consultation.¹⁰²

While generally American businesses have some of the same attitudes toward contracts as the Japanese, when a disagreement arises, contracts are treated as creating defined rights and duties. In practice, contract rights and duties have to be reexamined in light of changed circumstances, and one who always insists on his or her rights, may soon be without suppliers or subcontractors.¹⁰³ But with this caveat,

97. *Id.*

98. *Id.* at 295.

99. Iyori Hiroshi, *Antitrust and Industrial Policy in Japan: Competition and Cooperation*, in *LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY* 56-82, 62 (Gary R. Saxonhouse & Kozo Yamamura eds., 1986).

100. Takeyoshi Kawashima, *The Legal Consciousness of Contract in Japan*, 7 *L. JAPAN* 1, 2 (Charles R. Stevens trans., 1974).

101. *Id.* at 4.

102. *Id.* at 17.

103. Whitmore Gray, *The Use and Non-Use of Contract Law in Japan: A Preliminary Study*, 17 *L. JAPAN* 98, 103 (1984).

there is a difference between Japanese and American attitudes toward contracts. In the United States, one must fulfill the obligations of a contract, because that is what one has voluntarily agreed to do. Individuals making contracts in their own best interest is fundamental to the American concept of the free market economy. For the Japanese, the group relationship created and sustained is important; the goal of the arrangement being to work together to fulfill each others expectations in a mutually advantageous way.

B. Public Sector: Rights, Duties, and the Law

How do societies get individuals within the society to act contrary to what they believe to be in their own self-interest? Problems arise when citizens are called upon to sacrifice their self-interest for something else; be it a greater common good or something of intrinsic value. In the public sector the goal is to motivate and justify an individual's decision to move from self-interest to do what should be done.

The Japanese are reasonably successful in getting each other to "do what they ought to do." I have stated, without great elaboration, that in the United States the law is a primary instrument within the society for getting individuals and businesses to conform to what they ought to do. The law is the system of legislative, administrative, and judge-made rules and regulations which create duties, rights and privileges. Laws prescribe rights and duties, and provide the coercive mechanism motivating compliance.¹⁰⁴ The Japanese do not rely on either the prescriptive or coercive aspects of laws to the same extent Americans do.

In sections II and III we saw how the Japanese make decisions about the direction of their economy, select broad goals, effectuate means achieving the goals, yet have a competitive market economy. They accomplish this by consensus-building, respect for the elite bureaucracy, common ideology of values, close and harmonious government-business relationships, a plan-rational economy, intervention and protection, voluntary compliance, positive cooperation, quasi-legal administration, a guiding hand, group values and behavior, group-centered decisions, employee-employer commitment, the familial-model business enterprise, and long term business relationships. While I emphasize these characteristics, these same characteristics also are found in the U.S. economy. Toyota and Ford make cars. Their products are similar. Their production methods are similar. But differences are worth noting, and have implications beyond the bottom line.

How the Japanese in the public sector get people to "do what they ought to do" and how they differ from the U.S. approach, can be illustrated by examining two related Japanese practices: administrative

104. See DWORKIN, *supra* note 61.

guidance and conciliation in the legal system. While some aspects of these two social practices can be found in the United States, their dominant place in Japan points out a difference in the roles of the concepts of duties, rights, rules, courts, and coercion in getting people to act for a common good.

1. Administrative Guidance

According to John Haley, the use of administrative guidance in Japan has insured that competitive market forces, rather than bureaucratic goals, have been the determining force in Japan's economy.¹⁰⁵ The purpose of guidance is to indicate the "acts the recipient should perform in the future" and to "lead the recipient in a specific direction."¹⁰⁶ Administrative agencies influence parties through non-authoritative means, as opposed to legally coercive means, to cooperate voluntarily with the agencies' guidance toward the formation of the social order.¹⁰⁷ In a legalistic society a rule is formulated, setting the normative goal, and a regulatory agency or court enforces it if there is noncompliance. Administrative guidance combines prescriptive and coercive functions into one activity. The norm and its implementation evolve from the process. This is not to suggest the effect of hierarchy is absent.

Four characteristics of administrative guidance should be mentioned. First, guidance is provided by a specific administrative organ which is concerned with its administrative field. This allows it to develop expertise in the field, and increases credibility with those guided. However, the agency is not primarily implementing statutes or regulations. The agency has a general obligation for its sphere, and guidance is used to fulfill this obligation.¹⁰⁸

Second, administrative guidance does not involve coercive action by the agency. Because guidance does not have a legal character it is considered voluntary. The agency cannot enforce the guidance in court. The agency does not have at its disposal "significant collateral enforcement."¹⁰⁹ There have been cases where administrative guidance has been challenged in court by the regulated party. Generally the courts have found no justiciable issue, because of the voluntary character of compliance. But court challenges to guidance have been allowed where the refusal to "voluntarily comply" has resulted in the

105. JOHN O. HALEY, *Administrative Guidance Versus Formal Regulation: Resolving the Paradox of Industrial Policy*, in *Law and Trade Issues of the Japanese Economy* 107-128, 108 (Gary R. Saxonhouse & Kozo Yamamura eds., 1986).

106. Kanuo Yamanouchi, *Administrative Guidance and The Rule of Law*, 7 L. JAPAN 22 (Peter Figdor trans., 1974).

107. Yoriaku Narita, *Administrative Guidance*, 2 L. JAPAN 45 (James L. Anderson trans., 1968).

108. *Id.* at 46.

109. Michael K. Young, *Administrative Guidance in the Courts: A Case Study in Doctrinal Adaptation*, 17 L. JAPAN 120, 129 (1984).

loss of a benefit the agency controls, like the refusal to issue a license or permit.¹¹⁰ Bureaucratic excess will be checked by the courts, because it contradicts the “emphasis on societal consensus rather than formal procedure in administrative guidance.”¹¹¹

The third characteristic of administrative guidance is that it is often used without statutory authority. This further emphasizes the non-obligatory character of the result. Some Japanese legal scholars accept this non-statutory basis of guidance, but some find it antithetical to the concepts of rule of law and popular sovereignty.¹¹² Others have criticized administrative guidance as unfair and arbitrary, recommending that administrative guidance “ought to be carried out in writing clearly specifying the laws and regulations on which guidance is based.”¹¹³ But, eliminating the arbitrary by clarifying the rules would take guidance out of the realm of nonenforceable commitment into the realm of legal obligation.

The fourth characteristic of guidance is that the agency exercises influence over the parties’ concurrence “through the expression of expectations and wishes.”¹¹⁴ The agencies often have “a superior and domineering position over the people and have behind them all manner of coercive authority based on laws and regulations.”¹¹⁵ This, coupled with the traditional Japanese “deference to authority and related desire to maintain harmony and cooperation and to avoid adversarial posturing” add a coercive element to guidance.¹¹⁶

There are three kinds of administrative guidance.¹¹⁷ Promotional guidance promotes governmental policies which are industry specific. Regulatory administrative guidance is a substitute for law. It includes guidance to enterprises to act or refrain from acting, as illustrated in the check-prices and five-distributor-rule discussed in *Matsushita Electric*,¹¹⁸ and the voluntary restrictions on steel imports central to *Consumers Union*.¹¹⁹ The third type of administrative guidance is conciliatory. Conflicts between enterprises falling under the agency are reconciled. An example is the resolution of conflicts between large retail stores and small shops, where MITI or a local government agency use conciliation to settle disputes.¹²⁰

110. *Id.* at 130, 135.

111. *Id.* at 142.

112. Yamanouchi, *supra* note 106, at 27-31.

113. KEIDANREN, TOWARDS AN OPEN, TRANSPARENT AND FAIR MARKET ECONOMY-PROPOSALS FOR DEREGULATION, 1-14, 11 (July 7, 1992).

114. Narita, *supra* note 107, at 46.

115. *Id.* at 77.

116. HALEY, *supra* note 105, at 109.

117. Mitsuo Matsushita, *The Legal Framework of Japanese Industrial Policy*, 1987 B.Y.U. L. REV. 541, 552-53.

118. *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

119. *Consumers Union of the United States, Inc. v. Kissinger*, 506 F.2d. 136 (D.C. Cir. 1974).

120. Matsushita, *supra* note 117, at 553.

Haley points out that in Japan, administrative guidance is “the process of governing.”¹²¹ He believes guidance is effective because the guided end up seeing the goals to be achieved as their own. One reason this occurs is because the guided have a significant input into the guidance. Guidance is not one-directional; agencies “are forced to bargain and strike the best deal they can get.”¹²² Consensus is the goal.

How do the Japanese determine what ought to be done, and get each other to do it? One way is to set goals in an informal, non-legalistic process, arrived at by consensus. This insures noncoercive compliance because people see the achievement of the goals as in their collective interest, if not their individual self-interest. The process of norm-making reinforces norm-compliance. This is probably the most significant way in which the Japanese get others to do “what they ought to do” in the public sphere, and it contrasts sharply with the legalistic conception of rights and duties characteristic of American social ordering. Japanese and Americans differ as to how norms of conduct are created, and how compliance is obtained. The differences, and the fact that the Japanese system works, by implication challenges the way Americans assume things should work.

2. Courts, Law, and Conciliation

Japan has its share of statutory rules, administrative regulations and court precedents. These set norms for behavior, prescribing what people or businesses should or should not do, with enforcement procedures providing incentives to motivate desired conduct. In this respect, Japan and the United States do not differ. Japan characterizes itself as a country of law, and given the similarities between the United States and Japan’s post-war legal systems, this is an appropriate characterization.

But there are differences in the way the two systems work, particularly in the area of dispute resolution. Americans see laws as setting norms of conduct; creating rights and duties. Contracts have the same function in the private sphere. To justify a position that someone ought to be acting differently from the way they are acting, or are contemplating acting, we point to a law or contract provision as creating a duty on them to so act, or as giving us a right which is being infringed on by their action. Disputes are settled by appeals to rights and duties arising from laws and contracts.

Disagreements occur both about the facts, the rules of conduct, and their meaning or applicability. These disputes are capable of being resolved by the courts, which not only adjudicate the particular dispute, but do so by interpreting the legal norms, expanding on them, clarify-

121. HALEY, *supra* note 105, at 111.

122. *Id.* at 114.

ing them, and generalizing them. Dispute resolution by litigation is a prominent aspect of American culture. This is not so of Japan. Disputes arising under formalized rules embodied in laws or contracts are often resolved in Japan without court adjudication. The Japanese practice of conciliation, like the practice of administrative guidance, reflects the effort to resolve problems and disagreements by reaching a consensus.

a. Historical Observations

The pre-modern Japanese legal system focused on criminal law rather than civil law. This encouraged parties to settle civil disputes by mediation between the parties, through informal negotiations. Even when mediators were involved, there were no impartial third party rulings, which inhibited the development of a civil and commercial body of law.¹²³ During the Meiji Restoration, Japan adopted a western style legal system based on the German Civil Code in order to eliminate extraterritoriality. This code provided both substantive rules establishing rights and duties, and a procedural framework for resolving disputes. However, the civil code played little role in dispute resolution, and courts were seen as a tool of the rulers, with enforcement a virtual monopoly of the government.¹²⁴ There continued to be an emphasis on conciliation as the means for dispute resolution.¹²⁵

After World War II, Japan's legal system was infused with American concepts, including the affirmation of the peoples' sovereignty, guarantees of human rights, and creation of an independent judiciary. The idea of rule of law supplanted the practice of rule by law.¹²⁶ The framework of the Japanese court system is similar to that found in the U.S. federal system. The absence of jury trial and the civil law practice of carrying out trials in incremental stages, with no distinction between pretrial and trial procedures, distinguishes Japanese practice from American.¹²⁷

Haley summarizes the development of law in Japan by pointing out it has had a limited function in society, has been characterized by

123. Tetsuya Obuchi, *Role of the Court in the Process of Informal Dispute Resolution in Japan: Traditional and Modern Aspects, with Special Emphasis on In-Court Compromise*, 20 L. JAPAN 74 (1987); Ryosuke Ishii, *Book Review of D.F. Henderson's Conciliation and Japanese Law—Tokugawa and Modern*, 2 L. JAPAN 198, 202, 209. (K. Huff trans., 1968).

124. Hideo Tanaka & Akio Takeuchi, *The Role of Private Persons in the Enforcement of Law: A Comparative Study of Japanese and American Law*, 7 L. JAPAN 34, 38 (1974).

125. Ishii, *supra* note 123, at 210.

126. Kahei Rokumoto, *Problems and Methodology of Study of Civil Disputes*, 5 L. JAPAN 97, 100 (1972).

127. JOEL B. HARRIS, *LITIGATION IN JAPAN: A TRIAL PRACTICE AND PROCEDURE MANUAL* 66-69 (1980).

weak enforcement, and has failed to provide effective remedies or sanctions.¹²⁸ Nonetheless, law serves an important function, because legal rules “serve as tatemae, guiding principles, and as such relate directly to the development of social and political consensus.”¹²⁹

b. *Litigation in Japan*

According to Haley, the Japanese legal system can best be described as “the weakness of legal versus social control.”¹³⁰ This does not mean the Japanese do not understand or live by rules. On the contrary, according to Henderson, “the traditional Japanese society was rule-ridden and behavior was minutely prescribed by society, not justiciable law.”¹³¹ What distinguishes the Japanese is the interdiction through other institutional arrangements, like conciliation, in the judicial enforcement process.¹³²

The facts are stark. There are only 16,000 qualified lawyers in Japan, fewer than the number of judges in Germany.¹³³ This compares with 700,000 lawyers in the United States, approximately one for every 3108 residents.¹³⁴ In the early eighties, there were nine times as many civil suits filed in California on a per capita basis than in Japan. In 1982 there were 264,690 ordinary civil cases filed in Japan, plus 76,975 motions for conciliation.¹³⁵ When a Boeing 747 crashed in Japan in 1985, only 21 lawsuits were filed, on behalf of only 100 of the 500 Japanese victims, whereas all the non-Japanese victims’ families sued.¹³⁶ Surely, as to litigation, this points out Japanese are less litigious than Americans.

c. *Conciliation and Dispute Resolution*

The role of litigation in Japan in dispute resolution is less important than it is in the United States.¹³⁷ Japanese leaders use a pattern of mediation and conciliation, while American leaders use the command and adjudication pattern.¹³⁸ Mediation and conciliation have as their goal dispute resolution by agreement and consensus of the parties, rather than resolution by an independent third party. Though extra-

128. John O. Haley, *Law and Society in Contemporary Japan: American Perspectives*, 17 L. JAPAN 1 (1984).

129. *Id.* at 5.

130. *Id.* at 1.

131. Dan F. Henderson, *The Japanese Law in English: Some Thoughts on Scope and Method*, 16 VAND. J. TRANSNAT’L L. 601, 608 (1983).

132. Hideo Tanaka, *The Role of Law in Japanese Society: Comparisons With the West*, 19 U.B.C. L. REV. 375, 381 (1985).

133. *Id.* at 375.

134. Thom Weidlich, *The Most and the Greediest*, NAT’L L.J., Mar. 15, 1993, at 2.

135. Tanaka, *supra* note 132, at 377.

136. Andrew Pollack, *Japan Debates Broader Powers For Consumers*, N.Y. TIMES, Mar. 8, 1993, at A1, D2.

137. Rokurnoto, *supra* note 126, at 102; Obuchi, *supra* note 123.

138. Obuchi, *supra* note 123, at 211.

legal conciliation needs no authority other than the agreement of the parties, conciliation within Japan's court system was established in 1951 by the Civil Conciliation Law.¹³⁹

Conciliation, as the preferred method of dispute resolution, substitutes the parties agreement for judicial decision. Thus, conciliation inhibits the development of court-made commercial and civil law in Japan.¹⁴⁰ This contrasts with the United States, where a primary source of law is judicial decisions.

Why do the Japanese emphasize conciliation in dispute resolution? There are many suggestions. Japanese look on civil disputes as reflecting impaired relations between parties, and a favorable goal is not only to resolve the dispute, but harmonize the relationship.¹⁴¹ Civil trials in Japan have analogies with criminal trials, in that both deal with culpability. Thus, repentance and apology can be as important as compensation; goals more readily achieved in conciliation than in litigation.¹⁴²

Individuals do not play an important role in enforcement of anti-trust, securities, or consumer protection laws, this being the province of the government.¹⁴³ Regulatory statutes are enforced by criminal sanctions, with no significant means of private civil enforcement.¹⁴⁴ There have been only 150 reported product liability decisions in Japan.¹⁴⁵ MITI claims few are dissatisfied with the system as it exists.

Criticism of conciliation in Japan in dispute resolution is much like criticism of administrative guidance. Excessive use of conciliation stunts the growth and refinement of rules necessary to sustain complex commercial and community life.¹⁴⁶ Conciliation is satisfactory to the individual parties, but often there are social concerns which transcend the immediate dispute. Emphasis on conciliation tends to eliminate the legal system, and its ability to set out social concerns in rules of decision, which benefit society as a whole.¹⁴⁷ Failure to litigate cases involving issues of public interest, like whether products are safe or unsafe, tends to cover up bad laws and practices.¹⁴⁸ All of these criticisms apply equally well to the adverse effect of excessive reliance on administrative guidance.

139. 7 *DOING BUSINESS IN JAPAN* (Z. Kitagawa ed., 1989).

140. Ishii, *supra* note 123, at 211.

141. *Id.* at 209.

142. Koichiro Fujikura, *A Comparative View of Legal Culture in Japan and the United States*, 16 *L. JAPAN* 129, 131 (Malcolm D.H. Smith trans., 1983).

143. Ichiro Kato, *The Concerns of Japanese Tort Law Today—In Comparison with American Law*, 1 *L. JAPAN* 79, 91 (Rex Coleman trans., 1964).

144. Tanake & Takeuchi, *supra* note 124, at 36.

145. Pollack, *supra* note 136, at A1.

146. Obuchi, *supra* note 123, at 89.

147. Ishii, *supra* note 123, at 213-14.

148. Kato, *supra* note 143, at 87.

The critics are few, and certainly not powerful. Enforcement of rules is subservient to consensus building. This is the common method of both guidance and dispute resolution. While Japan is a country of law, it is not a country in which litigation plays a significant role in societal control. Japanese are motivated by different concerns than the fear of litigation or governmental penalty.

C. *Judicial Competence in Policy Issues*

Americans view laws as the basic protection of freedom and equality. By contrast, the Japanese consider law as “primarily an instrument of government control, especially bureaucratic control.”¹⁴⁹ Japan’s Constitution guarantees freedom of choice in occupations, which has been interpreted to include freedom in business activity. Article 29 guarantees private ownership of property. The free enterprise system is “essentially constitutionalized.”¹⁵⁰ While government may restrict these constitutional rights, how the Japanese courts involve themselves in policy issues contrasts with the practice of U.S. courts.

The Supreme Court of Japan, as with the United States Supreme Court, has the last word on the constitutionality of legislation. In Japan the Court will scrutinize legislation providing for general public safety and order, to determine if it is as restrictive as possible. If it is not, it may be declared unconstitutional. The court feels it has the competence to judge the constitutionality of general public safety laws, and will judicially intervene when the exercise of police power is perceived as overly broad.

However, where a challenged law or regulation “is intended to achieve some social-economic objective such as the protection of farmers, small enterprises or other disadvantaged groups” the Court will generally not declare such regulations unconstitutional, deferring instead to the legislative branch.¹⁵¹ For example, in what the commentators have called the “Retail Business Market Case,” involving Japanese laws which give the local governments authority to impose conditions on the issuance of licenses for retail establishments, including protecting small shops by territorial allocations, the Japanese Supreme Court held that policies dealing with excessive competition were beyond its competence and best left to the legislature.¹⁵²

Contrast this with the U.S. Supreme Court holding in *Lochner v. New York*, where the Court declared unconstitutional a statute setting maximum hours for bakers, holding that the state had no justifiable reason “for interfering with the liberty of person or the right or free

149. Hiroshi, *supra* note 99, at 62.

150. Matsushita, *supra* note 117, at 546.

151. *Id.* at 548.

152. *Id.* at 549.

contract.”¹⁵³ Only if the law relates to public health, as opposed to regulating particular groups, can it be constitutional when it impinges individual liberties. Laws which redistribute resources fall outside the scope of proper legislative functions.

Lockner is old law, long ago discredited, but not totally forgotten. *City of Richmond v. J.A. Croson Co.*¹⁵⁴ illustrates the same point, and contrasts well with what Japan’s Supreme Court might do. The City of Richmond created a minority set-aside program for awarding municipal contracts. The city’s population was about fifty percent black, and a goal was set to award thirty percent of the city’s construction contracts to black owned firms. In the past, less than one percent of those contracts had been awarded to black businesses. This remedial regulation, designed to benefit a specific group, with regard to public contracts, seems classic “plan-rational” economics versus a market economy. Appealing to the Constitution’s requirement of equal treatment by the law, the Supreme Court declared the regulation unconstitutional. Richmond could not solve the problem of persistent inequality in the awards of its contracts by favoring a specific group, because to do so would unconstitutionally discriminate against those not in the group, i.e., whites.

In the United States, a regulation that is group or industry specific, which benefits some individuals to the detriment of others, is suspect, particularly if based on categories like race. In Japan, where regulations are often industry specific and designed to favor one group over others, such laws are not constitutionally suspect, and courts will defer to the legislative choice.

D. Summary Observations

For the Japanese, rights and duties are less important in getting people to do what they ought to do than is the role of social groups. In their private relations, the Japanese would rather work together in good faith and harmony, than insist on their rights. The government guides citizens toward shared goals. What one ought to do and the motivation to do it evolve out of the same process. Planned and directed activity, rather than after-the-fact regulation, characterizes administrative guidance. Dispute resolution by conciliation rather than by appeals to enforcement of rights or duties is the norm. A weak sense of the judicial system as an effective mechanism of social order, coupled with the courts’ deference to micro-management through government regulation and guidance, illustrates differences between Japan and the United States.

Japan is perceived as a problem for the United States because of its success, and the means used to achieve it. This, in turn, conflicts with

153. *Lochner v. New York*, 198 U.S. 45 (1905).

154. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

American assumptions about how the free enterprise system should work in relation to law, regulation, rights and duties in society. If Japan functions as summarized above, then America's myth about itself is suspect. What are the implications for the American myth which follow from Japan's "differences" and its success?

V. MYTHS COLLIDE

Try this game. Suppose you are given a box of beads to string. Each bead represents a nation's view about itself. The first bead placed on the string is Japan's view about itself. It is at one end. The next bead you string should represent that nation whose view about itself you think most similar to Japan's view about itself. Then select the bead of the nation with a view about itself closest to the second bead on the string; and so on. Which nation's bead ends up at the far end of the string? It is not implausible to suggest the bead for the United States.¹⁵⁵ This would be consistent with our feeling that much of the conflict between Japan and the United States arises because of differences in the cultures. To understand these differences, we need to articulate how we understand the Japanese, and how the Japanese view themselves.

A. *The Japanese Myth of Uniqueness*

Japanese regard themselves as unique; individually and culturally. Japanese present the "seductive image of harmonious sociality in raw contrast to the alienated structure of Western life."¹⁵⁶ Japanese books discussing Japanese identity or nationalism have taken on the commercial character of a successful cottage industry. From 1946 to 1978 approximately 700 books were published in Japan on Japanese uniqueness.¹⁵⁷ One such work, apparently not atypical, by University of Tokyo Professor Hajime Nakamura, was published by the Japanese National Commission for UNESCO in 1960.¹⁵⁸ A brief summary of this work will exemplify the outline of the Japanese view about their uniqueness.

Nakamura argues that the Japanese are unique in their way of thinking. The Japanese tendency to emphasize feelings causes them to attach "much importance to the rules of propriety which are based upon human relationships."¹⁵⁹ An example would be the feelings of the inferior to obey the superior and to act from feelings of deco-

155. AUSTIN COATES, *CHINA, INDIA AND THE RUINS OF WASHINGTON* (1972). The bead game is a variation of one suggested by Coates, only with India and China at opposite ends as to cultures.

156. PETER N. DALE, *THE MYTH OF JAPANESE UNIQUENESS* 3 (1986).

157. *Id.* at 14-15.

158. HAJIME NAKAMURA, *THE WAYS OF THINKING OF EASTERN PEOPLES* 298-585 (1960).

159. *Id.* at 304.

rum.¹⁶⁰ Japanese have a strong regard for the relations of many individuals, rather than for the individual as an independent entity. The individual is not the fundamental entity of society. Individuals are subordinate to a nexus, and are conceived of in terms of human relations.¹⁶¹ This nexus of Japanese social life is manifest in the family. It is “an inherent tendency in the Japanese to lay emphasis upon rank and relations of master and servant.”¹⁶² Social order is based on rank, including devotion to the sovereign, which “has constituted the basis of morality throughout Japanese history.”¹⁶³

Nakamura contends Japanese emphasis on a specific limited human nexus is manifest by ultra-nationalism.¹⁶⁴ This justifies sacrifices made for the state, and fosters respect for authority. Complete devotion to a specific person, like the Emperor, boss, or superior reflects the submissive pattern of Japanese thinking. In these relationships, the distinction between good and evil is the equivalent of the distinction between submission or non-submission.¹⁶⁵ Emphasis on a limited social nexus is consistent with a lack of concern for universal or eternal laws. Japanese are indifferent to so-called universal religions.¹⁶⁶ The Japanese social cooperative structure causes them to value high esteem or prestige, and enhances the role of shame in social order.¹⁶⁷ Conformity to mores is the essence of the dedication to a particular human nexus.¹⁶⁸ The tendency to stress harmony in society leads to a spirit of conciliation and tolerance.¹⁶⁹

This view of Japanese uniqueness reinforces the theories considered above to explain the Japanese miracle. Underlying them is some view that Japanese and Americans are not alike. But is this because the Japanese are unique? Hondas and Fords are not alike, but are Hondas unique? Should discussions about economic conflicts become “entangled in dubious references to the decisive differences in mentality and culture” supposed to exist between Japan and the United States?¹⁷⁰

Jeffrey Garten seems to buy into Japan’s myth about itself in *A Cold Peace: America, Japan, Germany, and the Struggle for Supremacy*.¹⁷¹ Garten characterizes Japan as a communitarian society, where “the underlying philosophy is that the individual is an inte-

160. *Id.* at 305.

161. *Id.* at 308, 311.

162. *Id.* at 326.

163. *Id.* at 330.

164. *Id.* at 337.

165. *Id.* at 361.

166. *Id.* at 381.

167. *Id.* at 404, 414.

168. *Id.* at 438-39.

169. *Id.* at 444.

170. *Id.* at 567.

171. JEFFREY E. GARTEN, *A COLD PEACE: AMERICA, JAPAN, GERMANY, AND THE STRUGGLE FOR SUPREMACY* (1992).

gral part of the whole, and that one's best chance to develop fully is in the context of the state's goals."¹⁷² The state does not derive its powers from its citizens, but "from the idea of a state that existed above and apart from the people."¹⁷³ Garten summarizes: "Japan's mindset — communitarian values, a tightly woven culture, xenophobia, its vision of merged public and private interests — goes back centuries."¹⁷⁴

Any description of the Japanese as unique requires something against which to compare them. "Japanliness" can only be articulated by contrasting it with something like "the West" or "American." If the Japanese tend to think of themselves as unique as a group, Americans are at the opposite extreme. Americans think of themselves as unique as individuals, but as a society, everyone should and could be like the United States. There is no American race or American language. Americans not only don't consider themselves unique, but are intolerant of those who appear not to want to be like them. This is especially true of the Japanese. Japan's biggest sin is in not being more like America. If the Japanese think no one else could or should be like them, Americans think everyone can, should and wants to be American.

Of course, what the Japanese attribute to themselves as unique, they must necessarily deny to others. Peter Dale, in his critique of this genre of works on Japan's uniqueness, provides categories of the contrasts the Japanese make of themselves with "the West." Social contrasts between the West and Japan include: society vs. community; individualism vs. groupism; horizontality vs. verticality; equalitarianism vs. hierarchy; contract vs. kintract; private vs. public; guilt vs. shame; urban-cosmopolitan vs. rural-exclusive; rights vs. duties; and independence vs. dependence.¹⁷⁵ Uniqueness here is not a *sui generis* phenomenon, but is a contrast of values and interests based on a comparison with the West.¹⁷⁶ It seems fundamental to Japan's myth about itself that the individual neither exists nor thinks about himself or herself except in relation to the group.

I have used "myth" in connection with the articulation of those beliefs which seem irreducible. Beliefs about the primacy of the individual or society are not empirical or verifiable in any ordinary or scientific sense. Though fundamental assumptions are not verifiable, they can be challenged. The confrontation between Japan and the United States, I believe, should include the recognition of the challenge the Japanese myth poses to the myth held dear by Americans about themselves.

172. *Id.* at 83.

173. *Id.* at 84.

174. *Id.* at 96.

175. DALE, *supra* note 156, at 44.

176. *Id.* at 204.

B. *Why Japan Challenges the American Myth*

The liberal-political-economic myth prevalent in America assumes a commitment to individual freedom and free markets. “Free” means absence of state intervention. Liberal theory is committed to the individual, with the State acting legitimately only in that sphere delegated to it by individuals.¹⁷⁷ The U.S. Constitution reflects this social contract. The Japanese myth assumes the primacy of the State, with individual goals subordinate to State goals, particularly economic security.¹⁷⁸ As indicated, because the Japanese myth is articulated in terms of their uniqueness, while the American myth is felt to be a model all could and should follow, a collision is inevitable.

Freedom from government control is a fundamental value on the American model. Unfortunately, freedom can only be preserved by delegating to the State some authority to take action enhancing the public good within narrow confines. Individual freedom, protected by a limited constitutional government, is the basic concept of the market economy. The market economy, based on decisions by individuals, not the State, is the only economy which will efficiently function. This is not one way of doing things; it is the only way. Individual freedom equals success; government intervention means failure.

Japanese assumptions that the group is primary, that social control is desirable, and that individual freedom is not the supreme value, leads them to operate differently from Americans. On the American theory they should fail. Indeed, some suggest we continue to wait until they do.¹⁷⁹ But Japan is not failing; and most doubt it will. One can suggest Japan works because it is really like the United States — a free market economy. Though there has been State interference in the marketplace, it has become less directive in the past ten years. Those with this view imagine how much greater Japan’s economy might have been had the State been less involved.¹⁸⁰ This view is no comfort to those who see the continuation of the present scenario as spelling economic disaster for many Americans. The dominant view is that Japan is different, and it is hurting the United States. If the American way is the right way, then Japan’s success arises from doing things the wrong way. The belief that Japan’s success is based on doing things the “wrong way” soon translates into a claim that the Japanese are unethical or unfair. Indeed, the U.S. Trade Representative has accused Japan of “outright engaging in unfair trade policies” while the President, in meeting with the Prime Minister of Japan, “scolded”

177. ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATION* 27 (1992).

178. *Id.* at 31.

179. George Melloan, *Japan’s Economic Machine Needs an Overhaul*, *WALL ST. J.*, Mar. 1, 1993, at A15.

180. OKIMOTO, *supra* note 65; Gary R. Saxonhouse, *Japan, SII and the International Harmonization of Domestic Economic Practices*, 12 *MICH. J. INT’L L.* 450 (1991).

the Japanese for not changing.¹⁸¹ The rhetoric of American discourse about the “problem” with Japan reflects that Japan challenges fundamental views. Japan is perceived as morally or legally wrong. If Japan is different, then it should change, Americans are led to believe, and many do believe it. What starts as a trade dispute takes on moral tones.

C. *Alternative Viewpoints*

Whether Japanese trade unfairly depends on one’s viewpoint. Consumers of Japanese products are not being coerced into buying them, though the same cannot be said as to some U.S. products. From this view, consumers are getting better goods for less money. Quotas artificially increase prices, preserve market share for noncompetitive domestic producers, and contradict free-market rhetoric. From the viewpoint of domestic companies competing with Japanese imports, their businesses are being damaged by imports. Jobs are lost and profits vanish. The demand for government interference in the market is justified by characterizing Japanese competition as unfair. U.S. exporters to Japan want the government to intervene in the market by compelling the Japanese to meet quotas, or temporary quantitative indicators, to remove the invisible barriers to Japan’s markets. The U.S. government must reconcile the irreconcilable interests of those promoting open markets, job protection, industry protection from competition, and increased intervention in the faltering market to this or that group’s exclusive advantage. The Trade Representative and President are encouraged to “get tough” with Japan.

There is no way to reconcile irreconcilable differences. But one thing should change — the rhetoric. President Reagan termed the old Soviet Union the “evil empire” and Americans rallied to see its defeat. Americans did this because it is easier to define “the enemy” than to engage in self examination to solve problems. Some healthy reappraisal is called for when it comes to United States-Japan relations.

1. Solutions for Reappraising the Myth

We should start with a reappraisal of the myth we have about ourselves. The myth that the market operates fairly, neutrally, and apolitically, unless some participant acts improperly by allowing the government to interfere, has been challenged by Japan’s economic success. American characterization of Japan as unethical is an unjustified rhetorical response to Japan’s success, and to many apparent American failures. The solutions proposed, including tariffs in response to alleged dumping, quotas in response to unacceptable U.S.

181. Gwen Ifill, *Clinton and the Japanese Premier Scold Each Other on Trade Issues*, N.Y. TIMES, Apr. 17, 1993, at A1.

market penetration, and import quotas or targets for market share in Japan, all have in common that they are a call on the U.S. government to intervene in this international market because of alleged Japanese wrongful conduct.

The first part of the myth to be reappraised is that there is a market free from government or legal restriction or interference. The market only exists because of the role of government. Governments in the United States make the market possible; governments do not just occasionally regulate it. The so called “free market,” that is, a market existing apart from government intervention, is a crumbling myth.

The difference between Japan and the United States is not that there is government intervention in Japan’s economy, while there is less in the United States. The difference is in the how, when, and where of that interference, that is, in the values promoted by such interference. A good example is in the area of competition between retail stores. In Japan the Retail Business Adjustment Special Measures Law delegates authority to local governments to control the opening of retail establishments by giving them the power to issue licenses.¹⁸² A developer, seeking to open a retail store in violation of the market protection requirements, was indicted, and challenged the law as a violation of the right to freely engage in a business activity. Japan’s Supreme Court upheld the validity of the legislation, deferring to the legislature in such economic matters as control of competition.¹⁸³ The Japanese also regulate the opening of large retail stores with the Large Scale Retail Stores Law, which protects small retail operations from large competitors.¹⁸⁴

Americans would probably say we have no laws governing retail stores and their competition. This exemplifies the free market — the absence of law in the market. But there is no absence of law. The law in the United States is just different from the law in Japan. A recent American hero of free enterprise was Sam Walton, who reportedly became the richest man in America, while opening up hundreds of Wal-Mart stores in rural areas. With \$55 billion in annual sales, and \$2 billion in profits, one can only imagine the horror small retailers faced when a new Wal-Mart store was announced for their community.¹⁸⁵ Thousands of small retailers have been driven out of business by Wal-Mart stores opening in competition with them. To the bankrupt small retailer who seeks legal redress, we would say the law provides no remedy.

This is not to say there is no law. There is. The law is that a large retailer like Wal-Mart can open its stores, and through competition

182. Matsushita, *supra* note 117, at 549.

183. *Id.*

184. *Id.* at 553.

185. Susan Pulliam, *Wal-Mart Stock Tumbles as Investors Wonder If Dip in Sales is Part of Longer-Term Trend*, WALL ST. J., Apr. 2, 1993, at C2.

injure or destroy its competitors, and the injury is privileged, that is, the law provides no right of recovery by the injured party. As the U.S. Supreme Court stated the rule, as between competitors, "when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of another."¹⁸⁶ Wal-Mart competition hurts its competitors, though it may benefit consumers. As long as it is fair competition, the law favors Wal-Mart. Japanese competition in America benefits some consumers, but injures other Americans and their businesses. To get around this injury being privileged, it is alleged to be unfair. Unfair competition should be sanctioned. The Japanese are not like Sam Walton. This is one reason our trade problems with Japan are cast in moral terms. The worship of free competition requires that government intervention be justified because some actor is doing something unfair and immoral.

The privilege to intentionally inflict injury on another, without the duty to compensate the loss, unless the injury is inflicted unnecessarily, without just cause, or unfairly, involves drawing a line between what is or is not just, unfair, or unnecessary.¹⁸⁷ In the United States we have drawn this line so as to maximize freedom in competition; in Japan they have drawn the line differently, to maximize protection. This decision on where to draw the line reflects the resolution of the conflict between competing interests or values. Will the law protect large companies which destroy small competitors, what we call freedom, or will small competitors be secure in their market position because of protection by the law. Domestically we answer this question in favor of freedom, but in trade with Japan, there is a trend to come down on the side of protection. The conflict is between freedom and security. We value both. The legal order, whether in Japan or the United States, reflects the resolution of this conflict between freedom and security. In Japan, the resolution is on the side of security, while in the United States the resolution favors freedom. Referring back to the fictional market continuum in section II, the dichotomy is not between legal interference and no legal interference in the market economy. The continuum reflects the social decision about what is to be valued. The Japanese value security and community more highly than do Americans, who emphasize the values of freedom from social control and individual autonomy. But the distinction between intervention and nonintervention is meaningless.¹⁸⁸

We should not make policy decisions about trade with Japan in terms of what is seen as fair or unfair competition. There is nothing fair or unfair about Japanese competition. If Japan subsidizes an in-

186. *International News Service v. Associated Press*, 248 U.S. 215 (1918).

187. Oliver W. Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894).

188. See Francis Olsen, *The Myth of State Intervention in the Family*, 18 MICH. J. L. REFORM 835 (1985)(as an example in domestic law).

dustry, or protects it from imports, what is unfair about this? We might better characterize it as a wise or foolish policy, but not unfair. By unfair, we mean nothing more than that to meet the challenge, domestic industries should be subsidized or protected from Japanese competition. Additionally, concentrating on what the Japanese do, and whether it is characterized as fair or unfair, detracts us from the central issue: what are we doing that is right or wrong in our own economy and what should we do, if anything, to protect or promote activities or enterprises we consciously decide are deserving.

2. Competition and Cooperation

Too many policy discussions are posed in terms of mutually exclusive alternatives. The only choices are not between an economy free from government interference and a command-economy on the former Soviet Union model. One need not choose between either individual rights or communitarian values; there can be accommodation of both. Freedom and security are not either-or, there must be consideration given to both values. We often want conflicting things, but decisions resolving such conflicts are not best made by always opting for one over the other. Several suggestions seem appropriate in how best to redirect our focus on the conflicts between domestic concerns, international policy concerns, and Japan-U.S. trade issues.

As Jeffrey Garten suggests, we should begin by changing some aspects of our view of ourselves. We could begin by recognizing that the solution to pressing problems in our schools, healthcare system, crime, racial conflict and urban decay will not be solved by lack of social planning and governmental commitment. One should have a sanguine view about what government can accomplish, but not be a Pollyanna about what private efforts can accomplish. Recent difficulties at IBM and GM should give one cause for wonder about the wisdom of those making decisions in the private marketplace.

We should reevaluate the supposed universal applicability of our myth about ourselves.¹⁸⁹ With the demise of the evil empire, we must not suppose the world is walking lockstep toward democracy and our brand of capitalism. Instead of trying to export our institutions, we would do better to critically revisit them. We should spend less effort on making Japan in our image of ourselves, and more effort remaking our institutions in light of the realities of Japanese and other foreign competition. This does not mean remaking ourselves in the image of Japan; a feat both undesirable and impossible.

Foreign policy and international trade policy have generally been the province of the government. According to the myth, the domestic economy is best left to the invisible hand of free enterprise — not the government. Thus we incorrectly feel we have no domestic economic

189. GARTEN, *supra* note 171, at 224.

policy. But if we have learned anything from Japan's success, it is that foreign policy, trade issues, and the domestic economy are interrelated and must be considered together. The self-contained domestic economy does not exist. A domestic economy free from government involvement reflecting policy decisions about what values are to be promoted or protected never existed. We must discard the myth that our lack of success in a particular area of international trade results from unethical conduct by others. There are winners and losers in a market economy. We do not lose only when the other side cheats. Our emphasis on the value of individual choice and freedom, which has been a strength, recognizes we are responsible for our own failures. When it comes to Japan, we discard this conclusion, in favor of excuses which blame the Japanese. We will not have a better game plan for tomorrow if our losses are thought to be only occasioned by misconduct by our competition.

We have seen that the Japanese emphasize communitarian values as much as we emphasize individual freedom, as a value to be promoted and protected. But our new protectionism in trade with Japan belies the rhetoric of our myth. Freedom is one value. It competes in our concerns with the value of security and the interests of the community. We are evolving our own brand of economic nationalism. In response to the challenge of the world marketplace, we are recognizing the inadequacy of an economy where the government responds only after the problems have occurred. But economic nationalism focuses on protectionist policies. Our national economic policy should focus on strengthening the competitiveness of the domestic economy. Whether this is in terms of sound educational policies, effective macro-economic policies, or policies which foster and support specific industries or economic activities, we need to articulate these choices for what they are: national policy decisions. This contrasts with the present practice where favoring one sector of economic activity is disguised in terms of retaliatory measures in response to alleged unfair trade practices by others.

Rethinking that part of the American myth which makes the individual the atom from which society is built would begin with the recognition that it makes just as much sense to believe that in the beginning there is society, and that individual development is only possible because of the sustenance of the community.¹⁹⁰ Communities, as the Japanese recognize, are the settings "within which mediated participation takes place."¹⁹¹ What many of us think of as the ideal family provides a model. Obligations within the family are not based on bargained for rights and duties founded in consent. Family relationships are not bargained for, specific or reciprocal. Family rela-

190. Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445, 447 (1987).

191. *Id.* at 449.

tionships are open-ended, non-specific, and generally involuntary.¹⁹² The legitimacy of the government and the political community should not be seen to rest solely on the mythical consent of the governed, but is equally implicit in the fact that we are members of a community.

The communitarian decision-making process in Japan is neither incomprehensible nor totally foreign to practices in the United States. Administrative guidance, conciliation in dispute resolution, and a plan-rational economy are not unique to the Japanese, though they may carry them to extremes. But if their duty-conscious individual subordinated to the social nexus is not appealing to us because it is extreme, does not our rights-conscious individual whose freedom is valued above many social goods not cause some concern as extreme in the opposite direction? It may well be that the country which best adjusts its myths to the emerging pattern of international interdependence will be the one enabling its people to create the highest standard of living.

VI. CONCLUSION

Japan challenges America's myths about itself. Unless we can reevaluate these fundamental assumptions about the individual's relation to the community, and the concepts of freedom in relation to governmental activity, we are doomed to condemn in morally vacuous terms those other countries and their industries who succeed to the detriment of the United States and its businesses. We will continue to punish ourselves by imposing restrictions on their imports, or punish them by bullying them into accepting our products. More importantly, we will divert our attention from our shortcomings, which demand a greater degree of planned and coordinated solution. The Japanese challenge to our domestic priorities, and our shortcomings, may well be the impetus to a reappraisal of what we value and encourage as social goals. If so, the problem with Japan, may in the end be a blessing in disguise.

192. *Id.* at 451.