The State Rebuilding Civil Society: Constitutionalism and the Post-Communist Paradox

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THE STATE REBUILDING CIVIL SOCIETY: CONSTITUTIONALISM AND THE POST-COMMUNIST PARADOX

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INTRODUCTION

The concept at the forefront of the anti-communist movement behind the Iron Curtain was neither capitalism nor democracy, but "civil society." The underlying premise of the civil society movement was that the Marxist-Leninist assertion of the State's all-encompassing authority over all sectors was a falsehood because independent, private associations exercised authority over portions of citizens' lives.

Under communism, the dangers to civil society were state-imposed restrictions. The State had attempted to monopolize all "strategic positions" or resources necessary for an institution or individual to function independently in society. The monopolization of private property rights and other means necessary for the manifestation of consciousness were crucial to the Marxist-Leninist State's restriction of civil society.

Now the advocates of civil society are running the post-communist States. Nevertheless, civil society is still in danger. Indeed, the Prime Minister of Bulgaria and the President of Czechoslovakia each recently told Western audiences that the greatest problem confronting their countries was neither the establishment of democratic institutions nor the transition to a rational economic system, but the task of rejuvenating civil society.

At the foundation of the civil society crisis is the new regimes' inheritance of the communist States' control over all strategic positions.

1. "Civil society" functions in European intellectual history as a rough equivalent to "private sector associations" in American terminology. The term "civil society institution" can cover any non-State hierarchy, including a nuclear family, a church, a business corporation, a political party, and even an individual. As Part I explains, civil society has been used to refer to (1) a relatively homogeneous, politically dominant group of individuals or associations, (2) a pre-political, heterogeneous plurality of autonomous non-State entities, and (3) an interacting group of institutions that function as intermediaries between the consciousness(es) of the populace and the State.

I do not distinguish between purely private society and non-State, public or political society. In fact, all private institutions could, given the strategic resources, play a public or political role by making input into the State. Similarly, all private institutions are potentially subject to the influence of the State to some extent. However, I do make a distinction between public interaction among civil society's members and the private definition of a personal or institutional identity by civil society's members. See infra notes 24, 31, and text accompanying notes 68-70.

2. The term "strategic positions" is used by Michel Foucault to describe—via an analogy to what is necessary for a successful military exercise—what is necessary for an authentic discipline to flourish. EDWARD SAID, THE WORLD, THE TEXT, THE CRITIC 221 (1983) (quoting MICHEL FOUCAULT, DISCIPLINE AND PUNISH 26 (1978)). Disciplines underlie all that is signified and all that plays a role in society. Each discipline necessitates a unique set of "strategic positions" to function. These positions include the intended ideas and the means of manifesting those ideas. Many disciplines share needs for the same scarce strategic resources.

Civil society will be able to thrive only after those strategic positions are privatized. The most notable privatization processes are property sales and the creation of property right entitlements as compensation for takings by previous regimes. But privatization encompasses much more than the distribution of a State’s rights to land and shares in companies. Important State resources that must be privatized in order for civil society to function include access to and control over the media, education, the environment, and political campaigns.

The necessity of privatization for a functional civil society gives rise to the post-communist paradox. The movement behind the elimination of communism stood for the primacy of the pre-political. Yet, the only way for the pre-political to triumph is through privatization, which entails State action on a scale equalled only by a transition to totalitarianism. The debilitated condition of civil society compounds the burden of the State’s massive privatization mission. A paucity of post-communist civil society institutions exists. Moreover, those institutions that do exist either are elitist, in the sense that they lack a foundation among the citizenry, or strive to exercise a disproportionate degree of control over State resources. These circumstances render traditional liberalism of limited use. Nevertheless, as traditional liberalism correctly points out, the State’s new role as subsidizer and promoter of civil society may well be just as oppressive as the old State role of totalitarian suppressor.


Czechoslovakia and Poland are privatizing a limited number of large public enterprises via “mass privatization programs.” In Czechoslovakia, citizens can buy vouchers to purchase shares at public auctions. In Poland, citizens receive free shares in private management funds, which then purchase State enterprises. Hungary and Germany have avoided such programs. Romania has tentatively drawn up a mass privatization plan. Such plans may replace the State’s role with a select group of new mutual funds, which either buy up vouchers (Czechoslovakia) or manage shares as they are issued (Poland). For discussions of these plans for selling certain large public enterprises, see Frydman & Rapaczynski, supra; David Stark, Path Dependence and Privatization Strategies in East Central Europe, 6 E. EUR. POL. & SOCIETIES 17 (1992) [hereinafter Path Dependence].

5. See infra part II (defining the “pre-political” as that which is unconditioned by State action).

6. By “traditional liberalism,” I refer to historical and philosophical skepticism of State action.
With respect to the post-communist world, American legal scholars have dedicated substantial resources to the development of models for independent judiciaries, the efficient transfer of State industries to private ownership, responsible prosecutorial systems, and reformed constitutions and legal codes; but they have often failed to address directly the civil society issue. Reformers must focus their energies not only on translating Western political and economic designs, but also on concerns for the protection and development of social autonomy amidst the paradoxical situation in which post-communist States and societies currently find themselves. This article lays a foundation for remedying this oversight in Western legal scholarship on transitions from communism. This task is important because the future of democracy, justice, and capitalism in post-communist Europe will not be derived exclusively from "master blueprints, but [will be] shaped by the specific institutional resources" of civil society.7

A preliminary discussion of civil society theory, as it has developed both in the West and among Soviet bloc dissidents, is necessary both to understand fully the elements of the current civil society crisis and to arrive at solutions. Part I provides an overview of trends in the intellectual history of civil society theory in the West. Since the rejection of the classical notion of a unified State and civil society, Western commentators have focused their analyses on State action's effect upon modern civil society. In reaction to the dangers of State co-optation of civil society's autonomy, social critics have proposed a range of solutions, such as limitations on State power to interfere in areas like property rights and the assumption of power by a universal class.

Part I concludes by explaining a sophisticated middle ground articulated in recent post-Marxist criticism. This approach rejects State passivity toward the private sector's development of repressive hierarchies, but advocates limitations on State interference to prevent the State from playing a despotic, ideological role. These social critics advocate State action "to carve out space" for the development of civil society, as opposed to State action that "penetrates" civil society with the result of co-optation.

At its heart, I argue, the goal of this latter vision is actually the public re-creation of classical civil society on a larger, more heterogeneous scale. The debates among autonomous actors that shaped the classical State can exist in a more dynamic, drawn-out and noisy fashion in a modern civil society, as long as the State provides the mecha-

7. Stark, Path Dependence, supra note 4, at 23.
nisms to assure the participation of a multiplicity of autonomous members of civil society.

Part II reviews Soviet bloc dissidents' contributions to civil society theory. Instead of focusing upon the effect of State action on civil society, the dissidents tended to write about the pre-political character of civil society. Dissident theory exalts personal truths as the source of all civil society and emphasizes the irrelevancy of attempts to condition those truths. Despite their emphasis on individual truths as "absolutes," the dissidents recognized the significance of limiting public and private institutions, as well as the importance of dialogue and dynamism. Part II concludes that even though post-Marxist Western theory and dissident theory have different starting points—the West usually begins with the effect of State output on civil society, while the dissidents begin with the nature of pre-political civil society—they both give rise to similar visions of the relationship between the State and civil society.

Part III examines the problem of attaining the goal of a dynamic, modern civil society after the change from communism to democracy in Eastern Europe. This section compares the post-communist transitions with Jürgen Habermas's two models for the relation between civil society and a change of regime. Habermas explains how the American Revolution deferred to the "common sense" of already-existing civil society, while the French Revolution attempted to construct and to mobilize a new, "correct" civil society. I then explain why the post-communist transitions fit neither of those models. Unlike the American colonies, the former Soviet bloc has few contemporarily relevant, traditional institutions of civil society. Moreover, those authentic institutions that do exist are in a debilitated, resourceless condition. Furthermore, the French Revolution approach has little appeal for those in the midst of a failed utopia. Nevertheless, these models have some relevance. Part III argues that the post-communists should adopt an appropriate synthesis of the French affinity for State mobilization and the American respect for the pre-political.

Part III then reviews the manner in which civil society has actually developed in post-communist Europe. During the early days of change in 1989, authentic civil society appeared to flourish on both a

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8. This article uses the term "Eastern Europe" for consistency with the other articles in this symposium, without intending to imply either that the region is a monolithic block or that the region is separate from the rest of Europe. See Wiktor Osiatynski, Revolutions in Eastern Europe (Review Essay) 58 U. CHI. L. REV. 823, 851 (1991) ("It seems clear that Eastern Europe does not exist. The phrase has fallen out of usage even within the region.").
private and public level. That was after the collapse of communism, but before significant new hierarchies had a chance to impose themselves on others in society. Since then the crisis of civil society has arisen. The public sector and fledgling private sector currently operate in a manner that fails to empower large segments of civil society. In addition to reviewing the origins and elements of this crisis, Part III explains why this crisis presents risks to the success of the democratic and economic transitions in the region.

Part IV demonstrates how post-communist constitutionalism can function, and already has functioned in Hungary, to help resolve the crisis. The enforcement of constitutional rights need not function as a vehicle for servicing State clientele to sustain the authority of elites. A jurisprudence of rights can function to protect and nurture the type of modern civil society to which the social commentaries of Parts I and II aspire. As a result of the inevitability of a prominent State role in the provision of resources for post-communist civil society, the next challenge for post-communist constitutionalism will be the development of guiding principles that permit the State to rebuild civil society without suppressing civil society's essence.

Part IV proposes that constitutional courts review State action taken to eliminate and to retain the State's monopoly on resources. These courts would ensure that post-communist States structure the privatization of State resources in a manner that does not neglect those constitutional rights relevant to the existence of dynamic, modern civil society. One area of proposed review, pursuant to the protection of free speech rights, is State decisions on private access to state-dominated media outlets. To assist in determining when privatization decisions facilitate the development of civil society and when they hinder that development, Part IV provides a critique of the U.S. Supreme Court's constitutional review of State regulations of private rights of access to forums for communication. My analysis shows the concerns that the Supreme Court has found relevant to the constitutionality of such regulations. I then explain which of those concerns are appropriate, in light of the particular circumstances outlined in Part III, for use in post-communist constitutional review of potentially discriminatory privatization decisions.

I. ISSUES AND TRENDS IN THE DEVELOPMENT OF WESTERN CIVIL SOCIETY THEORY

The concept of civil society originated in ancient Greece (koinonia
Rebuilding Civil Society

Classical civil society was composed of the select group of autonomous individuals who interacted to create the mature rules of practical reason for a given community. The imperatives that emerged from civil society contained, dominated, and ultimately defined the community. Accordingly, the role of "civil society was coterminous with the state." Civitas was actually the form of government.

By the mid-eighteenth century, European political observers had come to associate despotism with the unification of the State and civil society. An ongoing debate ensued over an appropriate modern concept of civil society. The essence of these modern concepts of civil society is "the strategic importance of guarding against [classical civil society's] authoritarian potential by fostering the growth of independent 'societies' within civil society." The underlying reasoning is that the organization of autonomous identities undermines any attempt by any particular identity to assume a despotic position of authority.

Two problems plague modern concepts of civil society: (1) the destruction of a unifying public spirit and ethos by a cacophony of competing identities, and (2) the suppression of autonomy as a result of both the unequal distribution of resources among societies and the existence of a neglected society within every empowered society. Adam Ferguson's eighteenth century Essay on the History of Civil Society highlights the first problem with rhetorical flair. Ferguson observed the consequences of both capitalist economic competition and cultural intolerance. He sees the death of classical civil society as having unleashed "'a scene for the gratification of mere vanity, avarice, and ambition'" in which different interests are "always ready to trespass on the rights of others." If the State and civil society are no longer one, then Ferguson suggests that a means must be found to ensure mutual respect among the members of diverse societies.

Ironically, the way to encourage a sense of civic virtue in modern civil society is to guarantee the empowerment of diverse groups and autonomous individuals. Attempts to dominate absolutely are futile in the face of such a guarantee. If no group's interests can be ignored,

10. Keane, supra note 9, at 35.
11. Id. at 65.
12. Id. at 37. See supra note 1 (providing examples of civil society hierarchies).
13. Id. at 39-44 (quoting extensively from ADAM FERGUSON, AN ESSAY ON THE HISTORY OF CIVIL SOCIETY (1767) (Duncan Forbes ed., 1966)).
14. Id. at 41-42.
then the conflicting interests are forced to cooperate in a "public
spirit." As steps toward such an end, Ferguson suggested safeguards
such as the protection of civil liberties and the presence of members
from all walks of life on juries and in citizen militias.15

The administrator of any attempt to guarantee the empowerment
and participation of diverse groups and autonomous individuals must
be the State. Hegel expounded on this remedy at great length in The
Philosophy of Right, his reaction to the "blind and unstable field
of economic competition among private non-citizens."16 The State's
role, according to Hegel, is to introduce mechanisms that undo the
inequalities among competing autonomous sectors and to pursue uni-
versal interests.17 Without "the higher surveillance of the state," cer-
tain "Corporations" or private sector groups "would ossify, build
themselves in, and decline into a miserable system of castes."18 The
State has to intervene in the private sector to protect civil society from
oppression by private sector hierarchies.

Most critiques of The Philosophy of Right point to the second prob-
lem with modern civil society. The Hegelian quest for state-sanc-
tioned equality requires the secular deification of the State's
rationality, a concept which is easily attacked.19 Alexis de Tocque-
ville, writing at approximately the same time as Hegel, feared that a
Hegelian model would sanction interference with so-called "sacred"
property rights and ultimately lead to the "administrative suffocation
of civil society."20

De Tocqueville was probably most upset by the potential for the
State to "suffocate" the status quo, propertied powers of the private
sector. The same danger of "suffocation," however, exists with respect
to State attempts to assist disempowered elements of society. In a

15. Id. at 43; cf. Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131
Arguably, a source of unity like a crown or nationalism is necessary for there to be "public
spirit" in civil society.

16. Keane, supra note 9, at 52.

17. Id. at 53; ROBERT MEISTER, POLITICAL IDENTITY 160-61 (1990).

18. MEISTER, supra note 17, at 177 n.1 (quoting Hegel).

19. See, e.g., Keane, supra note 9, at 54; MEISTER, supra note 17, at 188-89; ROBERTO M.
UNGER, LAW IN MODERN SOCIETY (1976). Indeed, Hegel often hints in his own work that he is
presenting an overly idealized conception of the modern State's potential.

20. Keane, supra note 9, at 58; see MEISTER, supra note 17, at 132-33 (discussing de Toc-
queville's prudent democracy). James Madison had similar concerns about the potential negative
effects that could stem from a State empowered to engage in property right reform. See Stephen
Holmes, Precommitment and the Paradox of Democracy, in CONSTITUTIONALISM AND DEMOC-
RACY 220 (Jon Elster and Rune Slagstaad eds., 1988) (discussing Madisonian prudence on prop-
erty right reform); Klingsberg, Judicial Review, supra note 4, at 86-88, 107 & n.163 (discussing
interaction between Madison's views on popular sovereignty and property right reform).
world of scarce resources, the State is bound to oversimplify in its rational attempts to equalize. A multiplicity of civil societies exist within each group that the State can recognize. The empowerment of any group is bound to be at the expense of neglecting to empower the diversity within each group.\textsuperscript{21} More significantly, when the State is the source of empowerment, the members of civil society become dependent upon the State for organizational guidance and ultimately may sacrifice their autonomous voice in return for State assistance.\textsuperscript{22}

In such scenarios, State empowerment efforts function as violent impositions on the autonomy of those being assisted.

The problem with this critique of Hegel's secular deification of the State is that such criticism focuses only on the State's output—i.e., the role of the State in molding civil society. The other stage is the creation and definition of the State through input from civil society. If a complete range of autonomously formulated private interests characterize the input stage, then the modern State can enjoy the legitimacy of classical civil society and avoid the dangers of despotism outlined by de Tocqueville and others.

Theories of modern civil society indicate an aspiration to re-create classical civil society, at least on the level of public interaction, in a more drawn-out, large-scale, and heterogeneous version. Classical civil society "entailed a vision of an autonomous-domination-free association of peers who communicatively establish their goals and norms."\textsuperscript{23} If we could see those autonomous Greek peers arguing today, we would probably see ugly arguments in which each diverse individual relied on strategic resources to enable his preference to prevail. Today, the diversity of views in civil society is greater, but that does not necessarily mean that there cannot be "autonomous-domination-free participation" by modern civil society institutions in defining the State.\textsuperscript{24} Action by a State, which had been created by

\textsuperscript{21} See M.M. Bakhtin, \textit{The Dialogic Imagination} 426 (Michael Holquist ed., Caryl Emerson & Michael Holquist trans., 1981) (discussing political figures' delusions of "unitariness").

\textsuperscript{22} Arato & Cohen, \textit{supra} note 9 (criticizing the welfare state).

\textsuperscript{23} Id. at 61 n.6.

\textsuperscript{24} The actual difference between modern and classical civil society is that in classical civil society the results of the arguments between the diverse peers resulted in the sole set of rules. In modern civil society, there are both the rules derived from the interaction between civil society institutions and individuals, and the rules of each individual and private institution unto itself. \textit{See infra} text accompanying notes 68-70. When I refer to "modern civil society," I intend to imply a multiplicity of societies/communities. \textit{Cf.} Stephen Gardbaum, \textit{Law, Politics, and the Claims of Community}, 90 Mich. L. Rev. 685, 698-99 (1992) (discussing differences between \textit{Gesellschaft} and \textit{Gemeinschaft}).
such a society, would arguably nurture and be responsive to, rather than suffocate, civil society.

Marx was an outspoken skeptic of such aspirations in the modern world. As long as there was any separation between the State and civil society, Marx saw it as inevitable that the State would attempt to stabilize its position through selectively empowering certain of civil society's groups, which would then function as corporate clientele of the regime.\(^2\) In this respect, contemporary Marxists claim that a true Marxist analysis, based on Marx's critique of Hegel's *Philosophy of Right*, would identify the Communist Party's "stabilizing (and repressive) function" in relation to the modern civil societies of the Soviet bloc during the past four decades.\(^2\)

The problem with Marx's criticism of Hegel is that it leaves no means for grounding the State in the full range of identities in modern civil society, unless the cacophony of modernity is glossed over and faith is put into a universal class which can arise to unify State and society. In the modern world, where factors like communications and travel have brought radically diverse communities within the same State, such efforts will inevitably fail and result in repressive fiascos like the former communist world. The preferable course is the further pursuit of the goal, shared by both Hegel and de Tocqueville, of having diverse civil associations, which are separate from the State, serve as "crucial barriers against...political despotism."\(^2\)

Recent post-Marxist, Western conceptions of civil society suggest emulations of classical civil society, but not in the Marxist direction of striving towards an artificially unified utopia. Instead, the post-Marxist focus is on the potential, as discussed above, for modern civil society to emulate classical civil society's capacity to give rise to a public dialogue between diverse, autonomous interests. Sociologists Andrew Arato and Jean Cohen, in an article drawing on the insights of Jürgen Habermas, provide guidelines for attaining such a goal.\(^2\) The Arato-Cohen approach attempts to overcome simultaneously each of the two primary problems with modern civil society.\(^2\)

In response to concerns about the dangers of "the dissolution of an

\(^{25}\) Meister, *supra* note 17, at 193-94 (paraphrasing Marx's critique of Hegel's *PHILOSOPHY OF RIGHT*: "differential power of groups in society is itself an artifact of state power"); *id.* at 200-01 (regimes attempt to stabilize themselves by creating and favoring corporate clientele).

\(^{26}\) *Id.* at 233.

\(^{27}\) Keane, *supra* note 9, at 61.

\(^{28}\) Arato & Cohen, *supra* note 9; *see generally* ANDREW ARATO & JEAN COHEN, CIVIL SOCIETY AND DEMOCRATIC THEORY (1992).

\(^{29}\) See *supra* text accompanying notes 12-22.
all-encompassing ethos,"^{30} they build upon the realization that the guarantee of the autonomy of groups and individuals leads to constructive public dialogue. They foresee the potential for interaction on a grand scale: the "communicative opening up of the sacred core of traditions, norms and authority to processes of questioning and discursive adjudication. It entails the replacement of a conventionally-based normative consensus by one that is reflexive, post-conventional, and grounded in open processes of communication."^{31}

In response to the concern that State action inevitably co-opts civil society, Arato and Cohen point out that such a view erroneously "focus[es] exclusively on the role of law, and even rights, as a medium [for exploitation and exclusion], while dismissing its freedom-securing, empowering institutional moment as mere show."^{32} Law can function not only to violently structure civil society,^{33} but also as "an institution that secures and formalizes the normative accomplishments of the lifeworld."^{34} Law need not only protect select clientele hierarchies; it can be used simultaneously to empower a heterotopia.^{35}

In the Arato-Cohen portrayal of State action, "penetration" is bad, while "carving out" is good.^{36} The latter enables autonomous interests within civil society to thrive, while the former intrudes to attempt to shape civil society in a specific image. In particular, they argue that the law must carve out non-economic private spheres and non-State public spheres to ensure that hierarchies of money and political power, respectively, do not exclusively dominate society.^{37} The restriction of

^{30} Arato & Cohen, supra note 9, at 45.

^{31} Id. at 44. Engagement in such public, post-conventional interaction does not entail the abandonment of strict adherence to conventions on a private level. See infra text accompanying notes 68-70. Indeed, as stated above, what makes this public, post-conventional interaction possible is the private, autonomous development of personal and institutional norms.

^{32} Id. at 51 (criticizing Foucault). Similarly, Habermas complains that Foucault's critique of the subjectivity of liberal legalism "‘filters out all the aspects under which the eroticization and internalization of subjective nature also meant a gain in freedom and expression.’" Richard Rorty, Foucault/Dewey/Nietzsche, RARITAN, Spring, 1990, at 3 (quoting Habermas).

^{33} See JÜRGEN HABERMAS, PHILOSOPHICAL-POLITICAL PROFILES 184 (Frederick Lawrence trans., 1983) (discussing "structural violence" of political systems).

^{34} Arato & Cohen, supra note 9, at 50.

^{35} Id. at 51.

^{36} See id. at 53.

^{37} Id.

[W]e must use the market and use the state but regard neither as the primary locus of human emancipation. Rather, if we speak of democratic politics in Arendtian or Habermasian terms, we must realize that this locus is in civil society. This . . . is the post-liberal, post-Marxian insight.


The outlook upon rights as protecting society from the infringement of the State, as well as from private sector forces, can be traced back to James Madison: "'[I]t is of great importance in
the State to "carving out" space so that a multiplicity of civil societies can thrive is critical to whether a nation's future can be shaped "from below" by the potential grand interaction of modern civil society.

II. DISSIDENT\textsuperscript{38} CIVIL SOCIETY THEORY: AUTONOMY, SELF-LIMITATION, AND DYNAMISM

Modern civil society can be outlined by a continuum of input into the State and output from the State: civil society \textsuperscript{> State} \textsuperscript{> civil society}. While Western social theorists were primarily analyzing the effect of State output in a modern civil society, dissidents from behind the Iron Curtain were avidly writing about the pre-political side of civil society.

The fundamental premise of most dissident theory is that "consciousness is on its own" and is independent of State devices.\textsuperscript{39} Dissidents designated civil society as the product of such pre-political consciousness—a sacred concept in a lifeworld corrupted by State violence.

The elevation of the autonomy of individual value choices to the level of a theory of resistance to despotism provided a means for delegitimizing the apparent authority of State institutions. Václav Havel, for instance, contrasted the basis of communist authority in "[s]ystem, ideology and \textit{apparat}" with the dissidents' foundations in "our conscience, our natural understanding."\textsuperscript{40} Dissidents generally had little else on their side to legitimize their views. Except for those involved with the Polish Solidarity Movement, religious leaders, and a few sporadic exceptions elsewhere, most dissidents lacked mass popularity or even symbolic authority among underground communities or associations.\textsuperscript{41} They could only claim adherence to a personal, uncon-
ditioned moral imperative.\textsuperscript{42}

In Western social criticism, Michel Foucault’s writings carried to an extreme this aversion to the violent infringement of power systems upon authentic consciousness. For Foucault, State violence penetrated all structures in both the public and private sectors, and therefore only rare, spontaneous outbursts of autonomy were entitled to be designated natural or authentic reflections of consciousness. Edward Said, who would like to see Western critics become more comfortable with a socially active role, denounces “Foucault’s] more or less elimination of] the central dialectic of opposed forces that still underlies modern society, despite the apparently perfected methods of ‘technotronic’ control and seemingly nonideological efficiency that seem to govern everything.”\textsuperscript{43} Foucault focused on the illegitimacy of “tactics and strategies of power” to the point that he eclipsed room for faith in the potential for institutionalized consciousness ever to occupy a strategic position of power.\textsuperscript{44} The dissidents differ from Foucault in a manner similar to Said. The underground advocates of civil society in the communist world usually conceded that more traditional associations—such as the family, religious groups, and various types of intellectual circles—could function and interact, if they had the resources and the space, as legitimate outgrowths of authentic consciousness.\textsuperscript{45}

Despite this vision of the illegitimacy of the State and the legitimacy of civil society, the dissidents were not neo-classicists who yearned for civil society to replace the State. The dissidents had an ambiguous attitude toward the role of the State. They considered politics as both an inauthentic power system to be avoided and a force

\textsuperscript{42} Dimitrov, \textit{supra} note 3 (communists could not “destroy completely civil society or vanquish the moral imperative”).

\textsuperscript{43} \textit{SAID, supra} note 2, at 221.

\textsuperscript{44} \textit{See} \textit{MICHEL FOUCAULT, POWER/KNOWLEDGE} 77 (Colin Gordon ed. & Colin Gordon et al. trans., 1980) (describing his shift of focus from “consciousness” to “tactics and strategies of power”); \textit{SAID, supra} note 2, at 222 (contrasting Foucault’s critiques of power with those of Gramsci “for whom the fascinated description of exercised power is never a substitute for trying to change power relationships within society”). Antonio Gramsci, despite his penetrating critiques, was much less ambiguous than Foucault in retention of confidence in the duality between power in society grounded in authenticity and power grounded in exploitation of State violence and technique. \textit{See ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS} (Quintin Hoare & Geoffrey N. Smith trans., 1971).

\textsuperscript{45} Dissident criticism of Marxist-Leninism’s use of the “technology of power” to enforce metaphysical pretenses “does nothing to show that there is something wrong with whatever networks of power are required to shape people into individuals with a sense of moral responsibility.” Rorty, \textit{supra} note 32, at 7 (arguing that Foucault’s anti-Platonism should not delegitimize all private uses of power). The way critics like Franz Fanon, Edward Said, and many East European dissidents are able logically to condemn one power structure and then affirm another is explained \textit{infra} at text accompanying notes 66-70; 81-82.
with which civil society had to reckon. Dissident civil society advocates often denied interest in State subsidization of private sector interest groups. Political support was for compromising reformers, rather than autonomous associations. The fantasy of the State incorporating civil society groups as new clientele had lost favor after the brutal crushing of reform efforts, such as that led by Imre Nagy in Hungary in 1956\textsuperscript{46} and the 1968 Prague Spring in Czechoslovakia. An initiative to utilize a communist State to emancipate authentic civil society would lead only to additional State co-optation and denigration of the civil society institution, because of the communist regime's willingness to use violence to entrench the status quo.

Nevertheless, the dissidents recognized that the State plays a critical role in relation to modern civil society. Even though they insisted that civil society's exclusive source had to be "intrinsic moral and ethical inclinations,"\textsuperscript{47} they realized that the State had the power to force people to live in accordance with "uninhabitable fiction[s],"\textsuperscript{48} to "surrender[ ] individual reason and conscience,"\textsuperscript{49} and to alienate persons from themselves.\textsuperscript{50} Hence, politics could not be ignored. Havel set a precedent for dissident political philosophy when he reasoned that civil society advocacy entailed the endorsement of "anti-political politics": "politics not as technology of power and manipulation, of cybernetic rule over humans or as the art of the useful, but politics as one of the ways of seeking and achieving meaningful lives."\textsuperscript{51}

The implications of "anti-political politics" are subject to misunderstanding. There is a tendency to interpret the call to use politics as a means for achieving meaningful lives, coupled with the dissident rejection of reformist compromises, as a call for revolutionary politics.\textsuperscript{52} In dissident writings, the emphasis on intrinsic truths\textsuperscript{53} as the source

\textsuperscript{46} The 1956 movement had an element of spontaneous revolution, as well as reformism. Imre Nagy embodied 1956's reformist character. However, by October 24, 1956, the masses quickly forgot about Nagy and reform communism, because pluralism appeared to be at hand. Charles Gati, From Liberation to Revolution, in A HISTORY OF HUNGARY 380 (P. Sugar et al. eds., 1990).

\textsuperscript{47} Dimitrov, supra note 3.

\textsuperscript{48} Havel, supra note 40, at 394.

\textsuperscript{49} Id.

\textsuperscript{50} Dimitrov, supra note 3.

\textsuperscript{51} Havel, supra note 40, at 396-97; see also GEORGE KONRAD, ANTIPOLITICS (Richard E. Allen trans., 1984). I oversimplify, for purposes of this article, in stating that all dissidents agreed with Havel's approach to politics. See supra note 38.

\textsuperscript{52} By "revolutionary politics," I refer to the conception of a permanent and totalistic change. I do not incorporate conceptions of "self-limiting revolution," often referred to in Polish literature, or "liberal revolution," frequently used in recent work by Bruce Ackerman.

\textsuperscript{53} For example, Havel wrote in 1984: "At the basis of this world are values which are simply there, perennially, before we ever speak of them, before we reflect upon them and inquire
for both civil society and a future anti-political State comes perilously close to sounding like advocacy of a new enlightenment political philosophy that could be just as imposing upon civil society as the notion of the universal proletariat. Havel, in particular, frequently referred to a metaphysical "Absolute" when arguing in favor of civil society institutions and against the communist regime. Consequently, one Western legal commentator argues that Havel's approach "may have its virtues as a mode of dissent in a totalitarian society," but its success could pose "the greatest threat to liberty."  

Despite a superficial appearance to the contrary, dissident theory recognized the importance of self-limitation, dynamism, and dialogue among the participants in a modern civil society. Havel was quick to note the sense in which he invoked the metaphysical: "Th[e] Absolute is something which we can only quietly respect; any attempt to spurn it, master it or replace it with something else appears, within the framework of the natural world, as an expression of hybris for which humans must pay a heavy price, as did Don Juan and Faust." Individual and institutional adherence to self-generated values and imperatives leads to self-limitation and open-ended interaction, because the generation of these absolute truths is a dynamic, infinite process.

Havel's "Absolute"-based civil society has more in common with the affirmation of humanism in the the work of Samuel Beckett, another playwright whose writing is inspired by real life experiences resisting totalitarianism, than with advocacy of an imposing, rigid, and revolutionary ideology. Beckett's extreme respect for absolute truths results in his work mocking scientific systems and other marks of privileged communications. All imposing structures and ideologies deconstruct humorously in his characters' eyes due to those characters' affirmative faith in authenticity, as opposed to nihilism. Despite

54. Havel, supra note 40, at 389.
56. Id. at 77. West criticizes the unreliability of depending exclusively on leaders' adherence to moral restraints, as opposed to constitutional restraints. Id. Elsewhere, West endorses Havel's emphasis on moral foundations as constructive. Id. at 71-76.
57. Havel, supra note 40, at 383.
58. DIERDRE BAIR, SAMUEL BECKETT 320 (1978) (Beckett's witnessing of World War II as an active member of the Resistance was critical to his post-War writing).
59. See also Rorty, supra note 32, at 1 (arguing that Dewey's liberal democratic vision entailed "autonomy in purely human terms," as opposed to "universalistic self-justifications.").
60. See, e.g. Samuel Beckett's trilogy, MOLLOY (1955), MALONE DIES (1956), and THE UNNAMABLE (1958).
Beckett’s characters’ constant, seemingly all-encompassing negation ("I can’t go on"), they are always driven by a faith that authenticity is present within the human self ("I’ll go on").

The similar use of the Absolute in Beckett and in dissident theory comes forth poignantly in *Catastrophe*, the drama within a drama, which Beckett wrote for the imprisoned Havel in 1983. The play portrays the preparation of the character called “Protagonist” for a play. He is dressed, powdered, arranged, and physically manipulated as if he were a mannequin. In the play within *Catastrophe*, Protagonist has no opportunity to utter lines, to engage in movement, or even to make facial expressions. Any of those opportunities would entail space for autonomous input from Protagonist. The role of Protagonist corresponds nicely with what Havel was writing, at approximately the same time, about the detached role of individuals in relation to States: “States grow ever more machine-like; people are transformed into casts of extras, as voters, producers, consumers, patients, tourists or soldiers.”

Toward the end of *Catastrophe*, the “Director” character gives the signal that the play can commence. Everything appears to be in order, as Protagonist stands with his head bowed woodenly and the pre-recorded applause begins to fill the theater. But a catastrophe strikes the play. In a simple but haunting move, as the official, pre-recorded applause for Director’s creation is heard, Protagonist suddenly raises his head and stares at the audience. The mechanized applause ceases. With a simple humanist gesture, Protagonist ruptures the entire symbolic set forth by Director. Suddenly, a rich silence rules the stage. One recent production of *Catastrophe* inserted the Czech national anthem, rather than silence, after Protagonist raised his head and the pre-recorded applause ceased. However, the radical humanist message of the dissident is not another imposing tape recording, but the silencing of recordings so that there is space for human beings to come forward.

Such a courageous and deconstructive conception of the Absolute

62. Id.
64. Havel, supra note 40, at 388.
65. The notion of the “symbolic” refers to “differential elements, in themselves without meaning, which acquire value only in their mutual relations—the question is whether this order is or is not complete.” JACQUES LACAN, THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS 279 (Alan Sheridan trans., 1978). The “rupture” of the symbolic manifests that the symbolic is not complete, because an element of previously overlooked méconnaissance has turned up within the attempted symbolic order.
allies anti-political politics with the Arato-Cohen vision of modern civil society, as opposed to revolutionary ideology. Part I explained the Arato-Cohen approach as advocating (1) an open-ended, post-conventional, rational dialogue within modern civil society, which would be made possible through (2) limitations on the capacity of State and market institutions to dominate the public and private spheres. As to the first component of the Arato-Cohen approach, the dissident conception of the Absolute opens up even the integrity of identified pre-political consciousness to questioning. Such constructive questioning constitutes part of the grand process of dialogue in the modern conception of civil society, rather than part of the suppression of authentic individual development. This dynamic dialogue on both an individual and communal level is what dissident Joseph Brodsky is talking about when he describes the process of “gain[ing] an identity superior to the confines of class, race, or ego. This is just plain common sense; this is also the most sound program of social change there is.”

Even though all pre-political consciousness is subject to constant questioning and redefinition, dissident theory avoids resorting to a Foucaultian eclipse of room for faith in the authenticity of individual or institutional identity. Emulation of Foucault was not necessary because the dissident’s quest to embody beliefs in a civil society institution did not entail the uncompromising advocacy of the imposition of that institution’s norms on the rest of society. Dissidents were political and societal actors who adopted the privilege of poets—as opposed to philosophers—to manifest private authenticity (i.e., “to live in truth”) without asserting the “universal validity” of their positions. Like Richard Rorty, dissidents viewed society as neither a quasi-person nor a solitary civil institution; it is (at its liberal, social democratic best) a compromise between persons and private institutions.

As to the protection of modern civil society from co-optation and suffocation (the second crucial component of the Arato-Cohen framework), dissident writing tended to rely on the capacity of humanism, rather than legal rights, to carve out and to preserve space for autonomous societal actors. The dissidents saw humanistically-based dyna-

66. See supra note 31 and accompanying text.
67. BRODSKY, supra note 39, at 171.
68. See Rorty, supra note 32, at 4-5 (describing “knight of automony” in tradition of John Dewey).
69. Id. at 7-8 (arguing that philosophers should be entitled to adopt the privilege of poets once they “give up the hope of universalism”).
70. Id. at 5.
mism as potentially undercutting totalitarianism, as well as all other pretenses by public and private hierarchies toward imposing an ideological, as opposed to a deconstructing, Absolute. State clientele structures and institutions would disintegrate in theory, as individuals turned to authentic and dynamic institutions of civil society. Hungarian dissident George Konrád, author of an essay entitled "Anti-politics," explained: "totalitarian state power is stable only if civil society is forced underground, shackled by fear and apathy, and thereby reduced to the safety of the mousehole. . . . Whenever civil society becomes more confident, however, the state rapidly loses its grip." The dissident civil society movement also made claims to the capacity of its radical humanist emphasis to undermine the vulnerability of society to confinement by other abstractions, such as nationalism, democracy, constitutionalism, social justice, the international anti-communist movement, capitalism, or socialism with a human face.

The dissidents of the communist world did not rally around a particular Virtue. As Mihály Vajda puts it, the message which emerged from the anti-communist, civil society movement was: "Don't try to tell me how to live." The non-ideological, but energetic, defiance of eccentric individualists, writers, and musicians symbolized the movement. Although certain dissidents privately embraced specific, rigid

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71. See generally GUILLERMO O'DONNELL & PHILIPPE SCHMITTER, TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES 48-56 (1986) (discussing the relation between the resurrection of civil society and the decline of totalitarian regimes in Latin America); Gábor Halmai, The Freedom of Assembly and Association 167-179 (unofficial translation of Hungarian language manuscript on file with the Michigan Journal of International Law) (discussing the development of civil associations in the years prior to the end of communism in Hungary).


73. Mihály Vajda, East-Central European Perspectives, in Civil Society and the State: New European Perspectives, supra note 9, at 349-50; TIMOTHY GARTON ASH, THE MAGIC LANTERN 145-47 (1990) (discussing the dissident movements leading up to the events of 1989: it was "a springtime of nations [but] not necessarily of nationalism; . . . of societies aspiring to be civil."

74. Havel, supra note 40 ("a single seemingly powerless person who dares to cry out the word of truth and to stand behind it with all his or her person and life, has, surprisingly, greater power, though formally disenfranchised, than do thousands of anonymous voters."); Vajda, supra note 73, at 349-50.

75. Vajda, supra note 73, at 349; West, supra note 55, at 63-71 (on Havel).

76. Vajda, supra note 73, at 349.

77. Havel, supra note 40, at 391, 397 (change comes about through "help[ing] ourselves" rather than from outside help).

78. Id. at 392-93 (questions of capitalism versus socialism "have long since been beside the point").

79. Vajda, supra note 73, at 350.

80. Havel, a playwright, explains in an interview with Lou Reed how Charter 77 was in-
beliefs like Catholicism, they never converted such potentially imposing structures into revolutionary rallying cries to empower closed communities. For dissidents, as Brodsky states in his description of the premise of civilization in general, the "main vehicle—speaking both metaphorically and literally—is translation." The virtue of the dissidents was their faith in the capacity of interaction within a modern civil society to give rise to authentic private and public structures. The next part examines the difficulties of realizing this goal after the change from communism to democracy in Eastern Europe.

III. CIVIL SOCIETY AND CHANGE OF REGIME

Examination of the approach to civil society by the American and French Revolutions highlights the problematic and delicate position of post-communist civil society. Against that theoretical background, this part explains the development of the current crisis of civil society in the post-communist world. Part III.A explains that the debilitated state of civil society stems from the State's accrual of a near-monopoly on all resources over the past four decades, historical circumstances prior to the rise of communism, and the contemporary irrelevance of many traditional value systems that were suppressed and failed to evolve during the communist era. Part III.B then identifies three normative categories that characterize the crises of East European civil societies that have arisen amidst the circumstances described in III.A.
Although a more scientific analysis could reveal tremendous differences among East European societies, there is evidence that post-communist civil societies are currently plagued, to varying degrees, with: (1) elitism and an absence of institutional vehicles for societal forces, (2) the legacy of learned helplessness, and (3) unchecked, revolutionary special interest groups.

A. Synthesizing the American and French Revolutions

Jürgen Habermas’s contrast between the American and French Revolutions provides a useful framework for understanding the societal difficulties presented by transitions from communism in Eastern Europe. Under the French Revolution model, the new State provides “the organizational means for the construction of a total order of society.” Habermas explains that the drive by a new State “to install a technically correct system of institutions” stems from the foundation of the regime change, as was the case in the French Revolution, in a totalistic philosophical vision of a “correct social order.” The French Revolution was driven by a desire to have the State mobilize moral incentives. This clearly is not the case in Eastern Europe, where radical autonomy or mobilization from below characterizes the aspirations of many. More generally, those living in the midst of a failed utopia have little interest in the totalizing visions of revolutionaries.

Habermas’s description of the American Revolution’s approach to civil society appears, at first glance, to fit post-communist tastes more readily. The American Revolution was not a movement to empower the State to realize a philosophical vision of how to organize the “total society.” Instead, the American Revolution appealed to already-existing sentiments or “common sense” in its approach to civil society. The American Revolution approached the private sector with deference. Property rights, slavery, and other institutions were left un-

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84. JÜRGEN HABERMAS, THEORY AND PRACTICE 91 (John Viertel trans., 1973).
85. Id. at 93.
86. Id. at 104-05.
87. Although post-communist society may not fill its “ideological and emotional vacuum” with a new utopian vision, there are signs that society is turning towards extremist, counter-revolutionary pathologies like the quest for revolutionary justice. See Jeri Laber, Witch Hunt in Prague, N.Y. REV. OF BOOKS, Apr. 23, 1992, at 5. Such movements do not affirm values or contain a vision for a brighter future, but attempt to define society by opposition and by focus on backward-looking criteria.
88. HABERMAS, supra note 84, at 94 ("this revolution has nothing to do with the political act of realizing Natural Law, in the sense of constructing a constitution which organizes the total society") (paraphrasing Thomas Paine).
touched. Civil society was simply left as it was prior to the Revolution. The American Revolution brought civil society closer to the State by removing Britain's role in governance, but entailed no drive to reform or rebuild civil society.

Despite post-communist civil society theory's affinity for the American Revolution's "common sense" approach, the eighteenth century American model is of limited use. After the American Revolution, a no-reform policy made sense, because resources were already in the possession of "common sense" institutions. In contrast, the post-communist States have a virtual monopoly on all resources. Some type of affirmative State reforms of society are necessary for civil society to function with any power in the post-communist world.

Moreover, the post-communist State cannot simply transfer resources to traditional civil society institutions or privatize resources in accordance with "common sense," because authentic institutions and a traditional local "common sense" are not readily identifiable. Vajda recounts how, despite the existence of kernels of civil society throughout the communist era, there actually have never been strong institutions independent of the State in Eastern Europe. Strong, centralized, State power has usually been a necessity in the region due to the constant invasions, competition, and threats from Turkey, Russia, and Germany. Despite the professions of affinity for civil society by anti-communists, it is a sad, historical fact that Eastern Europe possesses few traditional structures with strong grass-roots foundations. As social scientist Claus Offe puts it, the post-communist world is an "associational wasteland." The emphasis, during the transitions and in the underlying civil society theory, was upon personal morality as opposed to group identities. That emphasis reflects the absence of distinct collective identities and forces. In addition, the institutions that do exist have little experience actually participating in a democratic polis, because political democracies in the region have only

89. See Stephen Holmes, Gag-rules or the Politics of Omission, in CONSTITUTIONALISM AND DEMOCRACY 19, supra note 20. Of course, the American Revolution marked the dissolution of monarchical social dependencies.

90. Vajda, supra note 73, at 348 (warning that the adoption of political democracy in the communist world will not ensure social autonomy).

91. Id. at 343 (civil society has never been able "to gain more than a limited measure of social autonomy").

92. Claus Offe, Strong Causes, Weak Cures 1 E. EUR. CONST. REV. 21, 23 (1992). Although I agree with Professor Offe's characterization, I do not buy into the "myth of 'starting from scratch' " after the demise of communism. See Stark, Path Dependence, supra note 4, at 20. Although there is an institutional vacuum, I recognize that there are "institutional legacies of the transitions." Id.; see infra part III.B (discussing the post-communist political parties, peasant movements, international investor groups, the Church, and other currently powerful civil society institutions, which either lack deep roots among citizens or exercise power disproportionately).
existed sporadically.\textsuperscript{93}

A quick glance at the newspapers reveals exceptions in the form of recently resurrected ultra-nationalist, ethnic, and religious identities. But those in the forefront of such collective identities are often demagogues exploiting the mere shell of an antiquated identity which failed to evolve during the communist era. Although there are notable variations, many of the ethnic, religious, nationalist, and minority movements in the post-communist world are not manifestations of the contemporary relevance to society of traditional value systems. Instead they are mostly examples of old labels being abused by desperate individuals to define themselves in opposition to others rather than unto themselves through affirmative values.\textsuperscript{94}

If autonomous and dynamic civil societies are to arise and contribute to the future directions of their countries, then post-communist States will have to synthesize the models of the French and American Revolutions. As in the French model, the State must mobilize civil society. As in the American model, the State must limit itself in deference to what exists prior to the State action. Accordingly, the challenges of the change in Eastern Europe give rise markedly to the input and output issues of modern civil society.\textsuperscript{95} The danger of State action co-opting civil society is at a zenith, because a major State role is inevitable, given the current distribution of resources and otherwise debili-

\textsuperscript{93} Vajda, supra note 73, at 359. In Poland, the Solidarity union and the Catholic Church had appeared during the 1980s to be promising institutions for a post-communist civil society. However, after the collapse of communism, it appeared that the support during the 1980s for those and other organizations had been more of a product of opposition to communism than an affirmation of the values of those institutions. Wiktor Osiatynski, an expert advisor to the Polish Senate on constitutional reform, keenly observes:

Ever since the early 1980s, a majority of scholars and observers agreed that a crucial agent of change in Poland would be the emerging 'civil society'.

The developments in Poland disproved this hopeful conclusion. By mid-1990, the civil society, instead of being a solid foundational structure, was merely a set of strategies and instruments to countervail the power of the communist system. . . . With the end of communism, . . . [t]he civil society began to disintegrate.

Osiatynski, supra note 8, at 855-56.

\textsuperscript{94} Claus Offe's study of "ethnification" and nationalism in the post-communist world offers explanations for this recent trend. Six of his explanations indicate the lack of a relation between this trend and the contemporary relevance of ethnic and nationalist values: (1) as a means to distinguish themselves from the prior regime, (2) as a "keep what we have" reaction to economic panic, (3) as a means for engaging in violence in light of the weakness of the State, (4) as a backward-looking, nostalgic response to cynicism about any forward-looking ideals, (5) as part of "the logic that 'what they are doing to our people we are entitled to do to their people,'" (6) as a reaction to the rediscovery of the history, suppressed by the prior regimes, of the atrocities committed by opposing ethnic groups. Offe, supra note 92, at 22-23. Offe provides two reasons which hint that this trend may be a result of the contemporary relevance of old value systems: (1) the strategic value of pooling resources and (2) the need for social guidance. But he concludes that ethnification and nationalism are playing such roles solely because they are the only associations readily available, rather than because they stand for popular values. Id. at 23.

\textsuperscript{95} See supra Part I and beginning of Part II.
tated condition of civil society. The opportunities for grass roots control over State output may also be at a zenith, because the dominant public and pseudo-civil society hierarchies of the past four decades have been destabilized.

B. The Development of Post-Communist Civil Society

1. 1989: The Early Days

The dissident movement succeeded at showing that not all functional civil society institutions are necessarily facilitated by the State. By the 1980's, the artificiality of Marxist-Leninist institutions' authority was clear, even though such institutions continued to retain officially most of society's strategic positions. Beneath the camouflage of societal compliance with communism, there existed underground initiatives such as samizdat publications, jazz and rock bands, philosophy lectures, filmmaking, and religious teaching.

As the official bans on societal pluralism disappeared during the days of change in 1989, these authentic manifestations of civil society surfaced, if they had not done so already, and flourished. Public matters were discussed by non-State associations. Dissident groups, whose names indicated that they sought to function as civil society associations, rather than as instruments of the State-co-opted political system, emerged as representatives of sectors of the public at roundtable negotiations for political change. Such groups included the Civic Forum in Czechoslovakia; the Democratic Forum and the Alliances of Young Democrats and Free Democrats in Hungary; and the Citizens' Parliamentary Club in Poland.

In addition, private interests flourished free of economic domination. Englishman Timothy Garton Ash recalls nostalgically how 1989 in Eastern Europe was a time of "family life, time and space for serious conversation, music, literature, not disturbed by the perpetual noise of our media-driven and obsessively telecommunicative world." Ash concludes his eyewitness account of 1989 in Eastern Europe with "the question of questions after 1989...: What if any of these good things will survive liberation?"

96. See supra note 2 (defining "strategic position").
97. In Romania there was the Civic Alliance. Unfortunately, civil society theory did not have a widespread effect in Romania and the majority of the populace felt more comfortable associating itself with the National Salvation Front, a group which, as its name implies, sought to bring about change "from above." The consequence of having a national savior lead the change is State action to stabilize the savior's political power in the style of the communist party, rather than the fostering of diverse grass roots organizations.
98. Ash, supra note 73, at 154.
99. Id. at 154.
2. What’s Wrong With This Picture?: The Crisis of Post-Communist Civil Society

Today a visitor to Eastern Europe can find many interesting signs of “progress.” Structured political parties take part in ruling and opposition coalitions. Most major cities have at least one McDonald’s, which is usually located in a historic locale. MTV is broadcast in public squares and available in most homes. The Pope has traveled to most post-communist countries and been honored with commemorative postage stamps, tributes from political leaders, and the return of Church property. International investors, the Church, and independent political parties are all examples of civil society. So what is wrong with this picture?

a. Elitism and the Absence of Authentic Institutions

In Eastern Europe there is a simultaneous underdevelopment and hyperdevelopment of post-communist civil society. The result is a “general crisis of civility.” Many of the dissident associations which identified themselves as vehicles of civil society have moved into positions of political power. However, their authenticity is questionable. The shift to multiparty democracy may have been too sudden. Sociologists David Stark and László Bruszt observe that the new parties’ “one-step uncompromised jump-start into electoral competition . . . was not conducive to sinking deep roots into the society.” Janos Kis, a leading dissident philosopher who resigned in October 1991 from his position as the President of Hungary’s Alliance of Free Democrats, comments that much of the public now feels locked out as they watch these groups of elites engage in pet projects.

Evidence that Stark, Bruszt, and Kis are correct is provided by the sharp drop in voter turnout. Much of the initial popularity of the main opposition parties was probably based on “the sheer novelty” of

100. Havel, supra note 3, at 6.
102. Janos Kis, Social Democracy in Hungary (Oct., 1991) (unpublished paper delivered as part of The New School for Social Research’s Democracy Seminar Series, New York, NY) (on file with the Michigan Journal of International Law). For similar comments on the first Polish post-communist government, see Osiatynski, supra note 8, at 857 (“The only thing that the intelligentsia-dominated government and Parliament neglected was to communicate with the society. They claimed to rule ‘for the people,’ but they definitely did not rule ‘by the people’ or ‘through the people.’ In private conversations, some deputies to Parliament and members of the government expressed contempt toward ordinary people.”).
their existence and the necessity of appearances of unity to defeat communism. The fact that Stanislaw Tyminski, a relatively unknown expatriate who was unassociated with a major domestic political group, could quickly rise in popularity to receive twenty-one percent of the presidential vote in Poland is another sign that the new parties, which put themselves forward as vehicles of civil society, actually have tenuous connections with society. Further support for the thesis that the original post-communist parties do not have foundations in civil society is the fractionalization of many of the 1989-90 political parties, in the year following the first elections, in Poland, Czechoslovakia, and Hungary.

The problem with the empowerment of elites in the new democracies is that the source of power is not the dynamism of civil society, but the system itself. One sociology commentator has even suggested that awareness of the probability that newly legalized opposition parties would assume the role of new elites, which "channel politics away from the ebullience of civil society" in order to stabilize themselves, may have been the reason why the communists invited those parties to the negotiating table. This suggestion borrows from an

103. O’DONNELL & SCHMITTER, supra note 71, at 48-56 (explaining sudden popularity of new, independent political organizations when a totalitarian regime changes to a multiparty system).

104. See Klingsberg, Judicial Review, supra note 4, at 131-32 (cooperation against communism was the unifying "movement of nationwide scope") (citing András Bozóki, Hungary’s Road to Systemic Change: The Opposition Roundtable 19-20 (unpublished manuscript, Law School, Eötvös Loránd University (Budapest), József Bőröcz trans., 1991) (manuscript on file with the Michigan Journal of International Law)); see also ASH, supra note 73, at 146 (discussing the quick change from unity to factionalism once communists were out of power).

George Soros recently stopped funding Charta 77, the original Czechoslovakian dissident organization, because it had failed to emerge as "an institution of civil society." Soros Resigns from Charta 77 Board, 3 OPEN SOC’Y: CHRON. OF THE SOROS FOUND. 3 (Mar., 1992). See also supra note 93 (discussing Poland).

105. Kis, supra note 102. Kis also points out that there is no traditional family association with the new political parties, as there is for instance in Germany. Id.

106. See Stephen Engelberg, In Polish Vote a Clear Slap at Reform, N.Y. TIMES, Oct. 29, 1991, at A3 (discussing splintering of parties); Laber, supra note 87 (on split up of Public Against Violence in CSFR). In Hungary, the Smallholders have split into two factions and dissension within the MDF is common. As for the Alliance of Free Democrats, the leader of the party since its inception resigned in October 1991.


109. ARATO, supra note 107, at 19, 22. Nevertheless, in this working paper, Arato is much more optimistic about the potential for post-communist dissident associations-cum-political parties to foster and embody civil society, through ties to social movements, than he is about the potential for political parties in the West. Id.; see also BRUSZT & STARK, supra note 101 (discussing "attempt by (renamed) communist/socialist leaders to take advantage of the perceived weakness of civil society").
observation made by analysts of Latin American transitions from totalitarian control. Those analysts point out that ruling elites suddenly permit quick elections and risk abolition of their rule, because these old elites seek to empower new elites and thereby stunt social change and the full development of a dynamic civil society.110

Havel notes that Czechoslovakian parties assume a manipulative approach to the public, rather than serving or responding to the public.111 This was also the basis for his critique of the communist discontinuity with civil society. In 1984, Havel accused the communists of following the “theory of politics as a rational technology of power.”112 Politicians must rely on technique when they have no substantive grass roots.

Another significant indication of the crisis of civil society in post-communist nations is the discontinuity between the language of the parties in power and the language used by private individuals to communicate meaningfully in a public setting. In recent essays, both Havel and the Vice-president of Bulgaria note how the language of politics in post-communist Europe is dominated by hyperbole, meaningless Western expressions, and cliches that are not found in common speech.113 Havel points out that even “when a personal tone does crop up, it is usually calculated, not an outburst of personal authenticity.”114 The Vice-president of Bulgaria calls the terminology of the new politics “anti-language,”115 or language imposed from above in an effort to stabilize society. By contrast, the political use of the language of authentic civil society would reflect the empowerment of civil society’s dynamism.

Similarly, the media has become a vehicle for stability rather than for empowerment of civil society. Prague’s Radio Stalin and Budapest’s Tilos Radio each arose as popular “pirate” radio stations during the early days of post-communism. Domestic communications enthusiasts sent diverse local and non-commercial music and messages across the airwaves. However, bureaucrats shut down both stations. In addition, performances by local musicians have been virtually elim-

110. O’DONNELL & SCHMITT, supra note 71, at 57-58; Osiatynski, supra note 8, at 856 (“It turned out to be impossible to sustain a Polish form of civil society (a bulwark against the State) with the very same people who became a part of the State.”).

111. Václav Havel, The End of the Modern Era, N.Y. TIMES, Mar. 1, 1992, § 4 at 15 (“technocratic . . . approach . . . to political power”). See also supra note 93 (discussing Poland).

112. Havel, supra note 40, at 387.


114. Havel, supra note 111.

115. Dimitrova, supra note 113.
inated from Hungarian television in favor of foreign videos (prompting a rally in Budapest).

In October 1990, the state-run media also attempted to suppress a sudden manifestation of civil society in Budapest: the taxi and truck drivers went on strike in response to an increase in gasoline prices. The response to this independently organized event revealed the problems confronting the development of civil society. Representatives of Prime Minister Josef Antall's Democratic Forum (MDF) sat in the television news studios controlling all of the initial reports on the strike and sent out the message that the use of force against the strikers was imminent.\textsuperscript{116} Nevertheless, the MDF's efforts to use State resources to suppress, rather than to incorporate, the dynamism of civil society failed. The MDF could not censor the strikers' message, because, in response to a demand of the strikers, the television and radio media provided live coverage of the government negotiations with the strikers. In addition the police chief announced publicly that he would not order his officers to engage in violent suppression of the drivers' expressive activity.

Further evidence, however, of the uncertainty of civil society characterized the October 1990 strike. A plethora of organizations took part in the strike negotiations. Representatives from opposition and ruling political parties, official unions, unofficial unions, and token drivers were all present. Exactly who was the authentic institutional representative of the strikers was not known, so it was best to just let as many groups as possible sit at the negotiating table. If there had been an established civil society institution to communicate the concerns of the drivers, then those concerns could have been considered prior to the strike. More importantly, an established civil society institution could have effectively protested, and negotiated a reduction in, the price hike in a manner more contained and directed than this inefficient, disruptive strike action and emergency negotiating session. The drivers felt compelled to close access for three days to all bridges, borders, main squares, and airports, and to involve nearly every official in tense negotiations — in which the destiny of the country appeared to be at stake — simply to work out the narrow issue of gasoline prices.

In sum, two manifestations of the crisis of civil society emerged

\textsuperscript{116} The MDF's exploitation of the state-dominated media was probably not limited to its actions during the taxi strike. Prime Minister Antall has sought to appoint exclusively MDF loyalists to key positions at the television and radio stations.

In Romania, the government's domination of resources for the preparation of newspapers also has been exploited to limit the dynamism of civil society. See John London, \textit{Freedom Within Limits: The New Media}, \textsc{Index on Censorship}, Aug. 1990, at 27.
from the strike: (1) the drivers almost did not have an institution through which to express their concerns; and (2) the government nearly prevented the drivers from expressing their concerns through ad hoc institutions. These characteristics of the civil society crisis take on particular significance now, when the economy is in poor condition. During difficult economic times, group interests require opportunities to communicate their special needs. Bruszt and Stark conclude that the crisis of civil society places the entire economic transition from communism at risk:

[T]his almost totalizing supremacy of party politics finds the society unorganized and still lacking intermediary forms of political organization such as trade unions, corporatist institutions, or broad social movements. . . .

[I]t may well . . . be the case that no one will be able to gain society's support for the government's economic policies. . . .

. . . [T]he absence of organizational ties into the society means that [the State] has neither the means to know the limits of society's tolerance nor the channels to persuade it to make those sacrifices. . . .

. . . [T]he Polish and Hungarian cases might yet demonstrate that vital trade unions not only mobilize but also demobilize and that the transition from redistribution to markets will be more difficult in their absence.117

b. The Legacy of Learned Helplessness

The source of the crisis is not solely the conduct of the new elites. The problem lies with citizen perpetuation of a syndrome of learned helplessness. "[E]ven now, when so many words have been said about freedom, a lot of people still feel uncomfortable with it—with the opportunities it presents."

118 Individuals hesitate to step forward to build institutions which can embody their autonomous beliefs. Many individuals are simply disaffected and fearful that any attempt to assert and to institutionalize personal ideals will foster and manifest their alienation from society, rather than their capacity to participate. A vivid example is the hesitation of large segments of Eastern European Jewry to come out of the closet and incorporate their Jewish identity into their participation in the post-communist world. Another example is the enthusiasm for anti-communist or revolutionary justice movements, as opposed to fervor for the affirmation of any forward-looking beliefs. After four decades of communism, anything that requires an affirmation of belief is seen as propaganda. It is pref-

117. BRUSZT & STARK, supra note 101, at 47.
118. Dimitrov, supra note 3.
erable to look backward and define oneself in opposition.119

c. Unchecked Special Interests

Another problem that stems from the commencement of political democracy in the midst of an underdeveloped civil society is that those autonomous social forces that have organized receive a disproportionate share of private resources from the State. The State is co-opting these minority but organized forces into clientele at the expense of enabling the rest of civil society to develop. The civil society group that most readily organized itself and set forth its interests was the peasant farmers.120 In each post-communist country there is a minority group whose sole goal is to put as much State property into the hands of the peasants as possible. Of course, the peasants are not the only individuals in Eastern Europe who desperately need entitlements to State property. These groups act as if the defeat of communism was the peasants’ revolution. Other groups with similar outlooks on privatization are the select international investor funds, which often expect that they will be entitled to buy and do what they wish with any State property for which they can submit the highest bid, and the Church, which expects to receive entitlements to just about all property it ever controlled including educational institutions. The nurturing of “genuine private initiatives”121 has not emerged as privatization’s underlying premise. Instead, those in politics use privatization to “buy grateful and loyal adherents.”122 Accordingly, post-communist States have limited those who have been able to obtain rights to State prop-

119. See Brodsky, supra note 39, at 7 (“. . . looking backward is more rewarding than its opposite. Tomorrow is just less attractive than yesterday. For some reason, the past doesn’t radiate such immense monotony as the future does. . . . the future is propaganda.”). See also Laber, supra note 87 (explaining that the current dearth of civil society institutions in Czechoslovakia, as a legacy of the unique brutality of the communist regime there, has left an “ideological and emotional vacuum” which is responsible for that country’s penchant for revolutionary justice, as embodied in the lustrace. Meanwhile, Poland and Hungary had relatively more well-developed civil society institutions under communism and therefore are now less prone towards revolutionary justice witch hunts).

120. See, e.g., ASH, supra note 73, at 146 (observing how peasant farmers quickly emerged as “the most distinctive and determined group” and would ignore party lines to “conspir[e] to advance their sectional interests”).

121. Major, supra note 4.

122. Id. In particular, Major relates a scam to channel shares for certain State properties into select hands. Major implies that these problems might be resolved by a shift from privatization run by a central organ, like Hungary’s State Property Agency, to the decentralized system of spontaneous privatization, in which purchasers can negotiate sales directly with the managers of State businesses and factories. Id. There are actually many choices in structuring a privatization system. Professor David Stark’s analysis of Hungarian privatization describes several of the dimensions: foreign v. domestic ownership; spontaneous v. controlled; institutional v. natural owners; concentrated v. dispersed ownership. See Stark, Privatization in Hungary, supra note 4. The choice of a particular organizational system will not solve the crisis of civil society. For instance, faith in the capacity of a switch to spontaneous privatization oversimplifies the
property (except for very small restaurant operations) to peasants, certain international investors, and the Church.\textsuperscript{123} Yet, there is no indication that these groups have any more merit than other less developed groups in civil society.

The domination of these special interests is problematic because (1) those with competing interests are not yet organized, and (2) the creation of State clientele during these first years of post-communism will have lasting effects on civil society because the economically empowered are now being created through the transfer of State resources to private hands. The warped empowerment of certain sectors of civil society would result in economic and political hierarchies that could stunt the grand dialogue of modern civil society\textsuperscript{124} for years to come.

The stunting of civil society, by the factors described in this part, is more dangerous now than it was under communism. If large sectors of the populace are locked out of the new public and private hierarchies and therefore become disillusioned with democracy, then the next regime may well be a form of populist authoritarianism. The ambitions of those who would like to co-opt the transition to democracy for their own benefit could bring on “the deadly merry-go-round of revolution and counter revolution.”\textsuperscript{125}

\textbf{IV. THE ROLE OF CONSTITUTIONALISM IN THE REBUILDING OF CIVIL SOCIETY}

The limitation of the State in order to ensure the empowerment of civil society is a traditional role for constitutionalism. In a recent historical analysis, Akhil Reed Amar points out that an original purpose of the U.S. Bill of Rights was the protection of the existence of “various intermediate associations—church, militia, and jury—designated to create an educated and virtuous electorate.”\textsuperscript{126} A theme of Amar’s study is that the Framers sought to have rights facilitate the development of societal institutions that ensure that “the real direction of soci-

\textsuperscript{123} See infra Part IV.

\textsuperscript{124} Other disproportionately powerful civil society groups are the Polish Workers Councils, “one of the most important institutional legacies in the economic realm of Poland’s extrication from state socialism,” Stark, \textit{Path Dependence}, supra note 4, at 41 n.45; and the Hungarian State enterprise managers, “the best-organized social group during the previous decade.” \textit{Id.} at 49. For discussions of how those groups have attempted to make themselves the locus of the privatization process, see \textit{id.} at 41 n.45, 49, 51.

\textsuperscript{125} \textit{But cf. supra} note 4 (discussing “mass privatization” plans for sales of certain large state-owned companies).

\textsuperscript{126} \textit{See supra} Part I.
This part argues that the generation of such a rights jurisprudence is post-communist constitutionalism's challenge for the future. First I will illustrate how a post-communist constitutional court can enforce constitutional rights to ensure that privatization decisions protect civil society. After an explanation of why such review would not place post-communist judiciaries in an overreaching position, I will discuss analogous instances of judicial review in the United States. Finally, I will comment on why post-communist courts should avoid certain concerns underlying the decisions in the analogous U. S. cases.

A. Constitutional Review of Privatization and Transformation

One lesson from the downfall of Marxism-Leninism is that political stability founded upon state-created clientele has its limits. Even if a regime has military force and access to all of society's property on its side, stability cannot be guaranteed if the State insists on steering and penetrating, rather than creating space for the empowerment of, authentic civil society. Civil society has a power unto itself. Even the most determined paternalistic efforts to channel authentic civil society into "innocuous outlets," as Kadar did in the last decades of Hungarian Communism, are subject to failure.

This lesson from the downfall of Marxism-Leninism has implications for those who would like to apply currently the prudence often attributed to the democratic visions of de Tocqueville and Madison. De Tocqueville and Madison argued that democracy could only exist with stability if unaccompanied by any quest for equality of property and other strategic resources. It was fair to make such an argument in the eighteenth century because at that time inequalities within civil society, including the complete non-recognition of certain sectors, had strong foundations in tradition. In the modern era, the selective suppression or neglect of institutions and sectors of civil society no longer can function to stabilize a regime. Traditional lines between those worthy of a voice and other resources, and those whose neglect must be accepted for the sake of stability, have faded. A political system that discriminatorily empowers certain sectors of civil society faces instability and risks losing its legitimacy in the modern world. A regime

127. Id. at 1185 (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293-94 (Vintage ed., 1945)).
128. Vajda, supra note 73, at 356.
129. See supra note 20 and accompanying text.
must embrace dynamism to be stable. This means coordinating State action and inaction so that the State does not foster the status quo suppression of authentic voices.

The mission of the post-communist State is to provide citizens with resources for the development and manifestation of their cognitive and moral competencies, rather than to dictate the direction of the future in a paternalistic fashion, as certain special interests would prefer. Privatization must provide the resources for the institutional structures necessary for this mission. If civil society were naturally thriving and the only role for the State was to mold public space so that each group interest could participate, then the task would not be so difficult. The problem extends beyond simply permitting preexisting societal groups to participate. Those societal groups need to form. What is needed in this socially devastated region is not only a "more realized State," as Hegel described a State that incorporated input from more sectors of society, but also a more realized civil society.

The circumstances described in Part III call for a new kind of victory. Arato and Cohen elaborate: "victory is no longer seen as the inclusion in state power (reform) or in smashing the state (revolution) but, among the most reflective segments of the movements, as the rebuilding of civil society and the controlling of the market economy and the bureaucratic state." The vehicle for ensuring "an adequately defended, differentiated, and organized civil society" is constitutional law. Post-communist constitutionalism should function not as a State master plan, but as a restriction upon privatization like Havel's "Absolute." Constitutionalism should seek to prohibit the State from structuring the transformation from communism in a manner that prevents authentic strivings from flourishing. The State should not favor a specific truth, but let truths live and thrive.

A mode for enforcement of constitutional law is review of State action by an independent constitutional court, which is insulated from the need to establish a clientele base among special interest groups. I advocate that such courts review all State decisions on private access to the vast range of resources currently within the control of the State.

131. Arato & Cohen, supra note 9, at 47.
133. Arato & Cohen, supra note 9, at 59.
134. Id.
135. See supra Part II.
These privatization decisions occur by sale, by state-created entitlement, as well as by restrictions, such as the shutting down of a pirate radio station. The purpose of the constitutional review would be to determine when the state action is empowering civil society and when the action is a discriminatory suppression of autonomy within civil society and therefore must be limited in some manner. Infringement upon or discriminatory neglect of a civil right signals that State action is suppressing civil society. While courts must defer to police power concerns like health and safety, the roots of the executives and legislatures in a developed civil and political society are too shallow for post-communist constitutional review to adopt deferential post-Lochner scrutiny of government rationales. When the State action suppresses autonomy within civil society, the judiciary must enforce those constitutional rights—whether they be free speech, environmental, or liberty rights—that the State has neglected in its effort to favor a particular client.

Hungary has the benefit of an insightful Constitutional Court that is well suited for such an undertaking. Indeed, the Court has already enforced this type of constitutionalism on several occasions. Constitutional courts in other countries could play similar roles. The Hungarian Court’s Land Act Cases struck down, pursuant to the equal protection clause, attempts by Parliament to distribute selectively State property to peasants. The Court also is considering whether to strike down legislation which entitles the Catholic Church to large amounts of State property, which otherwise could be used by educational institutions, student organizations, and other civil society groups. The invalidated enactments would have served as revolutionary instruments of discrimination and ultimately suppression. Equal protection requires that the State privatize resources in a manner that permits the institutionalization not only of one religion, but of all other identities.

Ecological rights—recognized in the draft Czech and Slovak Constitutions, as well as in the adopted Hungarian and Bulgarian Constitutions—should require courts to review privatization sales of polluters to protect those living in blackened wastelands near manufacturing plants. The argument that new investors will perceive environmental cleanup as in their best interests and therefore undertake cleanup unilaterally does not apply to post-communist Europe. It will


137. Id. at 139 & n.254.
be many more years before market forces will dictate to a private investor that environmental cleanup is his or her responsibility, because post-communist Europe is far from becoming a free market. As a result of administrative and other problems, in over two years only ten to fifteen percent of the property has been privatized.\textsuperscript{138} The State must either mandate the inclusion of a commitment to an environmental cleanup plan as a part of all purchases of State property or include the cost of such a plan in the sale price.\textsuperscript{139} In this way, the State is privatizing not only a business, but also responsibility for the environment. A constitutional court should mandate such action by the State when reviewing the constitutionality of the privatization of a company that pollutes. If a court does not review the privatization of polluters in such a manner, then it will be neglecting citizens' environmental rights.

Perhaps the most delicate area of privatization is communications. This area is crucial to the functioning of modern civil society's grand dialogue.\textsuperscript{140} The language that rules the day should be the product of debate among civil society, not newspeak invented by politicians. Accordingly, conduct like that of the MDF in the newsroom during the taxi strike\textsuperscript{141} must be constitutionally enjoined under free speech rights, as should the bureaucratic decisions to shut down pirate radio initiatives without a compelling police power justification. Furthermore, courts must recognize that post-communist State action can infringe on free speech rights not only by direct restrictions, but also by discriminatory privatization of media outlets and other scarce resources strategic to communication. In addition, until the major political parties are better rooted in society, constitutional courts should invoke free speech rights to invalidate campaign financing laws that fail to fund a wide range of parties.

Constitutions must also protect the new domestic capitalists from restrictive regulation. This "amorphous social and political category"\textsuperscript{142} sells goods in metro stations and parking lots, and offers serv-

\textsuperscript{138} See supra note 4.

\textsuperscript{139} For discussions of State attempts to accommodate environmental concerns in the privatization process, see Marlise Simons, Pollution Blights Investment Too, in East Europe, N.Y. TIMES, May 13, 1992, at A1, A12 (discussing privatization plan in which the Polish government and the investor set up a separate escrow account to fund the environmental cleanup); see generally Margaret Bowman & David Hunter, Environmental Reforms in Central and Eastern Europe: From High Hopes to Hard Reality, 13 MICH. J. INT'L L. 929.

\textsuperscript{140} See supra Part 1.

\textsuperscript{141} See supra note 116 and accompanying text.

ices like plumbing and carpentry through leaflets. Nearly all of the participants in the economy have a vested interest in opposing the further development of such activities. Most economic actors perceive it to be in their best interest to maintain the old system in which a stable return was guaranteed for the inefficient production of low quality goods. Therefore, as Edmund Mokrzycki observes, “social energy is mobilizing itself to defend group interests that are a product of the epoch of real socialism and are now threatened by the market.”

Consequently, the domestic free marketeers are often sneered at as black marketeers and gypsies. But this vibrant sector must be welcomed into society, rather than suppressed. Technically, these small-scale free marketeers are still illegal in most post-communist countries. But States have wisely refrained from restricting their sales. In Hungary, for instance, approximately thirty percent of the GNP stems from such activity. However, if Professor Mokrzycki’s observation is correct, efforts are underway to limit the growth of these genuine private initiatives. The Constitution must protect rights to private property and contractual liberty by carefully scrutinizing the rationality of future efforts to restrict such small-scale capitalist initiatives.

Constitutional oversight of the transformation of the State-dominated field of education is also necessary. Elementary education may shift from the domain of the Communist Party to that of religious or ultra-nationalist organizations. Free speech and liberty rights must protect citizens from the suppression of ideas in the schools. In addition, civil society development depends on the invalidation of regulations that require a style of teaching that develops uncritical minds. Under communism, faculties of law required students to memorize lists of Code terminology and ideological cliches. Written and creative

143. Id.

István R. Gábor points out that in Hungary the new entrepreneurs also favor the entrenchment of the rules of the communist era. ISTVÁN R. GÁBOR, ON THE IMMEDIATE PROSPECTS FOR PRIVATE ENTREPRENEURSHIP AND RE-EMBOURGEOUISEMENT IN HUNGARY (Cornell Project on Comparative Institutional Analysis, Working Papers on Transitions from State Socialism No. 90.3, 1990). The small-scale free marketeers prefer the role of black marketeers for many of the same reasons that pimps favor the illegality of prostitution: to avoid taxation, regulation, and competition. Gábor proposes that the way to win actors over to the free market is through State coordination of private actors in each industry to ensure that nobody is left behind at the outset. Even if Gábor’s proposals are not followed, the Constitution should protect the new “black market” entrepreneurs and thereby encourage others to follow that path. In Czechoslovakia, a sign of resistance to the market economy is the lack of interest in mass privatization programs, which present citizens with the opportunity to become “small active investors with an interest in the ups and downs of the market.” See Stark, Path Dependence, supra note 4, at 35 n.31 (“According to public opinion polls at the beginning of 1991, interest in participating in the voucher-auction program [of Czechoslovakia] was very low.”). However, domestic interest in Czechoslovakian privatization increased dramatically in 1992.

examinations were non-existent. The curriculum resembled a medieval catechism more than the training of active, critical minds that would construct, lead, and reform the juridical world. There is currently a strong tendency to retain this antiquated approach through the incorporation of new lists and cliches. If lawyers are to emerge as active participants in a modern civil society, through membership in bar associations and representation of a diversity of interests, then they must be trained in an environment which fosters dialogue and critical exchanges. Constitutional rights must protect unorthodox teaching initiatives from falling prey to education ministry regulations that would have civil society trained to suffocate itself.\textsuperscript{145}

Constitutional law should also protect the legal profession from rules that restrict its privatization. In the communist legal world, lawyers deferred to State investigations and prosecutions by never engaging in private investigations and only bringing civil actions after a successful State prosecution. There remains a sense that an activist lawyer who ignores these customs would somehow violate a code of ethics or court rule.\textsuperscript{146} Some countries also restrict the capacity of lawyers, who are admitted to the bar, to practice law independently of officially designated State collectives. The legal profession must be privatized or else civil society will be deprived of a useful resource. In order to detect infringements on the liberty rights of lawyers and their clients, constitutional courts should scrutinize the application of these Soviet-style restrictions on private lawyers.

This proposal to have constitutional courts oversee these privatization processes may sound overreaching to a Western audience. But no Western democracy has ever experienced the circumstances present in post-communist countries. A transition from communism requires a historic amount of action by a constitutional State and therefore presents an unprecedented risk of misuse of State power. Not only is there a great deal for the State to do, but each action is of major societal significance. Current privatization decisions will shape both the

\textsuperscript{145} One notable endeavor in this realm is an attempt to start a new law school in Olomouc, Czechoslovakia. Last year, Western law professors and former dissidents put together a curriculum for the Olomouc Faculty of Law which appeared radical and experimental in comparison with other Czech and Slovak law schools, where lists were still being memorized. Yet, the Olomouc legal training program almost never got off the ground, because of staunch resistance from the bureaucrats in charge of legal education. Only after an arduous struggle did the Olomouc proposal receive State approval. Another unorthodox initiative is the Central European University. See George Soros, \textit{Underwriting Democracy} 129 (1991). The Constitution of each nation should protect such initiatives.

\textsuperscript{146} Although when Professor George Fletcher pressed Hungarian lawyers to show him such a rule, they could not. George Fletcher, Remarks at the Hungarian Ministry of Justice Seminars (Jan., 1991).
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short- and long-term futures of post-communist societies. (In contrast, State attempts to mold society in the West will be of much more limited effect, because traditional, propertied institutions of civil society are already established here.) In addition to the stakes being high, the politicians and bureaucrats making the privatization decisions have shallow roots in civil society. Finally, post-communist society is too weak to check the political branches without the assistance of rights enforcement by an independent judiciary.

B. The Protection of Civil Society in United States Constitutional Caselaw: Trends for Post-Communist Courts to Avoid

The distinction between privatization that creates autonomy and privatization that suppresses autonomy is a delicate one. Every privatization to a certain extent increases one entity's autonomy and neglects to empower another entity, because the entitlement is being created for only one entity. A jurisprudence of rights, however, should be able to determine empirically when an entitlement is providing a strategic resource necessary for the fulfillment of a right and when it is being made discriminatorily at the cost of suppressing another's unfulfilled right. The ensuing case analyses discuss a framework for making such a distinction.

The United States has never undergone a massive property right redistribution and civil society rebuilding effort on the scale of the post-communist privatization processes. Nevertheless, the federal and state governments do redistribute property entitlements through welfare and tax laws.\footnote{See Richard Epstein, Takings: Private Property and the Power of Eminent Domain (1985).} Another type of State action in the United States, analogous to privatization, is the creation of "rights of access" to forums for communication. A privatization is basically the creation of a "right of access" to a resource to which the State had been entitled formerly. The U.S. Supreme Court reviews the legal rules that deny or create "rights of access" to determine whether the rules conflict with rights to free speech. A review of caselaw in this area provides an outline of the issues that the post-communist constitutional courts will confront when determining whether privatization decisions conflict with the right to free speech. In addition, the critical assessments that follow point to controlling factors that post-communist constitutional courts should avoid if they are to develop a rights jurisprudence that protects civil society.

Challenges to the creation of a right of access to resources for com-
munication generally assume a variation on the claim that the newly created right violates free speech rights through discrimination against the potential for other groups to contribute to an informative public debate. The free speech rights at stake are those of either the listeners, the speakers, or both. For example, in *Regan v. Taxation with Representation of Washington*, a taxpayer activist group challenged a tax provision which effectively "subsidize[d] the substantial lobbying activities of veterans' organizations," but not the lobbying activities of taxpayer activist groups. Similarly, in *CBS v. Democratic National Committee*, the Democratic National Committee (DNC) argued against the constitutionality of the Federal Communications Commission (FCC) rule that a television broadcaster could air its own views, but refuse to air a DNC political advertisement which expressed contrary views. In each case the plaintiff challenged a legal rule, which controlled the distribution of rights of access to resources for communication, for allegedly discriminating against free speech rights.

1. Backward-Looking Criteria and the Availability of Private Sector Resources

In *Regan v. Taxation with Representation of Washington*, the Supreme Court ruled that a government subsidy for the speech of veterans groups did not require a subsidy for the taxpayer group. The reason the Court found no conflict with a free speech right was because the neglect of the taxpayer group failed to result in the suppression of ideas. What is strange about the Court's holding is that it does not rest upon a finding that veterans' organizations need subsidization and that taxpayers' groups do not. The Court of Appeals for the District of Columbia, sitting en banc, had decided that the legislative discrimination had no rational basis. Then-Justice Rehnquist, writing for the majority, reversed that decision based upon his own conclusory observations that the decision to refrain from subsidizing taxpayer groups "is not irrational" and that the decision to subsidize the veterans is justified because of veterans' past contributions to society. The majority never determined how much either group needed the subsidy to function prospectively.

Post-communist legislatures may well create discriminatory enti-
tlements to State resources based upon the past, as the U.S. Congress did in *Regan*. There are several civil society institutions in post-communist Europe that have been resurrected from pre-communist eras. These groups, which are usually religious and peasant organizations, exercise a disproportionate influence over legislatures due to their ability to exploit remnants of their old organizational structures. The justification for any discriminatory privatizations in their favor are the contributions that they made in the past in comparison with other more recently formed and equally needy groups. A post-communist court following Justice Rehnquist's approach in *Regan* would have to uphold a privatization that favored one of these resurrected institutions.

The consequences of discriminatory entitlements based on past acts, as opposed to forward-looking criteria, are significantly different in the United States than in the post-communist world. In the United States, the taxpayers' group might well be able to thrive without a State subsidy as the result of the large amount of resources available in the private sector. If post-communist courts approve the privatization of communicative (and other) resources after such an analysis, then they will fail to protect civil society from State suppression. In the post-communist world, such a discriminatory entitlement would suppress the chance for new, contemporarily relevant civil society institutions to have any chance for development. Courts should determine the effect of the regulation on the capacities of both the favored and disfavored parties to convey their messages as participants in modern civil society. The following critique of the *CBS* decision discusses further the type of analysis required to protect the free speech rights necessary for the development of civil society.

2. Deference to the Status Quo

In *CBS v. DNC*, the Supreme Court again upheld the challenged legal rule. The Court decided that the exclusion of the DNC from advertising on the CBS network did not infringe on any free speech rights. The Court compared the effect on free speech rights caused by granting a right of access to the DNC with the effect on rights caused by upholding the present rule which guaranteed CBS exclusive access. That analysis of the legal rule's effect on public debate was more prob- ing than the review in *Regan*, but just as misguided. First, the Court found that the DNC's desired right of access would cause "erosion of the journalistic discretion of broadcasters" and thereby infringe on the

154. See supra part III.B.2.c.
free speech rights of citizens to receive CBS's message. At least the Supreme Court here made an assessment of the rule's prospective effect on CBS's capacity to function as an autonomous institution in society. In contrast, in Regan, the Court only examined the basis for the veterans' groups' receipt of the entitlement through examination of backward-looking criteria, which were irrelevant to the prospective exercise of free speech rights.

The CBS decision falters when it turns to evaluation of the effect of the FCC's rule on the DNC. The Court found that the exclusion of the DNC's advertisement would cause no cognizable set-back to the richness of public debate, because the fairness doctrine was in effect. The fairness doctrine required "fair coverage" of "each side" of "public issues . . . presented on broadcast stations." Under this doctrine, the DNC's message would be related in a manner and context over which the DNC would have no control. A broadcaster's compliance with the fairness doctrine could result in impairment of the DNC's message rather than conveyance of that message. The fairness doctrine and the CBS decision completely ignored the significance to the DNC's message of circumstantial factors, such as the speaker's identity, the rhythm, and the metaphors, "that designate such matters as relevance, propriety, regularity, [and] conviction." The Court refused to recognize the difference between the fairness doctrine's conveyance of representative views and an advertisement's "special and separate mode of expression." The scales showed that airing the advertisement would infringe on CBS's contribution to public debate, while providing for no additional contribution from the DNC. Accordingly, the Court concluded that free speech rights were best protected under the rule permitting CBS to refuse DNC access.

CBS v. DNC turned out to be the first in a line of decisions that have held that the denial of a right of access is not of constitutional

155. 412 U.S. at 124; see also id. at 118-120 (discussing importance to listeners' free speech rights of noninterference with "journalistic judgment of priorities").
156. Id. at 131.
157. Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 369 (1969). The Red Lion decision's approval of the fairness doctrine also embodies a trend to be avoided. The Supreme Court approved the fairness doctrine's infringement on the broadcaster's speech, because the doctrine supposedly caused the broadcast of messages that would otherwise be excluded from television. But there was no evidence that the doctrine would facilitate the messages of marginalized speakers. Indeed, the marginalized messages could be impaired by a broadcaster complying with the fairness doctrine. The mere protection of a large number of voices, see, e.g., Associated Press v. United States, 326 U.S. 1, 20 n.18 (1945), or intended ideas, see, e.g., Red Lion, supra, is futile if contextual and stylistic factors critical to a message are not protected as well.
158. Said, supra note 2, at 216.
159. 412 U.S. at 131.
160. Id. at 130.
significance, as long as the denied speaker still has an opportunity to have its intended views conveyed in some form over the medium in question, regardless of the fact that such opportunity would be in a potentially unfavorable context. These decisions are especially curious because they each recognize, with respect to the party with whom the desired right of access would interfere, that context, rather than simply the chance to have an intended view voiced, is crucial to authentic, informative expression. The Court consistently refuses, however, to apply that realization to the exercise of free speech rights by the speakers who claim a need for the right of access.

Moreover, the Court provides no explicit basis for using a double standard. The CBS case was supposedly based exclusively upon the question of whether the legal rule infringed upon the listeners' free speech rights to an informative and rich public debate, rather than on the grounds that CBS's ownership of the station included a fundamental right to exclude alien speech. Nevertheless, Madison's warning

161. In Syracuse Peace Council v. F.C.C., 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990), an anti-nuclear power group challenged the F.C.C.'s new rules that eliminate the guarantee of fairness doctrine access. The Court upheld the rules, because (1) the "explosion" of radio and television media over the last twenty years ensured that speakers like plaintiff could find a broadcast forum and (2) the fairness doctrine impinged on the capacity of broadcasters to communicate their messages. The Court engaged in minimal comparison of the degree of infringement on the plaintiff's speech caused by using a marginal media outlet with the degree of infringement on broadcasters' speech caused by enforcement of the fairness doctrine. Id. at 662.

Earlier the Supreme Court had issued a similar holding in a print medium case, Miami Herald v. Tornillo, 418 U.S. 241 (1974). In that case, the Supreme Court struck down a statute requiring newspapers to provide space for replies to editorial comments. Just as the plaintiff in Syracuse Peace Council could go to another broadcast outlet, the party replying in Miami Herald could easily find another print medium to convey its message. See Syracuse Peace Council, 867 F.2d at 683 (Starr, J., concurring) (implying that Syracuse Peace Council's recognition that broadcast media are no longer scarce marks a point at which rights of access to the print and broadcast media can be treated the same). The basis for the Miami Herald ruling was that any infringement on the newspaper's communication was of major significance, while requiring the replying party to find some other news print outlet did not result in any infringement on free speech rights.

Another variation occurred in Pacific Gas and Electric Co. v. Public Utilities Comm'n, 475 U.S. 1 (1986), where a public utility argued against a regulation which permitted a consumer group to enclose a newsletter in the public utility's billing envelopes. The Court struck down the regulation's creation of a right of access. The holding explained that putting the insert in the envelope would infringe upon the utility's speech, while the consumer group's message would be unaffected if the group sent its message by mail in another envelope. Again, the Court's analysis was overly sensitive to the requirements of the communicative discipline of one party (the utility) and insensitive to the communicative discipline of another party (the consumer group).

162. In Syracuse Peace Council, Circuit Judge Starr's concurrence claims to be applying the same standard to the speech of the broadcaster as to the speech of the plaintiff, because the rights at stake are those of listeners rather than of either speaker. 867 F.2d at 685-86 n.12 (Starr, J. concurring).

In Miami Herald, the Court invokes the special historical respect of the government for the absolute autonomy of newspaper editors.

In PG&E, the Court claims that the case is like Wooley v. Maynard, 430 U.S. 705 (1977) and W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), where individuals were relieved of the
that interests of stability require the State to defer to the preexisting distributions of rights of access in the private sector.\textsuperscript{163} appears to be the controlling factor behind the Supreme Court's double standard. The party limited to "fairness doctrine access" is always seeking to justify a change of the distribution of access rights, while the party protected against even the slightest additional infringement on the context of its speech is always the party already in control of the strategic resource.

Deference to preexisting rights of access should not be a concern in post-communist countries, where the only preexisting rights of access are those of the State. The application of a double standard in the protection of free speech rights would not lead to the development or protection of a rich civil society, but to insulation of State domination and to "suffocation" of developing associations. Moreover, as post-communist courts review the privatization of scarce resources for communication, such as the few broadcast stations which exist in that part of the world, they must be careful not to invoke double standards in the evaluation of a privatization's effects upon different groups' speech. The post-communist courts should be especially suspect of State decisions to grant absolute control of certain media to the State or select private groups, while the State contends that marginalized speech can be protected through devices, like the fairness doctrine, which ignore access to control over crucial factors like context and manner of presentation.

\textbf{CONCLUSION}

This article should enable readers to better understand the importance of a well-developed civil society to the existence of social autonomy in a political democracy. The origins, elements, and potential consequences of the post-communist world's current crisis of civil society have also been reviewed. As the final section has shown, it is no easy task to use constitutional law to ensure that State privatization decisions carve out space so that the dynamics of modern civil society can flourish. Nevertheless, this constitutional challenge must be un-

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\textsuperscript{163} See supra text accompanying note 20. The development of a "rights of access" jurisprudence will become increasingly significant to communications within society as new technologies become available in Eastern Europe.
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dertaken, because of the tremendous obstacles that post-communist civil society faces and the implications of the current crisis for the future of an open society in the region.