theories, mainly England, France, Germany, Sweden, and the United States, have in many respects different formal laws. Yet, these differences seem to disappear if we look at the factual arrangements, the behavior of people, and the practice before the lower courts. I agree with the author's conclusion that the assimilation of law and fact that we witness\(^\text{11}\) is likely to increase, rather than diminish, the respect for law.

**FOREIGN LAW**


_Reviewed by Robert C. Berring*

The appearance of a major book devoted to the subject of modern Chinese law is a welcome event, since no survey treatment of modern Chinese law currently exists. Many of us who teach courses covering this area use photocopied materials for students, not a desirable avenue, but one forced upon us by the lack of a general treatment. Bodde and Morris' *Law in Imperial China*\(^\text{1}\) and Van Der Sprenkel's *Legal Institutions in Manchu China*\(^\text{2}\) have stayed in print for several decades but unfortunately both stop at 1911, the end of the Qing Dynasty. As of January, 1990 Bodde and Morris finally went out of print. Jerome Cohen's *The Criminal Process in the People's Republic of China*,\(^\text{3}\) while obviously focused on one area of the law, also provides a useful general perspective. However, the fact that it is so dated renders it useless as a survey treatment. Victor Li's insightful *Law Without Lawyers*\(^\text{4}\) sets out crucial background, but it is too lean to go beyond broad generalities and it too has become severely dated. There has been a spate of publications

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\(^{11}\) This development has been foreshadowed in another German publication unrelated to family law. See Spiros Simitis, *Die faktischen Vertragsverhältnisse als Ausdruck der gewandelten sozialen Funktion der Rechtsinstitute des Privatrechts* (1957).

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concerning post-1978 China, but they are narrow in focus, often concentrating on questions of international business.

Thus, Law in the People's Republic of China, edited by professors Folsom and Minan potentially fills a major need. At last a work of substantial size, (over a thousand pages), that focuses on the whole of the People's Republic of China (P.R.C.) legal system. Its extremely high price, $245.00, is troubling, but if it were to successfully fill the existing gap in the literature, Law in the People's Republic of China would be a required purchase for anyone interested in the field. Indeed the book had the potential to redefine the approach taken to Chinese law. It is especially disappointing, then, that the book is both limited and flawed.

The book, of course, suffers from unfortunate timing. The growth curve of interest in Chinese law and legal institutions in the United States has been deflated, if not reversed by the June 4, 1989 events in TianAnMen Square. The actions of the P.R.C. government caused an end to what had been heady optimism about the role of law in the new China. Suddenly questions about the relative role of law and Party policy have been resurrected and the prevailing mood of American scholars is one of mistrust and wariness. Still, this setback should not be seen as an insurmountable problem. The Chinese government has continued to evince an interest in modernization and at least some form of economic liberalization. Nor has the increasing network of links between the United States and China in areas related to law disappeared. At the time that this review was written, late December, 1989, the United States was cautiously re-establishing links at the official level; commercial links were never severed. Indeed the Chinese government has labored mightily to re-assure the world of its continued economic reform.5

This factor should be considered in tandem with the P.R.C.'s apparent commitment to playing a role in the international community of nations. These decisions imply continuing efforts within the P.R.C. to address the question of the role of law and its legal system. While still fragile, the growing infrastructure of legal institutions in China continues to survive. Law schools are still operating,6 courts are still in place and business continues. The very fact that they have survived demonstrates the vitality inherent in them. Only a fool could fail to recognize the potential for further drastic change in the P.R.C., either positive or negative, but given these facts, it seems probable that there will continue to be growth of both legal institutions and infrastructure. All of these factors guarantee continued interest in law in China.

Even if the Chinese decide to stunt the growth of these fledgling institutions, the Chinese system would still merit our

study. The roller coaster of the 20th Century has made China a ver-
tiable hothouse of legal theory. To date, almost every legal form has
been tried in the P.R.C. and we are continually surprised by new
variations. Modern China is a comparativist's dream. Within the
span of a century the Chinese have actively employed Imperial
Codes of ancient lineage, experimented with modern forms of civil
and constitutional law, suffered through periods of virtual anarchy,
employed the rhetoric of Marxist legal theory, conducted enormous
experiments in the use of true communitarianism and made innova-
tive strides in incorporating a market economy into a socialist legal
structure. The Chinese have spent decades working through ques-
tions of democracy and legitimacy. The question of where law and
legal structures fit into the scheme of modernization has been ex-
haustively explored in theory and in practice. How can one resist
studying each of these efforts?

In part, this is why the Folsom and Minan effort is so disap-
pointing. Given its title one assumes that the book will explore at
least the post-1949 developments in China, but in fact the book con-
centrates almost solely on the post-1978 era, doing little to place the
post-Mao events in any rational context. The context of the 1949-
1978 years is essential. Indeed reflection on the deeper fundamental
principles that run beneath the dizzying changes in the P.R.C.,
seems crucial. There is no way to comprehend the post-1949, or
post-1978, events without the perspective of Chinese legal history.
While there was no need for Folsom and Minan to repeat in detail
the already existing analysis of the pre-1911 traditional system, they
should have provided the necessary context. Failing this, they
should have provided an overview of the post-1949 period. There
was a rich variety of experience between 1949 and 1978 in the P.R.C.
The consolidation of power and the reconstruction of sovereignty in
the 1949-1951 period, the experiment with Soviet style legality of
1952-1957 and the reign of Maoist principles from 1957-1976, all tell
us a great deal. Mention of these events would certainly provide a
needed frame of reference. However, Folsom and Minan center the
great bulk of the volume on the interpretation of post-1978 events.
They proceed as if one only needs to peruse post-1978 codes and
rules to understand law in China.

To set the stage, the editors provide an introductory chapter.
Unfortunately their treatment of pre-1949 China is superficial and,
in places, almost embarrassing. It is unforgivable to replicate such
misconceptions as, "China's Qing (Manchu) Dynasty fell in 1911
under the onslaught of a nationalist and democratic revolution led
by Sun Yat-Sen." 7 This is far too glib a characterization of a very
complex event. Sun Yat Sen was a major figure in anti-Qing politics,
but he was in Denver, Colorado when the Wuchang uprising trig-
gered the end of the Qing. Furthermore, he never really led the

7. Ralph H. Folsom, and John H. Minan, Law in the People's Republic of China
7 (1989).
government. The final implosion of the Qing Dynasty was an event that was as equally dependent upon the ambitions of Yuan Shi'kai as on the nationalist, democratic beliefs of Sun Yat Sen. The multi-layered complexity of the event proves crucial to understanding the legal turnabouts that followed. The oversimplified approach of Law in the People's Republic of China is counterproductive and shows little regard for the foundation on which all change must be built. The editors do not even provide footnotes or bibliographic references. One is left with nothing more than a highly questionable, facile foundation. This introduction then segues directly into discussion of the post-1978 legal structure.

The People's Republic of China has been involved in an orgy of statute making since 1978. One can easily lose oneself in the avalanche of new legislation, and simply examining the text of these new enactments, without regard to the background of Chinese society is a fruitless venture. Overemphasis on textual analysis of newly enacted laws has long plagued western study of Chinese law. It is imperative that these statutes be read in context. The inability of the P.R.C. to separate law from policy should compel the editors of a book on modern Chinese law to take politics and history seriously. This book does little of either and therefore deprives the reader of essential background information. Taking the language of the statutory enactments of the P.R.C. at face value is far too similar to debating about the number of angels who can dance on the head of a pin, for comfort. By providing a proceduralist approach to post-1978 People's Republic of China law, Folsom and Minan have left themselves open to the type of upending supplied by the TianAnMen incident. The first level questions in Chinese law run far deeper than analyzing the text of enactments.

At a more specific level, there are three major criticisms that can be made about the book. The first concerns the form of the book. It would be cruel and unfair for one to comment on the particular choices made by the editors in selecting articles for inclusion—reasonable minds always differ in such an enterprise. A few salient observations that run beyond such matters of selection deserve mention. The book is a republication of previously printed materials. Other than providing brief introductory sections of chapters organized by subjects, the two editors are unrepresented. Unfortunately, the editors fail to include with each article its citation. This means that as one begins to read a selection one has no idea where it appeared or when it was written, thus forcing the reader to flip to the beginning of the book to discover, for example, that Professor Lubman's interesting essay on mediation is of 1976 vintage, while Professor Jones' analysis of the constitution was written in 1982. Given the shifting sands of Chinese law, the date of a contrib-

bution is crucial. This failure to provide a texture of timeliness seems related to the book's general lack of context.

As a related, but quite important issue, one might question the price of the book. It is, in large part, composed of selections drawn from law reviews that are readily available. Even the translations of statutes appended to the book are widely available. These facts make the exorbitant price of $245.00 difficult to swallow. The book offers the convenience of gathering the articles into one place, but this is a high price to pay. If convenience is the point, the book should be "reader friendly." The lack of dates of the articles has already been noted. The lack of footnotes, bibliographies or sourcing exacerbates the situation. We are not even told who translated the statutes in the appendix. This is not the level of care one expects in such a book, and it hardly makes the volume easy to use.

A second complaint revolves around the work of Henry Zheng. By my count, excerpts from the work of Mr. Zheng comprise 105 pages of the 948 pages of text. The total contribution of the editors is barely more. Those in the field know that Mr. Zheng ranks as one of the brightest legal scholars from the People's Republic of China, one whose publications in United States law reviews have been of uniformly high quality. Given the large amount of his material used in the book, Mr. Zheng stands in special relation to it and deserves some form of official recognition. At the very least his work could be linked and explicated. As it stands, only the persistent reader will realize how crucial Mr. Zheng is.

The third complaint is more telling and more subjective. In a book that is so large and costs so much one must expect a theme, a goal. The authors state in the preface that the book has been prepared "primarily for use in university courses on Chinese law and government. Lawyers will also find it useful especially for its collection of P.R.C. laws and regulations . . . This publication is a current and systematic survey of Chinese Law." How the book, priced at $245.00, could be viewed as a teaching text strains the credibility of even the jaded book buyer. Given the fact that many of us who teach "university courses in Chinese law" are compelled to use photocopied compilations of materials, a good text would be most welcome. As we will explore further on, it is questionable how "good" the survey is, but there is no question that the book costs too much to be assigned as a text. I shall treat it, then, as a "current and systematic survey of Chinese law." As such it must be addressed to the community that is interested in Chinese law. If this is the case the book needs serious re-thinking. Some expanded discussion that unifies and expands upon the selections might help. The authors do not explain the overall structure of the book nor do they make explicit the mechanism for selection of articles for inclusion. Such "hidden" organization is often found in law school case books, but has no place in a general work that is addressed to the profession.

9. Folsom, supra n.7 at xvii.
As I stated earlier, it is unfair to second guess particular selections, but it is incumbent upon me to point out that there are some glaring problems both in content and selection. For example: Chapter I, "The Chinese Legal Tradition", is so truncated that it is virtually useless. The introductory commentary uses two pages, 3-4, to summarize the millennia long dispute over *li* and *fa* in Chinese law and society. In a typical treatment the authors state, "A scholar recently captured the essence of these philosophies in law..."\(^{10}\) The authors then proceed with a few sentences of highly conclusory discussion. There is no identification of the scholar, no footnote, and no follow up. The reader is left to rely on bold assertion. A second example is the one short paragraph on the Yan'an Period, a crucial stage in the development of the unique legal view of the Chinese Communist Party. This one paragraph, bridging pages 7 and 8 has no footnotes or references to other sources. Both these subjects and the reader deserve more.

Another type of problem occurs in Chapter II, "Constitutional Law and the Chinese Communist Party." Here the authors discuss the structure of Chinese government without ever relating it to reality. A startling example occurs on page 26 where the role of the Chairman of the Military Commission is discussed without any reference to the fact that until recently it was the position from which Deng Xiaoping controlled the country and the position which he has used to indicate that Jiang Zemin is his anointed successor. Much more space is devoted to a detailed discussion of the hierarchy of positions in the Chinese government as set out in the Chinese constitution, a structure which, in times of stress, has been irrelevant. These kinds of errors are emblematic of the overconcern with written documents so often found in Western observers of China. It is far easier, and much more familiar, to analyze written statues, but given the real state of affairs in the P.R.C., such exercises are written on shadows. *Law in the People's Republic of China* spends far too much of its effort in this pursuit.

Chapter II serves as an example of the selection of materials problem alluded to earlier. Ignoring quibbles over what pieces were chosen it is possible to highlight some glaring omissions. I will concentrate on Chapter II since it covers the area I know best. Though this chapter does include some telling pieces, particularly Professor Jones, "The Constitution of the People's Republic of China,"\(^{11}\) it fails to mention the work of Professor Andrew Nathan. Professor Nathan's award winning book, *Chinese Democracy\(^{12}\)* contains an analysis of Chinese constitutional theory that has redefined the field. Nathan's chapter on comparative constitutions in twentieth century China in which he finds common norms in the constitutions of the Qing, the KMT and the Communist governments is a bench-

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10. Folsom, supra n.7 at 3.
BOOK REVIEWS

BOOK REVIEW

Mark, one where all discussions of Constitutional law in China should begin. Perhaps the editors do not agree with Professor Nathan, or perhaps they could not get permission to reprint an excerpt from his book, however, at the very least they should have discussed his work. To omit all mention of the major line of thought in Chinese Constitutional theory from the book is a mistake.

These two types of problems, one demonstrating overly simplified, unfootnoted discussion, one the failure to mention a seminal work, could be multiplied. The point is that *Law in the People's Republic of China* does not succeed in instilling confidence. It serves neither as an adequate teaching text nor as a survey.

It is not asking too much of a treatise to request context and completeness. Professors Folsom and Minan offer neither. Specialists in Chinese area studies have long viewed those who work in the area of Chinese law as isolated and uninformed. I well recall Professor John Fairbank sternly lecturing to us in Harvard Law School's Chinese law colloquium in 1973, contending that we lawyers did not bring enough understanding to our work. He claimed that we failed to understand the reality of China, that we were prisoners of our own narrow world view. Sixteen years later my ears are still stinging. This book does little to contradict the points made by Professor Fairbank. I fear that most of us who teach courses in Chinese law will be using homemade, photocopied materials again this year.

LEGAL HISTORY


Reviewed by Knut Wolfgang Nörr

There are only a few legal historians on either side of the Atlantic who deal so passionately as Alan Watson does with the question of how law has evolved and what have been the main reasons and factors behind its present appearance. Watson does not ask the question with regard to a specific legal system or for a specific family of legal systems, as the comparative lawyer puts it. His goal is to elaborate a theory that is able to deliver valid answers for all legal systems. The material on which he bases his theory, however, is first of all taken from the European legal tradition, covering archaic Roman law up to the present. Yet, this limitation seems plausible because all relevant models of explanation for the evolution of law can be derived from the European legal tradition. In any case, this perspective corresponds with our present knowledge, since other
legal systems have not nearly been studied as intensely as the European ones.

If one looks closer to the factors that shaped the evolution of law, one sooner or later comes to the basic question whether law is an autonomous entity that is independent of other phenomena, or if it is merely a derived, and hence, secondary and subordinate creation. Clearly, Watson takes the former point of view. The book ends with a message, that is the thesis that law is largely autonomous and not shaped by societal, i.e. social, economic or political need. Legal institutions, it is true, will never exist without corresponding societal institutions, but law evolves from its very own, the legal tradition. To understand law and how it has evolved within society, this legal tradition must always be kept in mind. Here, then, the keyword that builds the quintessence of the book has been names: the main element of evolving law is the legal tradition. The legal tradition, in its turn, is represented by the lawyers in all their functions, that is as legislators, as jurists and as judges.

The thesis is elaborated in four chapters that deal with four exemplary phenomena within the European evolution of law. In the first chapter the author analyses Roman contract law in order to derive the above mentioned thesis from its development. The author finds proof in the fact that classical Roman contract law can be explained only by looking at ancient stipulatio. Jurists’ thinking in contracts had started with stipulatio, from which a tradition developed that subsequently determined classical Roman contract law (p. 26). After a great leap forward in time, the same chapter deals with paternity suits and their regulation in various states of Europe and America in the 19th century. Some states have accepted the paternity suit,¹ some of them, however, have not (following of course the model of the Code civil). These differences—and here one will agree with the author—can in no way be attributed to differing societal conditions; rather, it is the legal tradition and its representatives, the legal elite, which have decided the issue.

The second chapter deals with customary law. The doctrine of opinio necessitatis is rejected and instead it is emphasized that custom becomes law only when it is accepted by the courts. Thus customary law is a judge-made law and as such it is part of the legal tradition. But customary law could also be adopted from abroad. This evokes the problem of reception and leads to the third chapter, which asks for the causes of medieval reception of Roman law. Perhaps this chapter contains the core of reasoning about the basic thesis of the book, since Watson wonders about how law gained its autonomy. Obviously, Watson sees a chronological order where the beginning law develops from the societal conditions and then takes a life of its own, becoming autonomous. Various keywords are given,

¹ The reviewer, who teaches at Tübingen University, which of old is the State University of Württemberg, asks to be excused for having to point to the fact that a state named Württemburg (p. 29) never existed.
e.g. "standard" and "shorthand", the judges' authority, human ingenuity, and the elite of lawmakers or law-finders (p. 68ff). These and other keywords point to elements of the lawyers' culture, that is, the culture in which the evolution of law takes place and on which it is based. Hence, the medieval reception of Roman law is, in the last analysis, a result of lawyers' culture since the Roman law was admired for being more elaborate than the domestic one (p. 118). Finally, the fourth chapter comments on the pleading of George Mackenzie before the Supreme Court of Scotland in the 17th century.

In sum, Watson analyses certain manifestations of the European legal development in order to arrive at his thesis of the autonomy of law. But what does he, more precisely, mean by autonomy of law? The centre of his line of reasoning is the legal tradition. Autonomy of law means that the norms of law develop from its own tradition, which is distinguishable from other forces. The concept of autonomy apparently focuses on the sources and the shaping forces of law, but does not refer to the end of law. Watson emphasizes repeatedly that law is not an end in itself but is directed towards societal ends, even when the jurists have lost sight of them. Therefore, autonomy does not refer to the end of law but rather to the means of how to reach extralegal ends. Watson does not put the question whether there is such a thing as the idea of law, from which the autonomy of law could be defined. His concept of law, in the last analysis, is sociologically and historically determined, the historical account, however, being not quite complete since the idea of law also has its history. In other words: when Watson speaks of the autonomy of law, he has a restricted and relative concept of law in mind. The end of law is heteronomous for him, too.


*Reviewed by Knut Wolfgang Nörr*

The book is concerned with the legal community of English and American jurists, that was based on the "cult of the common law", as the author says in the introduction. The cult was the legal part of Anglo-American *rapprochement* which took place in the decades the book covers. While the rapprochement has already often been analyzed, a portrayal of the turning to common law has been missing up until now. This portrayal has to deal, first of all, with the individuals that contributed to the new cult of the common law. It is the purpose of the book to study these persons and their commitment to the common law.
The beginning of the community of jurists that gathered around
the new cult set in around 1870. The author gives various reasons of
a partly general, partly specific legal nature for this development.
The approximation of the political power position of the two states,
as well as their parallel economic interest in trade relations, be-
longed, among others, to the general reasons. The most important
legal reason was the popular idea of a common-law legacy which
formed the cornerstone for political liberty and constitutional pro-
gress in both countries. Before 1870, the influence of common law
on American legal development had been rather amorphous. One
wavered between refusing and accepting common law. In England,
the realm of law was neither impressed by American nor by conti-
nental developments; this becomes clear from the history of law re-
form. Thus, the years around 1870 brought about a change for both
legal systems. However, from the beginning two reservations have
to be made. One refers to the practical side of the legal systems.
The difference in practical matters were never forgotten. Above all
the jurisdictional structure in each country prevented the emer-
gency of a legal community in this field. This is shown, for example,
by the fact that, in the decades after 1870, the importance of English
case law for American courts diminished. Hence, the legal commu-
nity remained limited to the academic world; the author speaks of a
romantic level to which the community was bound. But even on this
level, and there we turn to the second reservation, the community
did not exist as a self-conscious entity. There were reflections, it is
true, on the community, they were, however, neither coherent nor
systematic enough to produce an identity of their own. In addition,
the community was limited to certain universities in each country.
In the United States, it was concentrated on Harvard Law School,
and it did not spread over the academic circles of the East Coast be-
tween Boston and Washington. And in England, Oxford built the
only cornerstone of the community; when American relations with
Cambridge grew and Cambridge started to take the place of Oxford,
the legal community was already in the process of disintegration.
Hence, the community, rather than being a formal institution, was
constituted by personal relationships, was a network of friendships
between individual, though outstanding universities. The author
graphically speaks of an informal commonwealth of the mind. The
history of the community, hence, is part of the history of the legal
culture or (here the author adopts a phrase from Goodhart) the his-
tory of men and ideas.

The legal community rested on individual jurists and their mu-
tual relations. Consequently, the author had to analyze the jurists'views of the common-law heritage, as they were spelled out in their
publications and in their personal correspondence with each other.
The author has chosen eight outstanding figures: Langdell, Holmes,
Pound, and Frankfurter representing American jurists, and Bryce,
Pollock, Maitland, and Laski representing English jurists. Each of
them is dedicated a chapter and each one is analyzed carefully in re-
gard to his attitude towards the common law. Despite the separation into single chapters the context is never lost. The individual jurists are not statically, but dynamically fit into the development of the legal community; that is they at the same time represent the rise and decline of the community. Thus, two groups can be distinguished: Langdell, Bryce, Holmes, and Pollock, embodying the rise and climax of the community, and Maitland, Pound, Frankfurter, and Laski, standing for the decline and dissolution of the community. Of course, the individual jurists played very different roles in the history of the community. And consequently in its dissolution, too: Maitland, for example, only unconsciously supported its demise by emphasizing the historic dimension of the common-law heritage and thereby relativizing it. Pound's academic career shows two phases. The first is characterized by his turning towards sociological jurisprudence, which also brought him in acquaintance with continental legal philosophy and led to a revaluation of comparative jurisprudence; this was, however, accompanied by a certain detachment from traditional views of common law. But England, most of all, did not participate in the new sociological movement; the analytic jurisprudence was not prepared to give room at their universities or courts to the new influences from America. The second phase of Pound's life is referred to as his conservative phase. It could have been a supporting element for the community if Pound had not preferred the University of Cambridge to hold the connection with England. By that means he further contributed to the decline of the community, for which the Harvard-Oxford axis had been of major importance. Frankfurter contributed to the process of disintegration of the legal community by his public career and by the way he allowed common law to become influenced by politics. This intrusion by politics was further advanced by Laski. His conversion to marxism meant the definite end of the legal community. In this connection one may add that in his former phase Laski was influenced by continental ideas, too; he had been reading Gierke and Duguit.

The book is written in a flowing style and fascinates the reader. The author has exhaustively analyzed the extensive correspondence of his jurists. In the letters one can find judgments on one or the other of the jurists. Some judgments express honest admiration, others are of a more critical nature. The critique rests on material grounds most of the time; however, occasionally one gets the impression that ambition and jealousy wielded the pen. As is generally known, value judgments often tell more about the critic than the one criticized. Certainly, in an academic community everybody speaks about everybody else, and everybody is aware of this fact. A community can neither emerge nor exist without this element, and so the author has done the right thing in having the correspondence playing such an important part in his analysis.
Reviewed by Christoph Paulus*

The members of the Cologne law faculty celebrated the 600th anniversary of their university's foundation by editing a Festschrift only two years after the Heidelberg law faculty did the same. The next—West German—will be due in the year 2057 from Freiburg¹. Unlike the Heidelberg Festschrift, whose articles had to fit into the general theme of "richterliche Rechtsfortbildung" (judicial development of the law)², the Köln Festschrift does without a common theme. As Dean Rüfner points out in the preface, this omission serves the purpose of demonstrating the width of scholarly activities of the law faculty.

Regardless of the fields not covered by the contributions (for example: antitrust law, intellectual property, insolvency law, etc.), the amount and the quality of the 42 articles give a representative and impressive survey of the position of modern legal thinking in West Germany in general. By reading the whole volume one is therefore tempted to trace out trends of a general development. To name but one example: for a civil lawyer like the reviewer it is noteworthy that only one article pleads explicitly for an increase of the rights of the individual—and deregulation in the specific area of Labor Law (Hanau, Freiheit und Gleichheit bei der Gestaltung des Arbeitsrechts, 183 ff.), whereas three authors describe—more than they claim—a shift in the jurisdiction away from an individual’s rights: Luig (Historische Betrachtungen über die Ersitzung des Wegerechts nach dem ALR und dem BGB, 95 ff.) towards higher responsibility within a neighbourly relationship, and Schmitt-Kamler (Ungelöste Probleme der verfassungsrechtlichen Eigentumsdogmatik, 821 ff.) towards a stronger emphasis on the social responsibility (Sozialpflichtigkeit) and common wealth (Gemeinwohl) of one’s property. Hepting (Erklärungswille, Vertrauensschutz und rechtsgesellschaftliche Bindung, 209 ff.) extrapolates a very important recent decision of the Federal Supreme Court³ about the cornerstone of the doctrine of legal transactions: the declaration of intent (Willenserklärung). He comes to the conclusion that the "basis of its [declaration of intent] normative binding force

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2. For the Heidelberg Festschrift see the review by Lorenz, 37 Am. J. Comp.L. 180 (1989).

3. BGHZ 91, 324 ff.
is the trust of the addressee in the declaration" (233)\(^4\). This seems to be the strictest counter position to Savigny’s original concept of the declaration of intent: for him the all decisive part was the intent.

Since it is impossible to depict, let alone comment on all contributions of the Festschrift, it must suffice here to select those whose contents are somehow related to the subject of this Journal. Thereby, as interesting articles are skipped over as, for example, that by Becker who gives a short survey of the history of the faculty (600 Jahre Rechtswissenschaft in Köln. 3 ff.), by Wacke who deals with comparative law in a vertical, i.e. historical manner (Logische Paradoxien in antiker und moderner Jurisprudenz, 325 ff.), by H. Hübner who, as the then president of the university, describes his view of the “Studentenrevolution” in the late sixties which was the German version of what some years before had begun in Berkeley, CA, as the free speech movement (Die Universität zu Köln in den Jahren 1968-1970, 53 ff.), or by Carstens, who as the then president of the Federal Republic of Germany, explains and justifies his decision to dissolve the German “Bundestag” in 1983 (Die Auflösung des Deutschen Bundestages im Januar 1983, 661 ff.).

Kegel’s article about “Story and Savigny” (65 ff.) is known to the readers of this Journal where its English translation was recently published\(^5\). Lüderitz writes about “Fortschritte im deutschen internationalen Privatrecht” (271 ff.), being, of course, fully aware of the relativity of the iridescent term “progress”. Subdividing the law of conflicts into a statutory and a jurisprudential part he finds progress with respect to the first, for example, in the only recently enacted “Internationales Privatrecht Gesetz”. Its tendency especially towards omnilateral collision norms or its equal treatment of the genders is described by Lüderitz as a positive development. With respect to the jurisprudential progress he mentions, for example, the introduction of the ideas of the “Interessen- und Wertungsjurisprudenz” into the international private law\(^6\), as well as a certain (restricted) trend towards an adjustment of conflict rules to the substantive law. Lüderitz raises, nevertheless, a question which is fundamental for the whole branch of this law, namely that of its “ökonomie”. That is to say, whether or not its expenditure of “social costs” are still in a tolerable relation to its outcome. His answer lies in his final remarks where he touches upon the tasks of the international private law. There he gives as a guideline for the future that the role of international private law is primarily to simplify matters, rather than building up an elaborate but overcomplicated system.

It is hard to imagine a more profound and competent report

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\(^6\) See also Flessner, Interessenjurisprudenz im internationalen Privatrecht, Tübingen 1989.
about the impact of the Iran-United States Claim Tribunal on the
development of international law than that given by Böckstiegel
who is the (former) president of that Tribunal (Zur Bedeutung des
Iran-United States Claim Tribunal für die Entwicklung des interna-
tionalen Rechts, 605 ff.). He sees as a formal but, nevertheless, tre-
mendous advantage of this Tribunal that all its decisions get
published. In contrast to the increasingly common practice among
parties of private international arbitrations to agree upon confidenti-
ality, the publications of the Tribunal bring forth an unique and in-
valuable fund of material and jurisdiction. Böckstiegel concentrates
on 14 issues and describes how they are dealt with by the chambers,
and respectively by the full Tribunal. It seems worthy to list them
here and to refer the interested reader to the article itself for fur-
ther details. The four procedural issues are: jurisdiction over dual
nationalities, nationality of enterprises, piece and taking of evidence,
interim orders. The substantive law issues are: applicable law, re-
sort to the state, interpretation of international law contracts, inter-
pretation of private law contracts, force maieur, documentary letters
of credit and bank guarantees, restriction of exchange transfers, in-
ternational law of expropriation, expulsion of foreigners, interests.

Böckstiegel's article is followed by (a wonderfully written) one
by Börner about the Single European Act (Die Einheitliche
Europäische Akte, S. 633 ff.). Börner emphasizes at the very end
that his criticisms are meant to be constructive rather than destruc-
tive, an information which seems to be appropriate since he points at
a good many deficiencies as well as dangers contained in the Act.
Thus, he shows that the goal of art. 8a par. 1, namely to realize the
internal market, is but an empty shell because it has to be pursued
in accordance with the provisions of "this Treaty": which means,
with internal frontiers. Or art. 149 Nr. 2: The introduction of this
complicated collaboration between Council, Commission and Parlia-
ment leads to a new kind of "Bermuda triangle" in which decisions
can easily disappear. Börner adds several more points of criticism
but by far the most important one seems to be about the extension
of majority decisions. Here he sees the danger that a government
which has been outvoted several times is forced to transform the un-
popular majority decision into domestic legislation will lose the next
elections and will be replaced by an antieuropean one. Börner then
adds: In a medium term perspective the survival of the Communi-
ties will depend on the general agreement of the ruled in each of the
twelve countries rather than that of the governments. The reader
who reads these lines in late 1989 will have a feeling for the funda-
mental truth of this sentence. In general, the eighties will probably
appear in later history books as the decade of the awakening of the
peoples' awareness of their powers. It started in Poland 1980 (if not
in Iran 1979) and culminated for now in the German Democratic Re-
public and Czechoslovakia. It might be justified to call this phenom-
enon to the attention of the Communities officials. It could be
canalized by, for example, strengthening the powers of the Parliament.

Brunner shows in his contribution about “Gedanken über Hans Kelsen und das Ostrecht” (647 ff.) that Kelsen not only had a tremendous knowledge of the Ostrecht but also exerted a great influence by explaining the Marxist and Soviet legal doctrine as a Naturrechtslehre, natural law doctrine. And in the last contribution to be mentioned here Kühne (200 Jahse: Amerikanische Verfassung und deutsche Verfassungsstrukturren, 747 ff.) describes, very convincingly, the influence of the US-American Constitution on the German development of its constitutions but stresses rightly also the limits of this impact. The latters are mainly rooted in the different tradition which itself created different Nationalcharaktere, national characters.

PRIVATE INTERNATIONAL LAW


Reviewed by Paul Edward Geller*

Switzerland has enacted a new conflicts code: the Federal Act on Private International Law. As befits a fine Swiss product, the Act is complex and well crafted, with an eye to the state of the art worldwide. The same observation applies to the work under review.

Swiss legal culture has the constant task of bridging Latin and German doctrines. Further, Switzerland could hardly codify its previously disparate conflicts laws without taking into account the European Community's efforts to comparable effect. Too, given its importance as a commercial and financial center, Switzerland is as likely as many larger jurisdictions to provide forums for cases that turn on conflicts issues.

The work here reviewed is the ninth in a series published by the CEDIDAC of the University of Lausanne. It derives from a two-day symposium in which that center for enterprise law brought nine leading Swiss experts together. One by one these experts guide us.

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1. Loi fédérale sur le droit international privé du 18 décembre 1987 [hereinafter LDIP].

2. This is indicated in the subtitle of *Le nouveau droit international privé suisse: Travaux des Journées d'étude organisées par le Centre du droit de l'entreprise les 9 et 10 octobre 1987, à l'Université de Lausanne* [hereinafter NDIPS].
both through the Act as a whole and through its labyrinthine corridors and chambers. The resulting commentary is concise and clearly organized, judiciously balanced between theoretical and practical considerations, and cosmopolitan in perspective. At its end this work sets out the Act in the definitive French text, along with a general bibliography to complement the wealth of footnote references in the contributions.

The foreign reader, innocent of prior Swiss conflicts law, is unfortunately not given an overview of the rather confusing state of affairs which the legislators had to remedy. Indeed, before the Act, conflicts in Swiss courts could be resolved by reference to a number of different laws: the federal Act of June 25, 1891, on private-law relationships of persons inside and outside Switzerland, now revoked; the federal Civil Code and Code of Obligations; and cantonal laws. The new Act supersedes this welter of sources for "international matters" exclusively, subject to a preliminary reservation of all international treaties. The Act then sets out choice-of-law rules which, in a series of traditionally classified fields of law, are triggered by statutorily defined connecting factors. The contributors to the work under review reveal novel wrinkles in this code-like structure that might give it a more refined and elaborate operation.

At the outset, Professor Frank Vischer remarks that the legislators have departed from Savigny's basic norm for any conflicts law: that it should remain indifferent to results in the cases. Thus the largely code-like structure of the Act need not apply in the face of Swiss laws that are based on ordre public or otherwise immediately applicable: Professor Vischer gives the example of laws assuring basic constitutional rights. Further, article 15 "exceptionally" allows the application of a law other than that specified by the Act where, in the light of the "totality of circumstances," such other law has a "much tighter relation" with the cause of action being asserted. Construing "looser" or "tighter" relations here as including more than mere ties of lesser or greater territorial proximity, Professor Vischer finds that this clause opens the door to case-based analyses such as those familiar in American conflicts law. Moreover, in a large and more precisely defined range of causes of action, the parties may choose the applicable law or, in those "money-related" matters where the court may and does shift to the parties its burden of determining that law, the parties may prove it. Otherwise, Professor Vischer explains, absent such proof, the lex fori may apply by de-

3. For a concise account, see O. Kahn-Freund, General Problems of Private International Law 64-65 (1976).
4. LDIP, art. 1.
6. Id. at 15. He here mentions only Leflar's "better law approach," admittedly "not a principle accepted in Europe," but nonetheless appropriately applied in some cases if it yields a result in line with the "expectations of the parties and appropriate to the situation."
fault, or the judge might fall back on the escape clause in article 15.7

Since, at least at first view, the Act has its rules triggered by connecting factors within traditionally classified fields of law, it at once raises the problem of characterization. In response, articles 13 and 14 of the Act impose the solution of lex causae, this without renvoi save in statutorily designated and quite limited cases. The last sentence of article 13 states that the “application of foreign law is not precluded by the mere fact that one imputes to the provision the character of public law.” Professor Vischer then observes that, once the Act allows a Swiss court to apply foreign public law, the judge need not focus only on such rules as the code-determined lex causae includes.8 To this effect he cites article 19 of the Act, authorizing the judge to “take into consideration” an imperative provision outside both the lex fori and lex causae if the “legitimate interests” of Swiss law so allow and if that provision presents a “tight tie” with the case at hand. To American ears this language might sound like an invitation to conduct some Swiss mutation of governmental interest analysis that, in tandem with the exceptions of ordre public and the escape clause in article 15, could at points undermine the code structure of the Act. Professor Vischer discourages any such reading in noting a variety of considerations, starting with Swiss ordre public, that limit the scope of any reference to the interests that underlie foreign public law.9 He obliquely alludes to the escape clause only by stating that “article 19 will make the task of the judge easier in finding an adequate solution” in particular cases.10

The Act generally gives Swiss authorities jurisdiction where the defendant is domiciled. It then defines alternatives and exceptions to this principle which are often structured much like parallel choice-of-law options.11 Further, as Professor Vischer points out, in many cases where Swiss jurisdiction may be exercised, for example, in the fields of family law and inheritance, Swiss law applies automatically. In the alternative, foreign acts of marriage, adoption, etc., are recognized under conditions much like those applicable to for-

7. Id. at 19-20. At the same time he here opines that “the parties are almost always represented by specialized attorneys, who quite certainly will furnish the proof [of law] in the event the application of foreign law would serve their case” where money is at stake. He refers to “the parties” in the plural; hopefully this reference will turn out in most instances to include all the parties with stakes in the case at bar.

8. Id. at 22-23. This remark arises in connection with a reference to a public-law rule as a standard of illegality of a contract or of conduct triggering tort liability. For an example, see infra text accompanying note 25.

9. Among these considerations he mentions: the self-limitation of public law in space, the criterion of a solution “adequate for purposes of the Swiss conception of right,” and the discretion of the Swiss judge in fashioning civil remedies for violation of such law. Id. at 22-25. He points out, for example, that the Act would preclude awarding treble damages under U.S. antitrust law. Id. at 26.

10. Id. at 25. Note that, in discussing the escape clause (supra note 6 and accompanying text), he cites U.S. analyses, but neither Currie nor interest analysis.

11. See LDIP, arts. 2-10 and introductory provisions to succeeding sections. See also infra notes 30-31 and accompanying text.
eign judgments. Professor Bernard Dutoit explains in some detail how a complex set of principal, subsidiary, and alternative connecting factors operate to give Swiss courts jurisdiction, or to authorize the application of Swiss or foreign laws, in matters of family law. In some cases, especially where the law to be applied bears on the welfare of the child, the usually dominant factor of domicile gives way to that of the habitual residence of the child. The rationale for this shift is the consideration that a minor would not have the capacity needed to form an intention to establish a domicile. Professor Albert E. von Overbeck undertakes the same task for laws governing property within marriage and subject to inheritance, both fields in which the parties have a certain latitude in selecting the applicable law.

Article 116(1) of the Act provides: "The contract is governed by the law chosen by the parties." This provision deviates from the more hedged formulations of the principle of "autonomy" sometimes found in European commentary. Professor François Knoepfler indeed affirms that the "validity of the choice will no longer depend on its reasonable character." Absent choice by the parties, article 117 applies the law of the jurisdiction with the "tightest ties" to the contract at issue. Professor Knoepfler reads the notion of a "tie" here and in article 15 as above all referring to relations of proximity. More particularly, in line with the doctrine and a rich case law, the relevant jurisdiction will be presumed that in which the party providing the characteristic prestation or performance under the contract habitually resides or has its place of business. Moreover, in specific fields such as sales, transfers of real property, consumer affairs, and labor contracts, under the Act itself or by virtue of international conventions, other specific connecting factors may prevail.

Of particular interest to this writer is article 122(1) which,

14. Id. at 54.
16. Id. at 66.
17. See, e.g., 2 Batiffol and Lagarde, Droit international privé 265, para. 571 (1983) ("...the law applicable to the contract is determined by the judge [i.e., not the parties], but with due account taken of the will of the parties concerning the localization of the contract.").
18. "Le contrat dans le nouveau droit international privé suisse," NDIPS 79, at 86-88. As he also here observes, the court need not find a free or valid choice under the lex fori, such threshold questions being subject to the law the parties have ostensibly chosen, even if only tacitly.
19. Id. at 89. This reading does not coincide exactly with Professor Vischer's of article 15 which (as discussed supra note 6 and in the accompanying text) is arguably broader.
20. See, e.g., LDIP, art. 118 (referring to the Hague Convention of June 15, 1955,
ostensibly formulated with transfers of patents or know-how in mind, subjects them to the law of the jurisdiction in which the transferor habitually resides.21

For torts Professor Andreas Bucher speaks of the “general solution” of *lex loci delicti* supplemented by the factors of common habitual residence and a preexisting legal relation.22 The Act allows all the parties to opt for applying the *lex fori* after the fact but only gives the plaintiff the option of invoking the law of the jurisdiction where harm was inflicted if there is proof that the defendant could have foreseen such harm taking place there.23 Professor Bucher discusses at some length the factor of a preexisting legal relation: for example, a contract might give rise to such a relation, although the law the parties chose to govern the contract might not necessarily apply to the tort at issue.24 Moreover, where the law governing the tort does not include certain rules of public safety, especially those intended to ward off harms independently of the place of the wrongful act at issue, the court might still take them into account.25 Particular fields with subsidiary or alternative connecting factors include traffic accidents, product liability, unfair competition, monopolistic practices, media violations of privacy and like interests, and ecological pollution.26

The last three contributions touch on more technical or procedural matters. Philippe Reymond confronts the problems of applying Swiss law generally, and the Act specifically, to legal entities.27 In lawyerlike fashion, he evaluates the extent to which the Swiss legislators have, and have not, succeeded in adapting the device of a complex set of connecting factors and choice-of-law rules to a spectrum of possible corporate maneuvers which he analyzes rather ex-

on sales), art. 119 (real property governed by law of *situs*, this imperatively for the form of the contract), art. 120 (habitual residence of the consumer), art. 121 (habitual workplace).


22. “Les actes illicites dans le nouveau droit international privé suisse,” NDIPS 107, at 115. Note that Article 133 of the Act sets out common habitual residence at the head of the list of general connecting factors, with the *lex loci delicti commissi* ostensibly applying in its absence. But Professor Bucher seems reluctant to give any priority to the factor of habitual residence beyond that recognized in a developing case law. Id. at 117-118.

23. This option only partially codifies the theory of the “ubiquity” of the wrong developed in a previously uniform Swiss case law. Id. at 116.

24. He here refers to the escape clause in article 15 as grounds for passing over the ostensible law of the contract in order to effectuate an “interest” in implementing tort rules intended to govern the “social activities” of the parties. Id. at 120-121.

25. Curiously, Professor Bucher does not refer to article 19 (discussed supra text accompanying notes 9 and 10) in this context. Id. at 124.

26. Whether the Act expands the normal tort options in these fields or not depends on the cause of action asserted. Id. at 125-139.

27. “Les personnes morales et les sociétés dans le nouveau droit international privé suisse,” NDIPS 143.
haustively. Professor M. Pierre Lalive surveys the provisions of the Act which provide a legal basis for, and govern, arbitrations taking place in Switzerland but involving foreign parties. Paul Volken, of the Federal Office of Justice, explains how the Act has unified previously disparate rules of jurisdiction and procedure in international matters. He also notes that it has facilitated enforcing foreign judgments in Switzerland, except those rendered in a jurisdiction where the defendant was not domiciled. Professor Joseph Voyame briefly reviews how the Act fits into an emerging European system for recognizing and enforcing foreign judgments.

This writer cannot fully concur with Professor Vischer when he introduces the Swiss Act as taking leave of the European ideal of a law neutral toward results. The very complexity of the Act, with its elaborate code structure of connecting factors and rules, provides Swiss judges with a large range of choice-of-law options. Thus Swiss judges need not often have recourse to the exceptions which the Act also incorporates for those extraordinary cases in which their judges' sense of situational equity or larger policy-based interests is not otherwise satisfied by its provisions. Nonetheless, the commentary just canvassed does suggest that, where the rules of the Act do not compel a unique result in a given case, the formulation of its exceptions will invite the courts to consider equities and policies in their deliberations.

But, even in such a case at the interstices of the Act, judicial activism is not likely to be unbridled. For example, Professor Vischer comments regarding the very sweeping language of one exception: "One might say that the legal restrictions are so numerous that a party invoking article 19 has to be born under a lucky star to overcome them." Indeed, in the context which the work under review so well elucidates, the very complexity of the new Swiss Act seems almost deliberately devised to contain and channel a pragmatic permissiveness rampant on foreign shores.

28. He notes that, at some critical points, the Act adopts solutions akin to those illustrated in U.S. theory (Cavers and Leflar: id. at 193) and practice (e.g., the response of California to standards in states such as Delaware: id. at 174).
30. "Conflits de juridictions, entraide judiciaire, reconnaissance et exécution des jugements étrangers," NDIPS 233. He observes that about half of the 200 articles in the Act are in some sense jurisdictional or procedural, superseding comparable provisions in a variety of other laws as to "international matters." Id. at 238-39. The Act also expands the ways in which a Swiss court may cooperate in the prosecution of a foreign action, for example, in discovery. Id. at 249-256.
31. A defendant liable on an obligation enforced in a foreign judgment, if domiciled in Switzerland at the start of the action, is constitutionally protected. Id. at 248.
33. See supra text accompanying note 5.
34. See supra notes 6, 9-10, 19, 24-25, and 28, as well as accompanying text.
35. Loc. cit. at 25.
The Greens party (Gruenen) was founded in West Germany to express the dissatisfaction of environmental activists with the policies of Germany's major political parties, which the Greens felt were not responsive to popular environmental concerns. Paradoxically, the Greens' very existence provides one of the best arguments against adoption of political reforms which they endorse: the initiative and referendum.

In his book, Plebiszitaere Demokratie in der Praxis: Zum Beispiel Kalifornien, Rudolf Billerbeck sets out to teach Germans about the benefits and dangers of direct democracy by presenting the good and bad of California's ballot measure experiences. Billerbeck takes an unorthodox approach to his task by quickly dismissing common complaints about the use of the initiative in California and attacking the ideological content of four conservative case studies. The discussion claims to be balanced, but the study does justice neither to the state of current research about the initiative process nor to the variety of outcomes which the process has produced. Germans would be well advised not to rely on this book as they attempt to decide whether to adopt these political mechanisms.

Billerbeck discusses issues surrounding the initiative process only briefly. American authors have generally focussed their efforts on: gauging the effects of campaign spending on ballot measure outcomes, the emergence of an initiative campaign industry, voters' understanding of ballot measures, and the role of the courts in implementing or disqualifying ballot measures.

Billerbeck selectively addresses only two of these common themes: voter rationality and campaign spending. He answers the question, "How rational are Californians?" with two studies from the 1960s that argue that citizens vote consistently and independently. However, he misses the main thrust of contemporary complaints about voter knowledge. Ballot measures are complex. The text of a measure is often several pages long. There are often drastically different interpretations of the ballot measure even among experts. Recent studies have supported the conclusion that significant numbers of voters may even vote against their intentions due to confusing wording of measure titles. David Magleby describes the con-

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fusion over the intent of a 1980 California ballot measure affecting rent control:

Its title might imply that a yes vote was a vote in favor of rent control, and a no vote a vote against it; it was just the reverse. The proposition was sponsored by landlords . . . . [According to exit polls,] over three-fourths of California voters did not match up their views on rent control with their votes on the measure. Twenty-three percent wanted to protect rent control but incorrectly voted yes, and 54 percent were opposed to rent control but incorrectly voted no.¹

Billerbeck also argues that campaign spending does not affect ballot measure outcomes. Again, his conclusions run contrary to studies which have found that proponents cannot assure a measure's success by outspending opponents, but when the proponents are significantly outspent, the measure's defeat is virtually guaranteed.² Billerbeck overlooks the bulk of evidence and instead points to two exceptions, Propositions 99 (the cigarette tax) and 103 (insurance reforms) in 1988, to show that excessive spending in opposition to a ballot measure can fail to beat the measure. He is correct, but it is significant that even in these cases the campaigns narrowed the election margin by as much as 50 percent in five months! The vote was so close on Proposition 103 that even the day after the election, it was called a toss-up by many newspapers.

Billerbeck's study fails adequately to discuss the emergence of an initiative industry in California and the role of the courts and executive branch in adjudicating and implementing ballot measures. Germans should give careful consideration to the size and shape of the initiative industry in California before implementing similar mechanisms. Several California firms make a business of collecting conservative or liberal mailing lists and combining petitioning and fundraising in the measure qualification process. This industry is a stark contrast to the romantic image of the citizen petitioner walking from house to house through the neighborhood. Another aspect of modern initiative campaigns, professional advertising firms may spend millions of dollars to cloud issues enough that voters will vote "no" on a measure.

The role of the courts and executive branch in the initiative process is dramatized by Proposition 103, the automotive insurance reform. One of the lures to voting for Prop 103 was the promise of a 20 percent premium rollback below 1987 rates, except where firms were threatened with insolvency. The state Supreme Court ruled that the insolvency standard was too high and that "the state must

permit insurers a fair return . . . .”3 The California Department of Insurance, which is responsible for implementing the measure, has been criticized by proponents for foot-dragging. One year after the measure’s passage, no insurance company has granted the premium rollback.

Billerbeck devotes four chapters to case studies of four measures: Proposition 13, the local slow growth ballot movement, a cluster of “security, cultural, and moral” measures, and the Rose Bird/Joseph Grodin/Cruz Reynoso Supreme Court election of 1986. (The court election was not a recall and hence is only marginally pertinent to a discussion of direct democracy.)

In fact, this book should shock those German Greens and Social Democrats who view the initiative as a tool for enacting socially progressive legislation. The four case studies are uniformly conservative in content. Billerbeck interprets them as efforts to preserve individual well-being often at the expense of social welfare. He also carefully elaborates how Proposition 13 (property tax reform), slow growth measures, and measures to promote law and order have promoted racism, segregation, and ethnocentrism. A considerable body of literature supports his claims that Proposition 13 and slow growth measures have affected various ethnicities differently. But this should not be interpreted as voting based on racial considerations. Citizens in both cases are probably motivated primarily by individual benefits gained by passing the measure. Voters who supported Proposition 13 did so primarily because of the tangible benefits of a tax reduction. Similarly, growth control supporters are generally motivated by desires to reduce traffic congestion, fear of crime, and other quality of life considerations.

Billerbeck is clearly aware of many progressive ballot measures in California. For example, he intermittently discusses the role of the initiative in the development of the California Coastal Commission. One wonders why the ballot measure case studies are not more balanced.

Billerbeck’s case studies successfully underline an important handicap of the initiative process when compared with the legislative process: the lack of opportunity for compromise. There is no point in the process where all affected interests negotiate the outcome. Instead, the initiative process cements legal relationships in certain policy areas with laws which are inflexible to future changes in the political climate. For example, Propositions 13 and 4 were responsive to voters’ desires for lower taxes in the 1970s, but now they limit budgetary flexibility. Today there is a surplus of money and a surplus of demands for spending, but no authority to apply the money to the demands.

Billerbeck should note that progressive measures are similarly inflexible. For example, the 1988 election guaranteed levels of fund-

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ing for education. We generally expect budgetary priorities will shift in small increments, but to alter the funding of this agency even incrementally will require new ballot measures and statewide campaigns.

Billerbeck argues that the initiative in West Germany would be a valuable tool to break the "cartel" of power held by Germany's major parties. He feels the major German parties are unlikely to adopt the initiative and referendum and the Greens do not have adequate support. This falls short of a full discussion of the mechanisms in the German political system which open it to factions desiring change or of the potential effect of direct democracy on the German political system.

The proportional electoral system in West Germany provides opportunity for groups supporting policy changes to run candidates for office at all governmental levels. This system elects legislative members both by district and by the party's proportion of the total vote. In the United States, a third party with thin support spread across many districts would capture no legislative seats; but, in Germany, the party will be represented in approximate proportion to the percentage of votes received. It is unlikely a third party will become a majority party, but it can elect enough representatives to serve as the swing vote in a divided Bundestag.

West Germany has at least six viable parties today. Four cooperate in regular coalitions as the major parties. There are also two minor parties at the extremes of the political spectrum. The Greens, of course, represent the extreme left, opposing the very concept of parties. The Republicans are a far-right party which has appeared in recent years. The vitality of these two parties shows that there are channels of access for minority political opinions. However, unlike ballot-box legislation, the proportional representation system subjects all legislative proposals to negotiation among affected interests. Such a system, by reducing the likelihood that an unchecked and unpopular monopoly will control the government, accommodates the shortcomings in the American political system which led to the adoption of the initiative in the early 1900s.

Billerbeck touches only superficially upon the impact of the direct democracy system on the West German party system. Would the existence of direct democracy tools provide an excuse for parties to avoid taking leadership in important policy areas?

Billerbeck's book adds to the archives of West German literature on direct democracy mechanisms. But Germans should read further before adopting these mechanisms. Important questions not addressed here include the poor quality of information often available in initiative elections, the influence of campaign spending on the process, and, most important, the effect that this reform would have on a reasonably well-functioning parliamentary democracy.