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Idea-Systems in Law: Nineteenth-Century German Experience

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Review Essay

Idea-Systems in Law: Images of Nineteenth-Century Germany

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James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical Vision and Legal Change,* Princeton: Princeton University Press, 1990. Pp. xi, 281 $39.50 (ISBN: 0-691-05560-2).

Michael John, *Politics and the Law in Late Nineteenth-Century Germany: The Origin of the Civil Code,* Oxford: Clarendon Press, 1989. Pp. 277 $64.00 (ISBN: 0-19-822748-5).

The extent to which ideas within a legal culture are systematically related to each other may have a far greater influence on the characteristics of that culture than is generally supposed. Particularly, where a single system of legal concepts controls central elements of legal culture, that system is likely to have a major impact on goals, methods, and values within the culture and on the relationships between legal culture and political power. The characteristics and roles of idea-systems in law thus deserve the careful attention of scholars.

Yet scholars seldom have focused on the role of idea-systems in law, except in regard to Roman law's influence on the development of civil law. In this essay, therefore, I explore this phenomenon in the course of reviewing two books that contribute significantly to advancing our understanding of legal idea-systems in general, and their roles in nineteenth-century German law in particular.

The term "idea-system" requires some explanation. I use it here to refer to sets of ideas in which the components are related to each other

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in systematic ways. A civil code is an obvious example. The specific provisions within such a code are related to each other through interconnected general principles, and the resulting structure is conceived as an organic entity, a whole in which all the parts are related. A legal idea-system need not be statutory, but may be merely used by courts as an authoritative framework for decision-making—for example, the idea-system of law and economics. Given that legal ideas have no "natural" or exogenous referents, idea-systems in law necessarily have a common historical source—they must be created.

The Setting

In nineteenth-century Germany, legal idea-systems achieved an importance perhaps unparalleled in modern legal history, and thus this period affords particularly valuable insights into the roles of idea-systems in law. During the first part of the century the idea-system of Roman law dominated German legal culture, providing much of its vocabulary as well as many of its central values and defining the roles of important institutions. During the last quarter of the century, a new civil code was created that was to provide much of the language of law until the present day. To understand these two idea-systems is to understand much about the development of law in modern Germany.

James Whitman and the Roman Law Tradition in Post-Reformation Germany

James Whitman's book is far broader in scope than the title suggests. It focuses on Roman law not primarily as a "legacy" of the past, but as an active agent in German legal, intellectual, and political life. Moreover, the book's temporal scope is not limited to the German Romantic period. It portrays the evolution of an intellectual-institutional tradition from the Protestant Reformation through the 1860s. The narrowness of the title may well deter potential readers who would benefit from reading the book, and this would be akin to a tragedy, for it is a superb piece of scholarship that should attract anyone interested in the evolution of law's role in society or in German history since the Reformation.

Professor Whitman tells the story of how Roman law influenced legal and political developments for more than three centuries. During this period Roman law was a source of authority, an interpretive construct,

and a lever of power. It structured thought, guided the interpretation of events, generated and supported powerful institutions, and mediated the relationship between political power and legal culture.

Whitman traces the beginnings of this tradition to Philip Melanchthon, the Reformation leader who began using Roman law as a tool for resolving conflicts in the strife-ridden German territories of the sixteenth century. Roman law had, of course, played important roles in medieval Europe, but in the German Protestant context its political uses changed. Roman law's influence continued to be anchored in the glory of the "cultural idea of Rome" and in the traditions of medieval Roman law scholarship.[1] In the new context, however, its political success derived from its practical value as a source of neutral and, it was thought, objectively ascertainable solutions to social conflicts, and from its capacity to legitimate institutions competing for power in a newly fragmented political world.

Roman law's influence was closely bound up with the practice of *Aktenversendung,* by which legal disputes were referred for resolution to institutions (*Spruchkollegien*) within university law faculties. These were "the institutional embodiments of the idea of Roman-law 'impartiality' " (Whitman, 34) and through them "the professors themselves became representatives of equal justice" (Whitman, 38). This mechanism gave law faculties a constitutional role. Roman law was an authoritative idea-system, and law professors derived their political power from their control over access to this authority.

The pressures of Enlightenment thought and absolutist institutions almost crushed Roman law during the eighteenth century. The rationalism of the Enlightenment focused on the creation of law through Reason, leaving little room for Roman law and its weighty centuries of scholarly accretions. The belief that Reason was the only proper basis of law undercut the claims that Roman law was authoritative because it represented time-sanctioned principles of conduct.

This intellectual attack on Roman law coincided with political efforts to undermine the institutions associated with it. Absolutist princes often saw *Aktenversendung* as an obstacle to their own sovereignty, because it represented an independent source of legal authority. Thus they sought to restrict the jurisdiction of *Spruchkollegien* and to subvert the power of the law faculties, often by providing exemptions from their jurisdiction.

Because of the symbolic and historical dimensions of Roman law's role, its intellectual and political fortunes were intertwined with the

1. See Paul Koschaker, *Europa und das Römische Recht* (Munich, 1947).

process of interpreting Roman history. The Melanchthonian vision of Rome emphasized, for example, the period of the Roman republic and the high status of lawyers as oracles of the law, while in the eighteenth century, attention was focused on Rome's Augustan age and on the role of lawyers in carrying out the will of the Roman Emperor.

During the German Romantic period (roughly the first half of the nineteenth century), Roman law and its associated institutions managed to recover from these setbacks and to reemerge at the center of the legal world. As the Napoleonic wars were eroding confidence in princely absolutism, the new forces of liberalism were challenging the moral and intellectual foundations of the eighteenth-century state, and Roman law provided support for those efforts.

German reformers were attempting to develop a law-based state (*Rechtstaat*) in which even the supreme power of princes would be constrained by law. This goal required a neutral set of substantive principles and reasonably objective and independent institutions to apply them. The Roman law tradition promised both. It represented a time-honored and well-developed idea-system known for the balance of its conceptual scheme. Moreover, its institutional base was in the universities, which were among the few institutions in post-Napoleonic Germany that could serve as reasonably autonomous power bases.

Roman law thus returned to its central position within German legal culture.[2] Roman law's emphasis on private property rights and contractual autonomy fit well with liberalism's economic and political doctrines without unduly threatening the existing political system. This also brought renewed life to the *Spruchkollegien,* and university law faculties again became centers of leadership within German law.

This return to prominence entrained yet another reinterpretation of Roman history to support the new conception of Roman law's role. This new image featured the age of the Antonines and spotlighted the independent and creative roles of law and lawyers in the service of intelligent and wise rulers. Here lawyers were seen as creators of a constitutional framework of liberty and peace.

But the revival was only temporary. A reputation for objectivity was increasingly difficult to maintain amid the growing social and political unrest of the years before the 1848 revolutions. Law professors were induced to take sides, and as they did, they lost their claim to confidence

2. During this evolution, Roman law was restructured in accordance with the systematization schemes of natural law, and even its content was frequently altered, so that the Roman law of the nineteenth century often was far different from that of the sixteenth century, not to mention the Roman law of antiquity.

as neutral arbiters of legal disputes. Political support for *Aktenversendung* quickly eroded, and with it much of the political influence of the Roman law professors.

Although the relatively tranquil years that followed the 1848 revolutions witnessed a brief resurgence of Roman law and its institutions, the movement toward national unification, which became increasingly powerful during the 1860s and culminated in the founding of the German Reich in 1871, changed the political context of Roman law. A unified German state operating in an atmosphere of legal positivism did not need Roman law; it would, and did, create its own laws and legal institutions.

Yet Roman law remained an important intellectual force, and it is in this narrower context that one might more appropriately speak of the "legacy" of Roman law. Indeed, the conceptual foundations of the new German Civil Code derived from Roman law scholarship. The vocabulary as well as the structure of the code were based on Roman law.

The tradition of Roman law that Whitman describes shaped attitudes and events as part of an intricate dialectical pattern. The idea-system molded perceptions of reality and supplied political legitimacy. In turn, political power gave it authority, durability, and prestige and thus determined its capacity to influence thought and conduct. The idea-system had its own force, but it also served as a tool for the attainment of political ends, and political and ideational processes often were intertwined.

Roman law's long dominance of European legal culture established its vocabulary as the basis for legal thought, the language of legal discourse.[3] The individual concepts of Roman law and the systematic connections between those ideas were honed and developed over centuries, and they served as the basis for structuring legal knowledge. This language had its own implicit values; it acknowledged and emphasized some elements of reality and disregarded or disparaged others, and in so doing molded the values of an important segment of society.

Legal professionals also turned to the history of Roman law to define their own identities and roles. As Whitman so effectively portrays it, changes in the roles played by Roman law were intertwined with modifications in the identities that lawyers created for themselves and with developments in the institutional contexts in which those roles were

3. See, for example, Alan Watson, *The Making of the Civil Law* (Cambridge, Mass., 1981).

fulfilled. These identities contained values, standards, and objectives that directed the energies of those professionals.

The strength of Roman law's influence depended at any particular time on factors such as the characteristics of the idea-system, the power of its symbols, and the political strength of the institutions associated with it.

The combination of comprehensiveness and structure gave Roman law inordinate influence. It created an integrated conceptual framework that encompassed most societal relationships and thus could conveniently be used as a language for structuring those relationships.

Roman law's influence also derived from the immensely powerful cultural symbol of Rome. Despite changing intellectual fashions, Rome remained part of the identity of many German intellectuals, and respect for Roman civilization was a source of authority for Roman law.

The influence of Roman law also depended on institutions, particularly the universities. Law faculties provided an institutional basis for Roman law's influence, and changes in that political strength or in the jurisdiction of the *Spruchkollegien* were associated with changes in Roman law's influence.

The power of Roman law, in turn, made it a valuable tool—a means of justifying and securing power. Legal professionals, particularly law professors, were the most immediate and obvious beneficiaries of Roman law. Their constitutional role was based on the prestige of Roman law, and *Aktenversendung* gave them power and influence that otherwise would have been unavailable. But other groups also used Roman law to achieve political ends. In the early nineteenth century, for example, German liberals supported it because it emphasized concepts of personal and contractual freedom that were congenial to their political goals and because universities provided an attractive power base within absolutist states.

The objectives for which Roman law tended to be used underline the interplay between system and power. Roman law and its institutions were used to create objectivity and neutrality and thus to separate law from political power and to provide a different kind of language for political authority. Roman law tended to be strongest when the perceived need for this type of language was greatest. In the sixteenth century, this need was created by the chaos of diffuse power, while in the early nineteenth century it was a response to absolutism.

Professor Whitman is the first to present an integrated picture of the tradition of Roman law in post-Reformation Germany, and thus his book is enormously important just because it tells the story and tells

it well. Moreover, it develops diachronic and systemic relationships within that tradition and reveals its internal dynamics.

The book also contains an abundance of new details based on archival research and many highly insightful analyses of components of the story. From Melanchthon's position in the Reformation through ancient constitutionalism to the roles of Roman law in the agrarian controversies of the nineteenth century, Whitman illuminates the stages in the evolution of the tradition with unfailing acuteness.[4]

The author's task was formidable. Not only does the primary story range over intellectual, political, and legal history during some four centuries, but penetration of the material also requires mastery of the Roman law material that was the "stuff" of the tradition. The author had to know Roman history as well as the Roman law sources that German thinkers were using to interpret their uses of those materials.

Finally, Whitman's presentation is a marvel of style and analytical finesse. What many might consider a somewhat arcane topic is convincingly presented as anything but. The writing consistently reflects concentrated analytical power, and yet the style is crisp, graceful, and accessible.

While Whitman tends to emphasize the intellectual component of the story more than the political, he manages to tie the political power issues into the intellectual developments, even if he does not dwell on them. He does not use the term "idea-system," but he sees Roman law as a system of ideas and focuses on the interplay between political power and that system.[5]

On occasion a bit more attention to the social context of the ideas may have been useful, and in the nineteenth-century context, the ties between liberalism and Roman law may deserve more attention. These are, however, trifles in the context of an outstanding performance.

Michael John and the Creation of the Civil Code

Michael John's story is the creation of the German Civil Code (*Bürgerliches Gesetzbuch*)—the idea-system that replaced Roman law at the center of German legal culture and has remained in that position.

4. Whitman's principal concern is not to describe the doctrinal content of Roman law, although he sometimes provides such descriptions to clarify more general points about the roles of Roman law. When he does, he does so with impressive depth.

5. I suspect that this cognitive factor is critical to his penetration of the material and his ability to perceive the interaction between the intellectual and political components of his story.

John picks up, therefore, roughly where Whitman leaves off. While Whitman analyzes the roles of an existing idea-system, John's objective is to elucidate the creation of such a system.

Given the enormous importance of the German Civil Code, it is surprising that there is no reasonably complete history of the process of its creation. It is even more surprising that the author of the first such history should claim that his objective was not to write legal history, at least "in the common sense of the term" (John, 1). He says that his primary interest is in the insights that the process of creation provides about the political situation in Germany during this period. He claims, it seems, to be studying law in order to understand politics, and the fundamental ambiguity of this objective sometimes distorts the picture he presents.

In contrast to James Whitman's situation, Michael John's basic story-line is well known. The creation of the German Empire in 1871 produced powerful political and economic incentives to draft a civil code that would apply throughout Germany. The process of codification was thus begun in 1874, and in 1888 an initial draft was completed. This draft was widely criticized, but it was approved in 1896 with comparatively few modifications and entered into force on January 1, 1900.

John's book does not, therefore, reconstruct an unknown or little-understood story. It is valuable because it provides a comprehensive and integrated account of a process that is immensely significant for understanding not only German law and German history, but also the development of modern Western legal systems. In addition, it generates many new insights into the political aspects of that process.

My concern then is with the author's analysis of that process. There is only one significant distortion here, but it mars important parts of the picture. The author fails to reveal adequately the roles played by legal ideas, particularly systems of legal ideas, in the evolution of the code, and this flaw touches each of the three main parts of the codification story: background, drafting, and acceptance.

No code, as no idea-system, is fashioned out of whole cloth. It presupposes years and often decades and centuries of intellectual refinement and, usually, legal practice. To understand the process of creating the German Civil Code requires, therefore, a reasonably sharp image of the intellectual and political forces that fed that process. John's descriptions here are solid and useful, but his lens is a bit too narrow, and he misses or leaves hazy important aspects of this background.

The creation of the German Civil Code was part of the process of national unification, and John effectively portrays the constellation of political forces that led to demands for national unity. The author may

understate the role of liberalism as a political force during the early nineteenth century, but the damage is minor.

He also provides sufficient background for understanding why the codification of private law was politically important. Focusing on the famous controversy between Friedrich Carl von Savigny and Anton Thibault, both leading German law professors, he traces the arguments concerning the desirability of a national legal code and elucidates the main political and intellectual factors that influenced treatment of that issue.

Yet equally as important as the question of whether there should be a code was the issue of what that code should be like—how it should be structured and what sort of legal mechanism it should entail. It is here that problems arise. The code's drafters were creatures of the legal culture of the period and had to fashion the code out of materials at hand—the ideas, structures, and values of that culture. These ideas defined the options open to the code's drafters and generated the standards for assessing those options.

John pays little attention, however, to this aspect of the code's background. For example, Roman law provided the conceptual language in which the code was written, but the book contains little discussion of Roman law's roles, and the author does not provide the insights necessary to appreciate their influence. Thus, while John prepares the reader for the issue of whether to create a code, he is less effective in providing a basis for understanding subsequent decisions about the content, structure, and methods of the code.

The same pattern recurs in the author's treatment of the drafting of the code. He handles the political aspects deftly and often with impressive insight, and he discusses the basic intellectual factors that influenced decisions about whether to create a code, but the interaction between legal ideas and political power that shaped the code ultimately remains obscure. In this regard, he seems to believe that political power and objectives determined the procedures for drafting the code and that these procedures determined its form and substance. So far, so good, but existing legal ideas combined with the exigencies of creating an idea-system to inform those political decisions.

Procedural and personnel decisions determined the basic shape of the code, and John's description of the political struggles that surrounded these decisions is enlightening. He ferrets out the relevant interests and conflicts and demonstrates the extent to which the bureaucracy was able to use the process to achieve its own goals. He pays particular attention to the often underrated role of the preparatory commission (*Vorkommission*) that organized the drafting process and established its

basic objectives. It was here, for example, that the critical decision was made that the code should integrate the existing legal principles of the separate states.

The drafting commission itself also made immensely important procedural decisions. It decided, for example, to divide the substantive material into five parts and to assign primary responsibility for each to one of five members of the eleven-person commission. Not unexpectedly, each of the principal drafters was a bureaucrat with known conservative proclivities. Similarly, the decision to allow the principal drafters to work for years without outside input or influence created an internal dynamic that greatly augmented their power. No meetings of the entire commission were held until 1881, and by then the individual drafts already had taken shape. Given a jurisprudential ethos that demanded deductive coherence and precision, this made significant changes difficult.

Bureaucratic control of the drafting process meant that the code would serve bureaucratic interests. There was no attempt to make the code accessible to "everyman" in the manner of the French *Code Civil.* Early decisions concerning personnel and procedures assured that it would be a technical document accessible only to professionals. These decisions strongly influenced the subsequent development of German legal culture, defining the roles of legal professionals and structuring their education, their language, and their thought.

Political considerations were also critical in establishing the objectives of the drafting process. When political unity was finally achieved in Germany in 1871, many believed that a comprehensive national legal code was an important, even necessary symbol of that unity. The bureaucrats and politicians of the *Reich* as well as the nation's businessmen generally saw a national code as a means of tying the newly created nation together. Such a code also served their own interests, enhancing the power of the bureaucrats and politicians and promising greater profits to business as a result of a more uniform market.

This national unity goal was closely associated with the objective of achieving *Rechtssicherheit* (roughly, legal security through an objective and neutral legal system). At least at its outset, the codification process had to promise this to overcome political resistance from the smaller states who feared that their interests would not be protected in the Prussia-dominated *Reich.*

In order accurately to interpret the political aspects of the creation process, it is often necessary to be aware of the perceived range of decisional possibilities and the anticipated consequences of particular choices. For example, the decision to allow several years for the prep-

aration of initial drafts must be interpreted in light of the dominant conceptions of law during the period, for they demanded high levels of structure and precision and, therefore, such a delay presumably was considered normal and necessary. It did serve bureaucratic interests, but not necessarily by political design—there were no available alternatives. The consequences of political decisions thus depended on existing conceptions of law and the expectations they created.

The goals of codification were also defined by the interaction of political power and systematic conceptions of law. Political goals generated incentives to make the code comprehensive, uniform, and objective, for the greater the coverage and uniformity of the code, the greater its effect as a unifying force. At the same time, existing idea-systems and systematic conceptions of law not only made possible, but also encouraged the realization of particular political goals through a legal code.

The book's treatment of the responses to the draft code, the process of revising it, and its final enactment reflect both the strengths and weaknesses of earlier parts of the story. From John's perspective, the dynamics of this process were political. Those who criticized the draft code lacked the power to overcome the entrenched support of bureaucrats, big business, and lawyers, and thus the code was enacted with few significant revisions. The story is not, however, that simple.

Preparation of the draft code lasted a decade and a half, and during this period, social and economic life in Germany was being transformed by rapid industrialization that generated economic growth and urbanization, but also created social problems such as a proletariat, resentful artisans, and frightened and economically tottering agrarians. By the late 1880s, this process was fragmenting German society, and, as a consequence, the code project was increasingly being viewed from a partisan, interest-group perspective in which the central question was who would gain and who would lose under its provisions.

During this long period of gestation the work of the commission proceeded without apparent consideration of these social and economic developments. The agenda had been set, and the commission considered itself obligated to follow it.

When the draft code was presented in 1888, it met two types of criticism. Progressive critics focused on its high level of abstraction and on its lack of protection for the weaker members of society. It allowed, they said, the strong to exploit the weak. Conservative critics challenged what they regarded as an atomistic conception of society that emphasized individualism, undermined social cohesion, and failed to protect the agrarians and artisans who represented the core of their commu-

nitarian image of society. Both criticisms sprang from deep distrust of liberal values and skepticism about the society those values were creating.

These criticisms forced the government to appoint a new commission to revise the draft and to include in that commission critics of the draft. As John shows, however, the political cards were stacked against significant revisions, because the critics had relatively little power within the commission. The Justice Ministry dominated the revision process, in part by supplying the commission with lengthy analyses of the draft that were used as the starting points for commission discussions. In addition, the bureaucrats on the commission were considered permanent members, while the critics were classified as occasional members and received correspondingly fewer rights. Finally, the critics tended to be heavily involved in politics and devoted relatively little time to the work of the commission.

When the revised draft was presented for enactment in 1895 with few significant modifications, there was opposition, but the combined support of bureaucrats, businessmen, and lawyers did, as John says, assure its enactment.[6]

Responses to the draft were influenced, however, by its systematic characteristics. For example, a central argument against significant changes in the draft was that piecemeal changes would be difficult because they would disrupt the systematic structure of the code. John suggests that this was largely political rhetoric and refers to the arguments as formalistic. Yet the systematic character of the draft did create a major obstacle to significant changes. A change in any one part might well affect many other sections of the draft; that is a necessary consequence of systematization. The deductive logic that held the structure together thus created its own dynamic and demanded its own answers, regardless of their social consequences.

Criticism of the draft was shaped by similar factors. The systematic character of the draft meant, for example, that only trained lawyers could evaluate its impact, and this meant that all who made arguments about the substantive provisions of the draft were dependent on lawyers for their information. Moreover, critics were forced to operate on a relatively abstract plane, and criticisms were always susceptible to the argument that while individual provisions might appear to have a par-

6. The code remained necessary for national unity, although "unity" now referred primarily to protecting the social fabric against disintegration in the face of socialism and other forms of populist agitation rather than to the original issue of holding the various geographical entities of the *Reich* together.

ticular consequence, the overall impact of the system would change this impact. The type of expertise required by the code thus determined who would play what roles in the political discussion of its benefits and costs, and it significantly influenced the form and strength of criticisms.

Michael John provides a highly valuable contribution to our understanding of the political aspects of the creation of the German Civil Code. He also recognizes the importance of the interaction of the intellectual and political components of the process. Political practice and ideology are interwoven, he says, and "neither of these levels is comprehensible without the other" (John, 10). Unfortunately, he does not consistently penetrate the dynamic of the relationship between political power and legal ideas.

His ultimate preference for the political component of the process tends to cloud the picture he presents, often reducing ideas to mere arguments without any configurative power of their own. Yet the systematic structuring of legal ideas defined the range of options available to political decision makers, influenced the objectives of the codification process, and channeled responses to substantive decisions. It was, therefore, central to the process by which the German Civil Code was created.

Power and Legal Culture: Mediating the Relationship

A central theme in each of these studies is the role of idea-systems in law. In both, the systematic structuring of legal concepts had important consequences for the relationship between political power and legal culture. Together, they suggest some of the factors that are likely to accompany the occurrence of idea-systems in law.

Systems of ideas occur wherever people think systematically, but idea-systems in law are unique in that they are interwoven with political authority. They are not merely products of thought; they represent conduct norms and thus directly influence conduct. This, in turn, gives them potential political significance.

Because they are structured and comprehensive, idea-systems tend to generate the language used in the area of law to which they relate. Where an idea-system is at the center of legal culture, its concepts and grammar tend to provide the language of the entire culture. The more structured the idea-system, the more structured the grammar of that language is likely to be.[7]

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7. For the concept of a "grammar of law," see Mirjan R. Damaska, "A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment," *University of Pennsylvania Law Review* 116 (1968): 1363–78.

This language naturally affects legal thought, providing the basic framework of legal discourse and shaping the claims and arguments that are deemed legitimate within that culture.[8] A highly systematic grammar will focus attention, for example, on the concepts and rules of the idea-system and deemphasize the value of ad hoc concepts created in response to the particularities of a specific fact situation.

Idea-systems also influence legal institutions. A highly structured legal language creates the need for a particular type of expertise based on the mastery of abstract conceptual systems. This is likely to shape the objectives and methods of legal education as legal educators seek to produce this type of expertise. In addition, procedures are likely to emphasize this type of expertise, thereby influencing the roles assigned to lawyers and judges within legal institutions.[9]

Through these types of influences on legal thought and institutions, idea-systems help to define the framework within which political power is exercised. They influence the ways in which societies perceive intra-societal relationships, the methods that are used to resolve conflicts, and the proper roles of government in society.

Political power is likely, in turn, to be important in determining the influence of an idea-system. Powerholders can enhance the impact of such a system, for example, by supporting its dissemination and enforcement. This may include measures such as financial support for educational and juridical institutions or increasing the jurisdictional scope of particular institutions.

On the other hand, political power also can be used to obstruct the influence of an idea-system. Powerholders can shift resources away from institutions associated with such systems, constrict the range and manner of their application or, of course, eliminate them entirely. A modified version of the German Civil Code was in effect in the former German Democratic Republic, for example, but the government undermined its influence by restricting the independence of the judiciary.

The roles of idea-systems in mediating the relationship between political power and legal culture are thus likely to influence how power is exercised, by whom, and for what purposes.

In this essay, I have assessed two valuable contributions to the history

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8. Few who have had extensive experience with both German and American lawyers would deny, for example, that the legal discourse of German lawyers tends to be far more abstract than that of American lawyers. This difference is due, at least in part, to the abstract system of the German Civil Code and to the absence of an analogous system in the United States.

9. See David J. Gerber, "Extraterritorial Discovery and the Conflict of Procedural Systems," *American Journal of Comparative Law* 34 (1986): 745–88.

of law in nineteenth-century Germany. In doing so, I also have identified a phenomenon that was central to both stories and that has potentially significant implications for legal analysis, in general, and legal history, in particular.

Idea-systems play more obvious roles in civil law countries than in those of the common law,[10] but they also occur in American legal history, and their importance seems to be increasing.[11] The Uniform Commercial Code is perhaps the best-known modern instance of this phenomenon, but law and economics doctrine provides a further example. It represents a systematic set of concepts that generates within its sphere of influence the types of consequences that our analysis of legal idea-systems would lead us to expect. It creates, for example, its own language and its own orthodoxy, and its "experts" derive power from their control of access to the idea-system. Thus analysis of the roles of legal idea-systems may also provide valuable insights into developments within American law.

The two excellent books under review demonstrate the potential value of studying the roles of idea-systems in law, and Michael John's book also provides examples of the problems that can arise when insufficient attention is paid to those roles. The idea-system perspective adds a dimension to the analysis of legal development, but its potential can only be realized where historians recognize the interpenetration of legal ideas and political power that provides the dynamics of legal change.

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10. I suspect that the high degree of systematization in such systems is associated with many of the major differences between civil and common law jurisdictions.

11. The growing importance of theory in at least some areas of United States substantive law increases the likelihood of this type of development.