

D the Digest

Summaries of important new research from the nation's universities, think tanks, and investigative publications



POLITICS

Put Judges Above the State

Paul Mahoney, "The Common Law and Economic Growth: Hayek Might be Right," in *The Journal of Legal Studies* (June 2001), University of Chicago Press, Post Office Box 37005, Chicago, Illinois 60637

Most nations use one of two systems to shape their laws. In the British "common law" tradition, judges are high ranking, well paid, and able to make decisions that change the law. Common law nations also allow upper-echelon judges to overturn the decisions of lower courts. By contrast, in the French "civil law" system, judges are lowly functionaries who enforce the laws prepared by bureaucrats, and whose decisions cannot be questioned or appealed.

Paul Mahoney of the University of Virginia School of Law finds that countries with common law grow faster economically than countries where civil law is the rule. This leads him to agree with Friedrich Hayek's observation in *Law, Legislation, and Liberty* that "the ideal of individual liberty seems to have flourished chiefly among people where, at least for long periods, judge-made law predominated."

The British and French legal systems both evolved from battles between crown and parliament over private property. In the seventeenth century, King James I and King Charles I tried to establish state-controlled monopolies and force merchants to loan the state money. Eng-

lish judges resisted these arbitrary expansions of government power, and such legal experts of the time as James Harrington, John Locke, and Sir Edward Coke "championed the rule of law as a superior organizational principle to royal absolutism."

In France, on the other hand, judges sided with the monarchy. Thus when legal codes were revised after the French Revolution of 1789, judges lost of most of their powers. The revolutionary legal code's chief drafter, P. A. Fenet, explained that, in the new France, the only basis for a judge's decision was "the mysterious and variable interests of the State."

This turned out to be bad for private enterprise. Having strong, independent judges protected from politics, Mahoney finds, "produces improvements in property rights and contract enforcement that in turn speed economic growth."

Politics and the IRS

Marilyn Young, Michael Rekuslak, and William Shughart, "The Political Economy of the IRS," in *Economics & Politics* (July 2001), Blackwell Publishers, 350 Main Street, Malden, Massachusetts 02148

The Internal Revenue Service claims that it enforces our tax laws fairly. But business school professors Marilyn Young, Michael Rekuslak, and William Shughart uncover evidence that politics seems to come into play.

Comparing IRS auditing data from 1991 to 1997, they find that "The percentage of tax returns audited by the

IRS is markedly lower in states that are important to the sitting President's reelection aspirations." They also investigated whether living in a congressional district or state with a member who sits on a committee that oversees the IRS affected one's chances of being audited. The three economists find that citizens with representatives who sit on committees that deal with the IRS also received fewer unwelcome calls from the tax collection agency.

These variations in IRS audit rates, the authors conclude, definitively show "evidence of politicization of the IRS."

Multiculturalism Damages Liberalism

Thomas F. Powers, "The Transformation of Liberalism, 1964 to 2001," in *The Public Interest* (Fall 2001), 1112 Sixteenth Street, N.W., #530, Washington, D.C. 20036

Multiculturalism, contends University of Minnesota (Duluth) political scientist Thomas Powers, is at its heart an attempt to change the rules by which American democracy has been conducted over the past two centuries. Among the dramatic changes advocates seek are these:

- *Policing opinion.* Liberals traditionally believed that the state could regulate behavior but not ideas. They thought that judges could regulate actions but not opinions, and approved of Thomas Jefferson's notion that "it does me no injury for my neighbor to say there are 20 gods or no

gods. It neither picks my pocket nor breaks my leg." Multiculturalists, on the other hand, believe that ideas they deem racist or sexist have to be regulated—and ultimately eliminated.

- *Having government enforce group relations.* Multiculturalists contend the suffering of blacks and women primarily results from a lack of "respect," and that it is the paramount duty of the state to oversee the ways in which members of different groups interact with each other. Relations must be monitored constantly to ensure equal status between all groups.
- *Dominance of faction politics.* In *Federalist* 10, James Madison warned against the rise of interest groups (what he called "factions") in American political life. For multiculturalists, though, the group you're in determines your fate. They believe, moreover, that group membership is "ascriptive"—you can't opt out of ethnic identity even if you want to. The state, in the multiculturalist view, must constantly act to give favors to some groups and punish others.

Both liberals and conservatives, Powers believes, underestimate the ways in which multiculturalism undermines democratic traditions. Anti-discrimination laws that limit or eliminate traditions of free speech and tolerance, Powers concludes, conflict with "nothing less than the ultimate self-understanding of American democracy. The choice between supremacy of liberty and the justice of anti-discrimination is a difficult one to make."

SOCIETY

When Juries Send Messages

Mark Curriden, "Power of 12," in *ABA Journal* (August 2001), American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611

In January 2000, a jury in Delray Beach, Florida found Humana, a health-maintenance organization, guilty of failing to provide adequate care to a nine-year-old who died from symptoms of cerebral palsy. The angry jury awarded the child's family \$79.6 million (an amount that's being appealed). "We

decided we had to send a message that would get not only Humana's attention but the attention of every HMO out there," says juror Diane Leininger.

The Florida case, says Mark Curriden, a reporter for the *Dallas Morning News*, is not unusual. In the past few years, tobacco companies, drug companies, gun manufacturers, the Catholic Church, and other companies and organizations have been socked with enormous judgments from juries eager to punish. "Today's jurors come to court angry and full of biases, and they are exacting revenge," declares American Tort Reform Association general counsel Victor Schwartz.

The first modern instance of a jury "sending a message" came in 1962, when television and radio commentator John Henry Faulk sued Aware, Inc., a group that accused Faulk of being a communist sympathizer. Faulk sued, and won \$3.5 million, the largest jury settlement up to that time.

But most juries stayed relatively moderate in their actions until 1982, when Texas trial lawyer Scottie Baldwin won a \$1 million lawsuit against asbestos makers Johns-Manville and Raybestos-Manhattan for his lung-diseased client. This case paved the way for class-action lawsuits where trial lawyers routinely persuade juries to punish large companies with massive judgments. A *Dallas Morning News/Southern Methodist University Law Review* study found that the number of cases where juries "stated publicly that they intended their verdicts to go beyond their individual cases" rose from 17 between 1900 and 1970, to 100 between 1970 and 1990, and then to 700 in just the decade from 1990 to 2000. In another survey, the *Morning News* and *SMU Law Review* found that 40 percent of 594 district judges had experienced a jury using its verdict "to send a broader political and social message." And 32 percent had had a jury ask to read a proclamation about why they made their decision.

Juries are also increasingly willing to use their powers to nullify laws they don't like. In the mid 1990s, for example, Atlanta jurors began to acquit sports bookies, stating that Georgia could not

simultaneously punish bookies and run a state lottery. Dallas jurors, likewise, often acquit exotic dancers who come closer to patrons than the law allows. The survey of district judges found that 34 percent of them had presided over a case of jury nullification of minor or major import.

"Like no time before," Curriden reports, jurors "regularly demonstrate an increasing willingness—even a clamoring—to force basic American institutions...to change the way they operate."

OTHER COUNTRIES

Beware of Mountain People With Guns

S. Frederick Starr, "Altitude Sickness: Poverty and Violence in the Mountains," in *The National Interest* (Fall 2001), 1112 Sixteenth Street, N.W., #540, Washington, D.C. 20036

What do the Taliban in Afghanistan, the Shining Path in Peru, and the Zapatistas in Mexico all have in common? They're all mountain people in revolt against civilization. S. Frederick Starr of Johns Hopkins warns that a "disproportionate number of the world's bloodiest zones of conflict today are in mountain regions."

One-sixth of the world lives in mountainous areas, and these regions are among the world's poorest areas. Construct a chart of areas where the average wage is less than a dollar a day and you'll encircle most of the world's mountain people. Mountain people tend to have less education, poorer roads, little or no rail service, and no air transportation. The few goods available from traders are usually expensive, which increases indebtedness and resentment against lowland neighbors.

What's the best way to deal with rebellious mountaineers? Mountaineers have historically been able to defend their own territories against aggressors. "Any government that thinks that it can bludgeon mountain people into submission," Starr writes, "is engaging in a most destructive form of self deception."

Ultimately the only way to make mountain people peaceable is to make them richer. But here foundations and

international aid agencies should avoid “grandomania”—the desire to impose a one-size-fits-all solution from outside. Most such solutions waste money and leave mountain people as poor as ever. Far better, Starr argues, to discover local entrepreneurs who know what poor people need and then support them. He commends the international Muslim leader, the Aga Khan, whose development network has helped poor people in Pakistan and Tajikistan establish schools, small enterprises, and self-sufficient farms. The Aga Khan also signed an agreement with the presidents of Kazakhstan, Kyrgyzstan, and Tajikistan in 2000 to establish the University of Central Asia, the region’s first college.

If donors can help mountain people to help themselves, Starr concludes, eventually “the world’s mountain territories will cease to be regions of despair and conflict.”

Is China a Paper Tiger?

Gordon Chang, *The Coming Collapse of China*, Random House, 299 Park Avenue, New York, New York, 10171

China appears to be on the verge of becoming an economic powerhouse. But Gordon Chang, a lawyer with extensive experience in China, contends that this is a mirage. Actually, he suggests, China is on the verge of economic collapse. “Today, China is halfway to somewhere with no consensus as to the future,” he writes. “It is suffering from the pain of a transition partially completed, yet at the same time it does not enjoy most of the benefits of modernization.”

Despite the economic reforms implemented by Deng Xiaoping and Jiang Zemin, China remains a communist nation. Economists still devise five-year plans (the Tenth Five-Year Plan will run through 2003) that are ratified at Communist Party Congresses. At least 240,000 Chinese are professional Marxists.

All these ideologists and party officials have to find work somewhere, and they are likely to work in a state-owned enterprise or SOE. SOEs are at the core of today’s Chinese economy; officially, the Chinese Communist Party is “the Party of Public Assets”—the “public assets”

being SOEs. Some of these SOEs are huge; China Petrochemical (Sinopec) has over a million employees, while its chief rival, China National Petroleum Corp. has a payroll of 1.5 million people.

Official Chinese statistics claim that SOEs are profitable. But these statistics don’t account for government subsidies. In 1998, SOEs allegedly made a profit of \$5.9 billion, but that was only after government subsidies amounting to \$18.1 billion. The losses may well be larger, but accounting practices are foggy. A 1999 study from the Ministry of Finance found that 89 percent of SOE corporate books were faked. Chinese government studies charge that as much as \$60 billion in equipment in SOEs is unused, and that 30 percent of SOE employees do nothing productive.

China’s state-owned banks are in trouble because of SOEs. The Chinese are among the world’s greatest savers, putting as much as 40 percent of their income into banks. But the banks take this capital (which, in 1999, was \$720 billion) and then squander it on loans to SOEs and other dubious ventures.

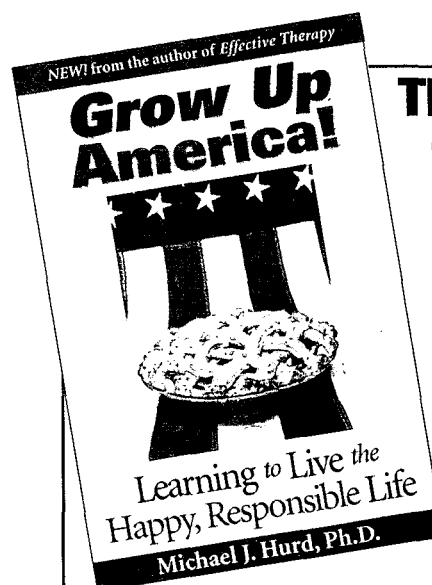
According to Standard & Poor’s, as much as 70 percent of the assets of Chinese banks are non-performing loans.

Chang foresees several ways Chinese communism could collapse. China could launch a war to conquer Taiwan, which the inept, war-averse People’s Liberation Army would probably lose. This could lead to a second march for democracy on Tiananmen Square—which the police would not suppress. A

second possibility would be a massive stock manipulation scandal that could lead to an economic depression. Since about 30 percent of Chinese stocks, according to Chang, are currently being manipulated, the likelihood of a Chinese depression is quite high.

Outsiders, Chang concludes, should not assume that China’s tyrants can repress democracy and capitalism forever. “Central government leaders do not know what to do as the institutions built over five decades become feeble,” he writes. “Social order in their nation is dissolving. The Chinese are making a break for the future, and the disaffected are beginning to find their voice.”

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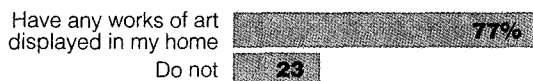
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Good Art, Bad Art

In 1978, two Russian artists, Vitaly Komar and Alexander Melamid, emigrated to the United States. They continued their artistic work, and, in 1993, embarked on an unusual project. They surveyed Americans about their tastes in art and then created a painting based on the poll's results. Eventually, they interviewed people in nine other countries. Americans, like most other people they polled, found blue landscapes most appealing. Some U.S. results follow.

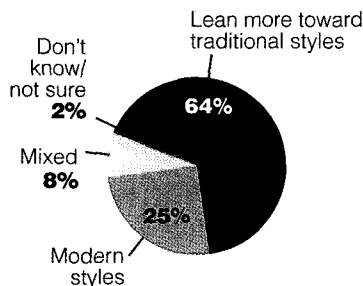
Question: Do you...?



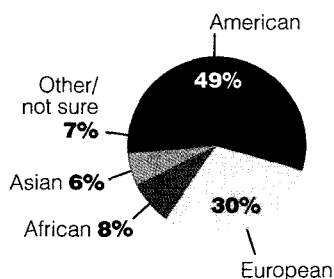
Of those who have art in their homes...

78% have at least one photograph other than a family snapshot
 77% have at least one print or poster
 73% have at least one piece of sculpture or a statue
 72% have at least one original painting
 45% have at least one reproduction of an original painting

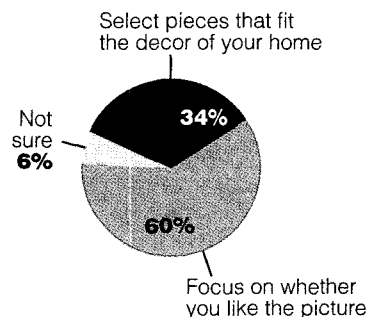
Question: When you select pictures, photographs, or other pieces of art for your home, do you...?



Question: If you had to choose from the following list, which type of art would you say you prefer...?



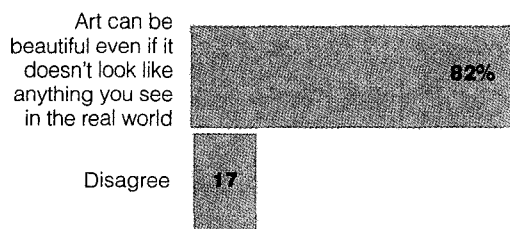
Question: When choosing art, do you...?



Note: Asked of the 77 percent who said they had art (other than family snapshots) in their homes.

Question: Do you have...?

Question: Do you agree or disagree with the following statement...?



	A very favorable impression	Favorable	Unfavorable	Never heard of/Don't know
Norman Rockwell	43%	38%	7%	12%
Rembrandt	32	46	7	14
Claude Monet	24	33	5	37
Pablo Picasso	20	45	19	16
Georgia O'Keeffe	11	19	5	65
Andy Warhol	9	24	33	34
Salvador Dali	9	23	17	51
LeRoy Neiman	5	20	10	66
Jackson Pollock	4	11	7	77

Note: Sample is registered voters.
 Source: Martilla and Kiley for Vitaly Komar and Alexander Melamid in conjunction with The Nation Foundation, 1993.