

## Law's Political Foundations in East Asia: The View from Recent Scholarship on China and Japan

Jason Michael Morgan✉

Faculty of Global Studies, Reitaku University, Kashiwa, Japan

(Received 9<sup>th</sup> May 2022; Revised: 9<sup>th</sup> October 2022; Accepted: 18<sup>th</sup> October 2022)

### Abstract

In a 2016 monograph, legal scholar of East Asia John Owen Haley explores the “political foundations” of public and private law. This is an important intervention because of the questions Haley raises about the bedrock of the legal order. Haley’s scope is global and diachronic, but in this essay I will limit my scope to Japan and China, largely in the twentieth and twenty-first centuries. With Haley’s insights in the background, my goal is to understand better how politics has shaped law and legal practice in these East Asian countries over the past dozen or so decades, and thereby to discover new ways of seeing the present geopolitical and transnational-legal dispensation in the region. I survey, including Haley’s monograph, fourteen recent volumes, as well as a handful of relevant scholarly essays, to help situate the discussion of law’s political foundations in East Asia within the broader and evolving scholarship. I focus on Japan and China as a way to highlight differences even between two major countries in the East Asian sphere. My argument is that the foundations of law are not always political, and that, conversely, sometimes law and politics are not separable in the first place. The modern history of East Asia—Japan and China, but also from throughout the region—provides many examples of this more complex reading of law and politics.

**Keywords:** legal orientalism, unconditional surrender, Mongolia, China, Japan

### Introduction

In his 2016 monograph *Law's Political Foundations: Rivers, Rifles, Rice, and Religion*, legal scholar of East Asia John Owen Haley explores the political foundations of public and private law. Although he allows for many variations to his theme, Haley’s main argument is that politics is the basis for legal orders worldwide. Haley’s work is of great importance to scholars of history, law, sociology, and many other disciplines, because Haley raises, as the title of his book suggests, foundational questions about two of the biggest elements of many societies worldwide: namely, the legal, and the political. What “began as an effort to explain a fundamental divergence in the legal regimes of the world’s two most highly developed and influential legal traditions—the centrality of public law in Imperial China and the contrasting primacy of private law in Western Europe,” Haley writes, “soon became an even more daunting venture” (Haley, 2016, p. viii). Because the “systems of private and public law developed historically within the context of the diverse configurations of multiple political regimes,” Haley continues, “the political foundations of these two basic systems of law—indeed even more broadly of law itself—became increasingly

---

✉ jmorgan@reitaku-u.ac.jp

apparent” (Haley, 2016, p. viii). This discovery of the political context of legal development led Haley to prioritize “understand[ing] how the political systems in which [private and public law regimes] first appeared evolved,” while also understanding “how and why patterns of extralegal ordering within legal orders persist or are transformed into legal rules” (Haley, 2016, p. viii).

Haley’s investigations into the “political foundations” of public and private law lead him beyond Japan and China, into considerations of legal history in western Europe, colonial Latin America, and even ancient Egypt and ancient Greece, among other times and places. In this essay, I will limit my scope to East Asia, largely in the twentieth and twenty-first centuries. More specifically, I will hew to one of Haley’s foci in *Law’s Political Foundations*, namely China, and will contrast mainly English-language scholarship on China with the same on China’s neighbor and often-rival, Japan. Doing so will help interrogate a theme of some of the works considered herein, namely Orientalism, by emphasizing major differences within eastern Asia between two closely-linked places. My goal is to understand better how politics has, and has not, shaped law and legal practice in two representative polities in East Asia over the past dozen or so decades, and thereby to discover new ways of seeing the present geopolitical and transnational-legal dispensation in the region. To get an even better sense of contrast, I will survey, including Haley’s monograph, fourteen recent volumes mainly in English, as well as a handful of relevant scholarly essays also mainly in English, to help situate the discussion of law’s political foundations in East Asia within the broader and evolving scholarship. There are therefore two contrasting paradigms at work here: that between Japan and China, and that between how these places look from within East Asian-language scholarship, and from scholarship written in a non-East Asian language.

My overall argument in this essay is that the foundations of law are sometimes political, as Haley argues, but sometimes not, and that sometimes it is not even clear where politics ends and law begins. What becomes apparent on a wider reading of literature about law across the modern history of East Asia is that the relationship between law and politics is not always one of foundations and derivations, of basic political rules and expectations with legal justifications overlaid thereon. Sometimes, contra Haley, I find that it is law which is logically prior to the political order, that it is legal assumptions and understandings which lay the foundation on which different political arrangements are constructed by a variety of political regimes. Law, in other words, sometimes maintains much more stability over time than does the political.

I also find, as a counterpoint to both positions (namely law as the foundation of the political, and the political as the foundation of law), that it is not always clear which is foundation and which is derivative, or which is which at all. Sometimes law and politics in East Asia appear co-generative of one another, or at least co-dependent on one another. While this would seem, on Haley’s reading, to suggest a confusion about law and politics in East Asia, I think it is more a subtle refutation of Haley’s main argument. It could be that Haley has reified a Western distinction between “law” and “politics” and extended that through space and time as though it had no pedigree in the assumptions of North America and Western Europe. (It is for this reason—to track down possible unwitting reifications of Western modes of thought—that I limit the scope of this essay almost entirely to works in English.) In any event, I find that in East Asia, past and present, historical and legal-political circumstances greatly complicate any hard lines that a scholar might seek to draw between what, in the West at least, are theoretically separate realms—the legal and

the political—and even separate branches of government. East Asia, therefore, serves as a challenge to Haley’s putatively global thesis that the political is the foundation of law.

### The Political Foundations of Law in East Asia

John Owen Haley’s survey of the political foundations of public and private law across a global and diachronic stretch of human history suggests that, as Haley argues, politics does influence and precede the development of law. “Legal rules,” Haley argues, “share a fundamental attribute. In all instances, by definition, they depend on recognition by those with *political authority*. Political authority, I posit, is the foundational feature of law in all contemporary societies” (Haley, 2016, p. 9; emphasis in original). While Haley conducts a nuanced survey of several world legal systems in his monograph, making allowances for differences in culture and environment, in the end he rests his argument on the primacy of political authority to law. “What distinguishes one legal order from another,” Haley writes, “[...] is less the role or rule of law, but who makes and enforces law by whatever means, and thus whose consensus and whose values control. In short, who enforces, governs. Ultimately, law’s development is political” (Haley, 2016, p. 36). In this essay, I will build on Haley’s insights and also expand them to consider the political foundations of law beyond the confines of one country, and within a region, East Asia, which is transected by many different vectors of political authority and legal regime.

While other scholars, such as Tom Ginsburg (Ginsburg & Moustafa, 2008; Ginsburg, 2009; Ginsburg & Chen, 2008), Alec Stone Sweet (Sweet & Mathews, 2009), and Ran Hirschl (Hirschl, 2020), have approached the study of law and politics from a global and comparative perspective, it is precisely the universality of Haley’s arguments—that the political is foundational to the legal—coupled with the strong and foundational argument he develops about what law is and where it comes from, that makes his work a potential touchstone for the study of law and politics around the world. East Asia is an ideal place to test Haley’s arguments in the laboratory of history and current politics, because of the cataclysmic changes in both fields which have wracked East Asia over the past century and beyond, and also because of the great variety of historical agents, many from far outside East Asia, who have influenced the course of events and the framing of laws in the region.

Because of its consideration of several of these vectors in East Asia, a good point of departure after Haley’s foundational definition-setting is Teemu Ruskola’s 2013 book *Legal Orientalism*. Here, Ruskola seems at first to view law as prior to politics, and in doing so to understand China—Ruskola’s main subject—as outside of the legal regimes manifested by the United States of America and “legal modernity,” which Ruskola seems to understand as “law, in the sense of rule-of-law, [which] is one of the signal markers of modernity” (Ruskola, 2013, p. 6). This contested field of what constitutes law, rule-of-law, and modernity form the ground for Ruskola’s comparative investigations, rooted, as Ruskola acknowledges, in Edward Said’s “path-breaking [1978] monograph” which brought the discussion of orientalism to Western academics (Ruskola, 2013, p. 4). Within these contexts, *Legal Orientalism* begins “from the premise,” Ruskola writes, “that the complex and unstable relationship among China, the United States, and legal modernity is of utmost global significance. [...] Law [is] a fundamental element in the modern worldview that conceives the individual—the singular human being—as

the paradigmatic existential, political, and legal subject and the state as the privileged medium for the instantiation of its universal values, through law” (Ruskola, 2013, p. 2).

Law may be a “fundamental element in the modern worldview,” but as Ruskola’s reliance on the ideas of Edward Said indicates, Ruskola is also aware of the cultural and other factors at work in making law fundamental. Given this, Ruskola appears to be foregrounding politics after all, setting out to understand how law has been shaped by political decisions and imperial expansion conditioned by, and conditioning, the American view of China. “Over the course of the nineteenth century,” Ruskola continues, “a diffuse set of European prejudices about Chinese law developed into an American ideology and practice of empire, entailing the extraterritorial application of a floating body of U.S. law in an otherwise lawless Orient. It is only from a perspective that is both theoretical and historical that we can understand the effect that Orientalism has had on the development of both Chinese law and U.S. law, as well as on international law and Sino-U.S. relations more generally” (Ruskola, 2013, p. 3). This kind of legal history forms the heart of Ruskola’s book and challenges many of the assumptions which Ruskola argues legal scholars in the West have tended to make about the cultural and political positioning of law in continental East Asia. Chief among these assumptions, and one which Haley also shares in many ways, is the universality of categories of law and politics which are by pedigree Western. The assumption that law and politics as found in the United States, Canada, and Western Europe today are culturally colorless and can easily serve as the baseline for comparisons with other places and times is one of the biggest assumptions which Ruskola problematizes in his book.

While Ruskola is generally clear about the primacy of politics in the study of the history of law in China, he nevertheless seems conflicted about law and politics in places. Ruskola writes, for example, that “law only exists in concrete historical and political conjunctures and cannot be evaluated apart from them” (Ruskola, 2013, p. 21). But elsewhere he appears to elide political backdropping, for instance in a discussion of legal fictions used by practitioners of law in or about China. “Whatever else one may say about legal fictions,” Ruskola argues, “they are *true in law*. In the end, law provides its own foundation” (Ruskola, 2013, p. 196; emphasis in original). A legal fiction is a way to bend the law to meet the demands of the political order, for example, by having the law declare that a missing person is deceased so that the state may proceed with inheritance procedures, or by having the law state that those who have turned eighteen years of age, or twenty, or twenty-one, or another number, have achieved the age of legal majority, which has major political ramifications including in suffrage and the military draft. But Ruskola collapses the political into law in his explication of legal fictions, assuming that law is its own realm and that fictions there are true there as well, as needed.

Just a couple of pages later, however, we are back to seeing law as embedded within political and imperial histories: Ruskola references an epigraph from a Beijing government white paper on the “rule of law” which states that “the rule of law signifies that a political civilization has developed to a certain historic stage. As the crystallization of human wisdom, it is desired and pursued by people of all countries” (Ruskola, 2013, p. 198; see also 2008).

From time to time, from day to day almost, the primacy of law over politics or politics over law seems to fluctuate. In the end, on Ruskola’s telling, law is held up by the political authorities of China as a symbol of civilizational advance and political arrival, making the political doubly master over the legal (because the law is used as metric for political achievement, and because

it is the political authorities who are instrumentalizing law in this way). The law as a symbol of political greatness is also a kind of “legal fiction,” only this time at the service of the political.

Taken as a whole, and despite these fluctuations, Ruskola’s arguments about the “juridification of the Chinese lifeworld” and “the juridification of Chinese sovereignty” reach deep into history and political thought to show that law, perhaps as Haley would also agree, is set, in the final analysis, upon a political foundation (Ruskola, 2013, pp. 207-208). Perhaps one of the reasons for the apparent ambidextrousness of “law” and “politics” in Ruskola’s telling is that he sees “an entire other circuit of uneven imperial legal exchange” in the “Confucian world of East Asia, consisting most notably of China, Korea, Japan, and Vietnam” (Ruskola, 2013, p. 23). This “entire other circuit” is what seems to be powering the separate legal-historical milieu which Ruskola sets out to describe. “Within that world,” Ruskola continues:

*the classical Chinese language of statecraft and Chinese legal codes enjoyed widespread cultural and political hegemony. Indeed, just as the putatively universal foundations of Euro-American international law in fact reflect the particular value of its progenitors, so Chinese political and cultural values pretended to a universal status in East Asia—prescribing a normative standard of civilization in the form of a set of constitutional norms for a properly administered polity, and guidelines for interactions among such polities. We might call this an East Asian law of nations, roughly similar to the European tradition of ius gentium. Both traditions claimed universality, while each in fact embodied a particular set of imperial norms—Roman and Chinese, respectively (Ruskola, 2013, p. 23; italics in original).*

Perhaps with pretensions to universalism, then, are universal tendencies within legal orders, especially those strong political bases.

Universalism, however, never lasts forever. With the arrival of Western influence in East Asia and the widescale reformulation of law’s meanings and contours, many in the Qing Dynasty were forced to rethink law and adapt to a foreign system, complete with its own “circuit” of ideological and historical wiring. That adaptation would appear to be ongoing, even while the geopolitical situation in East Asia has also been rapidly changing. Hence, the “orientalist” view of East Asia as an “other” to the West, and the awareness among many in East Asia that foreign law stands, in some capacity or another, as an always-present index of “legal modernity.”

The concepts of otherness, as implied by orientalist appraisals of East Asia, and of legal modernity as well, point to a political shadow across law outside of the West. In Western courtrooms, justice is blind—statues of Justice as an ideal are blindfolded to show that all are equal under the law. But in East Asia, Justice must peek out from her blindfold from time to time to be sure that “legal modernity” is keeping pace with Western Europe and North America. The circuit remains in place, in other words, with the current always flowing in one direction, namely west to east.

## Historical Empires and East Asian Legal Regimes

Ruskola's problematization of law as an uneasy partner of East Asian politics and history helps us frame further discussions on changes in the political foundations of law in East Asia. Ruskola also presents an opportunity to think more carefully about what is meant by "East Asia" in this discussion. On that score, we might begin by challenging Ruskola's understanding of the Sinosphere as asserting an organizing force in maritime East Asia by turning our discussion to the works of Yang Haiying, a Mongolian-born scholar of Eurasian anthropology and political history who does much of his writing in Japanese. This is also an important intervention into what "Orientalism" means, and into the bundling of histories, cultures, and peoples that are as diverse as any elsewhere in the world. Yang's 2019 volume *Gyakuten no dai Chūgoku shi: Eurasia no shiten kara* (a title perhaps best translated as 'The history of the great state of China turned on its head: As seen from the viewpoint of Eurasia'), Yang problematizes the notion of a diachronic "China" cycling through dynasties and sinifying surrounding states and peoples. In his work, Yang often calls into question the idea, prevalent in the People's Republic of China today, that, as Yang puts it, "'barbarian' transhumant and horse-mounted peoples powerful in war sometimes invaded from the north and assumed temporary power, only to be 'Han-ified, which is to say civilized' by the overwhelming force of Han civilization, thereby losing their identity [as northern barbarians]" (Yang, 2019, p. 14).

For Yang, the reality is rather different. As a Mongolian and scholar of Mongolian history, Yang sees the people of the steppe as cosmopolitan and skilled at imperial politics, and the Han politics and Han civilization as lacking the power to sway Mongolian and other steppe peoples as easily as many Han historians (and Japanese historians, Yang points out, who as Yang says are overly influenced by Chinese historical records) argue. "From the viewpoint of 'Eurasian history,'" Yang writes, "the transhumant peoples, which 'Chinese history' ranks as barbarians, were of a mixed civilizational and racial makeup, and extended from Siberia in the east to the world of Europe in the west. These transhumant peoples shook world history. By contrast, 'Han civilization' was able to extend only locally, in the so-called central plain of north and central China. [...] It is closer to the truth to think of 'Han civilization', not as one of the world's universal civilizations, but as a regional, localized one" (Yang, 2019, p. 15). The orientalist notions which exercise Ruskola are here called into question from a position within East Asia and other to, but in many ways interrelated with, the "China" which Ruskola takes as his subject. If "Han civilization" is merely "regional" and "localized," then what becomes of the civilizational standoff between Western powers and the Qing in the nineteenth century, especially in the field of law? One could press the question further. If "Han civilization" is merely "regional" and "localized," then what becomes of East Asia as a conceptual category? Yang's provocations give the scholar pause, reminding us that there is much difference glossed over by "East Asia" and much diversity underneath the categorical smoothness—diversity that upsets Haley's universality comparisons of law and politics.

Another question that might be asked here is, "What is meant by 'civilization'?" A revealing insight into the relationship between civilizational practice and cultural—and, by extension, legal—realities comes when Yang relays a transhumant saying which says that "people move, mountains don't" (Yang, 2019, p. 91). Yang explains that, for transhumant peoples, cities are collections of people attached to money, and that those engaged in commerce are lower than those who farm (Yang, 2019, p. 91). The political implications are made even plainer when

Yang writes that “there is no such thing as the ‘Chinese people’,” which instead is a “fabrication invented by the Chinese Communist Party” (Yang, 2019, p. 348). The concept of a “nation,” Yang argues, was imported from the West by Meiji Japan, and the continental political leader Sun Yat-sen (1866-1925) appropriated this terminology and mindset and looked to Japan for inspiration in how to craft and sustain a national identity among the people of the continent (Yang, 2019, p. 348).

Because Yang’s works are published almost exclusively in Asian languages, and because Yang is a naturalized citizen of Japan and often publishes works in Japanese-language journals, those without training in non-Western languages may be unable to appreciate the scope of Yang’s work. There is also the possibility that Yang will be dismissed out-of-hand due to his findings’ occasionally paralleling works in Japanese which take a skeptical view of the Chinese Communist Party’s version of twentieth-century history. The superficial “political” angle of Yang’s work, in other words, may be used to discredit his research. But it is precisely because of Yang’s ability to work in Japanese, Chinese, and Mongolian sources (Yang is also fluent in English) that makes his work an invaluable corrective to Chinese history. Yang’s Mongolian perspective, in particular, provides an important archival corrective to works written relying only on Chinese-language sources. Yang is not political, but multilingual—a very important distinction to make, and one that further brings to the fore the value of Yang’s works to understanding East Asia from a variety of perspectives.

Take, for example, Yang’s 2014 volume (in Japanese) *Genocide and the Cultural Revolution: The Ethnicity Problem in Inner Mongolia* (Jenosaido to bunka daikakumei: uchi Mongoru no minzoku mondai). In this work, Yang uses sources in Mongolian, Japanese, Chinese, and English to arrive at an in-the-round, on-the-ground, detailed explication of the Cultural Revolution as it played out in the Mongolian heartland. Yang also incorporates oral testimonials from survivors of the Communist genocide against the Mongolians—including many former Mongolian political leaders—to present a rich history of the events of a major cultural and political upheaval in East Asia (Yang, 2014). It is a striking contrast, in many ways, to read Yang’s work and then to read work by scholars who rely on Western languages, or on only one East Asian language. As the New Qing History of the 1980s and 90s revealed, history from just one linguistic vantage point (in the case of New Qing History, that of Chinese with no access to Manchu) can seriously compromise scholars’ understanding of the past. Yang Haiying is central to this essay for just this reason. His archival range—and whether this puts him in agreement with other scholars inside East Asia working in just one language, for example some scholars of Asia inside of Japan—shows the complexity of East Asian history and the present, a complexity which is often attenuated as linguistic reach is pared down.

To return to Yang’s point on national identity raised above, it was arguably lack of national cohesion which proved among the most difficult obstacles to overcome in the twentieth century for the peoples of continental East Asia. Central to this struggle for cohesion was the role of technology in underpinning political power, but because technology can reshape politics even as it strengthens it, many in East Asia were wary of adopting Western technologies outright. Others, by contrast, such as Japan from the middle of the nineteenth century, embraced the West without scrupling overmuch about cultural sensitivities. As Yang mentions, it was Meiji Japan which first appropriated, in East Asia, many of the technological and even civilizational advances of the West. And, as Sarah C.M. Paine argues in her 2017 book *The Japanese Empire: Grand Strategy from the Meiji Restoration to the Pacific War*, Japan adopted a course largely of

modernization with westernization, meaning that Japan decided to have both “the acquisition of the most up-to-date technology and particularly military technology and armaments” and “westernization, meaning the introduction of westernized institutions—and not simply westernized military institutions, but a whole array of civil institutions as well” (Paine, 2017, p. 6). By contrast, Paine notes, “the Chinese government [roughly during the Meiji Period in Japan] set a course of modernization without westernization. Their overarching policy objective became the preservation of Confucian civilization untainted by the pollution of Western civilization” (Paine, 2017, p. 7). This split between the Qing and Japan over technological cultural-politics was to have profound consequences for East Asia, and much of that hinges on differences in appropriation of Western legal norms.

One illustration of the power of this dual-track westernization—i.e., in both technology and civilizational institutions, with rule-of-law differences flowing from each—comes toward the beginning of Paine’s book, when she describes a chance encounter between a Japanese cruiser detachment and a “Chinese-leased but British-owned steamship” (christened the *Kowshing*) while in pursuit of another Chinese ship which the Japanese cruisers had damaged in a surprise attack on July 25, 1894, at the beginning the First Sino-Japanese War. While the Japanese negotiated with the “Chinese generals on board” the *Kowshing* who “refused to heed the Japanese order to follow” the Japanese cruisers to port (presumably there to be taken as a prize), “the British-trained Japanese commander, Captain Tōgō Heihachirō [(1848-1934)], carefully examined the relevant provisions of international law. Upon finding the law to be on his side, he sank *Kowshing* and virtually all Chinese aboard drowned. British courts later upheld this interpretation of the law” (Paine, 2017, p. 21).

This was hardly an isolated occurrence. Paine stresses that, during the First Sino-Japanese War, the Chinese side proved far worse informed than the Japanese side on questions of law and international rules of war, which provided Japan with a distinct advantage. During the Russo-Japanese War, too, Paine notes, Japan’s ability to understand the complex interplay of law and politics—for example by securing President Theodore Roosevelt’s (1858-1919) services at an early date as a peace broker, which allowed Japan to extract itself from a perilous situation fighting against Russia on the Asian continent—again advantaged Japan over her more politically isolated rival, in this case the Russian Empire. And Japan was also keen to revise the unequal treaties which Western powers had imposed on her, largely on the pretext that Japan’s legal system was inferior to any in the West. Taking all of this into view, Japan proved savvier in military, legal, and political mastery than her non-East Asian rival—further complicating Ruskola’s orientalist thesis.

And yet, while Japan proved a master of the political foundations of war in East Asia during the late nineteenth and early twentieth centuries, Japan made serious missteps in these fields during the 1930s. Paine writes, for instance, of what she sees as the lawlessness of the Japanese military in Asia, including but not limited to the unauthorized fomenting of war with China by rogue officers in Manchuria in 1931. “Army officers [during the Manchurian Incident],” Paine writes, “chose the ultimate solution in keeping with their Shintō ultranationalist, apocalyptic vision of world politics. Theirs was a self-fulfilling prophecy” (Paine, 2017, p. 115). This highlights the delicate balance between politics and law—and also, according to Paine’s argument at least, religion. Indeed, Paine’s foregrounding of Shintō in the clashes between modernizing Japan and other powers, including of course the Qing, compels us to look deeper at “politics” to see how

much is in the realm of political science—voting, parliaments, constitutions, and the like—and how much is in the realm of metaphysics. When politics secrets particularist religious beliefs inside apparently “universal” entities and practices such as political parties and parliamentary debate, then one should think carefully before positing that kind of politics, imbued with elements of otherworldly belief, as the foundation for a legal order. What would seem to be the lesson here for our purposes is that politics may be law’s foundation, but it can also be law’s grave if taken to extremes.

An interesting contrast with what Paine might describe as Japan’s political, or even militaristic, lawbreaking in Asia comes in Max M. Ward’s 2019 book *Thought Crime: Ideology and State Power in Interwar Japan*. Ward’s focus in this volume is on *tenkō*, or political conversion, usually away from communism and toward a more nationalistic or right-leaning political position in support of the Japanese imperial state. Ward provides a slightly more focused definition, describing *tenkō* as “the ideological apostasy of thousands of political activists throughout the 1930s, beginning with JCP [Japanese Communist Party] members who publicly defected from the party earlier in the decade, and later to socialists, leftist writers, and intellectuals who either abandoned political activism or began to explicitly identify with the emperor and aims of the imperial state” (Ward, 2019, p. 79). For Ward, law (as a political vehicle) is central, particularly the 1925 Peace Preservation Law (*Chianijihō*) intended to protect the *kokutai*, or national essence or character of Japan. Ward shows how procurators and others among the Japanese authorities were using the letter and spirit of this law and related official pronouncements to rehabilitate communists and guide them back into constructive lives within a society braced by the political framework of the imperial state (Ward, 2019, p. 68-73). On the Korean Peninsula, however, which was annexed by the Japanese Empire in 1910, the same Peace Preservation Law was used, Ward argues, more often to prosecute communists and other anti-state elements rather than to attempt to reform their behavior through suasion (Ward, 2019, pp. 73-74). Two political applications of one law, then, and one political basis for that law, namely the *kokutai*.

A political basis, and a theoretical one, at least on Ward’s retelling of the history of the 1920s, 30s, and 40s in Japan. Ward’s theoretical framework for investigating how the Japanese state embraced, and encouraged, the practice of *tenkō* comes from French Marxist Louis Althusser’s (1918-1990) “Ideological State Apparatuses” (ISAs) (Ward, 2019, p. 86). Althusser saw “ideas [as] produced in ritualized practices,” Ward notes (Ward, 2019, p. 87). Ward builds on Althusser’s ISAs arguments to question the “dualist understanding of *tenkō* as a phenomenon produced between internal ideas and external coercion. Rather, we can consider the ISAs as dispersed sites of ideological mediation between the imperial state, individual detainees, and the wider community” (Ward, 2019, p. 88). On this reading, at least, politics and law, ideology and the actions of the state, collapse into one. Perhaps it is the fairest reading of Ward’s application of Althusser to Japanese legal history to say that Marxian politics formed the basis for the legal makeup of prewar and wartime Japan.

But not all was Marxian, it seems, as indicated by Ward’s discussion of the well-known incident in 1935 in which constitutional scholar Minobe Tatsukichi (1873-1948) was forced to step down from his congressional seat and resign his position as a Tokyo Imperial University professor due to Minobe’s “emperor organ theory.” The uproar over Minobe’s ideas about the Emperor and the Japanese legal framework was due to Minobe’s having posited that the Emperor was not transcendent over the Japanese polity, but was instead an “organ,” or part, of that polity (Ward,

2019, pp. 134-135). “The debates concerning Minobe’s constitutional theory dominated the deliberations over the revised Peace Preservation Bill in 1935,” Ward writes, “further revealing issues concerning the relation between sovereignty, law, and kokutai ideology” (Ward, 2019, p. 135). Ward argues that because *kokutai* could not be adequately defined, the 1935 reform attempt to the Peace Preservation Law did not pass (Ward, 2019, p. 136).

Further complications between the political foundation of law and the legal justification for politics (including empire) can be seen in Jeremy A. Yellen’s 2019 *The Greater East Asia Co-Prosperity Sphere: When Total Empire Met Total War*. The Greater East Asia Co-Prosperity Sphere was an attempt by Japan to accommodate to the autarkic realities of the 1930s and 40s, when the liberal world order had broken down and states were partitioning off sections of the globe for exclusive and often extractive dominion. One example of the contrast between the battered liberal world order and the emerging “new order in East Asia,” as then-prime minister Konoe Fumimaro (1891-1945) put it in a November, 1938 declaration, can be seen in the contrast between the Atlantic Charter, signed by UK prime minister Winston Churchill (1874-1965) and American president Franklin D. Roosevelt (1882-1945) aboard the *HMS Prince of Wales* off the coast of Newfoundland in 1941, and the Greater East Asia Joint Declaration, unanimously approved by the Greater East Asia Congress held in Tokyo on November 6, 1943 (Yellen, 2019, p. 157). The latter document was “Japan’s Pacific Charter, meant in opposition to the Atlantic Charter,” Yellen writes (Yellen, 2019, p. 157).

The Greater East Asia Joint Declaration begins:

*It is the basic principle for the establishment of world peace that the nations of the world have each its proper place, and enjoy prosperity in common through mutual aid and assistance. The United States of America and the British Empire have in seeking their own prosperity oppressed other nations and peoples. Especially in East Asia, they indulged in insatiable aggression and exploitation, and sought to satisfy their inordinate ambition of enslaving the entire region, and finally they came to menace seriously the stability of East Asia. Herein lies the cause of the present war (Yellen, 2019, p. 157).*

Yellen sees the Greater East Asia Joint Declaration as “an amalgamation of two documents—one drafted by the Greater East Asia Ministry and the other by the foreign ministry. This accounts for the document’s uncomfortable marrying of Japanist and internationalist rhetoric” (Yellen, 2019, p. 158). Yellen describes the “marrying of Japanist and internationalist rhetoric” as “uncomfortable,” but perhaps here we might invite Ruskola to investigate how some ideas are construed as ethnic and others as culturally colorless—legal orientalism? The Atlantic Charter spoke of what the authors and signers saw as universal principles, and it may be that Yellen allows them this privilege when he describes the critique of those principles as somehow rooted in ethnic awareness.

Or perhaps, as it seems to me, “orientalism” is not the best way to approach many of these questions about law and politics. Orientalist discussions tend to package discrete actors and events into cultures and civilizations, useful for a categorical analysis but less wieldy, even counterproductive, for disrupting categories. As I am trying, in this essay, to interrogate Haley’s law-and-politics arguments using examples from East Asia, I favor a particularist

approach instead. To put a finer point on it, I take Japan and China as being very different, and from this insight one can see great differences elsewhere in the region—complexity that orientalist approaches elide. On that reading, it is worth noting that contemporary critics of the Greater East Asia Joint Declaration also saw that it was incomplete. Burmese leader Ba Maw (1893-1977), for example, Yellen notes, “immediately recognized that the declaration was meant in opposition to the Atlantic Charter,” and “then argued to the Japanese ambassador in Burma that the declaration should not be limited to the region. It should be a worldwide call for the support from all peoples who hold negative views of Britain and the United States, including Arabs, Egyptians, and Palestinians. Although the ambassador recognized the merit in this critique, Japanese policy makers had no intention of changing the declaration” (Yellen, 2019, p. 159). By a similar token, “liberal critic Kiyosawa Kiyoshi” (1890-1945) criticized the document for, as Yellen argues, “its shift away from Pan-Asian rhetoric, which negated the notion that Japan was waging a war in the name of Asian solidarity” (Yellen, 2019, p. 159). In the indirect dispute between Ba Maw and Kiyosawa one can see a struggle over the political foundations of law and the legal foundations of politics, embedded in a narrower dispute about which political entities were to stand as foundational to which legal proclamations.

And the role of the individual, and of social complexity and diversity, must also not be overlooked. Critiquing H.L.A. Hart’s (1907-1992) argument that a legal rule is a social and behavioral convention, for example, Stephen Perry counters that “legal normativity is moral normativity,” and that “the law’s claim to authority is a moral claim” (Perry, 2006, pp. 1171, 1174; see also Haley, 2016, p. 8). In the case of Ba Maw and Kiyosawa Kiyoshi, there are different moral stakes concerning the same document. Ba Maw’s moral motivations surely included the desire to end colonial rule and to avoid replacing one form of colonialism, British, with another, Japanese. Kiyosawa Kiyoshi, by contrast, derived moral justification for Japan’s war from the notion of “Asian solidarity,” which had very different connotations for the Empire of Japan and for revolutionaries in Burma. Consider also subaltern legal studies, which refuses to accept the dominant legal paradigm, especially on a colonial reading, and calls into deep question the legal, and even moral, foundations of any political rule of a subjugated Other (see, e.g., Balachandran, 2019). Such critiques are not orientalist—they are much more complicated than the dualism implied by that body of work.

### **The Postwar Reconstruction of Law and Politics in Japan**

Another excellent area for calling dualisms into question and interrogating the relationship between law and politics is postwar Japan. In many ways, Occupied Japan (1945-1952) is a palimpsest of prewar and wartime Japan, as the legality of Japan’s geopolitical moves in the first half of the twentieth century would shape the response to those moves by Japan’s rival for naval dominance in the Pacific, the United States. This response came to a head in 1945, as the United States took over Japan and proceeded to reshape—reconstruct—her in its image.

The political foundations of law in East Asia therefore underwent a seismic shift midcentury. In his 2020 book *Unconditional: The Japanese Surrender in World War II*, historian Marc Gallicchio tracks the political, military, and intellectual history of the “unconditional surrender” doctrine which allowed much of this reconstruction to happen. Gallicchio finds that the first public mention of unconditional surrender in World War II by an Allied leader came

in January of 1943, at the Casablanca conference. “The elimination of German, Japanese and Italian war power means the unconditional surrender by Germany, Italy, and Japan,” President Roosevelt, seated next to Prime Minister Churchill, declared to reporters on January 24 of that year (Gallicchio, 2020, p. 1). “With that brief announcement,” Gallicchio writes, “Franklin Roosevelt committed the United States to the unconditional surrender of the Axis powers” (Gallicchio, 2020, p. 1). Although this statement was made in a foreign country about the endgame envisioned for a foreign war, however, and although one must allow for the inevitable vicissitudes of thought and mind-changing by a politician (which Gallicchio deals with in his volume), domestic politics influenced Roosevelt’s, and his successor Harry Truman’s, thinking at least as much as overseas developments did.

The rub was the New Deal. The continuation of New Deal America, Gallicchio shows, including the era of government intervention in the economy and the throttling of capitalist energies by the state—a continuation, in other words, of the crisis mentality of the 1930s and a repudiation of the more business-oriented administration of Roosevelt’s predecessor, Herbert Hoover (1874-1964)—was the political backdrop to the military strategy which would allow the legal transformation of postwar Japan (Gallicchio, 2020, pp. 48-52). In a key passage, Gallicchio argues in this way:

*In response to the global crisis beginning in the late 1930s, FDR had created something akin to a coalition government, bringing Republicans like Secretary of War Henry Stimson and Navy Secretary Frank Knox into the administration to manage the wartime economy and oversee military production. Often during the war, they had circumvented New Deal policies in the name of efficiency. As Stimson explained, ‘If you are going to go to war in a capitalist country you have to let business make money out of the process or business won’t work.’ A host of Republicans would have agreed. Instead of regulating business and supervising its actions, the federal government became the principal underwriter of business expansion and windfall profits. When it came to war contracts, big business was the big winner. In 1940, as the defense program got under way, 175,000 companies were providing 70 percent of the U.S. manufacturing output and one hundred companies provided the other 30 percent. By 1943, the ratio had flipped, one hundred companies held 70 percent of war and civilian contracts (Gallicchio, 2020, pp. 49-50).*

It was this confluence of the interests of the state and the interests of big business in pursuit of a grand national project—such as rural electrification, or world war—which might best typify the New Deal mentality.

Many scholars have pointed out that World War II greatly improved the economic condition of the United States and helped save many provisions of the New Deal. In fact, a more accurate assessment is that World War II was not what improved any economy. War is destructive and tends to consume resources (including human resources) like no other endeavor. It was the aftermath of the war, when the Americans had won sway over much of the world, that allowed the American economy to take off, unrivaled by other countries where the war had razed whole cities to the ground.

On that note, it is interesting to further consider how the New Deal was internationalized by America's participation in that war. Gallicchio continues:

*The close collaboration between government and business, as well as the impressive output of America's industries during wartime, helped to redeem the shattered image of business and restore the shaken confidence of industry leaders. Nevertheless, by war's end, conservative business leaders feared that the continued popularity of New Deal liberalism at home and the spread of socialism abroad foreshadowed major and unwelcome changes in the U.S. economy (Gallicchio, 2020, p. 50).*

The war, then, on this reading at least, both revived the New Deal and allowed for it to be exported, especially to America's erstwhile enemies.

It was not so simple as Gallicchio puts it, however. Japanese voters did not want socialism any more than American voters did, and Harry Truman understood by 1946 that the New Deal would have to be scrapped so he could remain in office. Washington sent the most rabid of the New Dealers to Tokyo, where they set about remaking Japan in Roosevelt's image. But no dice in Japan, either. Japanese voters threw out of office the first postwar prime minister, Katayama Tetsu (1887-1978), a socialist, and Detroit banker Joseph Dodge (1890-1964) was dispatched by Washington to Japan to fix what the New Dealers had broken there. But this does not affect Gallicchio's argument, which is that it was unconditional surrender which made possible the New Deal-ification of Japan. As Gallicchio notes, this was a bittersweet development for Republicans, as, on the one hand, many businesses profited from the war, while on the other hand the war pumped new life into the New Deal, which meant the ongoing, and probably increasing, influence of the federal government in the affairs of big business.

Gallicchio's assessment of the business situation mirrors his assessment of the unconditional surrender doctrine: manifestly pro-Roosevelt, and supportive by extension of the American-dominated liberal world order that the United States was able to impose on the world largely thanks, it could be argued, to the unconditional surrender doctrine. "It took the occupation [of Japan] and an American-drafted constitution to make [the Emperor of Japan] a figurehead akin to the British monarch," Gallicchio writes, for example (Gallicchio, 2020, p. 210). On the very next page, Gallicchio says, apparently without irony, that "in refusing to make concessions about the [E]mperor's role after the war, Truman refused to abandon the original purpose of unconditional surrender—the elimination of the ideologies that enabled the conquest and subjugation of other peoples" (Gallicchio, 2020, p. 211). Truman seems to have forgotten, or perhaps it was Gallicchio, that the Second World War in the Pacific was a war of conquest, and that an entirely new legal and political order emerged in several places—Japan, of course, as well as North and South Korea and Taiwan, not to mention Singapore, the Philippines, and Hong Kong—as a result of the upheavals of the 1940s. Unconditional surrender may or may not have been a good strategy, but there is no denying that it was the Siamese twin of conquest.

Even so, there is no brooking opposition to Gallicchio's thesis—he demands unconditional surrender to his views. Those who disagree—and he is speaking here of President Herbert Hoover and General Douglas MacArthur (1880-1964)—he labels "two Roosevelt haters" (Gallicchio, 2020, p. 213). Elsewhere, speaking of Ambassador Joseph Grew (1880-1965), General Bonner

Fellers (1896-1973), Hoover, and MacArthur, Gallicchio opines that they “suffered convenient memory lapses, falsified the record, and, in MacArthur’s case, flat-out lied,” and that they “provided ammunition for conspiracy theorists for decades to come” (Gallicchio, 2020, p. 212). For Gallicchio, the point of the Pacific War remains the New Deal revolution which Rooseveltists were able to force on Japan following unconditional surrender.

The unconditional surrender doctrine and the subsequent exportation of the New Deal remains a powerful force in Gallicchio’s thinking even beyond the confines of the Pacific War and the occupation of Japan. For example, in the context of the later American invasion of Iraq in 2003, when the “democratization” of Iraq was being couched in terms of the success of the “democratization” of Japan (although Japan had been a democracy for decades before the outbreak of World War II), Gallicchio cites historian of Japan John Dower, who pointed out that “the success of the occupation of Japan’s liberal program owed much to its New Deal roots. Land reform, new rights for labor, revision of the civil and penal codes, reform of educational institutions, and, of course, the new constitution, were all part of a liberal agenda developed during the war. [...] Significantly, Dower asserted that all these changes were facilitated by Japan’s ‘unconditional surrender’, which resulted in a ‘nonnegotiable’ grant of authority to the victors” (Gallicchio, 2020, p. 207). Marc Gallicchio agrees with John Dower that “land reform” was among the New Deal-inspired goods from which Japan was able to benefit thanks to unconditional surrender, at heart the transposition of a new political basis for law in Japan for the old, pre-war and wartime one. The political basis of law in Japan remains, for Gallicchio (and Dower), at least, fundamentally Rooseveltian in the postwar.

### **The Washington Consensus as a Political Foundation for East Asian Law**

Gallicchio’s bibliography in *Unconditional Surrender* consists almost entirely of English-language sources, so it is not surprising that his interpretation of events will follow the New Deal, Rooseveltian consensus in the United States, or that he will feel confident enough in his place among that consensus to refer to those with differing views as “conspiracy theorists.” As I pointed out in the introduction, works on Asia rooted in non-Asian scholarship may tend unwittingly to reaffirm thought modes in the West, a hypothesis which *Unconditional Surrender* bears out, just as Yang Haiying’s works from within Asia also emphasize the importance of linguistic diversity to scholarly understanding. An alternative view to the New Deal consensus is possible, however, and that without resorting to conspiratorial motives, by rooting Japanese historiography and the study of Japanese jurisprudence in Japanese sources instead of American ones. On that alternative reading, one not as rooted in English-language historiography as Gallicchio’s is, the Washington-dominated political basis of Japanese law in the postwar is not so clear.

For example, on the question of land reform, Harvard Law professor and expert in Japanese legal history J. Mark Ramseyer finds the New Deal conceit that the Americans benefited Japan by implementing Rooseveltian measures there to be a “fable”:

*Land reform will not just reduce rural poverty, write development officials. It can raise productivity. It can promote civic engagement. Scholars routinely concur. Land reform may not always raise productivity and civic engagement, but it can—and during 1947-50 in occupied Japan it did. This account of the*

*Japanese land reform program is a fable, a story officials and scholars tell because they wish it were true. It is not. The program did not hasten productivity growth. Instead, it probably retarded it. The areas with the most land transferred under the program did not experience the fastest rates of productivity growth. They experienced the slowest (Ramseyer, 2012, p. 1).*

Ramseyer's alternative view of the political basis of law in postwar Japan would seem to be due to his working more closely in Japanese sources than do most American scholars of Japan.

There are many other challenges that a Ramseyerian reading of postwar Japanese law and politics might present to Gallicchio's Rooseveltian line. Take, for example, Ramseyer's explication of the constitutional law case *Sakata v. Kuni* (1959). In 1957, a communist-leaning judge named Date Akio (1909-1994) was on the Tokyo District Court when "he heard the case against several rioters arrested for trying to block the expansion of the Tachikawa runway," Tachikawa being the name of a now-defunct U.S. Air Force base in Japan (Ramseyer 2019, pp. 2-3). "Date acquitted the defendants," Ramseyer writes, on the grounds that "Article 9 of the [1947 Japanese] Constitution banned military weapons, and the Tachikawa base was nothing if not military." Therefore, Date found, the rioters had been "prosecuted under an unconstitutional statute, [and so] were not guilty" (Ramseyer, 2019, p. 3).

However, the government of Japan, obviously greatly inconvenienced by a ruling which had the power, if taken to its logical conclusion, to render all American bases in Japan unconstitutional—which would have made Japan's security agreement with the United States inoperable and probably void, which would in turn throw Japan's domestic politics and geopolitical situation into chaos—appealed Date's decision to the Supreme Court. "The Court reversed," Ramseyer writes (Ramseyer, 2019, p. 4). The first two reasons the Supreme Court gave for overturning Date's decision was that Japan's security agreement with the United States was for self-defense, "and Article 9 did not ban self-defense," and also that "the U.S. military (even if under contract to Japan) was not a Japanese military force" (Ramseyer, 2019, p. 4). The third reason is most germane to this essay: "the entire question," Ramseyer summarizes the Supreme Court's ruling, "was politically charged, and courts should avoid such questions unless the conduct at stake was obviously unconstitutional" (Ramseyer, 2019, p. 4). Politics as non-politics, then, was perhaps much closer to the postwar reality of the political foundation of law in Japan than the New Deal hyper-politics which Gallicchio and Dower posit.

Another case involving Article 9 came through the courts in the late 1960s. In 1969, Ramseyer writes, there was a "dispute over the Self-Defense Force's (SDF) Nike missile base in Naganuma, Hokkaido." This erupted into another political battle, again with tremendous potential domestic political and geopolitical ramifications. The case happened to be assigned to a young judge who was a member of the Young Jurists League, which was "affiliated" with the Japan Communist Party (Ramseyer, 2019, p. 5). Young Jurists League members were "committed to fighting any amendment to the Constitution. Given that the L[iberal] D[emocratic] P[arty] (the ruling party of Japan for most of the postwar)] sought to amend the Constitution to delete Article 9," Ramseyer writes, the judge's supervisor "panicked," realizing that the judge would almost certainly rule against the base, thus throwing Japanese politics into a tailspin (Ramseyer, 2019, pp. 5-6). The supervisor sent the judge a note expressing concerns about some legal questions surrounding the case, to which the judge, sensing interference, reacted by publicizing

the note, thus creating a political firestorm in the Japanese Diet (Ramseyer, 2019, p. 6). The judge ultimately ruled just as his supervisor had feared. Eventually, the Supreme Court upheld two separate High Court reversals of the young judge's ruling (Ramseyer, 2019, p. 6).

From the perspective of the political foundations of law in East Asia, it is most interesting that the judge was later demoted for his activism. This kind of retaliation “was not unusual,” Ramseyer writes. The Supreme Court Secretariat “regularly punished judges who held that either U.S. bases or the S[elf-]D[efense] F[orces] violated Article 9” (Ramseyer, 2019, p. 7). Citing prior work done by himself and business economics and public policy scholar Eric B. Rasmusen, Ramseyer finds that there is a “structural reason” why Japanese courts weed out those, like the young radical judge ruling against the military base, who disagree with the ruling party's political platform. The “effect” of this weeding-out, Ramseyer writes:

*...is distinctly partisan—but that partisanship follows from the institutional organization of the courts. First, the Prime Minister appoints the justices of the Supreme Court [...] late enough in life (about age 63 or 64) that they will not change their political preferences before hitting mandatory retirement at age 70. Second, the Chief Justice of the Supreme Court supervises the Secretary General of the Secretariat. Almost always, he himself worked as Secretary General before joining the Supreme Court. He knows, in other words, how the Secretariat works. Third, the Secretary General supervises the judges in the Secretariat. And the judges in the Secretariat, in turn, monitor the judges in the lower courts. They evaluate their performance, reward those they favor, and punish those they oppose (Ramseyer, 2019, pp. 11-12; Ramseyer & Rasmusen, 2001).*

On this reading, while the political realities of Japan's postwar are firmly in the background of judicial and political-institutional decision-making, there is a much more domestic and traditional-political calculus at work in creating the foundations of law (and jurisprudence) in Japan during the 1950s onwards. Ramseyer's work shows us that the legal and political Japan are not in a foundation-derivative relationship, contrary to what Haley's universalist reading would suggest. Also, the looming presence of the American superpower in postwar Japan, swaying both legal and political worlds alike, also greatly complicates any kind of reading of law and politics as discrete spheres operating on the condition of autonomy. Perhaps the New Deal was not as transformative of Japan as Gallicchio and Dower would have us believe, in the sense that Japan remained a place where law and politics shaded into one another more than acted as foundation and founded. But the New Deal did transform Japan indirectly, as the imposition of American power has been a vastly complicating feature of the postwar in both the legal and political realms (and more, such as the cultural realm) of Japanese life.

The disconnect one finds between Gallicchio's acceptance of the Rooseveltian consensus about Japan and the success of the New Deal policies in the Far East enabled by unconditional surrender, on the one hand, and the highly complicating details presented by scholars working in Japanese-language sources, on the other, might be fruitfully explicated by turning to Andrew J. Bacevich's 2010 book *Washington Rules: America's Path to Permanent War*. Here, Bacevich works through his disillusionment with the Washington view of the recent century or so, and finds himself at odds with the kind of presumption of the givenness of American political power which,

say, Gallicchio evinces. Unlike Ramseyer and Rasmusen, whose scholarship is rooted firmly in data, Bacevich adopts a Sophoclean tone in his assessment of the American sway over politics around the world, and his insights provide much opportunity for thinking about how that American influence also set the agenda for lawmaking and law interpreting in East Asia.

Take, for instance, Bacevich's brief summary of the political history of modern Europe, which, in its heavily American thematics, could also stand in as an understudy for East Asia during the same time period.

*For those inclined to view the past as a chronicle of parables, the modern history of Berlin offer[s] an abundance of material. The greatest of those parables emerged from the events of 1933 to 1945, an epic tale of evil ascendant, belatedly confronted, then heroically overthrown. A second narrative, woven from events during the intense period immediately following World War II, saw hopes for peace dashed, yielding bitter antagonism but also great resolve. The ensuing stand-off—the 'long twilight struggle', in John Kennedy's memorable phrase—formed the centerpiece of the third parable, its central theme stubborn courage in the face of looming peril. Finally came the exhilarating events of 1989, with freedom ultimately prevailing, not only in Berlin, but throughout Eastern Europe (Bacevich, 2010, p. 2).*

On this reading, the "parable" of the twentieth century, especially the rise of American power and the defeat of her illiberal enemies on the field of battle (both military and economic), takes on a power to color the political foundation of law. The New Deal dynamic of state-guided capitalism and the Soviet program of a state-run economy furnish the two alternatives from which the postwar must, in the end, have chosen between. The Hegelian force of history chose the former, and the rest of the political and legal course of the twentieth and early twenty-first century was set thereby.

Much of the "parable" of American power came out of East Asia—not just Europe. Writing about World War II in Asia, Bacevich foregrounds the career of Curtis LeMay (1906-1990), the Army general whom "the War Department reassigned [...] to the Pacific" in July of 1944. "There," Bacevich writes:

*he assumed responsibility for strategic attacks against the Japanese home islands, presiding over the firebombing of Tokyo and other major Japanese cities and then directing the atomic attacks on Hiroshima and Nagasaki that ushered in the nuclear era. [...] When it came to 'dehousing' civilian populations, the Luftwaffe's Hermann Göring [(1893-1946)] and the Royal Air Force's [Sir Arthur Travers] 'Bomber' Harris [(1892-1984)] weren't even in the same league. When it came to burning cities, William Tecumseh Sherman [(1820-1891)], who terrorized the citizens of the Confederacy during the Civil War, was a tyro (Bacevich, 2010, p. 44).*

Underpinning the New Deal and the unconditional surrender by means of which it was translated into a program for running Japan was a remarkable suite of violence and wanton

cruelty—a crudely political foundation to later legal regimes which Gallicchio’s argument tends to elide, or even justify.

Europe or Asia, Bacevich’s sights are set firmly on the Washington consensus, the “Washington rules,” which normalize America’s role as global military keeper of the armed peace. To return to the East Asian context, how deeply entrenched is the political underpinning of the legal order in East Asia can be seen in Tobias Harris’ 2020 biography of Japan’s longest-serving postwar prime minister, the late Abe Shinzō (1954-2022). In *Iconoclast: Shinzō Abe and the New Japan*, Harris writes that Abe’s “mission,” which he “inherited [...] from his forebears,” the postwar prime minister Kishi Nobusuke (1896-1987) (Abe’s maternal grandfather) and politician Abe Shintarō (1924-1991) (Abe Shinzō’s father), was to “carry out Japan’s return to the world of power politics” (Harris 2020, p. 3). Harris traces Abe Shinzō’s ambitions back to the Meiji Restoration, which, Harris argues:

*had made Japan a great power and a protagonist in the scramble for empire in Asia. The Second World War had left the country in ruins, and the US occupation had stripped it of its pretensions to great power, saddling it with constraints—particularly a US-authored constitution in which Japan [renounced] war as a sovereign right of the nation and the threat or use of force as means of settling international disputes—that would render it dependent on the US for its security. Kishi, a member of the cabinet that had declared war on America, never accepted that Japan should be anything less than a great power and spent his postwar career—which included three years as prime minister—battling the constraints the US had imposed after the war. His grandson [Abe Shinzō] inherited this vision of a strong, independent Japan (Harris, 2020, p. 3).*

The course of Abe the Younger’s political education may thus stretch back into the heroic age of Japanese history, but for all that pedigree the price of iconoclasm is steep in Japan. Prime Minister Abe Shinzō was declared a “fascist” by many American and other Anglophone journalists and academics for daring to question the Washington consensus (McCormack, 2016). The political foundation of law in East Asia is rendered stark by slurs such as these, which abound in the Anglophone literature about Japan. Overturning a Rooseveltian political-legal order turns out to be a labor both Augean and Sisyphean.

Given this, one cannot help but admire Abe the Younger’s drive. And yet, one must be cautious, as Harris implies, about overturning a political foundation too quickly. For there are more parties to the political foundation of law in East Asia in the postwar than the United States and Japan. As Michael E. O’Hanlon’s 2019 book *The Senkaku Paradox: Risking Great Power War over Small Stakes* shows, there are gaps in the seams of the American-sponsored postwar order in East Asia, and those gaps are more and more often filled by the rising power of the People’s Republic of China. O’Hanlon argues that “a localized crisis started or stoked by Moscow or Beijing could expand and escalate. It is my contention that, especially in this period of history, such conflicts pose the greatest risk to great power stability and world peace. The signature case [...] concerns the uninhabited and disputed Senkaku/Diaoyu Islands in the East China Sea, claimed by both Japan and [the People’s Republic of] China” (O’Hanlon, 2019, pp. 2-3). O’Hanlon wrote and published his book before the coronavirus outbreak, which arguably widened the gaps in the

seams in the East Asian order rather than cinched them. And O'Hanlon's methodical approach to considering Russian and Chinese power plays as a set has proven especially perspicacious, as ongoing events in Ukraine, and the agreements and discussions entered into by Beijing and Moscow in the run-up to the offensive in Eastern Europe, have tied "great power stability" risks together in ways that few other strategists likely thought possible just a few years ago.

There are other players, too, in East Asia, and many are still emerging from the postwar array of law and politics. From a less military-strategic and more cultural Leo Ching's 2019 book *Anti-Japan: The Politics of Sentiment in Postcolonial East Asia* alerts readers to the externalities of the political foundations of law in East Asia. Ching's interesting thesis, relying in part on the work of Yoshimi Shun'ya, is that

*anti-Americanism and pro-Americanism are not binary oppositions but are intertwined, interdependent and intersecting in complicated and, at times, contradictory ways. The 'embrace' between America and Japan assured that America would be the sole inheritor of the Japanese empire. American postwar hegemony is a reconstruction of the Japanese empire that existed until the end of the war. The transfiguration of Japanese imperial order from wartime to postwar under America's watch not only exonerated American violence during the war, but also obfuscated Japanese imperialism and colonialism in Asia (Ching, 2019, p. 7).*

Ching's intervention is a reminder that states such as Taiwan, the Republic of Korea, the Democratic People's Republic of Korea, the Philippines, Vietnam, Laos, Cambodia, Singapore, and the formerly independent polity of Hong Kong are also part of the postwar and the legacy of the grand reconstruction of the political foundations of law in East Asia.

One should also mention here related arguments in Kuan-Hsing Chen's 2010 book *Asia as Method: Toward Deimperialization*. For Chen, "deimperialization" is a project involving a wholesale rethinking of the meaning of politics, geopolitics, and regional history, moving beyond paradigms imposed upon East Asia during periods when outside forces were at work in the area. "In the new context of globalization," Chen writes:

*"the complexity of decolonization goes far beyond the anticolonial, national independence movements of an earlier era. Current decolonization movements must confront the conditions left behind by the cold-war era" (Chen, 2010, pp. 9-10). "If the colonized and colonizer do not address the history of imperialism and colonialism together," Chen argues, "it is impossible to build solidarity among the so-called global multitudes. If the world is not to go on as a theater of imperial conquests and rivalries, then deimperialization is a necessary intellectual and political commitment" (Chen, 2010, p. 16).*

Ching and Chen thus envision a political and legal dispensation freed from both the "legal orientalism" of the past, one might posit, and the intra-East Asia political and legal wranglings of more recent history. But I wonder if globalization itself cannot be seen as a new wave of legal orientalism, and if "deimperialization" is possible without recognizing the full brace of globalist control measures over wide swaths of the planet. "Colonized and colonizer" should

“build solidarity,” I agree. But the past is not all that needs overcoming. As O’Hanlon’s insights, and the news of the hour, reveal, it remains to be seen what lies beyond the “deimperialization” of East Asia, or what the political foundation of a new legal order—if one is coming—will be.

### **The Political Foundations of Law in East Asia: A Modern “Great Delusion”?**

In his 2018 book *The Great Delusion: Liberal Dreams and International Realities*, University of Chicago scholar John J. Mearsheimer makes a realist assessment of the tendency of liberal states to engage in nation-building abroad. Mearsheimer’s vision of liberal interventionism is not a rosy one. Pointing to the much greater power of nationalism when compared to abstractions like liberal ideologies, Mearsheimer argues that liberal powers, even superpowers such as the postwar United States, are bound to fail when it comes to liberalist evangelization (Mearsheimer, 2018, pp. 98, 103). “Even weak states,” Mearsheimer writes, “are tough nuts to crack” (Mearsheimer, 2018, p. 164). Liberal polities typically yearn for international systems which will overarch and reign in the ambitions of national leaders, but in the event it seems that the twentieth century proved that dream to be more of a “delusion” than a reality. The political foundations of law would appear to be national, not international. Specific, not universal.

Those specifics are crucial to understanding law and politics and how they intertwine. In this essay, I have tracked how the relationship between politics and law has unfolded in East Asia over the past century and a half or so. In many ways, law was at the heart of politics, especially in the early years of the Meiji Period when Japan and China, faced with unequal treaties and, as Teemu Ruskola explicates, “legal orientalism,” sought to order their polities around the new circumstances of foreign law. Japan’s advantage in the legal realm proved to have tremendous political and geopolitical consequences (Ruskola, 2013). But in many other ways, by contrast, politics undergirded law, such as in the postwar court cases in Japan studied by Mark Ramseyer, or in the struggles by Abe Shinzō to reform Japan’s foreign-imposed constitution in order to restore full military sovereignty to Tokyo.

John Owen Haley’s *Law’s Political Foundations* argues, in a way reminiscent of the great Marxist (at the time—later diametrically opposed to Marxism) scholar Karl August Wittfogel’s (1896-1988) theorizing on the hydraulic basis of social organization, that politics and natural conditions help mold a given’s society’s corpus of law. Above all, Haley sees the political as foundational to the legal. In this essay I have built on Haley’s insights but also taken a more complicating view, focusing on Japan and China to argue that sometimes it is politics which serves as the foundation for law, sometimes law which serves as the foundation for politics, and sometimes an even more complex relationship which prevails. In most cases, focusing on the particulars of a historical time, event, or process will reveal that few theories about law’s political foundations, or politics’ legal foundations, emerge unscathed from the grittier realities on the ground.

## REFERENCES

- Bacevich, A. J. (2010). *Washington rules: America's path to permanent war*. Metropolitan Books.
- Balachandran, A. (2019). Petitions, the city, and the early colonial state in South India. *Modern Asian Studies*, 53(1), 150-176.
- Chen, K-H. (2010). *Asia as method: Toward deimperialization*. Duke University Press.
- Ching, L. T. S. (2019). *Anti-Japan: The politics of sentiment in postcolonial East Asia*. Duke University Press.
- Clarke, D. C. (2020). Anti Anti-Orientalism, or Is Chinese Law Different? *The American Journal of Comparative Law*, 68, 55-94.
- Galicchio, M. (2020). *Unconditional: The Japanese surrender in World War II*. Oxford University Press.
- Ginsburg, T. (2009). Studying Japanese law because it's there. *The American Journal of Comparative Law*, 58(1), 15-25.
- Ginsburg, T., & Chen, A. H. Y. (Eds.). (2008). *Administrative law and governance in Asia: Comparative perspectives*. Routledge.
- Ginsburg, T., & Moustafa, T. (Eds.). (2008). *Rule by law: The politics of courts in authoritative regimes*. Cambridge University Press.
- Haley, J. O. (2016). *Law's political foundations: Rivers, rifles, rice, and religion*. Edward Elgar.
- Harris, T. S. (2020). *The iconoclast: Shinzō Abe and the new Japan*. Hurst & Company.
- Hirschl, R. (2020). *City, state: Constitutionalism and the megacity*. Oxford University Press.
- McCormack, G. (2016). Japan: Prime minister Abe Shinzo's agenda. *Asia-Pacific Journal: Japan Focus*, 14(24 no.1).
- Mearsheimer, J. J. (2018). *The great delusion: Liberal dreams and international realities*. Yale University Press.
- O'Hanlon, M. E. (2019). *The Senkaku paradox: Risking great power war over small stakes*. Brookings Institution Press.
- Paine, S. C. M. (2017). *The Japanese Empire: Grand strategy from the Meiji Restoration to the Pacific War*. Cambridge University Press.
- Ramseyer, J. M. (2012). *The fable of land reform: Expropriation and redistribution in occupied Japan*. <https://ssrn.com/abstract=2166688>

- Ramseyer, J. M. (2019). *Amerika kara mita Nihon hō: An American perspective on Japanese law*. Yūhikaku.
- Ramseyer, J. M., & Rasmusen E. B. (2001). Why are Japanese judges so conservative in politically charged cases? *American Political Science Review*, 95(2), 331-344.
- Ruskola, T. (2013). *Legal Orientalism: China, the United States, and modern law*. Harvard University Press.
- Sweet, A. S., & Mathews, J. (2009). Proportionality balancing and global constitutionalism. *Columbia Journal of Transnational Law*, 47.
- Ward, M. M. (2019). *Thought crime: Ideology and state power in interwar Japan*. Duke University Press.
- Yang, H. (2014). *Jenosaido to bunka daikakumei: Uchi Mongoru no minzoku mondai [Genocide and the Cultural Revolution: The ethnicity problem in Inner Mongolia]*. Bensei Shuppan.
- Yang, H. (2019). *Gyakuten no dai Chūgoku shi: Eurasia no shiten kara [The history of the great state of China turned on its head: As seen from the viewpoint of Eurasia]*. Bungei Shunjū.
- Yellen, J. A. (2019). *The Greater East Asia co-prosperity sphere: When total empire met total war*. Cornell University Press.