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## The Conscience of a Liberal



PAUL KRUGMAN

April 8, 2013, 4:54 pm [19 Comments](#)

# Guest Post: Hungary, The Public Relations Offensive

This is another guest post from my Princeton colleague Kim Lane Scheppele. The post is after the jump. Before I go there, however, a word about Ms. Scheppele and this blog, and why I stand behind her work.

Obviously I am an expert neither in law nor on Hungary — which is why Ms. Scheppele is writing these posts, not me! I do, however, know what serious inquiry looks like. Ms. Scheppele and colleagues have kept me apprised of their work and how they reach their conclusions, and I've looked at supporting material. This is the real thing — while the often-scurrilous broadsides aimed at my colleague aren't.

And with that, let me turn over the space.

The Public Relations Offensive

Kim Lane Scheppele  
Princeton University  
8 April 2013

The other day, I received a [letter in my inbox](#), attempting to set me straight. He also sent along for my edification the [letter](#) that Hungarian Foreign Minister János Martonyi penned to Ministers for Foreign Affairs of the Member States of the European Union.

I'm sure I'm not alone. The Fidesz government of Hungary is on a flat-out PR blitz, trying desperately to gain sympathy as international opinion solidifies against them. Because all of these communications repeat more or less the same talking points and are blanketing inboxes, editorial pages and diplomatic meetings across Europe and North America, I'll respond to the Fidesz public relations offensive here by explaining what their government's laws actually say. Fidesz officials are hiding behind Hungarian, which is a small and difficult (yet beautiful) language, so that outsiders are at a disadvantage in responding to their assertions of "fact."

Unfortunately for them, however, I've lived in Hungary for years, worked in the Hungarian court system, studied Hungarian law for decades and can find my way around Hungarian legalese. That is why they take me seriously enough to attack. Since I started writing about Hungary, I have received mountains of hate mail, been ambushed by non-academic criticism in academic settings and gotten death threats to the point where I need security on my trips back to Budapest. But I'm not taking it personally. I just happen to stand in the way of what Fidesz wants. They are ruthless and relentless — but not stupid.

Paul Krugman, who graciously allows me to post on his blog, knows precisely what I'm up to. He has seen the proof of what I say and knows that I have fact-checked all of my posts on every particular. I live, as he does, in the "reality based community" (as we say here in the US), where a commitment to detailed evidence informed by academic expertise counts for a lot. Paul's economic models have correctly predicted the ups and downs of the current financial crisis, and my legal analysis — which predicted from the start that Fidesz was bent on centralizing power based on the laws it was passing — has also been confirmed by events.

By contrast, as you will see, Fidesz spokespeople and government officials are engaged in a different enterprise. They say things that are technically accurate but misleading. In this post, I will expose what they are doing in their new public relations offensive.

To recap for those just entering the story: Hungary is in trouble with its critics right now because of the new and troubling constitutional Fourth Amendment that just went into effect, adding to three years of other [troubling legal developments](#). I've written about the Fourth Amendment [before](#), and since that time, many governments and human rights groups have expressed serious concern about different aspects of the Fourth Amendment. I've also testified before the Helsinki Commission, a joint committee of the Congress in Washington, which recently had a [hearing](#) that raised questions about whether Hungary is still on a democratic path. You can see my testimony [here](#).

Why is Fidesz ramping up such a strong defense now? An increasing number of members of both the European Parliament and the European Commission have called for the most extreme sanctions now that the Fourth Amendment to the new Hungarian constitution has added to the litany of other complaints that Europe has had

against Hungary. The European Parliament has [Hungary on its agenda](#) for its plenary session on Wednesday, 17 April. The LIBE (Civil Liberties) Committee of the European Parliament has prepared four (soon to be five) very critical working documents on the Hungarian situation that can be found [here](#). Those documents will form the basis of the European debate and have been signed off on by all parties of the European Parliament, including the European People's Party, the party fraction that includes Fidesz. They add to the many [critical reports](#) prepared by the expert Venice Commission of the Council of Europe.

No wonder Hungary has been trying to hit back – hard.

So what does Fidesz say in its defense?

Fidesz spokespeople argue that they have a democratic mandate to do what they are doing and therefore that the outside world should leave them alone. The young Hungarian MP, Gergely Gulyás, insists in his letter to me that the constitutional drafting process of 2010-2011 was open to public input and that the “constitutional drafting committee” sought advice from civil society and opposition parties. Like many statements in the Fidesz PR blitz, this is true as far as it goes, but it is misleading.

Mr. Gulyás does not mention something that is important to know: the constitutional drafting process in 2010-2011 consisted of two disconnected stages, one inconsequential public stage and one consequential secret stage. In stage one, the constitutional committee of the Parliament had open meetings, sought the opinions of civil society and produced a list of principles that the constitution was supposed to follow. The principles that came out of that parliamentary committee were approved by the Fidesz parliamentary bloc in the Parliament on 7 March 2011.

In stage two, a parliamentary resolution passed on 7 March 2011 (carried by the votes of the Fidesz parliamentary bloc), gave MPs exactly one week to propose complete draft constitutions, which were due 14 March 2011. But the resolution said that a proposed constitution could be offered “with or without” taking the draft principles into account. In short, the first participatory stage of the constitutional drafting process was entirely disconnected from the second secret stage. In the end, no one ever publicly checked the Fidesz constitutional draft against the basic principles that allegedly had public input, the public input that Mr. Gulyás relies on for his claim that the constitutional drafting process was open to public engagement.

Stage two of the constitutional drafting process was entirely secret. Even now, people outside the Party do not know who actually wrote the constitution. Its lead author, József Szájer, claims to have written much of it himself [on his iPad](#). While some Party members have also claimed credit, there is no official record of just who was in on the process, who was consulted, whose opinions were engaged. All of that was, and remains, a secret. The Fidesz constitution was unveiled as a completed document on 14 March 2011. And while there were some fine-tuning amendments added as the constitution hurtled to passage with the votes of only the Fidesz parliamentary bloc, the basic structure remained intact.

Mr. Gulyás insists that the Hungarian public was consulted about this new constitution because “a questionnaire was sent to each citizen in Hungary about some of the national issues that were undecided at that point.” Also literally true – and misleading.

In late February and early March 2011, the Fidesz government sent out a “social consultation” to all Hungarian voters, a questionnaire consisting of twelve questions that were to inform the constitutional drafting process. I’ve translated the questions [here](#) so you can see that none of them addressed central issues of constitutional design.

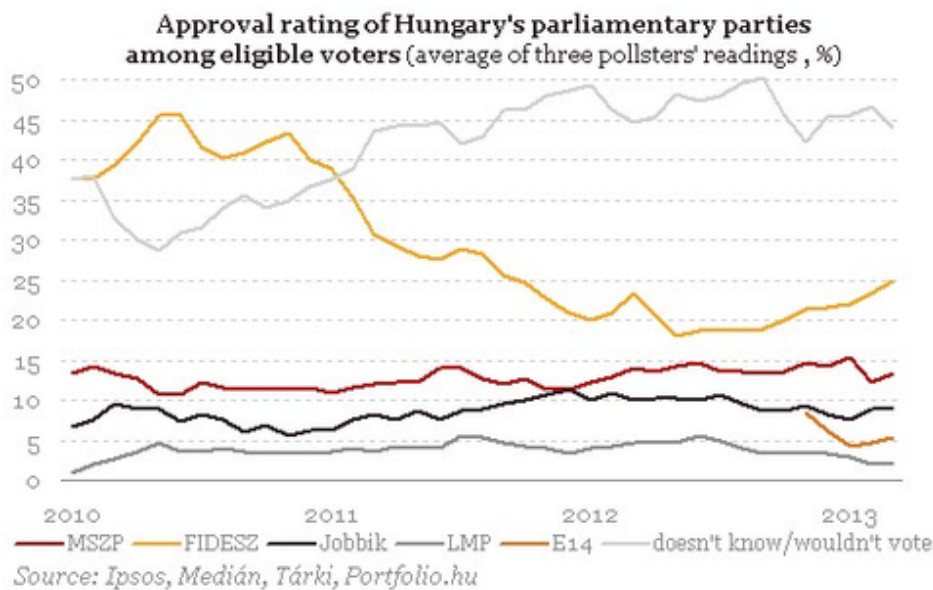
Did this social consultation affect the constitutional process? There is no way it could have done so. The questionnaires were sent out before the constitutional draft appeared – but no responses were collected in time to have influenced that draft. Instead, the questionnaires were being returned before, during and after the short one-month window when the constitution was on display before being adopted. The social consultation therefore provided neither input into the process nor a ratification of the result. In fact, the government still has not made the results of the questionnaire public despite the fact that Mr. Gulyás claims that nearly 1 million Hungarians returned it. So it is impossible to know whether the constitution has anything in common with the social consultation’s results, even on the rather odd collection of topics that the questionnaires probed.

Social consultations are often used by Fidesz to claim that it has a democratic mandate. The Party has repeatedly sent out questionnaires over the last three years to gauge public sentiment. But it never publishes the results. We do know that the questionnaires promise anonymity and yet each embeds a QR barcode that, when scanned with an ordinary cell phone, reveals the respondent’s name and address. After the independent ombudsman for data

protection exposed the QR code, his position was terminated before the end of his legal mandate and his office was transferred into the government, where it no longer has structural independence. The EU now has an [infringement action](#) before the European Court of Justice on the independence of the data protection officer. Critics within Hungary believe that the government has been using the social consultation process to determine who is with them and who is against them – but of course, that is impossible to prove from the outside of a very closed process.

Mr. Gulyás and other Fidesz spokespeople constantly say that Fidesz has a democratic “mandate.” It’s true that Fidesz won the free and fair election of 2010 with 52.7% of the popular (party-list) vote. But Fidesz rests its argument about having a mandate, especially when speaking to outsiders, on a mistaken claim that the party promised during its election campaign to change the constitution, a promise they say was ratified by the election. Mr. Gulyás claims in his letter that “[p]rior to the elections [Prime Minister] Viktor Orbán repeatedly said, on public television and various public forums, that Hungary needs a new, permanent constitution.” That statement may be true as it stands, but it certainly is misleading. In his 20+ years on the Hungarian political scene before the 2010 election, Mr. Orbán may well have said on numerous occasions a new constitution would be a good idea. Fidesz certainly participated in the constitutional drafting process of 1995-1996, to which I was an expert advisor. But Mr. Orbán did not call for a new constitution during the 2010 election campaign, as Mr Gulyás implies.

Does Fidesz still have the public support to qualify as a “mandate”? Even though Fidesz’s popularity picked up a little in the last few weeks after the government promised to force down utility rates, still only one quarter of Hungarian voters would vote for them again. As you can see below, Fidesz’s bad poll numbers were confirmed again when the online economic news portal Portfolio.hu last week published data averaged across all three of the major Hungarian polling firms. The results confirm that almost half of those who said they voted for Fidesz at the time of the election (April 2010) would not vote for the party now (April 2013).



Of course, the tragedy of Hungary’s political system is that none of the parties are popular. Routinely close to half of the public says that there is no party on offer that they would vote for. So Fidesz retains the dubious distinction of being the most popular party in a political system where the majority of the public doesn’t like any of them. But that’s hardly much to cheer about.

Because of strong international criticism, Fidesz officials’ public relations blitz routinely includes a defense of what they have done to Hungary’s churches, since hundreds of churches lost their official status through a law that went into effect on 1 January 2012. Now every church that seeks official recognition has to be approved from scratch by a special two-thirds vote of the Parliament. If a church can’t get that, it is confined to the legal category of a civil association without tax exempt status, assuming that the church can make it through the onerous re-registration process. The Constitutional Court struck this system of church registration twice – once on procedural grounds in December 2011 (in Decision 164/2011 (XII. 20)) and again on substantive grounds in February 2013 (in Decision 6/2013 (III. 1)). But the Fourth Amendment inserts the same unconstitutional system back into the constitution again.

Fidesz defends church registration by claiming that many of those now-deregistered churches were fraudulent. But Mr. Martonyi proclaimed to the European foreign ministers that “the exercise of religion and confession of faith is

[sic] not restricted by law.”

David Baer of Texas Lutheran University has studied in detail what happened to these legally demoted churches, and his [results](#) strongly challenge Mr. Martonyi’s statement. The Catholic Church may have abolished limbo for its faithful, but the Hungarian government restored it in the form of a legal insecurity that has gripped many legitimate churches for nearly 16 months. The legal changes have forced a number of them into moving, closing or agreeing to requirements that violate their faith by making them adopt specific internal structures of governance that are contrary to their beliefs.

Mr. Martonyi, however, assured his fellow European foreign ministers that the Fourth Amendment adds procedural guarantees to the church registration process, explaining that “an individual review of such decision can be sought before the Constitutional Court.” But a closer look reveals that this review is actually a trick.

How does this trick work? The Fourth Amendment provides (in Article 4) that “The provisions of cardinal Acts concerning the recognition of Churches may be the subject of a constitutional complaint.” Translated from legal language to ordinary language, that means that only laws can be challenged before the Constitutional Court only by those parties who are directly affected, who are the only ones who can bring a constitutional complaint.

But when a church applies to be recognized by the Parliament, the law is only modified if a church wins recognition. In such cases, the law is amended to add the name of the church to the list of recognized churches, which are all explicitly named. But if a church is rejected by the Parliament, the rejection comes in the form of a parliamentary “order” (határozat) and not an amendment to the “law” (törvény). And orders of the Parliament cannot be challenged before the Constitutional Court. So if a church is successfully added to the list of official churches, it has a remedy at the Constitutional Court when it doesn’t need one. But if a church is turned down and would benefit from judicial review, the appeal to the Court is barred. It’s a trick that makes it appear that the government has provided an avenue of legal redress to a church that has lost official recognition. But it doesn’t.

As a result, the Fourth Amendment perpetuates an unconstitutional situation because the Parliament can determine the fate of any church with no rules, evidentiary standards, or appeal when there is a rejection. The amendment simply overrules the Constitutional Court’s decision of a few weeks ago because it does not provide a real remedy to the problem identified by the Court — that there were no meaningful standards of procedural fairness in the church registration process.

Mr. Gulyás and Mr. Martonyi defend other aspects of the new Fourth Amendment as part of a common chorus of responses from other Fidesz loyalists. Mr. Gulyás claims that the Hungarian Constitutional Court “specifically mandated” that the Parliament pass this the Fourth Amendment to fix an unconstitutional situation. Mr. Martonyi says that the Fourth Amendment’s very purpose is “to implement” a decision of the Constitutional Court.

It is true that the Court annulled on purely formal grounds a number of purported constitutional amendments in its decision on the Transitional Provisions in December 2012 (45/2012 (XII.28)) because permanent changes were made not in the constitution itself but only to a constitutional annex. But the Court did not ask that the constitution be amended again to include the same provisions that were struck.

Mr. Gulyás asserts that failing to reenact the unconstitutional constitutional amendments would have been a problem because “Parliament had a constitutional responsibility to re-regulate these matters, otherwise an ex lex situation would have created complete legal uncertainty.”

It’s a touching concern. But again misleading. Mr. Gulyás fails to mention that almost all of the unconstitutional provisions struck down in the Transitional Provisions were duplicated in existing cardinal laws, so the nullification of the constitutional amendments changed very little on the ground and certainly did not cause legal insecurity. If the Parliament were deeply worried about legal uncertainty, perhaps it should not have annulled overnight more than 20 years of constitutional case law through the Fourth Amendment, something that really does create legal uncertainty.

Since the new constitution went into effect, Constitutional Court did declare a number of other laws unconstitutional as substantively inconsistent with the principles of the new constitution, including two of the now-nullified former constitutional amendments. But, far from implementing these Constitutional Court decisions, the Fourth Amendment simply overrode them by inserting the unconstitutional laws directly into the constitution without attempting to fix them. It’s true, as Mr. Martonyi says, that the government refrained from reintroducing into the constitution a requirement that each voter register anew before each election, after that requirement was

declared unconstitutional. He fails to mention to the foreign ministers of Europe, however, that the Fourth Amendment did override most of other the important Constitutional Court decisions that went against the government in the last 16 months, a fact which gives a very different impression.

Here are the substantive Constitutional Court decisions that were explicitly overruled in the Fourth Amendment:

□ A Constitutional Court decision declared unconstitutional the law that defined the family as consisting of a heterosexual couple and its descendants (Decision 43/2012 (XII. 20.)). But that decision is now overruled through Art. 1 of the Fourth Amendment.

□ A Constitutional Court decision declared unconstitutional the procedure through which the Parliament votes on the official status of each church (Decision 6/2013 (III. 1.)). But that decision is now overruled through Art. 4(1) of the Fourth Amendment.

□ A Constitutional Court decision declared unconstitutional on free speech grounds the restriction of political advertising during election campaigns (Decision 1/2013 (I.7.)). But that decision is now overruled by Art. 5(1) of the Fourth Amendment.

□ A Constitutional Court decision declared unconstitutional on grounds of freedom of movement the requirement that students be forced to seek employment only in Hungary after their university degrees have been paid for by the state (Decision 32/2012 (VII. 4.)). But that decision is now overruled by Art. 7 of the Fourth Amendment.

□ A Constitutional Court decision declared unconstitutional the law that creates a system of administrative fines for homelessness because it violates the human dignity of the very poor (Decision 38/2012 (XI. 14.)). But that decision is now overruled through Art. 8 of the Fourth Amendment.

(In case you want to check this, the official English translation of the Fourth Amendment is [here](#), but it can only be fully understood by cross-referencing the constitution [here](#). . Unfortunately, the Court decisions are only in Hungarian.)

And, of course, the Fourth Amendment indiscriminately nullifies ALL of the decisions that the Constitutional Court made between 1990 and 2011.

Fidesz officials say that critics have exaggerated the significance of the nullification of all of the previous Constitutional Court case law because, as Mr. Martonyi notes, the prior decisions' "legal effect would remain intact." But one needs to understand the meaning of "legal effect" to see how limited a claim this is. When the Hungarian Constitutional Court declares a law unconstitutional, the law is nullified. That is the legal effect: the law disappears from the law books. Mr. Martonyi's assurance only means that once-nullified laws don't automatically return when the decision that nullified the law is itself nullified. But everything else that gave Hungarian constitutional law its stability through reasoned Court judgments – the guarantees of checked powers, the elaboration of rights, and the relationship between Hungarian constitutional law and European human rights law, for example – has disappeared through the government's nullification of the case law. And that is what critics are objecting to.

As Mr. Martonyi explains, the legal disappearance of all prior case law "strengthen[s] the freedom and autonomy of the Court" because "[t]he Constitutional Court would hence be free to choose between taking its own previous decisions into consideration, referring to them, or simply ignoring them." Exactly. But this is odd to claim as a benefit.

I ask my readers who live under a Supreme Court or a Constitutional Court outside of Hungary: How would you feel if your high court were "liberated" in this way – by having all of its prior case law indiscriminately cancelled overnight? As Janis Joplin famously sang in the song "Me and Bobby McGee," "Freedom's just another word for nothing left to lose." When the United States adopted its constitution, most of the rights of American citizens were guaranteed in the common law, which was carried over – intact – from the period of colonial rule. In fact, that is typical of constitutional reform around the world: everything else stays the same except those relatively few things that have been explicitly changed. Not so, now, in Hungary.

Critics say that the Fourth Amendment restricts the power of the Constitutional Court, but the government now insists that the Fourth Amendment expands the Court's power because, for the first time, the constitution permits what the Court has already done – which is to declare constitutional amendments unconstitutional if they are not

passed in the appropriate way. Perhaps the government thinks that giving the Constitutional Court a capability it has already used is an expansion of its power, but that is not the usual meaning of the word “expand.” The government cannot deny that it is taking away a power that some judges of the Constitutional Court also claimed (in Decision 45/2012 (XII. 28)) – which was to review constitutional amendments for their substantive conflicts with constitutional principles. The Court had not yet used that power, but it was clear that support was gathering within the Court to do so. Removing from the Court the ability to review the content of constitutional amendments simply means that there is no barrier to the government inserting completely contradictory provisions into the text or overruling any Court decision the government doesn’t like, both of which the government has already done with the Fourth Amendment.

The idea of an unconstitutional constitutional amendment may sound odd. In countries like the US and others where the constitutional amendment process is long and arduous with many checks along the way, there may not be a need for a high court to be able to review amendments. But when the constitution is amended nearly every week and the government is routinely using its supermajority to put controversial laws beyond any check, some power should examine what the government does or else the government simply bursts the bounds of the rule of law. If the Court is not given this power, there must be some other check somewhere in the system – for example, an upper chamber of the Parliament, or an independently elected president, or parliamentary procedure that guarantees that the majority must address minority concerns, or a popular ratification of constitutional amendments. But, in Hungary, none of these options are present. Hungary has a unicameral parliamentary system with no other powerful checks. That is why the Court should have that power or else the constitutional system would – and now has – become a farce.

Mr. Gulyás claims that the Constitutional Court asked to have its power limited in a crucial way, by removing its “*actio popularis*” jurisdiction that allowed anyone to challenge a law before the Court. True, but misleading. Since the 1990s, constitutional judges have been complaining about the thousands of vague and misdirected complaints they receive through *actio popularis* petitions. But the Court’s judges (before those added by this government) would never have agreed to have most of their jurisdiction gutted, which has been the overall effect of the new system. (For more detail, see my [Helsinki testimony](#).) While the open petition system was not the only way that the Court could have been empowered to review important laws, eliminating it without a good substitution has created holes in the Court’s oversight of the constitutional order.

But we should all be careful what we wish for. This month, the ninth judge elected with the Fidesz two-thirds supermajority is joining the 15-member Constitutional Court. (He is one of the few judges to get a multi-party vote since the far-right Jobbik party supported him, too.) The eighth joined last month. Now that the government is practically guaranteed a friendly majority, perhaps Fidesz will offer to restore some of the Court’s powers as a way of showing how flexible they are. A Court that has nine judges who owe their careers to one party and who have been elected for 12-year terms can make it difficult for any non-Fidesz government to govern, even if a new government could be elected against the background of an ever-changing landscape of new electoral barriers that the opposition has to hurdle. Yes, the long terms for constitutional judges mean that the Fidesz judges could (and should) be independent but so far only one of the Fidesz judges has shown serious independence from Fidesz party positions.

Mr. Gulyás tells me I can’t have it both ways – since he claims that I have argued both that no institution can check the powers of this government and also that a future government will be stymied by the ability of these very same institutions to thwart a future government. But that is not what I claim. Fidesz has seized control of all institutions in the Hungarian government through a two-pronged strategy. It has tried to cut the power of institutions it could not yet control – like the Constitutional Court and the central bank. It has beefed up the power of institutions that were in reliable hands – like the National Judicial Office, the Media Board, the Prosecutor’s Office, the State Audit Office and the Budget Council.

As a result, after Fidesz gains control over the personnel of an institution it has previously weakened, then it often “compromises” with critics and strengthens the powers that institution again. The same is true for institutions it needed to capture only for a brief time to accomplish a specific purpose (like replacing 10% of the judiciary at once, including much of the ordinary court leadership). Then it agrees to disperse centralized power. Fidesz can then be very cooperative with its international partners by agreeing either to limit the powers of an office that it no longer needs to control or to strengthen the apparent independence of an institution that is now safely in its hands. But otherwise, strong powers in reliable hands are just what the government has accomplished. And as long as strong-enough powers are in reliable-enough hands, the Fidesz supermajority can rein in any future opposition government that deviates from the Fidesz path. So the very same institutions that have been domesticated by Fidesz can turn fierce when a party other than Fidesz is in charge. To understand what this government is doing,

one must always look both at the party background of the occupants of the offices and at the powers of those offices. Am I the one having it both ways – or it is Fidesz?

There are many other points to address in this Fidesz public relations blitz, and I have addressed them in detail in many of my other writings and interviews, which you can see [here](#).

Since Mr. Gulyás has called into questions my qualifications and independence, let me explain my background. I lived in Hungary full-time between 1994 and 1998, working as a researcher at the Constitutional Court, where I learned Hungarian constitutional law as it was being made. I was involved in the 1995-1996 constitutional drafting effort, as an expert advisor to the parliamentary committee drafting the text. I have held tenured positions as a law professor, political scientist and sociologist in the United States. My field of expertise is comparative constitutional law, which I have taught for more than 20 years. I am an elected member of the International Academy of Comparative Law.

Despite Mr. Gulyás's insinuations that I am an agent of some opposition party, I have never accepted money for my research and writing except through a scientific review process or university research funds. My 1990s research on Hungary was funded by two competitive peer-reviewed grants from the American National Science Foundation. I was not then and have never been in the employ of any government institution or political party in Hungary – or for that matter of any other government, including my own. All of my publications, including blog posts, have been fact-checked down to the ground and I am happy to provide supporting documentation for all of the statements I have made. While I have always talked to representatives from all parts of the political spectrum in Hungary to understand their arguments, I have also always insisted on my independence from any partisan organization.

Fidesz tries to turn all of its critics into agents for the “other side.” But that is a public relations trick. When a party brings all institutions of government under its control and attacks the independent judiciary, we are no longer in the world of normal party politics. Instead, we are in the world where Hungary's very existence as a state under the rule of law is in question. That is why I have gotten involved. Once Hungarians regain their ability to live in a fully democratic society with depoliticized courts, I plan to go back to the quiet world of scholarship from which I came.

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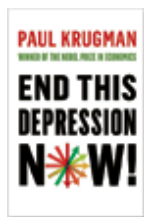
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Some links to stuff I've written bearing on macroeconomic policy. Read all of them, and you'll have a good sense of where I'm coming from.

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