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Will the Worldwide Liberal Revolution Bypass America through Judicial Restraint?

by Roger Pilon

These are exciting times for students of ideas. We are in the midst of a worldwide revolution, or so it seems, with ideas, not arms, leading the way. And the ideas that are leading the way, again it seems, are those of classical liberalism—respect for the individual, for individual liberty, private property, free enterprise, and popular sovereignty.

I qualify those observations first because in the socialist world it is not yet clear how deep, much less lasting, this revolution really is, and second because over the entire world, including America, it is not yet clear how liberal, how widespread, or how well understood the revolution is. In fact, certain confusions over the ideas that lead the revo-

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lution, especially in America, will be my principal focus here. Nevertheless, that a significant shift in our moral, political, and legal outlook is taking place, a shift from the outlook that dominated recent decades, cannot be denied. Not only can we say things today that a decade or two ago could not have been said, but events are unfolding today that were then unimaginable.

The Decline of Socialism

To lay the foundation for a broad look at those ideas in the American context, especially as they relate to the practice of judicial review, I want first to touch upon a few recent developments in the socialist world. Those developments began, on the popular view, with the rise of Mikhail Gorbachev and his calls for *glasnost* and *perestroika*; yet the ascent of Gorbachev and his "new thinking," important as that is in the Soviet context, should itself be placed within the larger climate of ideas

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Cato chairman William A. Niskanen and Cato president Edward H. Crane listen as Federal Reserve Board chairman Alan Greenspan discusses monetary policy at a Cato luncheon.

that led to the elections of Margaret Thatcher in 1979 and Ronald Reagan in 1980, which in turn can be traced to countless events going back at least to the appearance of Hayek's *Road to Serfdom*, if not to the dawn of the classical liberal tradition. In all of this, two themes stand out: first, that socialist systems do not work; second, that they are illegitimate.

Decentralization, Democratization, and Liberalization

That Gorbachev has seen fit to focus on the first of these themes is understandable. Yet even in this, in his attempts to fix the system, he is not as much leading as following events. For as Nikita Khrushchev's boast that socialism would bury capitalism became increasingly remote, "economic reform" came to be the watchword within the socialist world, well before Gorbachev's rise to power. In Poland and Hungary especially, socialist economists for a

(Cont. on p. 10)

The World Turned Upside Down Chairman's Message



An interview on National Public Radio in early January has already made my year. In discussing the Comecon meeting, Vaclav Klaus, the finance minister of the new government of Czechoslovakia, patiently explained to a reporter that F. A. Hayek had pointed out the difficulty of maintaining a credible gradualism in the reform of economic policy. Klaus stated that he therefore favored an abrupt, comprehensive reform similar to

the one implemented by German finance minister Ludwig Erhard in 1948.

Could the interview have been an NPR prank? When was the last time that you learned of a finance minister who had read Hayek and remembered Erhard? How could someone who has lived in a communist country for over 40 years have even heard of Hayek? In fact, how could someone with those views have become the finance minister of a government that was hard-line communist a month before?

No, it was not a prank. *The world has turned upside down.* The Klaus interview is only one manifestation of an extraordinary leap to liberty by the peoples of Eastern Europe, at a time when the United States seems to be drifting into a kinder and gentler *dirigisme*. Consider the following contrasts, some of which are more important than others:

- The success of each of the four popular coups against East European communist governments was critically dependent on a clear signal from Mikhail Gorbachev that Soviet troops would not intervene to suppress a local uprising. During the same few months U.S. forces intervened in the Philippines to support a weak government and invaded Panama to overthrow a petty despot. America's diplomatic set, not to be outdone, kowtowed to the tyrants of Tiananmen Square and invited the Soviets to intervene in Romania.

Oh, I know that the official story is that each of those interventions was for a good cause and that they are not a precedent. Each of them *was* for a good cause (as was the Vietnam War); the problem is that they have undermined the prospects of a general rule against intervention (except when vital national security interests are at stake) just as the Soviets seem prepared to live by such a rule.

- As the new East European governments are considering massive deregulation, the U.S. government is regulating with the restraint and discrimination of Cossacks in the name of eliminating infinitesimal risks. It is about to regulate grandmothers in the name of ensuring high-quality child care.

- Poland is prepared to curb its runaway inflation this winter, but the Bush administration is pressing the Federal Reserve to provide just an eensy bit more monetary stimulus—at least, until after the next election.

Some of the more pompous historiography of this century has postulated a convergence of the world's major politico-economic systems. Such predictions may turn out to have been right, but for the wrong reasons. The leaders of Eastern Europe are borrowing from the best of America's traditions, but the leaders of the United States seem to be losing sight of those traditions.

—William A. Niskanen

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Buchanan, Aganbegyan Head List of Speakers at Cato's Moscow Conference, "Transition to Freedom"

The Cato Institute will sponsor a historic conference in Moscow, "Transition to Freedom: The New Soviet Challenge." Scheduled for September 10-14, 1990, the conference is being cosponsored by the Academy of People's Economy, the Academy of Sciences of the USSR, the Central Economic-Mathematical Institute, and Moscow State University. The conference director is Cato's vice president for academic affairs, James A. Dorn.

The conference will consist of two parts devoted to the two aspects of a "transition to freedom"—the transformation of a centrally planned economy into a market economy and the

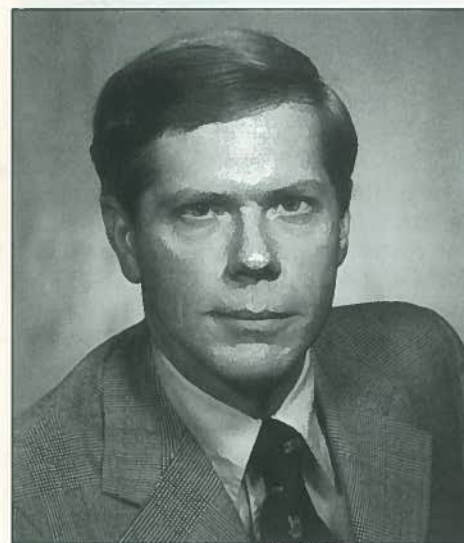
libalize its economy and increase its citizens' standard of living. Invited speakers include James M. Buchanan, Paul Craig Roberts, Henry G. Manne, George Gilder, Alan Reynolds, Peter Bauer, Roger Pilon, Charles Murray, Christopher Layne, Abel Aganbegyan, Fyodor Burlatsky, Jan Winiecki, Otto Latsis, Leonid Abalkin, and Boris Yeltsin.

The first session of the conference will focus on the need for constitutional reform, including the protection of individual rights and the provision of the legal framework required for democracy and a free market. The second session will consider the functions of private ownership and freely float-

thorities to sanction this conference is *glasnost* at its best," said Dorn. "We will be advocating market reforms unabashedly, as we did at 'Economic Reform in China: Problems and Prospects,' Cato's 1988 conference in Shanghai."

Cato president Edward H. Crane commented, "The Russian people know that central planning doesn't work, but they have a real need for information on the workings of the free market. This conference will be among the crucial forums through which the Soviets can learn what steps will lead to prosperity and freedom."

The Moscow conference is designed to build on Cato's previous work in



Paul Craig Roberts



James M. Buchanan



Charles Murray

progression from a bipolar, superpower-dominated world to an economically integrated world marked by improved international relations. Cato's director of foreign policy studies, Ted Galen Carpenter, is coordinating the second part of the conference.

The Soviet leadership is grappling with such major problems as lagging productivity in agriculture and industry, mounting budget deficits and inflation rates, the consequences of an irrational pricing structure, severe commodity shortages, and environmental deterioration. Speakers at the Moscow conference will discuss concrete measures that would enable the Soviet Union to sta-

ing prices in a modern economy. Highlights of the third session will include discussions of both the staggering economic problems caused by the socialist system and the role of property rights as an incentive for environmental protection. The fourth session, "Marxism, Capitalism, and Change," will feature talks on the information revolution, institutional reform, and the failure of mixed economies.

Three sessions on foreign policy will explore the U.S.-Soviet strategic relationship, solutions to regional conflicts, and the case for new political and security arrangements in central Europe. "The willingness of the Soviet au-

bringing free-market ideas to the Eastern bloc. In 1982 Cato published *Solidarity with Liberty*, a Polish-language book featuring essays by F. A. Hayek, Ludwig von Mises, Milton Friedman, Vladimir Bukovsky, and others, and arranged for its distribution in Poland. In 1985 Cato issued and disseminated a Russian-language collection, *Friedman and Hayek on Freedom*. And in 1989 Cato sent copies of the books to new members of Poland's parliament and the Soviet Politburo.

For more information on the Moscow conference, contact Sandra H. McCluskey, Cato's director of public affairs. ■

Greenspan Discusses Fed Policies at Cato Luncheon

Cato Events

December 8: Luncheon for Alan Greenspan, chairman of the Federal Reserve Board. Greenspan discussed congressional proposals to impose a zero-inflation mandate on the Fed and the political obstacles that a central bank would face in trying to achieve such a goal.

December 14: Book party for Randy E. Barnett, editor of *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*. Barnett contended that the long-ignored Ninth Amendment, which states that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," should be neither dismissed as incomprehensible nor taken as an open invitation for a court to impose its moral vision on society. Rather, Barnett argued, the Ninth Amendment should be viewed as a general presumption of individual liberty that leaves the government with the burden of justifying restrictions on liberty.

January 4: "Left, Right, and Liberal: Why Americans Don't Know Whom to Back in South Africa." Don Caldwell, author of *South Africa: The New Revolution*, pointed out that the South African government and the African National Congress have strikingly similar agendas—both support statist economic policies and restrictions on civil liberties. He argued that free-market policies are opposed by supporters of apartheid and members of the left but favored by a broad liberal constituency drawn from all racial groups.

January 17: "Strategic Disengagement: Foreign Policy in the Post-Cold War Era." Cato senior fellow Doug Bandow and Cato adjunct scholar Christopher Layne debated Frank J. Gaffney, Jr., director of the Center for Security Policy, and Roger Brooks, director of the Asian Studies Center at the Heritage Foundation. Layne asserted that the Soviet threat has diminished considerably since the establishment of NATO in



Randy E. Barnett, editor of *The Rights Retained by the People: The History and Meaning of the Ninth Amendment*, autographs his book for authors Russell L. Caplan of the Justice Department and Norman Redlich, dean of the New York University Law School.

1949 and that the best means of ensuring freedom in Eastern Europe is to seek the superpowers' mutual disengagement from the Continent. Gaffney countered that the significance of recent events in the Soviet Union is unclear and that the present European defense structure is needed to sustain the peace. Bandow argued that the United States should withdraw its troops from South Korea and Japan while helping them bolster their own



Ted Galen Carpenter listens as Doug Bandow proposes a U.S. withdrawal from South Korea at a Cato Policy Forum.

defense forces. Brooks contended that the American presence in the Far East has fostered prosperity and political liberalization and is still vital to the region's stability.

January 30: "Is Washington Waging an Unwinnable Drug War in Latin America?" Rensselaer W. Lee III, author of *The White Labyrinth*, argued that the cocaine production and trafficking in the Andean countries are too pervasive to be halted by supply-side strategies. A prerequisite for victory in the drug war is a strong base of popular support in Latin America, Lee contended, which the United States lacks. He said that U.S. threats to eradicate coca cultivation—an integral part of Andean economies—are enabling Marxist insurgencies to enlist thousands of supporters. Ted Galen Carpenter, Cato's director of foreign policy studies, warned that the Bush administration's plans to escalate U.S. military involvement in the drug war in the Andean countries would poison U.S.—Latin American relations. Carpenter argued that the legalization of drugs would head off such a crisis and end the drug lords' power. ■

An Alternative to Rate Increases

New Cato Book Calls for Competition in Mail Delivery

Mail delivery in the United States is slow, unreliable, and increasingly expensive, yet Americans have put up with the U.S. Postal Service because of its government-mandated monopoly status. In *Free the Mail: Ending the Postal Monopoly* Cato senior fellow Peter J. Ferrara, the book's editor, writes, "In a society that values freedom, the prohibition on private mail delivery should seem not only anomalous but authoritarian."

Because the Postal Service has no competition in first-class mail delivery, it lacks incentives to control costs, ensure high quality, and innovate. At the same time, federal subsidies enable it to overpay its bureaucracy in salaries, perks, and benefits—at the expense of taxpayers and the economy.

According to most of the contributors to the volume, which consists of papers delivered at Cato's 1988 conference "Privatization and the Postal Monopoly," the Postal Service should be stripped of its monopoly status. Now that technological advances have permitted instantaneous global communication, mail delivery is just another service—not an essential part of the nation's infrastructure, as Postal Service defenders claim. Moreover, the private sector would develop a universal mail-delivery system, just as it has developed universal systems for distributing food, gasoline, and other goods.

Thomas Gale Moore, a member of the Council of Economic Advisers under President Reagan, asserts that small postal firms would cooperate with each other to create a nationwide network for their customers. Financial consultant Bert Ely concludes that the extra cost and complexity of rural delivery are negligible and do not warrant price differentials. And James C. Miller III, former director of the Office of Management and Budget, calls the Postal Service's bluff by suggesting that competition be restricted to rural routes initially.

Stuart M. Butler, director of domestic policy studies at the Heritage Foundation, points out that privatization plans must be politically as well as economically sound. Daniel Oliver, former chairman of the Federal Trade Commission, argues that the Postal Ser-



vice's monopoly is an affront to a free people.

In response to such criticism, Postmaster General Anthony M. Frank con-

tends that the Postal Service "is a vital link in the economic and social life of the United States." Having described the Postal Service's efforts to become more efficient, Frank notes that there may be a middle ground involving measures short of privatization.

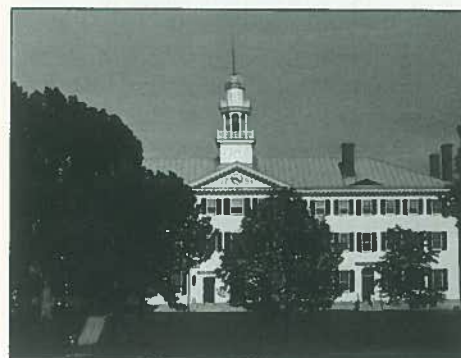
"Whatever the precise approach taken," contends Ferrara, "those who have the common interest clearly in view must favor repeal of the postal monopoly. Fighting government monopolies has a long and hallowed tradition in Anglo-American history. Today's struggle to free the mail is a continuation of that honored tradition."

Free the Mail: Ending the Postal Monopoly, published by the Cato Institute, is available in cloth for \$25.95 and in paper for \$12.95.

Two Summer Seminars Planned

Cato will sponsor two week-long Summer Seminars in Political Economy during 1990. The first will be held at Dartmouth College in Hanover, New Hampshire, from June 30 to July 7 and the second at Dominican College in San Rafael, California, from July 14 to July 21. Speakers will include Ralph Raico, Leonard Liggio, David Kelley, Mario J. Rizzo, Earl C. Ravenal, Ted Galen Carpenter, George H. Smith, Edward H. Crane, David Boaz, Chandran Kukathas, and special guest lecturer Charles Murray, author of *Losing Ground* and *In Pursuit*.

At Cato's summer seminars, 75 participants of all ages and backgrounds gather from all over the world for an intensive week of lectures on ethics,



economics, history, and current affairs. The seminars offer a unique opportunity for scholars, businesspeople, and students who share a commitment to liberty to explore and develop classical liberal ideas. Now in their 12th year, they have become world famous among advocates of liberty; classical liberals everywhere aspire to attend at least one.

Dennis Brennen, chairman of the Department of Economics at Harper College, called a Cato summer seminar "intellectually, the best week I've spent in years" and "a rejuvenation and regrounding in the basic principles of liberty." Lynne Kiesling, a student at Northwestern University, commented, "The personal interaction and intellectual stimulation left me with a new excitement about and commitment to classical liberal ideas and their role in society." Vladimir Chelminski of Caracas, Venezuela, said that "a seminar like Cato's should be taken by everybody, regardless of their occupations or careers."

For more information on Cato's 1990 summer seminars or an application form, contact Sandra H. McCluskey, Cato's director of public affairs. The deadline for receipt of applications is May 31. ■

Prospects for Peaceful Change in South Africa

by Helen Suzman

I'm very impressed that Americans continue to be concerned about South Africa, considering all the other problems that you have to contend with—the deficit, the failed coup in Panama, the aftermath of Hurricane Hugo, the HUD scandal, Cuban refugees, difficulties in your inner cities, and, of course, Jackie Mason's comments about David Dinkins. I would have thought that you would be occupied with your own affairs. But no, you are still interested in South Africa, and I'm genuinely pleased about that. I believe that it is absolutely essential that the most powerful democracy in the world, with human rights as its basic value, use its influence to safeguard those rights everywhere.

South Africa has undoubtedly breached human rights, but it is by no means the only country to have done so. Race discrimination is practiced everywhere—in the United States, in England, and in all other democratic countries. Indeed, there are many countries where race discrimination, in practice, is even worse than in South Africa. South Africa's unenviable position as the pariah of the Western world is, of course, due to its being the only country that has established race discrimination by statute.

I've had the dubious privilege of serving in the South African Parliament for 36 of the 40 years that race discrimination has been on the statute book. I've seen the National party, which has now been in power for more than 40 years, place on the statute book legislation to enforce racial separation in every facet of life. In the area of economics, there was the Job Reservation Act, which reserved all skilled work for white people and did not recognize black or racially mixed trade unions. There were statutes that prohibited marriage across the color line. (Americans shouldn't be too smug about that, because a Missis-

Helen Suzman was a member of the South African Parliament from 1953 to 1989. This article is based on her remarks as the Cato Institute's sixth Distinguished Lecturer in October 1989.

issippi statute that prohibited interracial marriage was only recently abolished. Of course, nobody had been prosecuted for many years, but nevertheless, the act was still on the statute book.)

Sociopolitical entrenchment of racial separation was brought about by a law that prohibited racially mixed political parties. The Separate Amenities Act gave to local governments the power to require that people use public amenities on a racially separate and unequal basis. And the Group Areas Act laid down that people could occupy or own land only in the area set aside for their particular ethnic group.



Helen Suzman: "If sanctions and disinvestment wreck the economy, every South African, white or black, will be hurt."

Politically, blacks were taken off the common roll, in the one province where they enjoyed voting rights, in 1936, before the present regime came to power. So-called colored people, people of mixed race, lost their common-roll franchise in the mid-1950s and lost their separate-roll franchise in the 1960s.

Educationally, the races were always segregated, even before the present government came to power. And I might point out that white children are segregated as well if they go to the state schools. Afrikaans-speaking children go to the Afrikaans schools, and English-speaking children go to the English

schools. Private schools, however, are integrated. Many of the private schools, in fact practically all of them, have not only English and Afrikaner students but students of other races as well.

All those factors have been in play for years and, as I said, have given South Africa the status of a pariah nation. I had a ringside seat from which to watch those laws come onto the statute book and spent all my time opposing them.

Pari passu came the erosion of the rule of law. The denial of habeas corpus effectively destroyed due process. On the statute book in South Africa are laws that allow the minister of justice and the minister of law and order to indefinitely detain people in solitary confinement without trial. And that, to my mind, is one of the most oppressive aspects of the entire regime. Whenever legislation is passed without the approval of the people to whom it applies, due process will not be sufficient to maintain law and order, and the government will therefore assume additional, oppressive powers.

That has been the case in South Africa, which has lurched from crisis to crisis over the years—from Sharpeville in 1960 to Soweto in 1976 to the sporadic outbreaks of unrest in the townships, in Johannesburg, in Cape Town, and in Pretoria. In 1984 a new constitution was accepted by the white electorate. That constitution set up a tricameral system, which is still in effect, under which votes were set aside on separate rolls for the colored people, for the Indian people, and for the white people. No provision was made for the votes of the black people, so 72 percent of the population were denied the franchise by the new constitution.

The violence that broke out in 1984 in the Vaal Triangle (Johannesburg, Pretoria, and the industrial area of Vereeniging) has continued ever since and has resulted in a declared state of emergency, as a consequence of which 30,000 to 40,000 people have been detained—some just for a matter of days, others for months, and a few for years. That situation, which still obtains, means

that we have strict censorship of the press, which is not allowed to report any unrest-related incidents without permission; it has of course resulted too in the banning of most protest meetings. Such is the present state of affairs in South Africa, and such are the circumstances under which the general election of September 6, 1989, took place.

To be fair, I should point out that during the past 10 years, under the leadership of prime minister and state president P. W. Botha, unaffectionately known as the Great Crocodile, many changes have taken place in South Africa. Some are considered cosmetic, such as the desegregation of sports, hotels, theaters, cinemas, and public places such as post offices and beaches. The Prohibition of Mixed Marriages Act has finally been abolished, along with the section of the Immorality Act that prohibited sex across the color line outside of marriage.

I must say I've had some wry moments in Parliament watching laws that I opposed when they came onto the statute book being repealed 10, 15, or 20 years later, and I can remember that when I moved to get those laws repealed, I was told that I didn't understand the mores of South Africa. Well, the mores apparently changed; the laws were taken off the statute book, and the heavens did not fall.

There have been more significant reforms as well, such as the repeal of the Job Reservation Act and the legal recognition of black and mixed-race trade unions, a very important future weapon for the black resistance movement and the blacks' attempt to attain equality. Powers of collective bargaining have now been given to the black trade unions. Blacks have been accepted at last as permanent residents of the urban areas. And most important of all, what I consider perhaps the most offensive laws on the statute book, the pass laws and influx control, which restricted the mobility of black South African citizens and prevented their moving from a rural area to an urban area or from one urban area to another, were abolished in 1986. Those were the laws that resulted in the arrest of thousands of black people every year for not having the correct permits in what were known as their "passes."

I used to ask many questions in Parliament—indeed, I consider it an important task of parliamentarians to extract as much information as possible from ministers in Parliament. One of the questions I asked was how many people had been arrested under the pass laws in the last two years before they were abolished. I was told that half a million people had been arrested. When that question was put, one of the National party members said to me bitterly, "Your questions embarrass South Africa." And I said to him, "It's not my questions that embarrass South Africa; it's your answers."

Repeal of the pass laws was not cosmetic. They were in fact very real restrictions on the development of the black economy and on the efforts of blacks to climb the economic ladder in South Africa. The government did not receive much recognition from blacks when it repealed those laws, because, understandably, blacks were not very grateful for the repeal of laws that should never have been enacted in the first instance.

Nor did the government receive much recognition from the rest of the world. Integration of sports, for instance, has not led to South Africa's readmission to the Olympic games or any other international sporting events. A cabinet minister said to me, sadly, in Parliament one day, "Our main problem is that we are confronted with a moving target. Whatever we do doesn't seem to be enough. We are constantly being asked to do more." And I said, "Well, of course you're being asked to do more. You should abolish all the remaining laws of racial discrimination."

I should mention that the laws that have been changed have been changed because of both economic factors and the steady escalation of black resistance within South Africa. The changes in the laws were not the consequences of sanctions, as some people claim. The changes took place between 1979 and June 1986. The U.S. Comprehensive Antiapartheid Act was enacted in November 1986, after those laws had been abolished. I'm not trying to say that international pressures do not play a part. Of course they do. They have an effect on the thinking of white politicians, and certainly they've had an effect on the integration of sports and in

other areas where the political power structure itself is not affected.

Nevertheless, I must emphasize that economic factors within South Africa have been the main forces behind the changes that have already taken place. Job reservation disappeared because there just were not enough whites to do the skilled work. The pass laws and influx control disappeared because they could no longer be implemented, given the massive urbanization that resulted from poverty in rural areas and job opportunities in urban areas.

De facto residential integration, despite the Group Areas Act, has taken place in some white suburbs because of the acute shortage of housing in the black urban areas, and the passage of the Free Settlement Areas Act in 1988 gave de jure recognition to some of the racially mixed areas. The shortage of housing has also given rise to vast squatter camps at the outskirts of metropolitan areas all over the country. An estimated 7 million black people are now living in squatter camps.

All the factors I have mentioned have played a part in precipitating South Africa into the throes of a "silent revolution," in the telling phrase of John Kane-Berman, the director of the South African Institute of Race Relations. According to his estimate, by the year 2000 blacks will outnumber whites in South African cities by 3 to 1. Another factor is the increased number of blacks who are benefiting from secondary and tertiary education. Kane-Berman says that by the year 2000, 7 of every 10 matriculants in South Africa will be black. That's a very significant figure. It also makes South Africa very different from the rest of Africa.

Already 40 percent of South Africa's university students are black. The leading so-called white universities, such as Witwatersrand and Cape Town, have a student body that is about 25 percent nonwhite. That is a very important increase in the number of educated and trained black people, and it has led to middle management's becoming increasingly black in South Africa. Naturally, that has had a considerable impact on income distribution and consumer spending.

Blacks' share of disposable income is rising all the time. The importance of black consumers is increasingly being

South Africa (Cont. from p. 7)

brought to the attention of white South African businessmen. Just recently there were boycotts in two towns that had tried to reintroduce the segregation of public facilities. Those towns found themselves practically bankrupt because the entire black population refused to buy in them and went to nearby towns to make purchases.

Black entrepreneurship has taken off in a truly remarkable fashion. Black taxi services, for example, have been competing very successfully with established transport companies. The informal sector has played a very important role by reducing black unemployment, which is a result of the low economic growth rate, which is due to the shortage of investment capital, which is, in turn, due to sanctions and disinvestment.

I don't want to leave the impression that apartheid has disappeared from the landscape in South Africa. It has not. As long as such laws as the Population Registration Act, which requires that every child born in South Africa be registered in a racial category, the Group Areas Act, the Separate Amenities Act, and the Land Act remain on the statute book, apartheid will remain alive and well. Most important, as long as black South Africans cannot vote for members of Parliament, who pass the laws that govern their lives, white domination will remain intact.

On September 6, 1989, the National party, under a new state president, F. W. de Klerk, was returned to power. Although it lost 17 seats to the Conservative party and 13 seats to the liberal Democratic party, it nevertheless came to power with a 27-seat majority, and it has been able to govern without forging alliances with either of the other parties.

During the electoral period the Mass Democratic Movement emerged as a symbol of solidarity between the disenfranchised and the people who sympathized with them. When its members took to the streets just after the election, the police were not sent in with their tear gas, their birdshot, and their quirts. That, I think, is a significant change.

Another significant change is that

for the first time a National party leader has claimed that he has a mandate for reform. De Klerk has said that he has a 70 percent mandate for reform. Now, he only got 50 percent of the vote, so quite obviously he has included the 20 percent who voted for the Democratic party.

De Klerk has not told us how he is going to use that mandate. He has to clarify exactly what he intends to do to realize his goal, which he said was "a new South Africa, a totally changed South Africa, a South Africa which has rid itself of the antagonism of the past, a South Africa free of domination or oppression in any form." Those are laudable sentiments, but what are

"Laws have been changed because of both economic factors and the steady escalation of black resistance within South Africa, not because of sanctions."

they going to mean?

The five-year plan released by the National party during the election campaign says nothing about which laws are to be repealed. The plan reiterates the party's adherence to the concept of the protection of racial interests, although it defines that concept less rigidly and provides for greater freedom of association.

The government has said that it may introduce a bill of rights—something desperately needed in South Africa—and that it favors holding a conference, a great *indaba* at which representatives of all the racial groups would be present, to negotiate the political accommodation of black people within the parliamentary structure. Such an assembly is absolutely essential if we are to have a new South Africa with a new

goal and without oppression or domination. But whether de Klerk will include the African National Congress and other banned organizations in the *indaba*, whether he will soon release Nelson Mandela and the other political prisoners, whether he will lift the state of emergency—all of which black leaders have cited as preconditions for their coming to the negotiating table—we do not yet know. My crystal ball is cloudy, but I think it's obvious that both sides will have to make concessions if negotiations are to have any hope of success; otherwise the *indaba* is going to be stillborn.

I think de Klerk intends to try to restore South Africa's credibility in the Western world. I hope he'll get a move on, for I have no doubt that the patience of the Western nations is wearing thin. But I am convinced that sanctions and the threat of further punitive actions notwithstanding, de Klerk will not hand over power to the black majority. He was not elected to do so. However, he will explore every means of bringing blacks into the parliamentary system that falls short of threatening white domination, and he will make incremental changes. I believe he will allow many laws simply to erode by nonprosecution; possibly the Group Areas Act will go that way. Certainly the Separate Amenities Act is already going, and the Johannesburg City Council, which is controlled by the National party, has desegregated all public facilities.

Another important postelection development is that the government is now negotiating with the people's representatives in the urban townships, the leaders of civic associations, whom it had always refused to recognize. It is no longer insisting on negotiating with the people elected under local government ordinances.

I firmly believe that sanctions and disinvestment are ultimately counterproductive. They may result in different political thinking and changes in the political structure, but if they also wreck the economy of South Africa, every South African, white or black, will be hurt. There is no point in inheriting a wasteland. If disinvestment continues and comprehensive sanctions are imposed, South Africa will lose its export markets, and there will be wide-

spread unemployment, mainly among the black population.

I'm not impressed by the argument that blacks are already suffering so much that a little more suffering will do no harm. Remember, South Africa has no social security safety net—no dole and no food stamps—so to be unemployed there is a dire experience. Every political candidate in the United States tells voters that he's going to create jobs in his jurisdiction. Does anyone really think that black South Africans' views on employment are different? They also need and want jobs. They also fear unemployment.

If one could say with certainty that sanctions and disinvestment would, in one swift blow, bring down the regime and dismantle apartheid and that the whole economic setup would be reestablished, there might be some sense to them. But change won't come that way. Instead the economy will erode as unemployment increases and growth ceases altogether, and half a million young blacks will enter the labor market every year to find that there are no jobs.

The result of sanctions and disinvestment is not going to be a sudden conversion to a nonracial democracy in a prosperous South Africa. It is going to be a gradual descent into poverty for everybody, and that means more oppression—it means more money diverted from education and training to the military and the police. In other words, there will be a long, drawn-out confrontation between a government backed by the military and the police and a popular mass movement that must turn to IRA-type violence. That is not a desirable scenario for South Africa.

Some years ago there was a nationwide survey on blacks' attitudes toward sanctions in South Africa. Sixty percent of the respondents were opposed to sanctions if job losses would be sustained. When the question about job losses was omitted, a far greater percentage favored sanctions. A recent Gallup poll—financed by the Chamber of Mines, which, of course, made it suspect to a lot of people—confirmed that blacks do not support sanctions if, as is inevitable, job losses would result. The percentage of respondents opposed to sanctions increased to 67 percent when it was stipulated that many peo-

ple would lose their jobs, and over 70 percent opposed sanctions if their own jobs would be jeopardized. Those polls, I think, belie such statements as "Blacks don't care if they lose their jobs."

Please don't misunderstand me. I totally understand the moral outrage that so many people feel about apartheid. After all, I think I can claim to have fought apartheid longer in Parliament than anyone else in South Africa. I just don't believe that punitive measures that would wreck the economy and reduce the country to chaos would improve the situation. I must also admit that the many black leaders who support sanctions, including Archbishop Desmond Tutu, say that the onus is on those who oppose sanctions to propose another method of dismantling

"People of all races who want peaceful progress and a decent standard of living should form the majority that runs postapartheid South African society."

apartheid. Well, the method I propose is the long-term economic development of South Africa, which would draw blacks into the skilled occupations. Such development can occur only in an expanding economy.

The front-line states also say that they want sanctions, but anything that affects the South African economy affects the economy of the front-line states, for the whole of southern Africa is one economic unit. All the front-line states depend on South Africa for electricity, transportation, and jobs. Unfortunately, they seem to have the mistaken impression that the West—America, Britain, and mainly West Germany—will pick up the tab to make good any damage suffered.

What can Americans do? I know it upsets Americans no end to be told

that there's a limit to what they can do, but there is a limit, and the solution to South Africa's problems is going to be found by the South African people—all the South African people.

In the meantime, countries that have freedom and human rights as their basic values must continue to use all diplomatic channels to protest long and loud against the miserable practices of apartheid and employ all positive means to speed their demise. Those means include the valuable social responsibility programs that many Western firms have initiated to educate and train blacks for the postapartheid society that must evolve. When disinvesting firms go, very often their social responsibility programs go too, to the detriment of the country as a whole.

Western nations must assist in the development of strong black trade unions, which can then use their economic muscle to redress inequalities that go beyond the workplace. Power takes many forms, and South African blacks are slowly but surely accumulating economic power as they're drawn into the national economy not only in ever-increasing numbers but at rising levels of skill. Economic muscle can be used, as has been shown in every industrializing country, to redress imbalances in wealth, privilege, and power. I don't believe that South Africa will be the exception. I do believe that we have to create a favorable climate for nonracial negotiations, that the ANC and the other banned organizations must participate in those negotiations, and that Nelson Mandela must participate as well.

Finally, I want to say that notwithstanding all the flagrant injustices of the apartheid system—the miserable laws and the glaring inequality between black and white standards of living—all South Africans are not right-wing whites or radical blacks. South Africa is home to fine, creative people of all races, most of whom are determined to remain there, strive to end all discriminatory practices, and be part of a democratic postapartheid society. People of all races who want the same things—peaceful progress, a decent standard of living, a good education for their children, proper housing—should form the majority that runs postapartheid South African society. ■

Liberalism (Cont. from p. 1)

number of years had probed the inefficiencies of planning, studying how to break the ties between enterprises and the central government yet remain within the socialist camp. Devolution of decisionmaking to holding companies was an early aspect of that thinking; then "self-management" came into vogue, followed by the idea of leasing to semi-private agents. In China, by comparison, quasi-private "township" enterprises were brought into being, with some measure of success. Since the massacre in Tiananmen Square, however, those arrangements have fallen into disfavor and today are under increasing scrutiny from Beijing.

What those developments reflect, again, is an effort by socialist economists to address the inefficiencies of central planning while avoiding the forbidden words "private," "privatization," and "private property," which Thatcher and Reagan had helped to make respectable once again in the West. For within the socialist system, until very recently, private property, especially when held as a means of production, enjoyed almost no legitimacy. Reformers were thus reduced to calling for various forms of decentralized socialism—but for socialism all the same.

Yet even when those calls were heeded and decentralization was implemented, little improvement followed. For whether the Party controlled from Moscow or Kiev, from Warsaw or Krakow, it was still the Party, with its perverse incentives, that was in control. Moreover, decentralization came, when it did, from the top down, not from the people. The illegitimacy of the system was thus all but palpable—as the people, from Budapest to Beijing, but especially in Poland, have made increasingly clear. With growing urgency, therefore, the people have been calling not for local Party control but for democratic control. Yet even this is changing, and changing rapidly, if uncertainly, as we hear the cry increasingly not simply for a political solution but for a liberal solution to the question: who controls our lives?

Private Property and Human Rights

A few recent examples, drawn from

the Soviet Union itself, will illustrate those moves toward liberalization. Reporting from Moscow on September 30, 1989, the *New York Times* observed that the Soviet legislature, about to take up a law proposing to define the basic notion of property, was launching a debate over "what may be the ultimate issue: who owns the Soviet Union?"

Already the preliminary work has pushed legal wordsmiths to new flights of euphemism, as conservatives try to sound like reformers while preserving state control of industry and farming, and market-oriented economists strive to push the limits while avoiding the dreaded p-word—private property, which generations of Soviet

"So far are we removed from our own first principles as to believe we can further those developments in Eastern Europe by throwing money their way."

Communists have been raised to regard as the root of capitalist exploitation.

"This word still frightens some people," said Aleksei N. Boiko, an economics professor from the University of Donetsk and a member of the legislature's Committee on Economic Reform, who said he believed that limited private ownership is the key to economic revival.¹

A week later, in this same vein, the *Washington Post* carried an Associated Press account of an article appearing in *Pravda*, the Communist Party daily, by a lawyer identified as A. Movye. Speculating that *Pravda* was endorsing, if not the idea itself, at least discussion of the idea, the AP had Movye

arguing that "Soviet socialism should get out of the housing business and turn it over to . . . private ownership."²

Then on November 26 the *New York Times* ran a lengthy piece about "the fastest rising political star in the Soviet Union," Anatoly A. Sobchiak, a law professor from Leningrad recently elected to the Supreme Soviet, "who has become the most influential of the country's radical reformers—apostles of free markets, private property and competing political parties." Sobchiak, the *Times* reported, "has been aggressive in defense of free enterprise, arguing that economic power is the real front line in the battle with hard-liners in the party and Government."³ Finally, in the *Washington Post* on December 10, the Carnegie Endowment's David K. Shipler quoted the chairman of a Supreme Soviet subcommittee on human rights, Fyodor M. Burlatsky, who gave a moral bite to these developments when he said recently in Washington that

the most important thing for us is to revolutionize, radically, the whole system of human rights in the Soviet Union. For all of our history—not only the Soviet period—we have not known a liberal tradition, that is, the tradition that every man has inalienable rights that the state cannot take away.

Commenting on Burlatsky's remarks, and on the Soviet constitution as well, Shipler went on to note that "while the American Bill of Rights . . . is predicated on the assumption that mankind has inherent rights that the state may not diminish, the Soviet concept envisions rights as items provided by the state to the citizenry."⁴

What we have here, in short, is an attempt by Soviet reformers to reverse the presumptions—the theoretical foundations—of their system, to make that system more liberal by putting the individual first. As in the American vision, stated most forcefully in the Declaration of Independence, the role of the state would thus be to secure the inherent rights of the individual, the rights the individual already has, not to give him rights through the creation of a planned society.

These moves from decentralization to democratization to liberalization are

still inchoate, of course, and can easily be stalled or reversed, but they are promising all the same. For they indicate that the people who live under socialized systems are coming to appreciate that democratization and, especially, liberalization in the form of the institution of private property are the keys not only to economic reform and economic prosperity but, more important, to political and moral legitimacy as well.

In all of this perhaps Hungary will be the most interesting case to watch, for there the change is most advanced, culminating in October 1989 in a major rewriting of the constitution. Yet even in Hungary the changes are fundamentally ambivalent, as reflected in the constitution's new preamble: "The Republic of Hungary is an independent, democratic legal state in which the values of bourgeois democracy and democratic socialism prevail in equal measures."⁵ Insofar as "bourgeois" connotes private property whereas "socialism" connotes its denial, those values are in direct conflict, of course, which may help explain why it took three months to work this wording out. Precisely where Hungary will go from here is less than clear. Perhaps Justice Minister Kalman Kulcsar gave us a clue when he said that the changes, affecting some 90 percent of the document, could be seen as creating a "transitional Constitution."⁶

All of which leads to three observations, at least. First, the changes that are now taking place in many parts of the socialist world are both real and fundamental, even if the evidence on their permanence is not yet in. Second, the direction of this change is clearly liberal in the classical sense: democratic socialism may be a way station, but increasingly people are realizing that democratic socialism replicates all the inefficiencies of nondemocratic socialism, perhaps even adding a few; that private property is the foundation of and hence the road to economic prosperity; that markets work only when property is protected; and that those arrangements, when secured through law and legal institutions, are the only liberal and hence legitimate political arrangements, reflecting our inherent human rights. Finally, throughout these nations-in-change there is excitement

in the air. My own discussions over the past year with scholars and officials from Hungary, Poland, the Baltic states, the Soviet Union, and China have left a single impression: fundamental issues are now at stake; toward resolving those issues, people are going back to first principles. In many of these countries, this is the founding generation.

The Detour of Liberalism in America

In Washington too there is excitement in the air, but so far are we removed from our own founding and our own first principles as to believe we can further those developments in Central and Eastern Europe by throwing money their way. Thus Congress just passed, and the president signed, a \$1.3 billion package of aid to Poland and

"While the socialist world is coming to recognize that government is the problem, not the solution, many in America remain in a mid-century time warp."

Hungary dubbed the Support for East European Democracy (SEED) Act of 1989. Although couched in the language of private-sector development, the act is replete with indicia of "industrial policy," including boards to distribute grants, loans, and guarantees. One supposes that the U.S. Congress believes it should do for them what it has done to us.

Rare in Washington is the understanding from Smith, Mises, Hayek, Friedman, and Buchanan that for spontaneous order to arise and markets to flourish it is simply necessary, largely for government to get out of the way. Government does not have to do anything, save to protect rights of property and contract and attend to those few areas that are inherently public. Yet from the Progressive Era at least,

and the New Deal in particular, we have come to expect government to be an active participant in our lives, especially our economic lives. While the socialist world is coming increasingly to recognize that in the matter of prosperity, government is the problem, not the solution, many in America remain in a mid-century time warp, so much so that a recent essay in the *Washington Post* asked, approvingly, "Are We on the Brink of a Progressive Comeback?"⁷

Judicial Review in Defense of Liberty

Yet the lust for active government among so many of our countrymen should not surprise. It was recognized explicitly by the founding generation and guarded against expressly by our constitutional scheme—in particular, through the separation and division of power and the institution of judicial review. The separation and division of power have had only marginal success in limiting the growth of government, of course, especially when congressional and executive power at the national level have rested in the same party. It is judicial review, then, to which we have had principally to look for the protection of our liberties—which again was foreseen, not least by Publius in the *Federalist Papers*.⁸

Over the course of this century, however, and especially since the New Deal, the judiciary, far from serving as "the bulwark of our liberties," as Madison put it, has grown increasingly restrained in its scrutiny of governmental acts for constitutional infirmity, particularly in the economic area. From *Nebbia v. New York* in 1934 to *West Coast Hotel v. Parrish* in 1937 and *United States v. Carolene Products Co.* in 1938,⁹ the doctrine emerged that there were two "kinds" of rights—fundamental and nonfundamental—and two "levels" of review—strict and minimal. Because economic liberties were said to be "nonfundamental," legislative and executive acts that "took them away," in the language of Fyodor Burlatsky, came to receive only minimal review by our judiciary—under the "rational relation" test, which is tantamount to no review at all.

Perhaps the most egregious example, in a crowded field, of judicial restraint in the review of economic

Liberalism (Cont. from p. 11)

regulation occurred in 1942 in the celebrated case of *Wickard v. Filburn*,¹⁰ where the Supreme Court upheld a penalty imposed on an Ohio farmer, under the Commerce Clause, for growing more wheat than his marketing quota allowed, even though the wheat in question was not marketed but consumed entirely by the farmer and his family. Only those enamored with the idea of planning a national economy, in the public interest, could believe themselves endowed with a right to restrict so inherent a right as feeding one's family from the fruits of one's own property and labor.

Yet these doctrines of disparate rights and corresponding disparate levels of judicial review have remained with us since the halcyon days of the New Deal. Strict constructionists of the conservative persuasion will have difficulty finding the doctrines in the text of the Constitution, of course—certainly “in terms,” a phrase Chief Justice Rehnquist has used when unable to find a right in the document.¹¹ But they, like their liberal counterparts (contemporary American sense of the word), have clung nonetheless to those legacies of the New Deal, so much so that the doctrines are now all but “settled law.”¹² Thus do we shield ourselves from first principles, with a routinized, mechanical process that undermines the original design even as it undermines the original substance.

The Intellectual Roots of Judicial Restraint

But why did those doctrines arise? Why has the judiciary been content to lapse into a restraint unintended by the Framers, yielding results expressly eschewed by those Framers? Although it has been said of those developments that “rarely has a Supreme Court doctrinal pronouncement been more transparently political”¹³—about which there is doubtless much truth—let me suggest but two reasons here, reasons that point rather more to the climate of ideas than to any political motivations.

First, the confidence necessary for the judiciary to stand athwart the majoritarian engine that drives the popular branches was undermined in the

early part of this century by the rise of logical and legal positivism, legal realism, and the moral skepticism that accompanied these schools. That skepticism took aim especially at the theory of natural rights that had informed and inspired the founding generation. But it undermined as well the entire effort to justify moral conclusions. Reduced thus to legal and, in particular, constitutional positivism—to a will-based, not a reason-based, theory of law—the judiciary sought refuge within the “four corners” of the document, especially within its explicit language. Unskilled and unschooled in the “Higher Law,” not to mention the philosophy of language, judges were thus unable or unwilling to “derive” the rights they called, accordingly, “nonfundamental.”

But a second reason those doctrines

“It is judicial review to which we have had principally to look for the protection of our liberties.”

arose, I suggest, is a corollary of the first, namely, that with the decline of natural rights we have seen, as if by default, the rise of the democratic impetus—the “moral accompaniment” to the will-based theory of law. Rooted itself in the idea of individual rights—indeed, derived from the right to rule oneself, which grounds the right of self-government—democratic theory flourished in the Progressive Era when it was directed largely, if often mistakenly, against the economic interests that arose during that era. In the constitutional context the democratic view was nowhere more succinctly stated, perhaps, than by Justice Holmes when he declared, in his famous *Lochner* dissent, “the right of a majority to embody their opinions in law.”¹⁴

That “right,” of course, like its doctrinal progeny, is nowhere to be found in the Constitution. Yet so powerful was the majoritarian impulse that by the late 1930s even the Court—the bul-

wark of our liberties—was under its sway. The Holmesian minority in *Lochner*—directed toward making the world safe for such progressive legislation as would regulate the hours that New York bakers might work—had become the majority by *Carolene Products*—directed toward making the world safe for legislation prohibiting the shipment in interstate commerce of a perfectly wholesome product called filled milk. But respect for such wide-ranging majoritarianism is not limited to New Deal liberals anxious to see their legislative agenda pass constitutional muster. Indeed, we need look no further than to the new volume from Judge Robert H. Bork to find the conservative vision to the same effect:

The United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that *in wide areas of life* majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless *some* things majorities must not do to minorities, *some* areas of life in which the individual must be free of majority rule.¹⁵

There, quintessentially, is the vision that leads to judicial restraint: majority rule first, *in wide areas of life*; individual rights second, protecting us against majoritarian tyranny in *some* areas of life. It is a far cry from the Madisonian vision of a judiciary standing as “the bulwark of our liberties.” It is a far cry from the vision of the Declaration of Independence, where rights come first, government comes second—created in *exercise* of our rights, to *secure* our rights. It is a far cry even from the Constitution itself, where the Ninth Amendment states plainly, if only generally, that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁶

What the modern vision fears, at bottom, is an unelected judiciary running roughshod over “the will of the people.” What it gets, in reality, is an all-but-unaccountable legislature run-

ning roughshod over the liberties of the people—in the name of the people but in fact in the service of special interests.¹⁷ Let me take these points in order.

Judicial Restraint, Legitimacy, and Special Interests

Although it ordinarily eschews moral arguments, the judicial restraint school, in either its liberal or its conservative version, is driven nonetheless by a concern for legitimacy, which it understands to be a function of process. Reacting often, and rightly, against a judicial “activism” that is grounded neither in the Constitution nor in sound moral theory, the school argues that majority rule and the enumerated rights that restrain it are legitimate by virtue of the way they were instituted as law. In the beginning, the argument runs, we came together to write a Constitution; we laid down the rules, the process, by which we would thereafter be governed. Provided the results—the laws, acts, and decisions—that flow from the process flow by the rules, those results will be legitimate, for the beginning—grounded in consent, the essence of *self-government*—was legitimate. Legitimacy in, legitimacy out—if we follow the rules.

That is a nice theory of legitimacy. In fact, it is a theory that enables all manner of *private* associations—from clubs to churches to giant corporations—to manage their affairs with a measure of legitimacy. But the state, ordinarily, is not a club that one joins or leaves at will. Rather, it is, as the classical theorists recognized, a forced association—and a “necessary evil” accordingly. For in the beginning, “we” did not all come together. Certain of our forefathers did, who could hardly have had the authority to bind the rest of us. Nor will it do to say we are free to leave; for that would amount to a right on the part of any transient majority to put the rest of us to a choice between leaving and coming under their rule—precisely what they have to justify, absent our consent, on pain of circularity.

No, the arguments from original and from so-called tacit consent—at the core of the social contract theory, and the bedrock of the judicial restraint school as well—have never deeply sat-

isfied, especially in the face of majoritarian tyranny. What consent, whether original or periodic, does accomplish, rather, is simply this: it lends legitimacy to a *government*—which is not the same as lending legitimacy to the *acts* of that government.

Government acts are legitimate, more deeply, by virtue of their respect for the inherent rights of the individuals governed. Acts that secure the rights of some against the depredations of others are thus perfectly legitimate—not from procedural but from substantive considerations. But governmental acts that take from some to give to others, as so many modern acts do, cannot be justified—from considerations of process, of substance, or even, save on rare occasions, from a consideration of “the public good.” Those acts are naked

“Bork’s view is a far cry from the vision of the Declaration of Independence, where rights come first, government comes second.”

takings, designed to help one part of the population at the expense of another. It is precisely to protect ourselves against such “popular” measures that we instituted, originally, an unelected judiciary. That is what the judiciary is for. That is its job.

But the truth, of course, is much worse than this. It would be painful enough, that is, if our rights were subject simply to the tyranny of the majority, which redistributed goods from the minority to itself as a restrained judiciary looked on. In reality, however, it is far less majoritarian tyranny that we have to fear than the tyranny of the minority in the form of the special interest. For reasons the Public Choice literature has documented over and over, and the Founders clearly recognized, the popular branches are particularly susceptible to the importun-

ings of special interests. What, after all, was *Lochner* if not an effort by large, often unionized bakeries in New York to protect themselves against competition from the small mom-and-pop bakeries that hired new immigrants for long hours, immigrants who were willing to take such jobs and often lived at the bakeries? What was *Carolene Products* if not a naked transfer of the earnings of the filled milk industry to the pockets of the dairy industry? As one critic recently put it, “The purported ‘public interest’ justifications so credulously reported by Justice Stone [in *Carolene Products*] were patently bogus.”¹⁸ And what are modern agricultural marketing orders, import quotas, grants to the arts, and on and on if not the Iron Triangle of special interest, Congress, and bureaucracy all busily at work? This is the modern redistributive tyranny the modern judiciary refuses to review because the arrangement is, by now, “settled law.”¹⁹

Reclaiming Our Liberal Tradition

The irony, to bring the discussion full circle, is that it is precisely this rule by special interest that the peoples of the socialist world are attempting to overturn. To be sure, the Party insinuated itself by direct force, not through the forced association that is the modern democratic state. But history demonstrates, and theory explains, that once ensconced, the special interest is all but immune from being unseated through the democratic process—the very process that lends “legitimacy” to its being where it is, making it, if anything, harder to unseat than the Party. The further irony is that the judicial restraint that Judge Bork urges, which enables the natural drift of democratic rule, is urged out of a concern for the “politicization” of law that flows from an “active” judiciary attuned to an elite’s conception of “evolving social values.” Well founded as that concern is, it misses the deeper point—that a far greater, historically manifest threat arises not from this “least dangerous branch” but from the majoritarian and, even more, the narrow interests that have politicized our law through legislation stretching endlessly across the length and breadth of our land. We are today fairly suffocating from a surfeit of such “laws.”

Liberalism (Cont. from p. 13)

As they search for their first principles, therefore, the nations of the socialist world would do well to learn from our experience. Unlike us, they are moving in the right direction—from decentralization to democratization to liberalization. But the end of each of those strains is the individual. Out of respect for the inherent rights of the individual—his right, at bottom, to plan and live his own life—only as much force as is necessary to secure those rights should be brought into being. Toward restraining that force, an independent judiciary is essential, a judiciary confident in the character and the scope of its authority. Should we expect any less a judiciary in America? ■

Footnotes

¹Bill Keller, "Soviets Seek a Definition of Property," *New York Times*, October 1, 1989, p. A15.

²Mark J. Porubcansky, "Lawyer Urges Soviet Government to Get Out of the Housing Business," *Washington Post*, October 7, 1989, p. E7.

³Bill Keller, "Law Professor Takes Soviets by Storm with Crisp Oratory and Hard Work," *New York Times*, November 26, 1989, p. A3.

⁴David K. Shieler, "After the Wall: A Rule of Law in the Soviet Bloc," *Washington Post*, December 10, 1989, p. C1. For a more detailed discussion of human rights and the Soviet constitution, see Roger Pilon, "The Systematic Repression of Soviet Jews," *Current Policy* no. 878 (U.S. Department of State, Bureau of Public Affairs, Washington, October 1986).

⁵Imre Karacs, "Hungarian Parliament Adopts Non-Communist Constitution," *Washington Post*, October 19, 1989, p. A35.

⁶"Hungary Purges Stalinism from Its Constitution," *New York Times*, October 19, 1989, p. A8.

⁷Robert Borosage, "Are We on the Brink of a Progressive Comeback?" *Washington Post*, October 22, 1989, p. C1.

⁸See, for example, Sotirios A. Barber, "Judicial Review and *The Federalist*," *University of Chicago Law Review* 55 (Summer 1988): 836.

⁹291 U.S. 502 (1934); 300 U.S. 379 (1937); and 303 U.S. 144 (1938). See Bernard H. Siegan, *Economic Liberties and the Constitution* (Chicago and London: University of Chicago Press, 1980).

¹⁰317 U.S. 111 (1942).

Rising Costs, Falling Scores

More Money Won't Improve Schools

More money would not improve our schools, concludes John Hood in a new study from the Cato Institute. "The history of funding for education over the last three decades, the overwhelming consensus of academic research, and the common sense principles of market efficiency establish that conclusion."

Hood, a contributing editor of *Reason* magazine, argues that "for most Washington politicians and the national media, how education should be structured and directed has become simply a question of dollars and cents." Yet "experiments in the trenches—from inner-city schools in Harlem to suburban schools in Minnesota—have been demonstrating that local control and parental choice, structural changes that are money neutral, hold the key to real educational reform."

The United States has been spending a larger percentage of its gross national product on education than most of the other industrialized nations, but their students have been outperforming American students on standardized tests. In 1986, for example, the United States spent 6.8 percent of its GNP on education, the United Kingdom spent 5.2 percent, and Japan spent 5.1 percent. Yet

both British and Japanese students have consistently outscored U.S. students.

More spending would not ensure higher scores on the Scholastic Aptitude Test. Although real educational expenditures grew by 89 percent from 1965–66 to 1985–86, SAT scores of college-bound seniors dropped sharply. In particular, hiring more teachers to reduce class sizes would not ensure better test scores. The Department of Education itself has concluded that doing so would "probably be a waste of money and effort."

School equity plans are "wasteful and counterproductive," Hood maintains, in part because they increase centralization and bureaucratic control—two of the primary causes of the current crisis in education. "Only structural changes that give parents the power to demand quality in an educational marketplace will achieve real results." Reforms that work, such as those of East Harlem, are not given the media coverage they deserve because their success "flies in the face of all the assertions about underinvestment and spending causality."

"Education: Is America Spending Too Much?" is no. 126 in the Cato Institute's Policy Analysis series. It is available for \$2.00. ■

¹¹*Paul v. Davis*, 424 U.S. 693, 701 (1975).

¹²See, for example, Antonin Scalia, "Economic Affairs as Human Affairs," in *Economic Liberties and the Judiciary*, ed. James A. Dorn and Henry G. Manne (Fairfax, Va.: George Mason University Press, 1987), pp. 31–37.

¹³Martin Shapiro, "The Constitution and Economic Rights," in *Essays on the Constitution of the United States*, ed. M. Judd Harmon (Port Washington, N.Y.: Kennikat Press, 1978), p. 85.

¹⁴*Lochner v. New York*, 198 U.S. 45, 75 (1905). For a more complete discussion, see Roger Pilon, "On the Foundations of Economic Liberty," *Cato Policy Report*, July/August 1989, p. 10.

¹⁵Robert H. Bork, *The Tempting of America* (New York and London: Free Press, 1990), p. 139. Emphasis added.

¹⁶See Randy E. Barnett, ed., *The Rights Retained by the People* (Fairfax, Va.: George Mason University Press, 1989).

¹⁷In recent years House incumbents running for reelection have been reelected at a

rate of about 98 percent. See "The House Unrepresentative," *National Review*, September 11, 1987, p. 20.

¹⁸Geoffrey P. Miller, "The True Story of Carolene Products," in *1987: The Supreme Court Review*, ed. Philip B. Kurland, Gerhard Casper, and Dennis J. Hutchinson (Chicago and London: University of Chicago Press, 1988), pp. 398–99. "If the preference embodied in this statute was not 'naked,' it was clothed only in gossamer rationalizations. The consequence of the decision was to expropriate the property of a lawful and beneficial industry; to deprive working and poor people of a healthful, nutritious, and low-cost food; and to impair the health of the nation's children by encouraging the use as baby food of a sweetened condensed milk product that was 42 percent sugar." *Ibid.*

¹⁹For a more complete discussion of the foregoing arguments, see Roger Pilon, "Economic Liberty, the Constitution, and the Higher Law," *George Mason University Law Review* 11, no. 2 (Winter 1988): 27–34.

Book Offers Alternatives

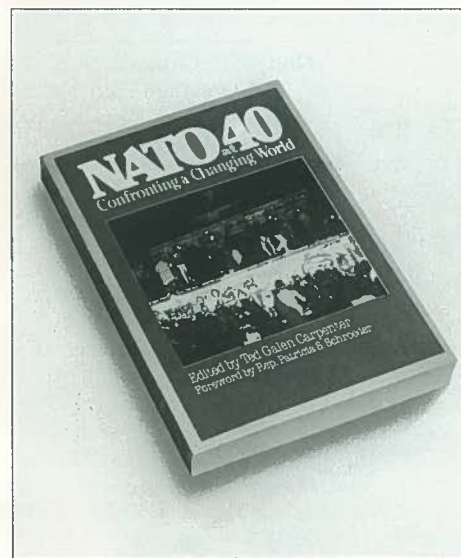
Have Changing Times Made NATO, At \$160 Billion a Year, Obsolete?

The 40th anniversary of the North Atlantic Treaty Organization last April could have been as unremarkable as previous anniversaries, but the revolutionary events of 1989 and the growing concern over U.S. defense spending have prompted a reappraisal of NATO's role in ensuring European security. *NATO at 40: Confronting a Changing World*, copublished by the Cato Institute and Lexington Books, examines the critical issues posed by America's commitments to its NATO allies and offers realistic proposals for the future of NATO.

Edited by Ted Galen Carpenter, Cato's director of foreign policy studies, the volume features a foreword by Rep. Patricia S. Schroeder, chairman of the House Armed Services Committee's defense burden-sharing panel. After characterizing NATO as a sacred cow in the federal budget, Schroeder questions the wisdom of spending \$160 billion a year—more than 60 percent of the U.S. defense budget—on "prosperous allies capable of providing for their own defense."

The 16 distinguished contributors to *NATO at 40* explore three major themes: the stresses that are undermining the alliance, its costs and benefits, and the evolution of the strategic environment.

Bancroft Prize winner Ronald Steel



describes the economic, military, and political problems that have beset the alliance throughout its history. He urges that the United States use its remaining influence to transform NATO into "the cornerstone of a pan-European state system." Robert E. Hunter acknowledges the need for reforms but asserts that NATO is resilient and that the development of the "European pillar" will relieve internal strains. Josef Joffe, foreign editor of Munich's *Süddeutsche Zeitung*, sees the American presence in Europe as essential not only to protecting the West Europeans from an undiminished Soviet threat but also to averting intra-European nationalistic struggles.

Melvyn Krauss and Alan Tonelson examine the economics of NATO. Krauss argues that the U.S. presence in Europe has given the allies incentives to remain dependent on the United States and disincentives to provide for their own defense. Tonelson contends that forcing American taxpayers to assume a disproportionate share of the collective defense burden has exacerbated the nation's economic ills.

Jeffrey Record points out that America's NATO commitment does not entail a specific troop level. Stanley H. Kober, with meticulous documentation from Soviet sources, argues that Soviet political thought is being radically restructured. William S. Lind finds that fundamental geopolitical changes have made force reductions inevitable.

Alternatives to the status quo are offered by David P. Calleo, Earl C. Ravenal, and Christopher Layne. Calleo proposes that U.S. policymakers gradually devolve some of America's defense responsibilities to the European members of NATO. Ravenal stresses that reforms of the alliance must keep pace with the rapid changes in the strategic environment. Layne observes that Western Europe is an embryonic superpower and maintains that the United States and the Soviet Union should mutually disengage from central Europe.

NATO at 40: Confronting a Changing World is available in cloth for \$39.95 and in paper for \$14.95. ■

Cato Sponsors On St. Thomas



Cato vice president Cathi Smith welcomes Federal Express founder Fred Smith to the 1990 Benefactor Summit on St. Thomas.



Dick Kossman presents tennis tournament prizes to Shirley Foote, Fred Foote, Richard Wolf, and Georgia Buchta.



Nien Cheng describes her imprisonment by the Chinese government to 80 Cato Sponsors at the Benefactor Summit.

"To be goverped..."

If it ain't broke, don't fix it

The world's drug problems have grown significantly worse over the past year . . . according to a United Nations report . . .

"Within one generation, the abuse of drugs has expanded so quickly that virtually all countries and segments of society are menaced."

At the same time, the report strongly rejects any calls for legalization of drugs, saying that such a step would lead to "an explosion of abuse."

— *Washington Post*, Jan. 11, 1990

They're too good to us

Former representative Robert Garcia (D-N.Y.) and his wife, Jane Lee Garcia, were sentenced to three years each in prison today for extortion and conspiracy . . .

[Lawyer Robert] Morvillo called Robert Garcia "a man for the little people. . . . He loved too much and was unable to say no."

— *Washington Post*, Jan. 20, 1990

[Washington mayor Marion Barry told] the ministers and media packed into St. Timothy's Episcopal Church on Sunday that "I spent so much time caring about and worrying about and doing for others, I've not worried about or cared enough for myself."

— *Washington Post*, Jan. 23, 1990

Which would include shrimp subsidies, shrimp tariffs, and, um, shrimp toast

Jurors have seen a videotape of an FBI undercover agent representing a bogus shrimp company giving [California state senator Joseph B.] Montoya a \$3,000 check, which Montoya has called a legal honorarium in return for a breakfast meeting on shrimp-related issues.

— *Washington Post*, Jan. 22, 1990

Generic news story

Sen. Joseph Biden (D., Del.) proposed sharply increased federal spending as part of a plan to . . .

— *Wall Street Journal*, Dec. 14, 1989

Confirming the reported rise of Satanism

Populations of frogs, toads and salamanders appear to be declining mysteriously in many places around the world.

— *Washington Post*, Dec. 13, 1989

There being no domestic spending to speak of

Without a [social security] surplus to mask the deficit, the White House and Congress would have to confront it more honestly—raise taxes or gouge the Pentagon.

— *Washington Post*, Jan. 18, 1990

Maybe he'll forget

Three weeks before [New York mayor-elect David N. Dinkins] takes office, his old nemesis, outgoing Mayor Edward I. Koch, has warned that Dinkins will probably have to raise taxes.

— *Washington Post*, Dec. 10, 1989

If you can fake sincerity, you can fake anything

Questioned yesterday whether the China visit would "send the wrong signal to the Kremlin" about internal repression, [President] Bush said . . . that the United States is "properly positioned" as being "in favor of human rights and against totalitarian oppression."

— *Washington Post*, Dec. 12, 1989

Thus thwarting the economic challenge from Poland

Senior U.S. officials today evoked Franklin Roosevelt's New Deal in offering to help Poland erect a safety net. . . .

As an example of Poland's interest in New Deal programs, [Secretary of Agriculture Clayton] Yeutter said the new non-communist government is discussing setting up a financing agency similar to the Reconstruction Finance Corp. of Roosevelt's New Deal.

— *Washington Post*, Dec. 1, 1989

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