Cato Policy Report

March/April 1990 Volume XII Number 2

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 revolution, 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 unimagined.

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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 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

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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.

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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 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

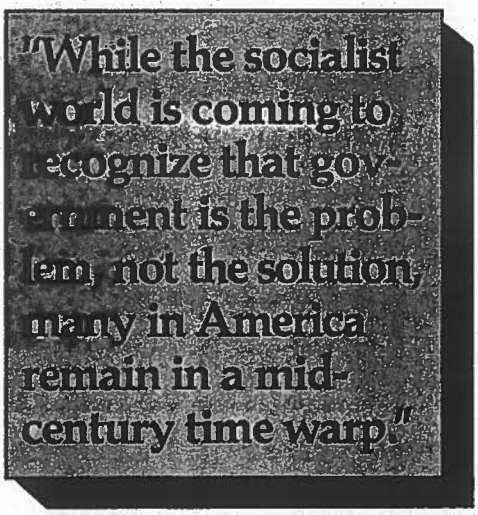
still inchoate, of course, and can easily be stalled or reversed, but they are promising all the same. For they indicate that the people who live under socialized systems are coming to appreciate that democratization and, especially, liberalization in the form of the institution of private property are 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



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

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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.

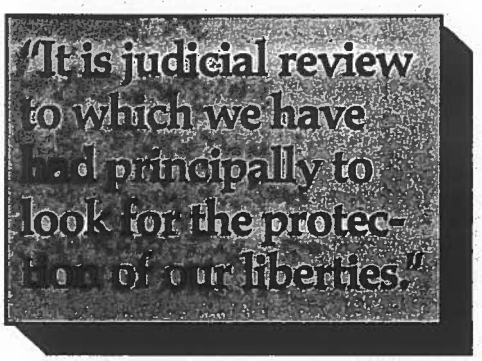
Yet these doctrines of disparate rights and corresponding disparate levels of judicial review have remained with us since the halcyon days of the New Deal. Strict constructionists of the conservative persuasion will have difficulty finding the doctrines in the text of the Constitution, of course—certainly "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



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 bulwark 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.

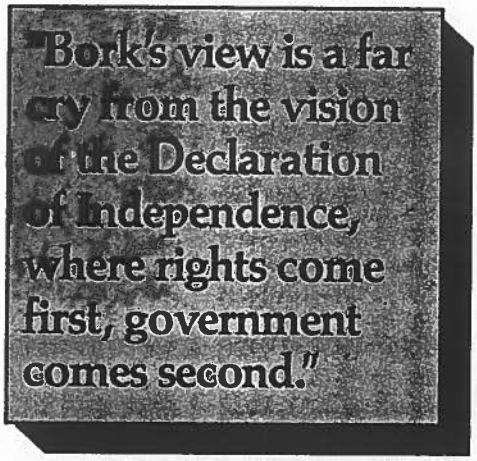
Judicial Restraint, Legitimacy, and Special Interests

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 satisfied, 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



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 importunings 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."

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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

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

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

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

[4]David K. Shipler, "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).

[5]Imre 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.

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

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

[9]291 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).

[10]317 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).

[12]See, 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.

[13]Martin 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.

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

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

[17]In 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.

[18]Geoffrey 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.

[19]For 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.