

1992

Book Review (reviewing Bruce Ackerman, *The Future of Liberal Revolution* (1992))

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Recommended Citation

Richard A. Posner, "Book Review (reviewing Bruce Ackerman, *The Future of Liberal Revolution* (1992))," 1 *East European Constitutional Review* 35 (1992).

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sufficient reason for the case to be tried at court, proceedings would be discontinued and the deposit forfeited. The citizen making a request would have a right to appeal the decision to discontinue the proceedings.

Once the charges are brought to a court, the proceedings would take place behind closed doors, in the presence of a legal representative of the accused. Court procedures should be based on a free evaluation of evidence. In order to establish the existence of collaboration as a rule the following evidence must be presented: (1) a card with a file number, (2) a signed declaration of collaboration, and (3) reports. Even if such documents can be produced, in themselves they do not constitute proof of collaboration. If perjury is proven, sentencing and revocation of the official mandate would follow. If, however, the accused is acquitted (the same concerns acquitted judges and high-ranking state officials), he may request appropriate compensation from the state treasury and/or the citizen who requested the inquiry.

Apart from the procedure described here, each citizen would have a right to turn to the Ministry of Internal Affairs and inquire whether, and in what capacity, his or her own name is listed in their files. If that individual's name is indeed listed in the files as an SB informer, the person involved should be informed about the procedure for challenging the record in court. The person involved would act through his representative, an attorney sworn to confidentiality and with access to the files. Limited access to files is necessary to protect the rights of third parties whose names might be mentioned in the files, as well as to protect state secrets.

This article is based on a report by experts from the Helsinki Committee in Poland and the Helsinki Foundation for Human Rights: Halina Bortnowska, Prof. Jerzy Ciemniowski MP, Prof. Janusz Grzelak, Prof. Ewa Letowska, Marek A. Nowicki, Marek Nowicki, Prof. Wiktor Osiatynski, Prof. Andrzej Paczkowski, Danuta Przywara, and Prof. Andrzej Rzeplinski.

The New World gallops to the rescue of the Old; a conversation among students of revolution, East and West.

Constitutional Reviews

The Future of Liberal Revolution

By Bruce Ackerman
(Yale University Press, 1992)

Reviewed by Richard A. Posner

This short book—really an essay—is a menu of political-legal advice for Europe, both Western and Eastern, prepared by an American constitutional theorist not heretofore known as a deep student of continental institutions. The book was written in haste and is marred by clichés, such as “hearts and minds,” “clear a conceptual space,” “our ongoing life together,” and “window of opportunity.” An uncertain rhetorical note is sounded in the first sentence: “From Warsaw to Moscow, Havana to Beijing, a specter haunts the world as if risen from the grave: the return of revolutionary democratic liberalism.” This echo of the opening sentence of the Communist Manifesto doesn't work. Whatever we should call the vanquisher of Communism, it is not some cemetery spook.

The argument of the book is easily summarized. The collapse of Communism in Eastern Europe and the Soviet Union between 1989 and 1991 has created both dangers and

opportunities. The principal dangers are that Eastern Europe will collapse back into autocracy, and that, freed from American “hegemony,” Western Europe will resume its nasty nationalistic ways and the stage will be set for another world war. The principal opportunity is for a “liberal revolution” that will create a federated Europe dedicated to the principle of “undominated equality” urged in previous books by Professor Ackerman. Undominated equality is the real liberalism and is to be distinguished from laissez-faire capitalism which some Eastern Europeans, unduly influenced by Friedrich Hayek and Milton Friedman, misunderstand to be the true liberalism. Liberal revolution is real revolution though it involves no shedding of blood. Essential to the liberal revolution will be the adoption in each European state or, preferably, in a federated Europe of a written constitution on the U.S. model and with many though not all the provisions of our Constitution. The new constitutions or constitution should be judicially enforceable but by a German-style constitutional court whose judges have fixed terms of office rather than lifetime tenure as in our federal judiciary. Liberal revolution thus fits hand in glove with a written constitution. But it is antithetical to settling scores by punishing officials of the prior, that is, Communist,

regimes in Eastern Europe and the former Soviet Union, so the desire for retribution should be resisted.

In part the book is a modest extension of themes that Ackerman has expounded at greater length elsewhere. One is the belief (which he shares with many other liberal theorists, such as Ronald Dworkin) that the true liberalism is radically egalitarian and therefore radically redistributive, so that the Eastern Europeans who associate liberalism with Hayek and Friedman are embracing false prophets. Another is the belief elaborated upon elsewhere by Ackerman that post-revolutionary American constitutional history is in fact punctuated with liberal-revolutionary moments, including the adoption of the post-Civil War amendments that enlarged the power of the federal government vis-à-vis the states and the eventual ratification by the Supreme Court of the New Deal's vision of federal power. This proves, to Ackerman's satisfaction anyway, that a written constitution can provide the framework for continual, though not continuous, liberal revolution.

In part, therefore, the book is an exercise in persuasive definition: Ackerman wishes to appropriate the words "liberal" and "revolutionary," which carry for him highly positive connotations, and make them the names of his personal political beliefs.

In part the book is good-natured, if faintly patronizing, American universalism—the New World galloping to the rescue of the Old. Ackerman believes us Americans to be, despite all our lapses, the exemplars of the good things in the Western political tradition. Foreigners would therefore be wise to copy our institutions. They're apt, it is true, to listen to us only in times of crisis—it is in fact striking how little the Europeans have imitated our legal and political institutions. But fortunately (from this perspective) the present is a time of crisis for both Eastern and Western Europe—the former in transition from Soviet hegemony, the latter in transition from American hegemony.

In part the book is a voyage of discovery. Ackerman has discovered features of the German legal system that he likes. And in part it is a now-conventional warning against score-settling in the former Communist bloc. This last part may seem disconnected from the rest—the only connection that Ackerman himself points to is that score-settling will distract the Eastern Europeans from the important thing, which is drafting constitutions. (The historical parallel is the argument after World War II that overly vigorous denazification would undermine West Germany's potential as a bulwark against Communism.) The deeper connection lies in the fact that punishment for newly declared crimes is discordant with American constitutional traditions—which is why the Nuremberg trials were controversial among American academic lawyers. The *ex post facto* clause appears in the original Constitution; it thus preceded the Bill of Rights. I must say that I think it presumptuous for coddled Americans to tell the victims of Com-

munist to let bygones be bygones.

I like short books; but a short book, to be persuasive, ordinarily must confine itself to a narrow subject. Ackerman's little book covers too much ground. His preference for welfarism over capitalism is not argued; it is asserted. He is correct that pure laissez-faire, what today is sometimes called "anarcho-capitalism," is unsound; it ignores monopoly and externalities, and hence cannot be assumed to be efficient even in the narrowest economic terms. But redistributive liberalism, with its progressive taxation, heavy inheritance taxes, pervasive interventions in labor markets, and cradle-to-grave social insurance, is not, as Ackerman implies it is, the only alternative to laissez-faire. A middle ground that he ignores is the pragmatic libertarian state, which intervenes in free markets just so far as is necessary to achieve an efficient allocation of resources and maintain peace and order. The United States today is intermediate between the redistributive liberal state and the pragmatic libertarian state, though leaning toward the former.

Ackerman's preference for written constitutions is argued more fully, but not adequately. The issue is an empirical one. One observes that some nations, such as England, have gotten on well without a written constitution, while others, such as France and the nations of South America, have had a succession of written constitutions none of which seems to have been productive of much good. Even that triumph of constitution-writing, the U.S. Constitution, is an ambiguous example because it has been so bent and twisted by judicial interpretation—to which I have no objection, but it does illustrate the limitations of trying to shape the future by paper. Ackerman argues that if Israel had a written constitution with freedom-of-religion clauses similar to those in our own First Amendment, that country would have been spared its distracting religious strife. But this argument ignores the endogeneity of constitution-writing. If religion were not such a divisive force in Israel, the country might long since have had a written constitution—to which the religious controversies have in fact been the principal stumbling block. I am told that Hungary has the most progressive laws dealing with the rights of minorities of any of the Eastern European states. Of course. It has no significant minorities.

Some of the ex-Communist nations appear to be in a state of too great ferment to allow for effective constitution-making. The U.S. Constitution was not drafted until six years after the fighting ended with the defeat of the British at Yorktown. Perhaps the Eastern European countries should be allowed a similar breathing space.

I know even less about European law and politics than Ackerman does, so I advance my own suggestions with even greater diffidence. I needn't have used the comparative form: there is no diffidence in Ackerman's book, even when he is at his most operational, as when telling the Poles to convene a special constitutional convention—pronto. For what little it

may be worth I think that the priority for Eastern Europe and the successor nations to the Soviet Union should be economic rather than political: to create a functioning free-market system, a process furthest advanced, among those nations, in Poland. I thus would not, as Ackerman does, decry as "infatuation" the attraction of many of the leaders of the formerly Communist nations to the "free market" model. It is true that the economic and the political cannot be neatly separated, because political institutions undergird the economy. But the political institutions necessary for prosperity are fairly elementary: an independent central bank, membership in the International Monetary Fund, legally enforceable property and contract rights, a professional judiciary, a police force, a few honest civil servants, and an otherwise noninterventionist state. The rest is icing on the economic cake. This implies, by the way, that Ackerman is probably correct that it would be a mistake to allow people whose property was confiscated by the Communists to get their property back. The effect of such an entitlement is to unsettle property rights by creating a cloud on title. The obvious alternative would be to give these people just compensation for the loss of their property—the fair market value of the property when it was taken, plus interest to the present—or at least as close to this amount as the nation can afford. This would be better than giving the victims of confiscation nothing, because by recognizing the importance of property rights compensation encourages new investment.

As it happens, none of the elementary institutions of effective capitalism that I have listed above is actually guaranteed by the U.S. Constitution, a document that in its original form (together with the first ten amendments, i.e., the Bill of Rights) is preoccupied with issues of federalism, political structure, and criminals' rights. The recent experience of several Asian nations (possibly including China) suggests that these issues are

secondary to the achievement of that modicum of prosperity without which political stability in the modern world is unlikely. The main problem that led to our Constitution was that the national government was too weak; that was also the problem behind the Fourteenth Amendment, the most important of the post-Civil War amendments. A nation that does not have the sorts of political problems for which American-style federalism is a solution are unlikely to profit from imitating our constitutional tradition. In any event the priority for poor countries should be, I suggest, wealth rather than political liberty. Wealthy people don't like to fight—which is why I find it hard to imagine the nations of Western Europe going to war with each other once our guiding hand is withdrawn. They also don't like to take orders. We should encourage nations to become wealthy, confident that when they do, liberty is around the corner. Once the formerly Communist nations achieve economic stability, they can train their sights on the constitutionally ordained redistributive Utopia limned by Professor Ackerman.

I acknowledge the existence of difficult problems of transition. Some are technical, like the modalities of privatization. Others are political. In the changeover from a Communist to a free-market economy many people are hurt—people whose support may be essential for continuing the transition. The mollification of those people is a formidable challenge for statecraft, but not one that Ackerman's book will help the countries of Eastern Europe to meet. They cannot afford generous welfare systems. Maybe they cannot afford to do without a certain amount of score-settling which, by uniting the people in execration of a common enemy, will help them overlook the economic issues that divide them.

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La Democrazia in Europa

By Ralf Dahrendorf, François Furet, and Bronislaw Geremek, edited by Lucio Caracciolo (Bari: Laterza, 1992)

Reviewed by Stephen Holmes

This unusual book contains the transcript of impromptu conversations among three acute political observers concerning the prospects for democracy in post-Communist Europe. The conversations were taped during the winter of 1991-1992. Without any trace of sympathy for the now vanished regime, all three assume that the fall of Communism represents a great crisis for our civilization, the dimensions and implications of which we have not yet fully grasped. The range of issues they touch upon is remarkable. For instance, they discuss the fragile legitimacy of political parties in all post-Communist states and

the surprising difficulty of arranging the political spectrum according to the traditional left-right scheme, which now seems either outmoded or irrelevant. In the same spirit, they worry about proportional representation exacerbating the tendency toward ungovernability caused by political fragmentation. Without a large middle class, Geremek notes, it is very difficult to build a stable constitutional republic. (A centrist liberal party such as his own Democratic Union, he adds, appeals to only 4-6% of the population). They also discuss the chances that fascist parties will emerge as strong actors, in light of the legitimacy vacuum characterizing most of the new democracies.

Geremek's arguments are consistently pointed and interesting. He claims, for example, that lustration can never be made just or reasonable, given the tainted evidence being used to incriminate collaborators. One of the most destructive legacies of Leninism, he also argues, is the lack of civic spirit, the