The Economic Causes and Consequences of Constitutional Reform in Eastern Europe

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NOTES

THE ECONOMIC CAUSES AND CONSEQUENCES OF CONSTITUTIONAL REFORM IN EASTERN EUROPE

More than three years have passed since a wave of revolutionary fervor swept across Eastern Europe. From the exuberant celebration in Germany at the dismantling of the Berlin Wall to the bloody uprising in Romania, the people of Eastern Europe revolted against the economic failure and unfulfilled promises of the communist political and economic systems. The people wanted a government that did not involve itself in every aspect of their lives, and they wanted an economy capable of providing their most basic needs.

After three years of democratic reforms and attempts to establish market-based economic systems in Eastern Europe, however, many people, particularly members of the rural lower class, are no longer sure they had the right goals in mind. Under the former communists regimes, they had jobs and low prices; now they have staggering unemployment and hyperinflation. In addition, a growing perception exists among the middle and lower classes that capitalism has merely created golden opportunities for profiteers without improving conditions for the average worker.

In the midst of this struggle between the desire to establish a market economy and the need to maintain popular support for re-

1. Several Eastern European countries have recently turned to former Communist Party members for leadership in this difficult time of transition. Eric Bourne, Hardships of Reform Return Poll Victories for Ex-Communists, CHRISTIAN SCI. MONITOR, Nov. 24, 1992, at 6. Most notably, in the independent-minded former Soviet republic of Lithuania, the “labor” party, which is composed of former Communist Party members, recently returned to power after parliamentary elections this past November. Id.

2. See, e.g., Peter Maass, Romanians Nostalgic for Strongman Rule; Voters Again Favor Former Communist, WASH. POST, Sept. 29, 1992, at A15 (quoting a homeless Romanian woman who claims that if executed tyrant Nicolae Ceausescu were still alive and in power, she would have a job and could afford sugar and meat).

3. See, e.g., Bourne, supra note 1, at 6 (noting the prevalence of this attitude in Poland).
form programs, several countries in Eastern Europe have undertaken the task of drafting new constitutions. These documents will establish not only the fundamental principles upon which new political systems will be based, but also the fundamental principles upon which new economic systems must be built.

This Note examines the constitutions of Bulgaria, Albania, and Romania in an effort to determine whether these countries have successfully incorporated the fundamental principles of capitalism into their new political and economic structures. As a foundation for this analysis, the Note first discusses and contrasts the basic tenets of capitalism and communism and explains why the relative "failure" of the communist system gave rise to the massive movement for change across Eastern Europe. Next, this Note provides an overview of the current economic setting in Eastern Europe, giving particular treatment to Bulgaria, Albania, and Romania. With this historic and contemporary perspective in mind, the Note then examines the new constitutions adopted by these three countries, analyzing the extent to which these constitutions embody the fundamental principles of capitalism. Finally, the Note discusses the prospects for a successful switch to a market economy in Bulgaria, Albania, and Romania, given the political, economic, and "constitutional" climate.

ECONOMIC CAUSES OF CONSTITUTIONAL REFORM IN EASTERN EUROPE

The most fundamental premise of economics is that there are never enough resources to satisfy the desires of every individual. This "scarcity" of resources stems from human beings' nature constantly to want more than they currently possess. Because the roots of economic scarcity are found in human nature, scarcity is a condition that transcends all societies, irrespective of their eco-

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4. For example, Albania, Bulgaria, Czechoslovakia, Poland, and Romania have all embarked on the constitutional drafting process within the last three and a half years. See Jan Elster, Constitutionalism in Eastern Europe, 58 U. Chi. L. Rev. 447, 447 (1991).
5. At the time of this writing, Albania has yet formally to adopt a new constitution, so the analysis for this country is based solely on the current draft constitution under consideration.
7. Id. at 3.
EASTERN EUROPE

ECONOMIC SYSTEMS. The logical outgrowth of the constant scarcity of desirable resources is the widespread presence of self-interest. Economics itself is defined in terms of scarcity and self-interest: "the study of how scarce resources are allocated among competing ends."  

A brief examination of the two basic types of economic systems—capitalism and communism—provides the background for understanding the economic impetus for constitutional reform in Eastern Europe. Of course, any particular economic system can be influenced to some extent by both schools of thought. Therefore, economic systems exist in a continuum, with pure communism on the left and pure capitalism on the right. A particular economic system may fall any place along the continuum but, at some point, the system is so far to the left that it can no longer be classified as a market economy. The question that the reform efforts in Eastern Europe present is whether these countries have moved far enough to the right so as to establish a true market economy.

Capitalism

Capitalism is "an economic system characterized by private ownership of the factors of production, market allocation of resources, the use of economic incentives, and decentralized decision making." Capitalism operates under the principle that individuals instinctively strive to employ their capital in a fashion that will pro-

9. Id. at 560. Professor Epstein explains that the presence of self-interest results from the fact that an "individual who practices a form of voluntary and unreciprocated altruism will have fewer resources at his command than one who follows the dictates of self-interest." Id. His reasoning, although likely considered cynical by some, is firmly entrenched in the aforementioned principle that human nature compels people to want more than they have.
10. RUFFIN & GREGORY, supra note 6, at 31.
12. Id.
13. See id. Professor Friedman acknowledges that although "there is no really satisfactory substitute for a full-scale use of a free market," there are situations in which a "command"-type economic system may be desirable. Id.
14. RUFFIN & GREGORY, supra note 6, at 866.
duce the greatest value to that particular individual. Despite a person’s intention to promote only his own financial interest, inevitably an “invisible hand” guides the individual, promoting the interest of society.

Self-interest, however, will not always lead to desirable results for society as a whole. In addition to promoting trade, self-interest can promote theft. In order for the market to work properly, the legal system must be used to promote trade and deter theft. The extent to which emerging Eastern European countries are able to utilize their legal systems to harness the forces that drive capitalism will have a great impact on their ability to make a prosperous switch to a market economy.

If the countries of Eastern Europe ultimately are successful in converting to a capitalist economic system, they will reap the benefits associated with a market economy. Most notably, the econ-

16. Id. A full discussion of capitalism is beyond the scope of this Note, but the following example illustrates how the invisible hand operates in the real-world environment:

There are 12 million people living in the environs of New York City, each of whom is concerned with an infinitesimally small part of getting that city’s work done. Each person is concerned—for the most part—with making a living. Yet no single person or bureaucracy is in charge of the department-for-mak-

17. Epstein, supra note 8, at 560.
18. Id. Professor Epstein points out that trade is a “positive sum game” because all parties to the exchange will profit. Id. Theft, on the other hand, is a “negative sum game” because the winner’s gains are less than the loser’s losses. Id. Epstein explains that three “missions” of a legal system are necessary to ensure that profitable trade wins out over theft:

The first mission of the legal system is to determine an initial set of property rights from which subsequent bargains can go forward at a reasonably low cost. The second mission is to insure that these entitlements once established are protected against various forms of theft—the office of the law of crime and tort. The third mission of the law is to facilitate the voluntary exchanges of property rights—the law of contracts.

Id.
mies of these countries will become significantly more efficient.\textsuperscript{19} Capitalist economic systems operate more efficiently than socialist systems because valuable information is constantly communicated through the price system.\textsuperscript{20} Because the price system also determines the distribution of income, information transmitted through the price system is accompanied by the incentive to act in the most efficient manner on the information received.\textsuperscript{21} When every individual in society maximizes the utility of his resources, society as a whole benefits because total output will approach its maximum potential.

Entrepreneurship is related to this process of promoting efficiency.\textsuperscript{22} In an effort to reap greater profits, individuals will try to produce higher quality goods at a lower cost in order to increase the attractiveness of their products.\textsuperscript{23} Although self-interest drives the individual, society ultimately benefits as higher quality goods become available at a lower price.

Of course, the countries of Eastern Europe that are moving toward market economies must experience the bad with the good. Capitalism has its faults. For example, pure capitalism fails to provide public goods efficiently.\textsuperscript{24} Capitalism's price system breaks down with respect to public goods because the benefit an individual receives from the good is usually indeterminable.\textsuperscript{25} In addition, nonpayers in society will inevitably receive the benefits of the public good.\textsuperscript{26} Another major stumbling block on the path to a market economy is the state of "efficiency." The state of "efficiency" is defined in economic terms as "[a] state of affairs in which, given available knowledge and resources, no change can be made that will make one person better off without making another worse off." Edwin G. Dolan, Economics 34 (4th ed. 1986).

\begin{itemize}
\item The state of "efficiency" is defined in economic terms as "[a] state of affairs in which, given available knowledge and resources, no change can be made that will make one person better off without making another worse off." Edwin G. Dolan, Economics 34 (4th ed. 1986).
\item See Friedman, supra note 11, at 7-8. Professor Friedman states that the price system serves three functions: 1) it conveys information; 2) it provides "an incentive for people to adopt the least costly methods of production and to use available resources for the most highly valued uses"; and 3) it handles the distribution of income. Id.
\item Entrepreneurship is defined as "the process of looking for new possibilities: making use of new ways of doing things, being alert to new opportunities, and overcoming old limits." Dolan, supra note 19, at 34.
\item See id.
\item Ruffin & Gregory, supra note 6, at 62. Government typically provides public goods and services such as public parks, roads and bridges, national defense, and police protection.
\item Id. at 837.
\item Id. at 62.
\item Id.
\end{itemize}
economy in Eastern Europe is capitalism's tendency to widen the disparities in income distribution.27 Given the desperate state of Eastern European economies, an accumulation of wealth in the hands of relatively few people will likely upset the poorer classes,28 particularly if it is foreigners who are reaping the benefits of the market economy.29 The fact that uneven income distribution is a necessary part of harnessing individual self-interest will provide little consolation to people without jobs who lack money to buy essentials.30

Communism

Communism, or planned socialism, is "an economic system characterized by state ownership of the factors of production (other than labor), the use of moral as well as economic incentives, resource allocation by economic plan, and centralized decision making."29 Whereas capitalism is based on each individual member of society striving for his own self-interest, communism is based on individuals consciously working for the benefit of society as a whole.32

For the communist system to work efficiently, each citizen must work diligently for the good of society, regardless of individual economic reward.33 This concept, of course, contradicts the fundamental principle of human nature that people always will want more than they have.34 Under a communist economic system, the incen-

27. Id. at 62, 784-91.
28. As previously noted, this feeling is already beginning to arise. See supra note 3 and accompanying text.
29. See Linnet Myers, In East Europe, There's More Than One Capitalist Road, Chi. Trib., Oct. 25, 1992, at C1 (describing complaints in Poland that the government's privatization efforts entailed "selling out" to foreigners).
30. Another related downside to a capitalist system is macroeconomic instability—the strong tendency that a capitalist economy will experience cyclical upturns and downturns. Ruffin & Gregory, supra note 6, at 63. This potential instability will likely add to popular disapproval of capitalism if a severe economic downturn is experienced in a young capitalist state.
31. Id. at 866.
32. Karl Marx defined communism by the principle: "From each according to his abilities, to each according to his needs." Karl Marx, Critique of the Gotha Programme, in 24 Karl Marx, Frederick Engels: Collected Works 75, 87 (1989).
34. See supra notes 6-10 and accompanying text.
tive for the individual efficiently to produce more disappears. No matter how hard the individual works, he will receive personally only what the state allocates to him, not what he has earned.\textsuperscript{35}

Communism conveniently sidesteps the problem of a lack of individual incentive by presupposing an abundant supply of resources that can satisfy the demands of every citizen as well as provide the capital investment necessary to keep the economy growing.\textsuperscript{36} The presupposition is inherently false. If individuals always want more than they have, no quantity of supply can meet the demands of each individual.\textsuperscript{37}

Communism enjoys some theoretical advantages over capitalism, but most of these advantages are based on the misguided notion that the system in its purest form actually could work in the long run. Nikita Khrushchev once said that when true communism was achieved, workers would be able to visit the store and take as much bread as they needed without having to pay for it.\textsuperscript{38} In theory, this abundance of resources would extend to all consumer goods as well as health care and education. Karl Marx believed that, in addition to its economic rewards, communism was the highest stage of social and political development.\textsuperscript{39} Under a communist system, class distinctions would disappear because all the means of production would be held in common ownership.\textsuperscript{40}

\begin{footnotesize}
\textsuperscript{35} Professor Friedman argues that although information is transmitted in a “command” economy from one level to another, the information is not accompanied by any incentive to act in accordance with it. \textit{Friedman, supra} note 11, at 8. This is a major distinguishing feature between communism and capitalism; in a market economy, information flowing through the price system is accompanied by the incentive to act on that information. \textit{See supra} notes 20-21 and accompanying text.
\textsuperscript{36} \textit{Smith, supra} note 33, at 37.
\textsuperscript{37} Recent history has shown that this is one of the most devastating failures of communism. Not only was communism unable to satisfy every demand of each individual in society, it was unable to satisfy even the basic needs of its citizens, including food, clothing, and shelter. \textit{See infra} notes 60-64 and accompanying text.
\textsuperscript{38} \textit{Smith, supra} note 33, at 37 (citing \textit{Pravda, Jan. 28, 1959}).
\textsuperscript{39} \textit{See Karl Marx & Friedrich Engels, Communist Manifesto} (“In place of the old bourgeois society, with its classes and class antagonisms, we shall have an association, in which the free development of each is the condition for the free development of all.”), reprinted in \textit{Harold J. Laski, Karl Marx, at 59, 82 (1933); see also Smith, supra} note 33, at 38 (providing an overview of Marx’s core ideology).
\textsuperscript{40} Marx & Engels, supra note 39 (“The proletariat will centralize all instruments of production in the hands of the State”), reprinted in \textit{Laski, supra} note 39, at 81.
\end{footnotesize}
coercion and, therefore, would be able to maximize their freedom and express themselves creatively.\(^4\) As class distinctions withered away, so would internal class tensions.\(^2\) With no ruling class using governmental power to protect its own interests, ultimately all state institutions would disappear.\(^4\) From this perspective, proponents of communism argue that their system is more advanced than capitalism.\(^4\)

The disadvantages and failures of communism are more readily apparent than its advantages and successes. Most notably, the centralized planning mechanisms necessary to oversee communist economies have been subjected to strong politicization as well as gross incompetence.\(^5\) History also has shown that by vitiating the individual's incentive to produce, communism has resulted in shortages of supply, poor quality products, and low pro-

\(41.\) See id., reprinted in Laski, supra note 39, at 75, 81.
\(42.\) See id. §§ I-II (describing the relationship between existing proletarian groups to communists and the benefit of creating one unified group), reprinted in Laski, supra note 39, at 59-82.

\(43.\) Gordon Smith describes Marx's belief that there would be "no courts, no law, and no police, because these are merely tools used by one class to subjugate other classes." Smith, supra note 33, at 37.

\(44.\) Id.

\(45.\) Central planning was not a fundamental principle of Marxism. Not until 1928, when Stalin introduced the first Five Year Plan, did centralized state planning become a prominent feature in the Soviet economy. Id. at 189.

\(46.\) Id. at 195.

\(47.\) Most of the incompetency and inefficiency in centrally planned economic systems stems from pressure to fulfill production quotas set by the central agency. The classic example of this "success indicator" problem is the "May Day Nail Factory":

If the output of the May Day Nail Factory is specified in the plan in terms of the number of nails produced, this will encourage factory managers to produce small tacks. On the other hand, if output is specified in terms of the gross weight of nails produced, it is more advantageous for the factory to produce railroad spikes. Id. at 198.

\(48.\) Alex Kozinski, The Dark Lessons of Utopia, 58 U. Chi. L. Rev. 575, 578 (1991) ("Without a price system to allocate resources and create incentives, there is no way to match up supply and demand.").

\(49.\) See Smith, supra note 33, at 199 (discussing the lack of spare parts in the Soviet Union and the hoarding of parts by individuals in response to the problem).

\(50.\) See id. at 191 (discussing how economic plans stressed quantity over quality).
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The Economic Failure of Communism

The history of communism in Eastern Europe has been described as "a gradual process of losing popular legitimacy rather than never having it." 52 In its early days, communism enjoyed some rather astounding successes. For example, between the late 1920s and the mid-1930s, the national income of the Soviet Union experienced growth rates estimated at fourteen to eighteen percent. 53 As early as the 1960s, however, communist leaders in Eastern Europe began to realize the failure of their economic system. 54 They knew that without economic performance, they could not maintain their political legitimacy 55 At the same time, the necessary reforms would have forced the communists to forfeit their ideals and their position of power. 56

In an effort to maintain control, communist leaders in Eastern Europe adopted a system of economic and social controls similar to that already in place in the Soviet Union. 57 By the late 1980s, however, with the economic situation worsening and support from Moscow shrinking, 58 communist leaders in Eastern Europe could not maintain their grip on power. 59

The driving force behind this revolutionary wave in Eastern Europe in the late 1980s was the complete breakdown of communism as an economic system. In addition to the insufficient supplies of

51. RUFFIN & GREGORY, supra note 6, at 876 & n.4 (explaining that American industrial workers produce roughly twice as much as Soviet industrial workers and that the Soviet economy produces only 60% as much output per unit of input as the American economy does).


53. SMITH, supra note 33, at 190.

54. Osiatynski, supra note 52, at 848-49.

55. Id. at 848.

56. Id. at 849.

57. Id. at 850.

58. Id.

59. Id. at 854.
people under communist rule endured chronic housing shortages.\textsuperscript{61} Even countries like East Germany, which appeared relatively prosperous, are now referred to as an “economic disaster zone.”\textsuperscript{62} Bulgaria, Albania, and Romania rank among the countries having the worst standards of living in Eastern Europe.\textsuperscript{63} The overwhelming failure of communist economics and the current state of affairs has been likened to the process of a Chapter 11 reorganization.\textsuperscript{64}

Beyond the economic problems, however, communism also failed as a political and social institution. Alex Kozinski, a former resident of Romania and currently a judge on the United States Court of Appeals for the Ninth Circuit, believes that despite the economic woes in Eastern Europe, socialism might have succeeded had it achieved its promise of a “happier, more tranquil, less harried existence.”\textsuperscript{65} Instead, the social realities of communist regimes provided socialism its greatest failure. Judge Kozinski wrote, “By every conceivable standard, collectivist states fell short of their expectations, failing to provide even a minimally acceptable quality of life for their citizens.”\textsuperscript{66}

\textsuperscript{60} Kozinski, \textit{supra} note 48, at 578 (citing PAUL C. ROBERTS & KAREN LAFOLETTE, MELTDOWN: INSIDE THE SOVIET ECONOMY 7-74 (1990)). Discussing the struggle for food in the Soviet Union, Roberts and LaFollette state:

> Even the homeless on the streets of urban America, if they wished, could readily obtain edible cabbages, potatoes, bread, animal fat, sugar, salt, the occasional soup bone, and dairy products—the basic Soviet diet—from the garbage bins of grocery stores. Indeed, the American poor eat much better than this.

\textit{ROBERTS & LAFOLETTE, supra}, at 44.

\textsuperscript{61} The notoriously shoddy government-supplied housing in the Soviet Union provided about 97 square feet of living space per capita in Moscow and 75 square feet in the rest of the country. \textit{ROBERTS & LAFOLETTE, supra} note 60, at 52.

\textsuperscript{62} Gerhard Casper, \textit{European Convergence}, 58 U. CHI. L. Rev. 441, 444 (1991). Professor Casper explains that respectable Western publications ranking East Germany among the world’s leading industrial economies were fooled by fraudulent statistics that suggested East Germany was a model of socialism that actually worked. \textit{Id.}

\textsuperscript{63} Albania has the worst standard of living in Eastern Europe, \textit{see infra} note 114 and accompanying text, followed by Bulgaria, and then Romania. \textit{See infra} notes 103-10, 126-30 and accompanying text.

\textsuperscript{64} Casper, \textit{supra} note 62, at 444 (characterizing the Round Table Talks that preceded governmental change in most of the Eastern European countries as “somewhat reminiscent of bankrupt management asking creditors for forbearance”).

\textsuperscript{65} Kozinski, \textit{supra} note 48, at 579.

\textsuperscript{66} \textit{Id.}
More important than understanding that these failures occurred, however, is understanding why these failures occurred. Identifying the causes of the communist downfall is essential because the transition to a capitalist economic system will not occur instantaneously. As countries attempt the prolonged transformation toward market economies, many of the former communist ideas likely will remain in place. The remainder of this section examines these residual communist principles, explaining how they caused the failure of communism and how they might poison the move to a market economy.

As discussed, communism is based on the principle that each individual should work for the benefit of society as a whole. Communism, however, fails to account adequately for the fact that human nature compels individuals to want more than they have. Recent history has shown that the net result of this contradiction is that the individual is provided no incentive to produce efficiently, for he is unable to reap the rewards of his efforts.

Given a system devoid of individual incentive, communist governments must establish some type of "department-for-making-sure-the-country-does-not-starve," because without individual incentive, the invisible hand will not automatically perform this function. Marx failed to explain exactly how communism should replace the impetus of individual incentive and the workings of the invisible hand. Most of his writings contain only vague descriptions of the operation of socialist society Stalin attempted to solve this problem by introducing central planning in 1928 in an

67. Epstein, supra note 8, at 570. Professor Epstein notes that the strong socialist traditions in Eastern Europe make it unlikely that the public will make a "radical transformation" and adopt true "laissez-faire capitalism." Id.
68. Strong evidence indicates that the transformation has already begun. See infra notes 191-97, 200-18 and accompanying text (detailing provisions in the new constitutions of Bulgaria, Albania, and Romania that exemplify the carryover of basic communist principles).
69. See supra note 32 and accompanying text.
70. See supra notes 6-10 and accompanying text.
71. Smith, supra note 33, at 213.
72. See supra note 16. In the former Soviet Union, this "department" was called Gosplan. Smith, supra note 33, at 194.
73. See supra notes 15-16 and accompanying text.
74. Smith, supra note 33, at 37.
75. Id.
effort rapidly to industrialize the Soviet economy. In the long run, however, central planning became such a great failure that instead of overseeing and stimulating a prosperous economy, it merely exacerbated the problems caused by the lack of individual incentive. With no personal economic incentive to produce quality goods at low cost, output quotas set through central planning provided the only impetus for production. This focus resulted in chronic shortages of spare parts and input resources, shoddy workmanship, low productivity, and in many cases, a complete disregard for the environment.

With the advent of computers, the Soviets thought the logistical problems of central planning could be solved. Scientists thought that in the future the entire Soviet Union could be linked by a massive computer network that would issue commands coordinating all of the economic units to ensure optimal utilization of resources. The idea was thwarted, however, when a group of mathematicians in Kiev calculated that drafting a plan of material-technical supply for just one year for the Ukrainian Republic alone

76. Id. at 189.
77. Id. at 213.
78. Id. at 199. Chronic shortages of spare parts forced producers to “cannibalize” portions of their production capacity. Id. “Cannibalization” refers to the ubiquitous practice in state farms and factories of keeping available an entire tractor, or other piece of machinery, for the purpose of providing spare parts. Id.

Chronic shortages of input materials resulted in widespread hoarding of resources in the Soviet Union. Id. Factory managers would hoard raw materials to protect against the frequent disruption in supply of resources. Id. Soviet production facilities also often hoarded labor year-round so they would have sufficient human capital during the final months of a plan when the facility would “storm” to meet its targets. Id. Soviet factory managers were also forced to hoard labor to compensate for the estimated 20% of the labor force that would arrive drunk or not show up at all. Id.

79. In hurried attempts to fulfill plans, factories have been known to turn out “finished” automobiles without headlights, taillights, or windshield wipers because the plant ran out of these parts. Id.
80. See id. (discussing the low productivity of communist workers resulting from lack of economic initiative). Another major cause of low productivity was the cannibalization and hoarding of resources. See supra note 78.
81. See, e.g., Bettina Boxall, Eastern Europeans Seek Advice on Environment, L.A. TIMES, Sept. 18, 1990, at B3. Roberts and LaFollette discovered that all of the major seas and lakes in the Soviet Union are dying, and drinking water is scarce in many regions. ROBERTS & LAFOLLETTE, supra note 60, at 33.
82. SMITH, supra note 33, at 192.
83. Id.
would require the services of the entire world population for a period of ten million years.  

After forty-five years of individuals' having no incentive to produce efficiently, working under the supervision of poor central planning, focusing solely on output quotas, and neglecting the environmental impact of communism's pursuit of the ideal society, negative remnants of the communist system will not disappear overnight. These remnants pose a major hurdle to the adoption of a capitalist economy in Eastern Europe. "Revolutions" are typically only the starting point for a much longer revolutionary process. Wiktor Osiatynski points out that this extended transformation of political and economic structures usually "takes more time, pain, and blood than the original assault on the pre-revolutionary establishment." The greatest problem facing every revolution is how to placate the frustrated expectations of those who must make sacrifices in the name of reforms and future progress.

In Eastern Europe, this problem of dealing with frustrated expectations will likely resurface as a result of the current economic conditions. As these countries search for democracy, by definition they should begin to be governed by the will of the majority. In an impoverished country, however, the will of the majority typically demands rapid economic improvement rather than patient reform. Unfortunately, a market economy cannot be established overnight, nor will it lead to immediate improvements in the standard of living.

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84. Id. (citing O.K. Antonov, Dlia Vsekh i Dlia Sebia: o Sovershenstvovani Pоказатеlei Planirovaniia Sotsialisticheskogo Promyshlennogo Proizvodstva 23 (1965)). The estimate likely overstates the challenge, but the problem remains clear.

85. See supra notes 67-68 and accompanying text.

86. Osiatynski, supra note 52, at 853.

87. Id.

88. Id.

89. Id. at 854.

90. Id.

91. Professor Osiatynski explains that this process has already taken place to a certain extent in Poland. Id.

92. Id.
features—alone are enough to send living conditions in Eastern European countries into a further tailspin.\textsuperscript{93}

\textbf{Current Economic Climate in Eastern Europe}

The current economic troubles of Eastern Europe are well documented. Of particular concern to the future of free market reforms, however, is the fact that the economy of the region continues to decline.\textsuperscript{94} Unemployment has risen to levels not seen since World War II, and the collective gross national product for the region has declined rapidly\textsuperscript{95} Further exacerbating the problems of the fledgling economies of Eastern Europe is the fact that forty-five years of communism have resulted in economies that cannot produce goods of sufficient quality to compete on world markets\textsuperscript{96} and that cannot respond to competitive pressures.\textsuperscript{97}

The economic outlook for Eastern Europe, however, may not be so gloomy as current conditions may indicate. The newly democratic nations present significant opportunities for foreign investment and economic growth.\textsuperscript{98} The markets of Eastern Europe offer sixty-four million new consumers\textsuperscript{99} "with enough pent-up demand to empty a host of Wal-Marts in a single afternoon."\textsuperscript{100} As a prerequisite to mass consumption, however, these countries must establish an income base. The communist legacy guarantees the diffi-

\textsuperscript{93} Further accentuating this problem is the fact that the workers and peasants are likely to bear the biggest burden of the economic reforms. \textit{Id.}

\textsuperscript{94} The current experiment with capitalism in Eastern Europe has been referred to as "an excellent advertisement for the virtues of Communism." Paul Hofheinz, \textit{New Light in Eastern Europe?}, \textit{Fortune}, July 29, 1991, at 145, 145.


\textsuperscript{96} Worsnip, \textit{supra} note 95, at 2.

\textsuperscript{97} Hofheinz, \textit{supra} note 94, at 145. Hofheinz notes that even the Eastern Europeans underestimated how uncompetitive their industries had become. \textit{Id.}


\textsuperscript{99} Hofheinz, \textit{supra} note 94, at 146 (counting only consumers in countries with essentially convertible currencies).

\textsuperscript{100} \textit{Id.}
EASTERN EUROPE - CONSTITUTIONAL REFORM

culty of this task as well: “Primitive commercial mechanisms, crumbling infrastructures, murky property rights and the absence of a market mentality make every move complex.”101 The problem is, unfortunately, circular. Poor economic conditions limit consumption, thereby driving down profit potential and consequently discouraging potential investors.102 Without new investment, there will be no source of income to drive consumption.

Economic Environment in Bulgaria

The current state of the economy of Bulgaria presents a hostile environment for capitalism to take root. Ninety percent of the economy is still state owned and growth in the private sector is stagnant.103 Economic production has decreased thirty percent since 1989, unemployment is climbing, and the annual inflation rate is nearly five hundred percent.104 In addition, the Bulgarian economy was more closely tied to the Soviet economy than any other Eastern European country.105 When the Soviet economy collapsed, demand for Bulgarian exports disappeared.106 Like most Eastern European countries, Bulgaria has found little demand for its products in the West.107 Bulgaria also relies upon nuclear reactors for its energy needs, a situation that has been described as a “catastrophe[] waiting to happen.”108 The lack of a vocal Western lobby and a “disastrous geographical location” further complicates the political and economic future of Bulgaria.109 New laws passed by the Bulgarian Parliament have failed to initiate economic

102. Worsnip, supra note 95, at 2 (quoting Jonathan Eyal of Britain’s Royal United Services Institute).
104. Id.
105. Id.
106. Id.
107. Id.
109. Longworth, supra note 103, at C1.
growth and have created a climate suited only for the investor "with iron nerves and a long-term view."\textsuperscript{110}

Prospects for Bulgaria, however, are not hopeless. Bulgaria's electrical engineering and information-technology sectors have in the past produced relatively high-quality goods for the Soviet space program.\textsuperscript{111} In addition, Bulgaria's food industry boasts extremely low labor costs and worker educational levels often higher than those in Britain.\textsuperscript{112} The reputation of Bulgarians "for a dour steadiness, a financial flair and a willingness to work hard if necessary" has also fostered foreign optimism.\textsuperscript{113}

\textit{Economic Environment in Albania}

Albania represents the greatest challenge to proponents of capitalism in Eastern Europe. Albania suffers the worst standard of living in Eastern Europe\textsuperscript{114} and is the least developed country in the former Eastern bloc.\textsuperscript{115} Albanians suffer chronic shortages of eggs, milk, meat, and most consumer goods; the country's markets are even short of native fruits and vegetables.\textsuperscript{116} Unemployment approaches thirty-three percent, and Albania's national income decreased fifty-five percent in the first six months of 1991 alone.\textsuperscript{117} Albania's geographic isolation from most western markets compounds the country's problems.\textsuperscript{118} The country has only one railroad line, one harbor, and one airport.\textsuperscript{119} Basic business technology

\begin{itemize}
\item \textsuperscript{110} Privatization in Bulgaria May Accelerate After October Elections, BNA Int'l Trade Daily, Sept. 16, 1991 (quoting a foreign observer who requested anonymity), available in LEXIS, Nexis Library, BNAITD file, at *3.
\item \textsuperscript{111} Cooper & Shapiro, supra note 101, at 93 (citing Paul Reynolds, leader of the Montcrieff Consortium, a British management consulting and accounting group specializing in Eastern Europe).
\item \textsuperscript{112} Id. (citing Paul Reynolds).
\item \textsuperscript{113} Longworth, supra note 103, at C1.
\item \textsuperscript{114} Laura Silber, Albania Sets Out to Attract Foreign Investors, Fin. Times, Jan. 2, 1991, § I, at 2.
\item \textsuperscript{117} Joe Ortiz, Albanians Strip Trees Bare for Firewood, L.A. Times, Jan. 5, 1992, at A22.
\item \textsuperscript{118} Dolan, supra note 115, at 3.
\item \textsuperscript{119} Id.
\end{itemize}
is primitive. For instance, the Albanian telephone network was linked to the international network just two years ago.  

Although the short-term economic outlook in Albania appears bleak, the country is not totally devoid of economic opportunity. Albania possesses one of Europe’s richest oil reserves, in addition to valuable minerals and other resources. Some have even proposed that Albania’s Mediterranean climate could provide lucrative opportunities for investment in tourism.

**Economic Environment in Romania**

As in Bulgaria and Albania, the implementation of capitalism in Romania will prove a challenging task. Economic growth fell 20% in 1990 and an additional 22.3% in 1991. Industrial production is declining monthly and agricultural performance has been characterized as an “embarrassment to [the] Romanians.” As with the other Balkan states, Romania suffers staggering rates of inflation, presently over two hundred percent. Despite rising prices, many goods are still unavailable. Milk, for example, is available to only one-third of the people living in Bucharest.

Compounding Romania’s problems is the fact that most Romanians are unwilling to work harder to offset the higher prices. They increasingly refuse to work. In fact, a recent sur-

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120. *Id.*
121. *See, e.g., Hofheinz, supra note 94, at 150 (blaming ethnic strife and political instability for turning potential investments into “nightmares”).
122. *Occidental Petroleum is already drilling for oil and gas off the coast of Albania. Dolan, supra note 115, at 4.*
123. *Albania’s most notable mineral reserves are chrome and copper. Id.*
125. *Dolan, supra note 115, at 3 (citing Albanian foreign minister, Muhamet Kapllani).*
128. *Id. Romansians believe that their country could be a major agricultural force in Europe given its vast amount of fertile land. Id.*
129. *Peter Humphrey, Romanian Crisis Deepens as Inflation Breaks 200 Percent, REUTERS, Oct. 30, 1991, available in LEXIS, Nexus Library, MONRPT file, at *1. Inflation of food prices is even higher, over 250% in October 1991. Id. at *2. Wages have also increased, but only by 159%. Id.*
130. *Sonnenberg, supra note 127, at 8A.*
131. *Id.*
132. *Id.*
vey conducted by the European Community found that only a minority of Romanians agreed that moving toward a market economy would lead to progress. One commentator noted that "Romania is especially vulnerable, since it is neither clear that its leaders really wish to implement true reforms nor that people understand the need and meaning of privatization."

Nonetheless, Romania provides some optimism for the development of capitalism. The nation's primary advantages—its large size and raw resources—give it the potential to become one of the most prosperous Balkan states. Despite the lack of readily identifiable business opportunities, Dr. Keith Crane, research director with PlanEcon Inc., predicted that new investment in Romania would climb to $200 million in 1992, up from only $150 million in 1991. The relatively low cost of entering the emerging market and establishing a regional market share, as compared with Western Europe, has contributed to this rapid increase in investment.

CONSTITUTIONAL REFORM IN EASTERN EUROPE

The close interrelationship between economic rights and individual rights and privileges means that a successful shift to democratic values requires a concurrent shift to a market economy. The foundational ingredients for this successful transformation to a capitalist economy will be the stability and permanence of prop-

133. Ray Moseley, E. Europe Wants Faster Reform, Survey Finds, Chi. Trib., Jan. 29, 1992, at C2. Romania was the only country in Eastern Europe surveyed in which a majority of the people did not support a move to a market economy. Id.


137. Id. Coca-Cola is a prime example of a company investing in Eastern Europe in the hopes of expanding its international market share. As part of international investment strategy, Coca-Cola is currently involved in a joint venture in Romania. Eben Shapiro, Coca-Cola's Earnings and Stock Climb, N.Y. Times, Jan. 31, 1992, at D1.

138. See Milton Friedman, Capitalism and Freedom 7-21 (1962). Professor Friedman argues that economics and politics are closely interrelated and that only certain types of political and economic systems can be combined. Id. at 7-8. In his opinion a socialist economic system cannot be combined with a democratic form of government. Id. at 8.
The establishment of concrete property rights provides the foundation upon which Eastern Europe must build its emerging capitalist economies. Without private ownership rights in land, raw materials, and means of production, the move to a market economy cannot succeed. Private and transferable property rights are essential for giving individuals an equal opportunity to carve out a better life for themselves, to make the most efficient use of their scarce resources, and to reap the benefits of their diligence and entrepreneurship directly. Without these motivating factors, the emerging capitalist economies of Eastern Europe will surely fail, likely toppling the fledgling democratic regimes in the process.

Unfortunately, the prospects for successful privatization in Eastern Europe are dim. One of the major problems facing the countries in Eastern Europe is their "inability to forge a durable social consensus on the necessity of strong institutions of private prop-

139. Epstein, supra note 8, at 569. Property rights serve as the foundation for business transactions. Without stable and easily determinable property interests, capitalist exchanges will be seriously hampered. See supra note 18 and accompanying text.

140. Political risk is "[t]he probability that changes in government laws or regulations will result in a lower rate of return of the investment or, in the extreme case, a total loss of the invested capital." Peter S. Rose, Money and Capital Markets 828 (1989). The greater the political risk is in these emerging capitalist markets, the harder it will be for these countries to attract foreign investment.

141. Full examination of these "instability provisions" is outside the scope of this Note. Therefore, the Note focuses predominately on "affirmative rights" provisions that will create enormous economic strain on the new governments, rather than on the separation-of-powers issues, checks-and-balances problems, election provisions, and amendment procedures that also have the potential to impact the stability of the new governments.

142. Private ownership of the means of production and the ability to reap personal financial gain from one's efforts are among the hallmarks of a capitalist market economy. See, e.g., Harry D. Hutchinson, Economics and Social Goals: An Introduction 75-79 (1973).

143. Id.
erty for both political liberty and economic growth." Gerhard Casper characterized the possibility of guaranteeing Eastern Europeans the meaningful right to hold private property as "highly dubious."

The uncertainty over property rights is compounded by disagreement as to which path these countries should follow to achieve denationalization of the economy, and which path they should follow once privatization is complete. The increasing movement to slow the transition to a market economy represents one of the greatest dangers facing the countries of Eastern Europe. If the transition is slow and drawn out, these countries will remain unattractive to risk-averse investors. In such an atmosphere, only investments that yield high short-term returns will flow into Eastern Europe. The nations of Eastern Europe must, therefore, fully and quickly embrace the principles of capitalism and provide an environment in which capitalism can grow and prosper. The new constitutions adopted by these countries provide the perfect forum to demonstrate to foreign investors that the countries of Eastern Europe are serious about making a dramatic switch to a market economy. Any attempt to lengthen the process in order to soften the blow of the transition will directly promote the failure of capitalism and democracy in Eastern Europe.

144. Epstein, supra note 8, at 557.
146. Epstein, supra note 8, at 570.
147. Poland is a prime example of a country that made great strides toward achieving a market economy but has now decided to scale back reforms in order to lessen the sting of the transition. See Stephen Engelberg, Poland Again Saddles up the Steed of Reform, N.Y. Times, Feb. 16, 1992, at 14. Professor Epstein identifies the dangers of making a slow transition to a market economy as the "perils of prudence." Epstein, supra note 8, at 570.

148. Epstein points out that investors are willing to wait a longer period of time before receiving a return on their investment only "when the legal environment is stable, when the regulatory structure is predictable, and when the tax burdens are ascertainable." Epstein, supra note 8, at 570.

149. Id. at 571. Epstein notes that this type of investing will lead the citizens of Eastern Europe to perceive investors as mere speculators, causing popular resentment toward the capitalist system. Id.

150. Id. Epstein calls the danger of proceeding slowly toward a capitalist system "The Failure of Gradualism." Id. at 570. He points out that "an attitude of 'there's no going back' drastically improves the chances of success." Id. at 571.
Bulgaria

Articles 17 and 18 of Bulgaria's constitution are the principle provisions affecting property rights.\textsuperscript{151} Article 17 enunciates the principle that private property rights shall be inviolable.\textsuperscript{152} This is clearly the proper starting point for fostering an environment conducive to the establishment of a capitalist economic system. An earlier draft version of this article granted the government the power to establish laws regulating the uses of property "with a view to ensuring its social role."\textsuperscript{153} If the government were to take an active role in determining how property should be used to maximize social value, individuals would be denied the opportunity to decide for themselves how best to utilize their resources. Choices concerning the use of scarce resources would be based on political

\textsuperscript{151} The full text of Article 17 states:
(1) The law guarantees and protects the right to property and inheritance.
(2) Property may be private or public.
(3) Private property is inviolable.
(4) The management of state and township property is established by law.
(5) Expropriation of property in order to meet state or township needs must be according to law and provided that such need cannot be satisfied in any other way. Suitable compensation must be paid in advance.

\textsuperscript{152} Bulg. Const. art. 17.

\textsuperscript{153} Bulg. Const. art. 17, § 3.

\textsuperscript{152} Id. art. 17, § 3.

\textsuperscript{153} Bulg. Const. art. 15, § 3 (Draft, 1991).
factors and not on the operation of a real price system. The drafters of Bulgaria's constitution took a significant step towards establishing a market economy by amending the original version of Article 17 before the constitution was ratified.

Article 18, however, provokes concern because it overtly states that important factors of production will remain state property. The government's exclusive ownership of natural resources would severely hamper a privately run business in Bulgaria, for example. A single source of supply means no competition and only one price. Businesses will be denied the opportunity to choose a supplier who can deliver the same materials at a cheaper price. By the same token, the government, which controls the only source of supply, will have no incentive to find cheaper methods to deliver materials because it will have no fear of losing domestic buyers to other companies in the same industry. As a result, industries in Bulgaria requiring large amounts of natural resources will not be able to compete with companies outside of Bulgaria that are able to buy their resources from the most efficient producer and in turn produce their finished goods for less.

Additionally, the governmental claims to ownership of natural resources, both on land and offshore, close the door on private investment in what could be Bulgaria's most lucrative economic sector. Western technology is clearly more advanced and more efficient at utilizing these resources. The Bulgarian government is not only preventing the inflow of this technology, but it is also preventing new jobs that would be created by Western firms entering the industry.

The final section of Article 18 attempts to quell these fears by requiring the state to manage its assets for the benefit of society.

154. See BULG. CONST. art. 18, §§ 1-2; see supra note 151.
155. Bulgarian companies may have the option of importing natural resources that are produced more efficiently elsewhere, but the price of transportation of the resources, (not to mention any tariffs that might be levied to protect Bulgaria's inefficient domestic production) will add to the Bulgarian company's costs.
156. As are the other Balkan states, Bulgaria is relatively well endowed with natural resources that could produce a solid foundation for the emerging market economy. See Karen Taylor, Bulgarian Mines Flounder in Market Economy - Domestic Shipments Have Fallen by 60% over the Past Two Years, Fin. Times, Aug. 13, 1992, at 22 (describing some of Bulgaria's mining and land resources).
157. BULG. CONST. art. 18, § 6; see supra note 151.
Again, however, the communist background of Bulgaria and the strong representation that the Socialist Party\textsuperscript{158} still maintains in the legislature\textsuperscript{159} raise concerns that the failed communist ideology might resurface at a later date. Even if a democratically elected government acts under this provision with good intentions, problems are bound to arise. Actions that benefit society in the short term may have devastating long-term drawbacks.\textsuperscript{160}

Other portions of the Bulgarian Constitution further threaten the creation of sufficient private property rights. Article 21, for instance, restricts the use of arable land solely to agricultural purposes.\textsuperscript{161} Although probably intended to help alleviate the current food shortages, this provision ignores the law of comparative advantage.\textsuperscript{162} By constitutionally requiring that arable land be used for agricultural purposes, Bulgaria has demonstrated an inflexibility that is not conducive to the proper operation of market forces. Article 21 denies owners of arable land the opportunity to make their own economic choices as to the most efficient use of their land. This lack of choice quashes the entrepreneurial spirit and perpetuates inefficient allocation of resources.

\textsuperscript{158} "Socialist Party" is currently the fashionable name in Eastern Europe for the former communist parties, and Bulgaria is no exception. Longworth, supra note 103, at C1.

\textsuperscript{159} The Bulgarian Socialist Party currently holds 106 out of the 240 seats in the legislature. Bulgaria; In Business, Just, ECONOMIST, Nov. 16, 1991, at 64. The Socialists occupy just four seats fewer than the Union of Democratic Forces, Bulgaria’s reformist party. Id.

\textsuperscript{160} For example, freezing prices and guaranteeing jobs will likely be an attractive short-term solution to the inevitable problems Bulgaria will face. However, this approach to the transition to capitalism may have tremendous long-term economic drawbacks. See supra notes 146-50 and accompanying text.

\textsuperscript{161} BULG. CONST. art. 21, § 2. The full text of Article 21 states:

(1) The land is a basic national resource and benefits from the special protection of the state and society.

(2) Arable land may be used exclusively for agricultural purposes. Changes in its use are permitted only when based on proven need, in accordance with conditions and procedures defined by the law.

\textit{Id.} art. 21.

\textsuperscript{162} The law of comparative advantage was formulated in 1817 by David Ricardo and states: "[I]t is better for people to specialize in those activities in which their advantage over other people is greatest or in which their disadvantages compared to others are the smallest." RUFFIN & GREGORY, supra note 6, at 58-59. The law of comparative advantage applies to international trade as well as to individual economic systems. For example, if a country has a large supply of labor relative to capital, it will be more efficient for that country to produce labor-intensive goods than capital-intensive goods. \textit{Id.} at 449.
Potential investment opportunities in Bulgaria are further complicated by Article 22, which prohibits foreign ownership of land.\textsuperscript{163} Such a provision hardly comports with the ideals one would expect to find in a newly adopted constitution of a country starving for foreign investment. Without the ability to obtain permanent property interest in land, foreign investors will likely be discouraged from undertaking long-term investments in Bulgaria. Article 22 provides a company considering investment in Eastern Europe another reason to opt for a country other than Bulgaria.

\textit{Albania}\textsuperscript{164}

The Albanian Constitution contains several articles regarding property rights that will have a significantly negative impact on the domestic economy Article 12 will undoubtedly prove most disturbing to foreign investors; it not only claims all land and natural resources for the state, but also grants the government control over the railroads and the major means of communication.\textsuperscript{165} This article demonstrates a complete lack of commitment to capitalist ideology and will clearly drive potential investors away from Albania.\textsuperscript{166}

\begin{flushleft}
\begin{footnotesize}
163. \textit{Bulg. Const.} art 22, § 1. The full text of Article 22 states:
\begin{enumerate}
\item Foreigners and foreign juridical persons may not acquire the right of land ownership unless legally inherited. In such cases, they must transfer such ownership to someone else.
\item Under conditions stipulated by law, foreigners and foreign juridical persons may acquire user rights, building rights, and other real rights.
\end{enumerate}

\textit{Id.} art. 22.

164. As of this writing, Albania has still not adopted a final constitution. The analysis in this section, therefore, is based on \textit{Alb. Const.} (Draft No. 2, 1991).

165. \textit{Id.} art. 12. The full text of Article 12 states:
\begin{quote}
The land and underground resources, the mines, forests, waters, natural resources of energy, means of communication of national importance, means of railway transportation, telecommunications, radio and TV stations, and cinematography are the property of the state.
Alienation or co-ownership of each of the above objects, with the exception of the land, is permitted only in accordance with law.
\end{quote}

\textit{Id.}

166. As with Bulgaria, the mining of natural resources is potentially Albania’s most lucrative industry. \textit{See supra} notes 122-24, 156 and accompanying text. Government control over this sector of the economy severely limits the number of attractive investments available to foreigners.
\end{footnotesize}
\end{flushleft}
Article 12 suffers from the same flaws as Article 18 of the Bulgarian Constitution, and more. In addition to claiming all natural resources as state property, Article 12 declares that all land is property of the state. This article contemplates a staggering role for the Albanian government in controlling the economy. In order to invest in Albania, a foreign company must first conduct a significant amount of business with the government—the sole supplier of all land and natural resources. This scenario does not present an ideal bargaining position for Western businesses; it forces investors to contract with an unstable foreign government with a monopoly over the most basic resources. Article 12 will erode the price system in Albania and will lead to inefficient choices regarding how best to utilize scarce resources.

Paragraph 2 of Article 12 appears to contemplate the government's surrendering some portion of the property interests claimed in Paragraph 1. However, such a transfer of property will do little to correct the problems associated with the first paragraph's extensive claim to ownership. First, Paragraph 2 specifically excludes land which therefore will remain exclusively in the hands of the state. In addition, the government is under no affirmative obligation to privatize the items listed in Paragraph 1. Even if the government chose to do so, there is no guarantee that the denationalization would be organized in an economically responsible fashion. The very fact that the government anticipates an active role in the regulation of future alienation and co-ownership of property plants the seeds of inefficiency at the most fundamental level of economic development. Without the ability to transfer a property interest freely, an investor's ability to realize a return on his investment is severely limited. In addition, restraints on alienation result in property's being put to unproductive uses by a current owner who is unable to transfer the land to an individual who can use the property more efficiently.

167. See supra notes 151, 154-60 and accompanying text.
168. Alb. Const. art. 12, para. 1 (Draft No. 2); see supra note 165.
169. The choices on how to utilize resources will be inefficient because they will be reached as a result of an economic judgment made by a state bureaucracy, not by free-market forces.
170. See Alb. Const. art. 12, para. 2 (Draft No. 2); see supra note 165.
171. Alb. Const. art. 12, para. 2 (Draft No. 2).
The drafters of the Albanian Constitution commit the same mistake as Bulgaria by restricting the use of arable land to agricultural purposes.\(^{172}\) Although the restriction can be overridden with the approval of the appropriate state regulatory body,\(^{173}\) this type of excessive state involvement in economic affairs is exactly what these emerging countries need to avoid. Albania should not dictate to its people the uses to which they must put their land.

Article 15 presents a related problem by restricting private initiative to activities that “do [ ] not infringe upon the interests of society.”\(^{174}\) This standard is unnecessarily broad and could severely restrict legitimate economic activity.\(^{175}\) This article places the power to make economic decisions with the government instead of with individual economic actors.\(^{176}\) Individuals in society can determine their own best interests far better than a bureaucrat in Tirana.

Albania must sever the ties between government and the economy. The advantages of the invisible hand will benefit society but capitalism must first be set in motion by freeing up the price system, limiting government involvement in the economy, and allowing individuals to make their own economic decisions.

**Romania**

Article 41 of the Romanian Constitution contains the major provisions that will affect property rights in the emerging capitalist system.\(^{177}\) Although these provisions should prove more satisfactory to investors than the provisions contained in the constitutions

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172. *Id.* art. 13, para. 2 (“Arable land can be used for purposes other than cultivation only upon the approval of the appropriate state organs.”); *see supra* notes 161-62 and accompanying text (discussing a similar provision in the Bulgarian Constitution).
173. *ALB. CONST.* art. 13, para. 2 (Draft No. 2).
174. *Id.* art. 15, para. 2. (“Private initiative is free, on the condition that it does not infringe upon the interests of society.”).
176. *See supra* notes 72-81 and accompanying text (discussing the consequences of depriving individuals of economic choice and placing that power with a central state agency).
177. Article 41 states:

*Protection of private property*

(1) The right of property, as well as the claims upon the State are guaranteed. The content and limitations of these rights shall be established by law.
of Bulgaria and Albania, they are far from perfect. Stability of the right to own private property is the key factor in establishing a successful market economy in Eastern Europe; Article 41 simply does not fulfill this requirement.

Section 1 of Article 41 is the primary roadblock. Although it establishes the right to private property, the scope of that right is to be determined by statute. The danger of this infirmity is clear: by merely passing a statute, the legislature can alter citizens' fundamental property rights. This presents a risk to an investor because a simple swing in the majority control in the legislature could significantly affect one's property interest and undermine investment return. The manifest uncertainty that this provision creates therefore diminishes the long-term attractiveness of Romania to foreign investors.

(2) Private property shall be equally protected by law, irrespective of its owner. Aliens and stateless persons may not acquire the right of land ownership.

(3) No one may be expropriated, except on justified grounds of public utility against proper and fair compensation paid in advance in accordance with the provisions of the law.

(4) For such projects of general interest, the public authorities are entitled to use the subsoil of any real estate (land or house property), with the obligation to pay compensation to its owner for the damages caused to the soil, crops or buildings, as well as other damages imputable to the authorities.

(5) Compensations provided under paragraphs 3 and 4 shall be agreed upon with the owner, or by the decision of the court, unless a settlement can be reached.

(6) The right of property is binding to the observance of duties relating to environmental protection and ensurance of good neighbourhood, as well as of other duties that, in accordance with the law or custom, are incumbent upon the owner.

(7) Legally acquired property (assets) may not be confiscated. Legality of acquirement shall be presumed.

(8) Any goods intended for, used for, or resulting from a criminal offence or breach of law may be confiscated only in accordance with the provisions of the law.

Rom. Const. art. 41.

178. See supra notes 142-43 and accompanying text.
179. Rom. Const. art. 41, § 1; see supra note 177.
180. A swing in the control of the legislative branch is a distinct possibility given the political turmoil and continued economic problems in Romania. See Maass, supra note 2, at A15.
In section 2 of Article 41, Romania commits the same mistake as Bulgaria by prohibiting foreigners from owning land. Such protectionist measures will severely damage the Romanian economy's chance for a successful recovery. The prudent course for the emerging Eastern European countries is to permit free trade and remove all barriers to foreign investment in the region. Labor costs in the Balkan states are extremely low, making investment in labor-intensive manufacturing relatively attractive. The Balkan states need to capitalize on this comparative advantage if they hope to become players in the world economy. Lowering the barriers to entry into the Balkan states should attract investors looking for a launching pad into Western European markets. The resultant influx of hard currency into the Balkan states could expand domestic consumption. Section 2 of Article 41 essentially creates a needless barrier to entry that will only steer investment capital away from Romania.

Article 135 of the Romanian Constitution also expressly vests all property rights in minerals and raw materials in the state. The Romanian Constitution's allocation of property rights to the state proves more troublesome than similar allocation in Bulgaria and Albania when section 4 of Article 135 is read in light of section 4 of Article 41, which allows the state to use the subsoil of any property with an obligation to pay only for damages to the soil, buildings, or crops. This section could allow the government to mine natural resources from an individual's property while paying for only damage to the soil, rather than the value of the resources. Because Romania's greatest investment opportunity may be its natural re-

181. See supra note 163 and accompanying text.
182. Rom. Const. art 41, § 2; see supra note 177.
183. Cooper & Shapiro, supra note 101, at 93.
184. Rom. Const. art. 135, § 4. The full text of Article 135, section 4 states:
   Subsoil resources of any nature, ways of communication, the air space, waters that can generate motive force or can be used for the public interest, beaches, territorial sea, natural resources of the economic zone and the continental shelf, as well as other assets established by law, shall make the exclusive object of public property.
   Id. This provision has the same faults as Article 18, section 1 of the Bulgarian Constitution, and Article 12 of the Albanian Constitution. See supra notes 154-56, 167-71 and accompanying text.
185. Rom. Const. art. 41, § 4; see supra note 177.
sources, governmental control of these resources is bound to scare investors away.

Section 6 of Article 41 creates additional regulatory hurdles deterring foreign investment in Romania. This provision makes one’s right to private property subject to environmental and “good neighbor[ ]” concerns. The policy justifications underlying this provision, while noble, simply do not make sound economic sense. In order to protect and clean up its environment, Romania should first strengthen its economy and attract foreign investment. The wealth generated from economic growth can then be used to clean up the environment and invest in more environmentally sound production technologies. With respect to the “good neighbor” provision, as discussed with Article 15 of the Albanian Constitution, society is capable of making its own choices regarding its own best interest. Through the decisions of millions of individuals considering only their best interests, the free market will allocate resources according to their most desirable and efficient uses.

Establishment of Capitalist Ideology

The treatment of property rights in the new constitutions of Bulgaria, Albania, and Romania will likely have a negative effect on the prosperity of the emerging free market. Economics, however, is far from an exact science, and more than one factor will affect the ultimate success of capitalism in Eastern Europe. The constitution of a country, however, defines its basic political and economic ideology and will therefore impact significantly on future economic growth and political stability. In determining the “constitutional” climate for the establishment of free market economies in the Balkan states, this section examines the tension between capitalist and communist principles present in each of the three countries. This political tension renders uncertain the ultimate

187. Rom. Const. art. 41, § 6; see supra note 177.
189. James Sheehan, Now Not to Come Clean?, Wash. Times, Jan. 19, 1992, at B4. Sheehan quotes Russian deputy minister of nature protection, Alexander Bazykin, who points out that “[r]ich countries are relatively clean, while poor countries are dirty.” Id.
190. See supra notes 174-76 and accompanying text.
constitutional commitment these countries must make actively to pursue a true free market economy

The remnants of communism present in Bulgaria's new constitution extend beyond its treatment of private property ownership. The constitution provides for numerous "positive rights" that the government is responsible for providing to its citizens. Given the surviving representation of communist ideology in Bulgaria, the constitution inclusion of several provisions that exemplify the communist political philosophy is not surprising. Foreign investors looking for capitalist opportunities will likely be discouraged by these provisions for fear of both political instability and heavy tax burdens.

The positive-rights provisions found in the Bulgarian Constitution are merely one indication that the political horizon has not been cleansed completely of socialist and communist ideology. Numerous provisions demonstrate a markedly pro-labor ideology. Although many of these provisions were even stronger in an earlier

191. The U.S. Constitution is almost unanimously interpreted as a charter of negative liberties as opposed to a list of positive rights. See, e.g., DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989). In other words, the Constitution lays out restrictions on government power, rather than listing the duties that government must live up to.

192. See, e.g., BULG. CONST. art. 51, § 1 ("Citizens have the right to social security and social assistance."); id. art. 52, § 1 ("Citizens have the right to health insurance and to free medical services"); id. art. 53, § 1 ("The right to education is universal."); id. art. 55 ("Citizens have the right to a healthy and favorable environment").

193. As noted, the Socialist Party in Bulgaria holds only four fewer seats than the Reformist Party in the legislature. See supra note 159 and accompanying text.

194. Political instability will probably be a problem in Eastern Europe for some time to come, but these communist-based principles will exacerbate the problem by promising to satisfy the basic needs of the citizens when the government has no ability to deliver. Political instability will increase because a government that fails to deliver on its promises loses popular legitimacy.

195. The constitutional provisions discussed in this section all place a tremendous financial strain on a government that is already bankrupt. See Girard C. Stchen, Bulgaria Slips Deeper into Economic Crisis, CHRISTIAN Sci. MONITOR, Mar. 5, 1991, at 5 (documenting the fiscal woes of the Bulgarian government). Even as the market economy develops, foreign investors are likely to be wary of doing business in Bulgaria knowing they will have to support extensive social programs.

196. See, e.g., BULG. CONST. art. 16 ("The law guarantees and protects labor."); id. art. 48, § 1 ("Citizens have the right to work. The state is concerned with providing conditions for the exercise of this right."); id. art. 48, § 5 ("Workers and employees have the right to healthy and safe working conditions"); id. art. 50 ("Workers and employees have the right to strike").
draft of the constitution, they still provide a strong economic incentive for a corporation to seek a less labor-friendly base of operation.

The more optimistic observer of the events in Bulgaria would likely point to Article 19, which declares that the national economy is to be based on free economic initiative. This single article, however, clearly conflicts with the numerous other articles in the new constitution that contemplate a government actively involved in economic matters. This tension creates uncertainty, and uncertainty severely diminishes the attractiveness of investment opportunities for foreigners.

Beyond its unsatisfactory treatment of property rights, the new Albanian Constitution contains a significant number of provisions that grant positive rights to the citizens. It also endorses other basic tenets of communist ideology. The implied rejection of true capitalist principles makes investment in Albania an extreme risk because the government seems prepared to perpetuate the existence of an unprofitable economic system.

Positive-rights provisions pervade Albania’s constitution to a greater extent than Bulgaria’s. In addition to guaranteeing free health care and education, the Albanian Constitution entitles citizens to recreation after work and a paid annual holiday. As

197. See, e.g., BULG. CONST. art. 14, § 1 (Draft, 1991) (“The state shall protect labour as a source of private and public wealth.”); id. § 2 (“Every citizen shall have the duty of assisting in a manner he finds fit and within his means the material and intellectual progress of society.”).

198. BULG. CONST. art. 19, § 1.

199. See id. arts. 18, 20-22, 51-55.

200. See, e.g., ALB. CONST. art. 33 (Draft No. 2, 1991) (“guarantee[ing] the necessary material means of living in old age”); id. art. 34 (“guarantee[ing] free necessary medical service”).

201. The American Bar Association’s Central and East European Law Initiative analysis of the Albanian Constitution found that “[t]he tensions between state control and the concepts inherent in a free enterprise system are not adequately resolved.” ALBANIAN CONSTITUTIONAL ANALYSIS, supra note 175, at 7.

202. See ALB. CONST. arts. 19-22, 32, 34, 38 (Draft No. 2).

203. Id. art. 34 (“The state guarantees free necessary medical service to its citizens and free treatment in the country’s health institutions.”).

204. Id. art. 38 (“Citizens enjoy the right to education. Education is organized and directed by the state and is open to all and is free.”).

205. Id. art. 32 (“Citizens are entitled to recreation after work. Work time, per day and per week, as well as a paid annual holiday, are set by law.”).
previously discussed, these positive-rights provisions will force the state to impose a heavy tax burden on companies conducting business in Albania.\textsuperscript{206} Furthermore, the political legitimacy of the government will surely suffer if the guarantees are not met.

The real danger in Albania, however, lies beyond the positive-rights issue and concerns the express adoption of communist economic principles. Articles 19 and 20 are so fundamentally flawed, and will have such a negative impact upon the economic development of Albania, that they deserve specific mention. Article 19 instructs the state to plan "the entire economic and social activity" of the nation.\textsuperscript{207} This provision diametrically opposes the principles of capitalism and will deter any investor from seriously considering opportunities in Albania. Forcing the investor to produce goods in accordance with a state plan entirely eliminates the prospects for a fruitful return on one's investment.\textsuperscript{208}

Article 20 only exacerbates the problems created by Article 19. Article 20 grants the state control over internal and foreign trade.\textsuperscript{209} It further increases the state's involvement in economic affairs as established under Article 19 and demonstrates adherence to communist principles of economic planning and control.\textsuperscript{210} The danger of Article 20 turns on the concept of "control." Even the governments of capitalist countries exercise some control over foreign and domestic trade,\textsuperscript{211} but generally, this regulatory control impinges on economic freedom without suffocating it. The notion of control expressed in Article 20, however, appears to be far more expansive. One need look no further than Article 19 to infer that

\textsuperscript{206} See supra notes 194-95 and accompanying text.
\textsuperscript{207} ALB. CONST. art. 19 (Draft No. 2) ("The state attends to planning the entire economic and social activity and to harmonizing national and local interests, with a view to meeting the material and cultural needs of the society and strengthening the independence and defense of the country.").
\textsuperscript{208} The system of economic planning that Albania's constitution calls for appears to be a complete adherence to its communist past. Such a system will undoubtedly lead to failure again. See supra notes 72-81 and accompanying text.
\textsuperscript{209} ALB. CONST. art. 20 (Draft No. 2) ("The state exercises control over internal and foreign trade.").
\textsuperscript{210} Id.
\textsuperscript{211} E.g., U.S. Const. art. I, § 8, cls. 1, 3 (providing Congressional authority to tax and regulate foreign commerce); 29 U.S.C. §§ 651-678 (1988) (providing government regulation of occupational health and safety conditions); id. §§ 201-219 (providing federal minimum wage and overtime labor protections).
the control anticipated by Article 20 will extend to almost every facet of Albania's economy. The net result of Articles 19 and 20 will undoubtedly be excessive state entanglement in the economy that will not only deter investors, but will perpetuate the economic catastrophe in Albania.

Romania's new constitution also sends conflicting messages as to the country's commitment to free market principles. The uncertainty caused by this lack of a clearly defined economic ideology will surely Romania's chances of attracting foreign investment. Investors will doubtless delay large-scale or long-term investments in Romania until they are more certain of the economic outlook in the country.

Article 134 of the Romanian Constitution endorses the notion of a free market economy, but it also contains several provisions that will deeply entangle the government in the new economic system. Article 134 calls for the state to stimulate factors of production, protect the national interest in hard currency, protect the environment, exploit natural resources in accordance with the national interest, and raise the quality of life. As economic conditions in Romania worsen, as they undoubtedly will, the government will find it extremely difficult to explain to the citizens that the abstract concept of a free market is worth a short-term decrease in the quality of life. The specific burdens that these obliga-

212. Articles 21 and 22 provide further support to the proposition that communist ideology remains a powerful force in the Albanian political and economic arenas. Article 21 embraces Marx's theory that "work" is the foundation of all wealth and value in society. A.L.B. Const. art. 21 (Draft No. 2). Article 22 is the codification of Marx's philosophy that every citizen has a duty to contribute to society to the best of his ability. Id. art. 22.

213. See Rom. Const. art. 134. The full text of Article 134 states:
   (1) Romania's economy is a free market economy.
   (2) The state shall provide for:
      a) the freedom of trade, protection of loyal competition, stimulation of every factor of production;
      b) protection of national interests in economic, financial and hard currency activities;
      c) encouragement of national scientific research;
      d) exploitation of natural resources in accordance with the national interest;
      e) recovery and protection of the environment and preservation of ecological balance;
      f) the necessary conditions to raise the quality of life.

Id.

214. Id.
tions place on the state will surely take precedence over any theoretical experiment with a laissez-faire economic policy. The problems associated with Article 134, however, are quite manageable relative to the problems encountered in the new Bulgarian and Albanian constitutions. Romania does not embark on mass economic and social planning as does Albania,215 nor does it contain paraphrased references to Marxist ideology 216 Romania deserves credit for moving further away from its communist economic past than its Balkan neighbors, but Romania must go even further. Freeing market forces will be painful in the short term, but the countries of Eastern Europe must take this first step boldly. Hanging on to the nation’s ideological past will surely poison the successful operation of a capitalist system.

If the domestic economy does take a serious turn for the worse, Romania’s problems will be compounded by the numerous positive-rights provisions in the new constitution.217 These provisions will create an enormous tax strain on the economy and thus discourage foreigners from doing business in Romania.218 These bold promises also threaten the legitimacy of the government if the privileges are not provided to the citizens.

Outside of the problems with ambiguous property rights, the climate for investment in Romania is most seriously damaged by the high expectations set by the government. As expectations are not met, people become restless, and restlessness does not attract or promote business. If capitalism fails to do a better job than communism in providing food and shelter to the people, the citizens’ calls for a return to the old system will be imminent.219

CONCLUSION

The economies of Eastern Europe are in a state of total despair. It was this economic strife that began the reform movement three

215. See supra notes 207-12 and accompanying text.
216. See supra notes 196-97 and accompanying text (Bulgaria); supra note 212 (Albania).
217. See, e.g., ROM. CONST. art. 32 (right to free education); id. art. 33 (right to free health care); id. art. 43 (right to a decent standard of living).
218. See also supra notes 194-95 and accompanying text (predicting similar consequences in Bulgaria); supra notes 202-06 and accompanying text (predicting the strains in Albania).
219. See supra notes 1-3 and accompanying text (discussing souring attitudes toward capitalism in several Eastern European nations).
years ago, and it is this economic strife that will be the death knell for capitalism if conditions do not improve. Unfortunately, the new constitutions adopted by the Balkan states do not provide a healthy environment for free market forces to operate. The new constitutions fail to provide the citizens of these countries with the full thrust of individual incentive necessary to spur entrepreneurship. In addition, these constitutions contemplate an inflexible network of government involvement in the economy that will significantly deter Western investment. The likely effect of these core deficiencies is weak economic growth, which will inevitably lead to political instability. One need only witness the events in Russia this year, when the conservative Parliament tried to remove President Boris Yeltsin from power, to understand this inherent connection between economics and politics.

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