

Losing Liberty Through Judicial Restraint

by Roger Pilon

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

I qualify those observations first because in the socialist world it is not yet clear how deep, much less how lasting, this revolution really is, and second because over the entire world, including America, it is not yet clear how liberal, how widespread, or how well-understood the revolution is. In fact, certain confusions over the ideas that are leading the revolution, especially in America, will be my principal focus here. Nevertheless, that a significant shift in our moral, political, and legal outlook is taking place, a shift from the outlook that dominated recent decades, cannot be denied. Not only can we say things today that a decade or two ago could not have been said but events are unfolding today that were then unimaginable.

The Decline of Socialism

To lay the foundation for a broad look at those ideas in the American context, especially as they relate to the practice of judicial review, I want first to touch upon a few recent developments in the socialist world. Those developments began, on the popular view, with the rise of Mikhail Gorbachev; yet the ascent of Gorbachev and his "new thinking," important as that is, should itself be placed within the larger climate of ideas that led to the elections of Margaret Thatcher in 1979 and Ronald Reagan in 1980, which in turn can be traced to countless events going back at least to the appearance of Hayek's *Road to Serfdom*. In all of this, two themes stand out: first, that socialist systems do not work; second, that they are illegitimate.



That Mr. Gorbachev has seen fit to focus on the first of these themes is understandable. Yet even here he is not as much leading as following events. For as Nikita Khrushchev's boast that socialism would bury capitalism became increasingly remote, "economic reform" came to be the watchword within the socialist world, well before Gorbachev's rise. A favored form of reform has been decentralization, which preserved Party control while avoiding the forbidden words "private

property." But whether the Party controlled from Moscow or Kiev, the perverse incentives and hence the inefficiencies remained. Moreover, because decentralization came, when it did, from the top, not from the people, the illegitimacy of the system continued. Thus with growing urgency the people have been calling not for local Party control but for democratic control. Yet even this is changing, as witness the programs of such Interregional Group members as Anatoly A. Sobchik, which increasingly demand not simply democratization but privatization, not simply a political solution but a liberal solution to the question: Who controls our lives? And all of this is being cast, in turn, as a matter of rights: "The most important thing for us is to revolutionize, radically, the whole system of human rights...the tradition that every man has inalienable rights that the state cannot take away," said Supreme Soviet member Fyodor M. Burlatsky recently in Washington.

Efforts by Soviet reformers to reverse the presumptions of their system, to make it more liberal by putting the individual first, are still inchoate. Nevertheless, they suggest a growing appreciation among many living under socialized systems that democratization and, especially, liberalization in the form of the institution of private property are the keys not only to economic reform and economic prosperity but, more important, to political and moral legitimacy. Democratic socialism may be a way-station, but increasingly it is realized that democratic socialism replicates all the inefficiencies of nondemocratic socialism, perhaps even adding a few; that private property is the foundation of and hence the road to economic prosperity; that markets work only when property is protected; and that those arrangements, when secured through law and legal institutions, are the only liberal and hence legitimate political arrangements, reflecting our inherent, individual human rights. As those ideas take root in these countries, intellectual excitement follows. Going back to first principles, this is the founding generation.

The Detour of Liberalism in America

In Washington too there is excitement in the air, but so far are we removed from our own founding and our own first principles as to believe we can further these developments by throwing money their way — as in the recently passed "Support for East European Democracy Act of 1989," with its loans, grants, and guarantees. Rare in Washington is the understanding that for markets to flourish it is simply necessary, largely, for government to get out of the way. Government does not have to *do* anything, save to protect rights of property and contract, and attend to those few areas that are inherently public. Yet from the Progressive Era at least, and the New Deal in particular, we have come to expect government to be an active participant in our lives, especially our economic lives. While the socialist world is coming to recognize that in the matter of prosperity, government is the problem, many in America remain in a mid-century time warp.

This lust for active government should not surprise. It was recognized explicitly by the Founders, who guarded against it expressly through the separation and division of power and the institution of judicial review. Since the separation and division of power have had only marginal success in limiting the growth of government, we have had to look principally to judicial review for the protection of our liberties.

Over the course of this century, however, and especially since the New Deal, the judiciary, far from being “the bulwark of our liberties,” as Madison put it, has grown increasingly restrained in its review, particularly in the economic area. From *Nebbia* in 1934 to *Carolene Products* in 1938, the doctrine emerged that there were two “kinds” of rights — fundamental and nonfundamental — and two “levels” of review — strict and minimal. Because economic liberties were said to be “nonfundamental,” legislative and executive acts that restricted them started to receive only minimal judicial review. Perhaps the most egregious example occurred in 1942 in the celebrated case of *Wickard v. Filburn*, where the Supreme Court upheld a penalty imposed on an Ohio farmer for growing more wheat than his marketing quota allowed, even though the wheat in question was consumed entirely by the farmer and his family. Only those enamored of the idea of planning a national economy could believe themselves endowed with a right to restrict so inherent a right as feeding one’s family from the fruits of one’s property and labor.

Yet those doctrines of disparate rights and disparate levels of judicial review have prevailed. Strict constructionists of the conservative persuasion will not find the doctrines in the text of the Constitution, of course. But they, like their modern “liberal” counterparts, have clung still to those legacies of the New Deal. Thus do we shield ourselves from first principles, with a routinized, mechanical process that undermines the original design even as it undermines the original substance.

But why has the judiciary lapsed into a restraint unintended by the Constitution’s framers, yielding results expressly eschewed by those framers? Let me suggest two reasons that

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point more to the climate of ideas than to any political motivations. First, the confidence necessary for the judiciary to stand athwart the popular branches was undermined in the early part of this century by the rise of logical and legal positivism, legal realism, and the moral skepticism that accompanied those schools. That skepticism took aim especially at the theory of natural rights that inspired the Founders, but it undermined as well the effort to justify any moral conclusions. Reduced thus to legal and, in particular, constitutional positivism — to a will-based, not a reason-based, theory of law — judges sought refuge in the explicit language of the Constitution, unable or unwilling to “derive” the rights they called, accordingly, “nonfundamental.”

But second, with the decline of natural rights we have seen, as if by default, the rise of the democratic impetus — the “moral accompaniment” to the will theory of law. Rooted itself in the idea of individual rights — indeed, derived from the right to rule oneself — democratic theory flourished in the Progressive Era. In the constitutional context, Mr. Justice Holmes put the point succinctly when he declared, in his famous *Lochner* dissent, “the right of a majority to embody their opinions in law.”

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That “right,” of course, like its doctrinal progeny, is nowhere to be found in the Constitution. Yet so powerful was the majoritarian impulse that by the 1930s even the Court was under its sway. The Holmesian minority in *Lochner* — directed toward making the world safe for such progressive legislation as would regulate the hours that New York bakers might work — had become the majority by *Carolene Products* — directed toward making the world safe for legislation prohibiting the interstate shipment of a perfectly wholesome product called filled milk.

But respect for such wide-ranging majoritarianism is not limited to New Deal liberals anxious to see their legislative agenda pass constitutional muster. Indeed, Judge Robert H. Bork has recently given us a conservative vision to the same effect. The United States was founded, he writes, on “two opposing principles that must be continually reconciled. The first principle is self-government, which means that *in wide areas of life* majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless *some* things majorities must not do to minorities, *some* areas of life in which the individual must be free of majority rule” (emphasis added).

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

Judicial Restraint and Special Interests

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

name of the people but in fact in the service of special interests.

Let me take these points in order. Although it ordinarily eschews moral arguments, the judicial restraint school is driven nonetheless by a concern for legitimacy, which it understands to be a function of process. Reacting often, and rightly, against a judicial activism that is grounded neither in the Constitution nor in its natural rights background, the restraint school argues that majority rule and the enumerated rights that restrain it are legitimate by virtue of the way they were instituted as law. In the beginning, the argument runs, we came together to write the rules, including the process by which we would thereafter be governed. Provided the results that flow thereafter from the process flow by the rules, those results will be legitimate, for the beginning — grounded in consent, the essence of self-government — was legitimate. Legitimacy in, legitimacy out — if we follow the rules.



Claudia Mills is the founding editor of *QQ: Report from the Institute for Philosophy and Public Policy*. It was Claudia who in 1980 turned a half-formed idea in the minds of the Institute's staff into a periodical that has won wide praise throughout its ten-year history. Until the last issue, every unsigned article in the Report was written by Claudia, who was also responsible for selecting and editing all the other articles (and often cajoling and encouraging her procrastinating colleagues to meet their deadlines). Remarkably, Claudia found time as well to write eleven widely acclaimed novels for juniors and to coedit two books in the Maryland Studies in Public Philosophy, *Liberalism Reconsidered* (1983) and *The Moral Foundations of Civil Rights* (1986). More than that, almost no paper or book left the Institute during her ten years here without improvement at her hand (Claudia saved each of her colleagues from literary embarrassment on numerous occasions).

Claudia has now left the Institute to devote herself more fully to her own literary pursuits. All of us at the Institute will deeply miss our dear friend, and we wish her well. We shall offer her the best thanks that we can by working to maintain the tradition of excellence that she established.

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That is a nice theory of legitimacy. In fact, in the *private* domain it works well. But the state is not a corporation or a club that one joins or leaves at will. Rather, it is a forced association — and a “necessary evil” accordingly. For in the beginning, “we” did not all come together. Certain of our forefathers did, who could hardly have had the authority to bind the rest of us. Nor will it do to say we are free to leave; for that would amount to a right on the part of any transient majority to put the rest of us to a choice between leaving or coming under their rule — precisely what must be justified.

No, the arguments from original and from so-called tacit consent — at the core of the social contract theory, and the bedrock of the judicial restraint school as well — have never deeply satisfied, especially in the face of majoritarian tyranny. What consent, whether original or periodic, does accomplish, rather, is this: it lends legitimacy to a *government* — which is not the same as making legitimate the *acts* of that government.

Government acts are legitimate, more deeply, by virtue of their respect for the inherent rights of the individuals governed. Acts that secure the rights of some against the depredations of others are thus perfectly legitimate, not from procedural but from substantive considerations. But acts that take from some to give to others, as so many modern government acts do, cannot be justified — from considerations of process, of substance, or even, save on rare occasions, from a consideration of “the public good.” Those acts are naked takings, designed to help one part of the population at the expense of another. It is precisely to protect ourselves against such “popular” measures that we instituted, originally, an unelected judiciary.

But the truth, of course, is much worse than this. For in reality, it is far less majoritarian tyranny that we have to fear than the tyranny of the minority in the form of the special interest. As the Public Choice literature has well documented, the popular branches are particularly susceptible to the pleas of special interests. What, after all, was *Lochner* if not an effort by large, often unionized bakeries in New York to avoid competition from small mom-and-pop bakeries that hired re-

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cent immigrants for long hours, immigrants who were willing to take such jobs, often living at the bakeries? What was *Caroline Products* if not a naked transfer of the earnings of the filled milk industry to the pockets of the dairy industry? And what are modern agricultural marketing orders, import quotas, grants to the arts, and on and on if not the Iron Triangle of special interest, Congress, and bureaucracy all busily at work? This is the modern redistributive tyranny the modern judiciary refuses to review, because the arrangement, by now, is “settled law.”

Reclaiming Our Liberty

The irony is that it is precisely this rule by special interest that the peoples of the socialist world are attempting to overturn. To be sure, the Party insinuated itself by direct force, not through the forced association that is the modern democratic state. But history demonstrates, and theory explains, that once ensconced, the special interest is all but immune from being unseated through the democratic process — the very process that lends "legitimacy" to its being where it is. As they search for their first principles, therefore, the nations of the socialist world would do well to learn from our experience. Unlike us, they are moving in the right direction — from decentralization to democratization to liberalization. But the end of each of those strains is the individual. Out of respect for the inherent rights of the individual — his right, at bottom, to plan and live his own life — only as much force as is necessary to secure those rights should be brought

into being. Toward restraining that force, an independent judiciary, confident in the character and the scope of its authority, is essential. Should we expect any less a judiciary in America?

Roger Pilon is a Senior Fellow at the Cato Institute and the Director of Cato's Center for Constitutional Studies. This is a revised and abridged version of an address he delivered before the Federalist Society at the University of Chicago School of Law on October 25, 1989. The unabridged version appears in the *Cato Policy Report*, vol. 12, no. 2 (March/April 1990). Sources quoted in this article are Robert H. Bork, *The Tempting of America* (New York & London: The Free Press, 1990); Bill Keller, "Law Professor Takes Soviets by Storm With Crisp Oratory and Hard Work," *New York Times*, November 26, 1989; *Lochner v. New York*, 198 U.S. 45, 75 (1905); David K. Shipler, "After the Wall: A Rule of Law in the Soviet Bloc," *Washington Post*, December 10, 1989.

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