

Report from the Institute for

Volume 10

Number 1

PHILOSOPHY & PUBLIC POLICY

Winter

1990

School of Public Affairs • University of Maryland
College Park, Maryland 20742 • 301-454-4103

Reflections on Democracy

The Iron Curtain has lifted, revealing scenes undreamt of even a year ago. Last August Solidarity became the leader of Poland's new coalition government. In the next two months Hungary codified civil and human rights and scheduled free, multiparty elections. November saw mass demonstrations in Prague and the resignation of the Communist leadership. By year-end Vaclav Havel, a dissident playwright, had been elected president of Czechoslovakia; the Romanian dictator Ceausescu had been executed; and ten thousand protesters were marching in Sofia, demanding an immediate end to Bulgaria's Communist regime.

In a matter of months, the Eastern Bloc's Communist governments fell like so many dominoes. Poland, Hungary, East Germany, Czechoslovakia, Bulgaria, and Romania all took their first steps on the long, hard road to democracy. Multiparty elections have been scheduled for this spring. The principles of free-market economics have been widely, and fervently, embraced.

The historic drama reached a symbolic peak in early November, when the East German government knocked holes in the Berlin Wall. As thousands of citizens streamed through to visit the West, their jubilant compatriots danced in celebration on the Wall's top. A month later shoppers could find chunks of the Wall on sale in Washington, D.C., department stores: nestled in velvety pouches, each complete with a certificate of authenticity — the perfect stocking-stuffers for the Christmas that brought the end of the cold war.

A triumph of capitalism? Or a sad comment on the American way of life?

As we watch the nations of Central and Eastern Europe struggling to reorganize their economies and political systems, many of us long to offer advice. Some of them can hardly remember how democracy works;

some never really knew. We'd like to encourage them, guide them, tell them all that Americans have learned from two centuries of experience with democracy. Yet we must pause to ask ourselves: Just what can these newly democratic nations learn, and what should they not learn, from the United States?

In what follows, five authorities — on political science, law, and economics — suggest answers to this question. And, true to the American tradition, they sharply disagree.

To make its research readily available to a broad audience, the Institute for Philosophy and Public Policy publishes this quarterly newsletter. Articles are intended to advance philosophically informed debate on current policy choices; the views presented are not necessarily those of the Institute or its sponsors.

In This Issue

HARD DECISIONS

Jane Mansbridge 2

LEARNING NOT TO LOVE REVOLUTION

George Friedman 4

THE POSSIBILITY OF MARKET SOCIALISM

John E. Roemer 7

POST-COMMUNIST CONSTITUTIONALISM

Karol Soltan 9

LOSING LIBERTY THROUGH JUDICIAL RESTRAINT

Roger Pilon 15

Hard Decisions

by Jane Mansbridge

The economies of Central Europe are a shambles. The transition to more market-oriented economies in these countries will, in the short run, hurt a large number of people. But democracy, many hope, will legitimate these hard decisions.

This hope is not completely farfetched. Management studies show that when employees participate in making a decision, they are more likely to accept the results, instead of quitting or overusing sick days. Even convicted criminals support the system that convicts them more when they think the process is fair than when they merely get the outcome they want. On the national scale, too, faith in the democratic process can lead citizens to accept outcomes that hurt them as individuals.

Yet hopes for legitimating hard decisions through democracy can founder when practice doesn't live up to democratic ideals. And practice cannot live up to democratic ideals unless those ideals are better understood.

The Politics of Power and Persuasion

Democracy, as practiced in the United States and Western Europe, is a hybrid idea that incorporates conflicting assumptions. In one vision of democracy, the system creates fair procedures for resolving conflicts of interest; in another, it encourages deliberation about how best to promote the common good. Intellectuals in Central Europe are often quite aware of the difference between these two visions of democracy. In the German Democratic Republic, the *New York Times* reports a growing gap between "intellectuals and dissidents, who formed groups like New Forum with the notion of democracy as a process of well-meaning discussion in which the universal good was the shared goal, and the political parties in West and East Germany whose primary goal is to win the elections."

Practicing politicians in the United States and Western Europe tend to understand democracy in only one of these two ways. For them, democracy is an adversary system that assumes conflicting interests and sets up fair procedural rules under which each side attempts to "win." Political scientists in the West also describe politics in this way, as a matter of who gets what. This is the politics of power, not persuasion.

Yet American and European philosophers who discuss democracy usually emphasize its "deliberative" character. In deliberative democracy, citizens talk with one another about public problems. Their talk can be both raucous and constrained, conflictual and harmonious. It can turn on opinion as well as fact. It can draw on emotion as well as reason. It can help the participants think "we" instead of "I." While it does not rule out the possibility that the participants' interests fundamentally conflict, it aims at the creation of a common good. It works through persuasion, not power.

In fact, politicians in the West practice not only a politics of power but also, in some of their roles in the legislature, a politics of persuasion aimed at the common good. Recent research among political scientists is only now uncovering the extent of this common-interest behavior. While political

rhetoric aimed at the common good often masks, whether consciously or through self-deception, both self-interest and the interest of a particular class or locality, previous analysts who prided themselves on their "realism" have simply failed to see the genuinely communal motivation that prevails in certain contexts.

The danger in the next few years is that the new governments of Central Europe will duplicate only the West's highly visible adversary institutions, premised on conflict and designed to "aggregate," or sum, individual preferences, and will ignore our less visible, but no less real, deliberative institutions. They may also ignore their own potential to develop new institutions that encourage a quality of citizen deliberation surpassing any known in the West.

The new governments thus have two tasks. They must act quickly to foster aggregative institutions that settle issues of fundamental conflict fairly, on the basis of one person, one vote. And they must also act to provide what is not so common in the West — extensive forums for deliberation, in which citizens have a voice in determining the common good.

Keeping Adversary Procedures Fair

To legitimate the hard choices ahead, Central European governments must first protect their new "aggregative" institutions from corruption through bribes, stuffed ballot boxes, and intentional miscounts. Multiparty monitoring of elections, neutral investigative commissions, and swift, strong punishment for infractions will maintain confidence that the adversary procedure is fair.

More problematically, legitimacy in adversary democracy rests on the proposition that each citizen should count for one and none for more than one. Yet every democracy's formal aggregative process admits gross inequalities in power based on unequal economic and social resources. As a result, citizens at the bottom of the socio-economic scale often feel that, as one survey in the United States puts it, "People like me don't have any say about what the government does."

Free markets will soon give Central Europeans vastly different economic resources, and their social resources already differ dramatically. Democratic institutions will not have the same force of tradition behind them that they have in most Western democracies. If the countries of Central Europe cannot develop institutions that consciously guard against the excessive power of their new elites, they may find the legitimacy of their decisions severely undermined.

Central Europeans must also realize that majority rule works only in polities with many cross-cutting cleavages. When majority rule results in certain groups being outvoted again and again, democracies require corrective measures: proportional representation, federalism, and "consociationalism," i.e., the division of power and state-provided goods, like school and television time, in proportion to each group's percentage of the population. While such solutions do not provide equal satisfaction to ethnic and other minority groups, they still work better than winner-take-all majority rule.

Adversary democracy generates winners and losers. It therefore combines badly with state socialism, where there is only one arena in which to win or lose. As state socialist systems begin to adopt adversary democratic procedures, they need diversified political and economic systems, so that "apparatchiks" who lose in politics can become "entrepreneur-chiks" who win (or at least can win) in economics.

Indeed, moving toward adversary democracy means injecting large amounts of risk into previously risk-averse systems. The new governments in Central Europe will have to learn to live with uncertainty. But accepting uncertainty, losing control over outcomes, and being unable to guarantee the protection of one's personal interests will require from many citizens and bureaucrats an ideological, political, and psychological breakthrough.

Institutionalizing continual conflict requires tolerance of opposition parties. Yet after years of oppression by authoritarian systems, some activists in Central Europe and the Balkans can think only of revenge. In countries like Romania, where most people with talent and administrative experience have collaborated in some way with the old system, that impulse toward revenge may breed a rhetoric of character assassination that is bound to erode trust in any system of representation.

Citizens cannot easily be weaned from cynicism after decades of "facade politics," in which elites determined public policy behind a front of supposedly democratic institutions. Exposed to an array of charges and countercharges from the new democratic parties, Hungarian voters have already grown jaded. "All they do is make promises," says one worker. "And those advertisements on television, it's like a cabaret. I don't believe any of them."

To counter this legacy of pervasive cynicism, Western forms of aggregation through representation may have to be supplemented not only with the (mostly symbolic) devices of initiative and recall, but also with more participatory institutions, such as national and local referenda. Decentralizing decisions to the lowest possible level — instituting elections and referenda in schools, workplaces, villages, cities, and counties — would also provide experience in accepting conflict. As those who run in local elections and those who vote for them learn to lose on some issues but win on others, they should become more able to understand, and bear, losing nationally.

Fostering Deliberation

The procedural methods of adversary democracy are necessary to produce legitimate decisions in conditions of conflict. But they are insufficient to generate the individual transcendence of self-interest that hard decisions often require. Adversary democracy encourages participants to aim at winning rather than at finding a course of action that is best for the whole. It discourages listening. It lends itself to short time horizons.

Like an economic market, adversary democracy legitimates the pursuit of self-interest. Voters pursue their individual interests by making demands on the political system in proportion to the intensity of their feelings. Politicians pursue their own interests by adopting policies that buy them as many votes as possible. While this system of "politics as marketplace" ensures accountability, it also mirrors — indeed, encourages — a larger materialism. Candidates and their policies become commodities, selling themselves or being sold.

The dynamic of adversary democracy has traditionally made democracies incapable of the kinds of sacrifices that Central European governments are now asking of their citizens. National unity and national sacrifice for long-run ends have instead often required a strong, even dictatorial, leader. Yet revolutionary movements demonstrate that citizens will sacrifice even their lives when they believe that their sacrifices are for the common good. That conviction can arise not only from devotion to a charismatic leader, but also from faith in policies arrived at through deliberation, which command the loyalty of those who participate in creating them.

Throughout their past struggles, many dissident groups in Eastern Europe held together through institutions that fostered a common commitment to national goods. As one of my American friends concluded from talking with members of Solidarity, "The decision rule there is what is good for Poland." Much of Solidarity operated by *de facto* consensus, making decisions only after members had worked their way through a deliberative process that tried to encompass widely differing points of view. The experience produced unity in the struggle, widespread practical understanding of how to take many interests into account, and a consequent willingness to live with the results of decisions. This bottom-up practice in deliberative democracy may give Poland an edge over other newly democratizing nations in the use of democracy to make hard decisions.

Department of Defense

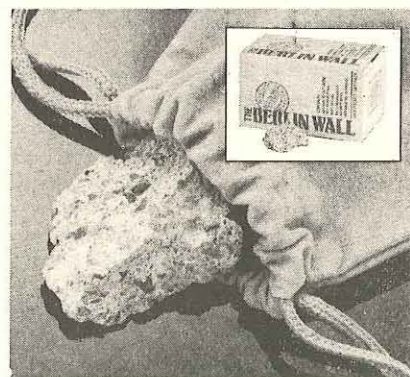


BERLIN WALL

AN HISTORIC ARTIFACT.

Own a fragment of history and celebrate a city's triumph with this authentic cul taken from the heart of the Berlin Wall. Your purchase will include a wall segment, soil carrying pouch, declaration of authenticity and an informative booklet. Boxed and imported by Hyman Products. (D.077) \$10. On view through Saturday at Metro Center, a 40 lb. segment from the British gate.

HECHT'S



Before and After. (At left:) U.S. Army scouts check activity on the Communist side of the Berlin Wall during a border patrol in 1980. (Above:) A newspaper advertisement for fragments of the Wall on sale in Washington, D.C., department stores during December 1989.

Whenever possible, participatory institutions should bring together citizens of opposing views in circumstances that reward mutual understanding and the accurate gathering of information. Deliberation among intellectuals, or even elected representatives, is not enough. In the United States, theorists have accordingly proposed neighborhood and workplace assemblies, referenda requiring two distinct votes separated by a period of deliberation, and "policy juries" formed from representative samples of citizens — all institutional means of nourishing deliberation at its citizen roots.

Each nation must work out the deliberative innovations, and the mix of adversary and deliberative institutions, that fit its own patterns of cleavage, its own history, and its own culture. In the long run, deliberative processes may offer the best hope of finding ways to handle not only class conflicts, but also the ethnic disputes that threaten to split several of the newly democratizing nations in Eastern Europe. While "consociational" and federal solutions can produce reasonably just allocations among groups, shifting citizen perspectives from class or ethnic interests to a long-run common good requires the transformations of self that deliberative processes make possible.

Jane Mansbridge is Professor of Political Science and a member of the Center for Urban Affairs and Policy Research at Northwestern University. Her first book, *Beyond Adversary Democracy*, from which many ideas in this article are drawn, was followed by *Why We Lost the ERA*, a study of the problems of deliberation in the social movement that advocated the Equal Rights Amendment. *Beyond Self-Interest*, a collection of Mansbridge's recent research on public-interested motivation, will be published this spring by the University of Chicago Press. The present article draws on the following sources: Benjamin Barber, *Strong Democracy* (Berkeley: University of California Press, 1984); Adam Przeworski, "Some Problems in the Study of the Transition to Democracy," in Guillermo O'Donnell, Philippe Schmitter and Laurence Whitehead, eds., *Transitions from Authoritarian Rule: Comparative Perspectives* (Baltimore: Johns Hopkins, 1986); George Schöpflin, "The Political Traditions of Eastern Europe," *Daedalus*, vol. 119 (1990); Valerie Bunce, "The Transition from State Socialism to Liberal Democracy," in Kazimierz Poznanski, ed., *The Great Transformation in Reverse* (Princeton: Princeton University Press, forthcoming).

Learning Not to Love Revolution

by George Friedman

For the past two centuries every revolution has wanted to serve as the model for all future revolutions. Since 1917, two regimes have laid claim to be the rightful heir of the revolutionary tradition. For most of that time, it appeared to reasonable observers that it was the Soviet Union that would serve as exemplar to the world. In a stunning reversal of fortunes, the Soviet model has fallen into disrepute, and most of the rebellious world appears to be taking its bearings from the American regime. It is the Statue of Liberty that moved the crowds in Peking and Prague rather than the Internationale.

While this is a very satisfying view of things, it should not be accepted too quickly. This is not because the American model is not superior to other models, but rather, because the world, and particularly those rising up against communist tyrannies, has not yet learned one of the fundamental teachings of the American revolution: Don't enjoy revolutions too much. They have not learned to expect only the bare necessities from politics and to seek the more sublime joys of life elsewhere.

Eastern Europeans still expect great things from revolution. Coming together in rebellion is seen as a great moment. They see their revolution as paving the way to a generally and radically improved human condition. This places them at odds with the modesty of the American revolution. In their great hopes for more than a mere "more perfect union," the crowds of Berlin and Prague still share much with their oppressors and less than they should with us. They understand revolution very differently from our founders; it follows that

the sorts of regimes they will found will be very different from our own, and, I think, terribly inferior.

When Revolutions Are Young

There is a certain ineffable sweetness about revolutions when they are very young. In the beginning, when they strike out against tyranny, they are poems to decency and community, promises of radical simplification. They are odes to joy more than exercises in political theory or action. Consider the words of Schiller immortalized by Beethoven:

Joy, bright spark of divinity,
Daughter of Elysium,
Drunk with fire we walk in
Thy celestial holiness.
Thy spell reunites
What custom has divided,
All men become brothers
Under Thy lingering, gentle wings.

This poem and Beethoven's symphony are not incidental to politics. Beethoven wrote the Ninth Symphony with the French Revolution very much in mind. Perhaps more immediately relevant, the Ode to Joy movement of Beethoven's Ninth is the anthem of the European Community, the Community that the Eastern Bloc now very badly wants to join.

Elysium was, in Greek mythology, the field on which the gods and those humans the gods favored, came together in peace and harmony. Schiller in his poem combines three themes. First, there is the promise of a pastoral redemption.

Second, the means are those of a fiery intoxication. Third, there is the secular vision of human brotherhood, the Elysian Fields brought to earth. In this fusion of pagan and Christian symbols, and of divine and secular principles, Schiller celebrates the central theme of the enlightenment: that men will become like gods in their power and perfection. And nowhere is this fire-drunken surge to perfection more practically visible than on the barricades of a revolution.

Young revolutions are festivals, celebrations of youth, bravery and innocence. Men and women, boys and girls, gather together with the simplest and noblest dream, that the wickedness of the past will end. Young revolutions are a universe in which good will would appear to be a sufficient basis for political life. In a way, revolution is a time when a new species of man already appears to have been born, possessing a new relationship to everything old and commonplace. Even in the most brutal of revolutions, this poetry of redemption permeates. Consider, in John Reed's *Ten Days That Shook the World*, his description of an old man, telling the young soldiers, "Mine, all mine now! My Petrograd."

At that moment, it was his Petrograd. He had lived in it when it had belonged to others, when he was the city's demeaned and exploited guest. He had joined with others against the manifest wickedness of his dispossession, and now the city was his. As with the sentiments of lovers, thoughts that seem absolutely true at the instant of expression, become false or banal, even a mockery.

The simple truthfulness of the old man's sentiment at the moment of the triumph of Bolshevism inexorably turns false. The sweetness of his sentiment becomes a mocking indictment of the revolution, as the words "my Petrograd" become a cruel joke. The moment at which the Russian revolution became a lie was when the sentiment "my Petrograd" had to be turned from an aesthetic celebration into a principle of political operation. What did it mean for a citizen to lay claim to his city? Such a question required sober reflection, and such sobriety is the antithesis of the revolution's joy. Revolutions do not fail because wicked men seize hold. They fail because the very practicality of governing is a betrayal of the revolutionary sensibility. Revolution is about the sublime and the sacred. Governing is about the prosaic and the profane.

In Paris in 1789, in Petrograd in 1917, and in Berlin or Prague or Bucharest or Peking in 1989, the men and the women in the streets did not see themselves as merely overthrowing the old. The act of coming together in the streets had created a new species of society, the community of the celebratory crowd. As Germans danced on top of the Wall, it appeared that all things were suddenly possible for Germans and humanity alike. Both on the highest and most ordinary levels, revolutions make the revolutionaries feel that the mundane profanity of everyday life has already given way to something new and unprecedented. As with all revolutionaries, those of 1989 want their glowing moment to suffuse everything that comes after.

America's Modest Revolution

An Eastern European intellectual was asked by a reporter about the sort of society he hoped to create. His answer, consistent with those of others, was apparently modest: he wished to borrow the best ideas from socialism and capitalism and combine them into something new, something suitable to his country. On the surface it was a reasonable answer.

Two things were striking about the answer. The first was that the question and answer always involved society rather than the regime. Society encompasses all human relationships while the regime confines itself to political ones. True

to the more radical revolutionary tradition, the Eastern Europeans remain committed to social restructuring, to creating a new society, instead of seeking to free people to live their private lives without demanding that they measure those lives against standards of social significance.

This raises the second striking point about the answer: that one was given at all. Another answer to the question might have been: "I haven't given it a thought. I personally plan to open a hardware store." But the intellectual had an answer. He intended to create a new and better world for others to live in. Unlike Marx or Lenin, the intellectual had no complex system of thought to guide him. But quite like them, the revolutionary of Prague or Berlin in 1989 was convinced that the power to reshape society was now his.

*Eastern Europe must learn to love
private life more than public. . . .
The revolution over, it is time to go
home, fall in love, raise children,
make money, and see the sacred in
the banality of everyday life.*

If the city belongs to the revolutionary, then he is morally obligated to do something with the city, to improve it. He cannot just go home to make a living. A revolution feels itself morally bound to improve the human condition as a whole, rather than just the condition of a single private citizen. To have replied: "I want to go home and make money" would have been a betrayal of the deepest moral principle of revolution.

Almost all modern revolutions have suffered from being both too beautiful and too ambitious. The one exception to this was the American revolution. Its very sobriety and modesty caused many to argue that it was not a genuine revolution at all. Its desire to found a regime rather than create a new species of man has caused many to dismiss the American example as an anti-colonial war that left the social order intact. It fell short of the spirited beauty expected of revolutions.

Our founders wished neither to found a new society nor to perfect the old. They sought merely to found a regime that would protect society from its own ambitions, leaving men free to find their own way in the world. Our founders sought to create a world in which men of modest vision could pursue their private ends in peace, entering public life only as necessary, and reluctantly. There is a vast difference between the right to "life, liberty and the pursuit of happiness," and "liberty, equality, fraternity." The former is a promise to individual men concerning their private lives. The latter is a promise of a new species of man with a new understanding of what it means to be human.

Learning to Value Hardware Salesmen

In 1917 and 1789 all eyes were on the capital city, first on the streets and then on the public buildings. The public's eyes never left those buildings, except in despair or terror, when citizens sought refuge in private lives far more distant from

Report from the Institute for Philosophy & Public Policy

public affairs than anything envisioned by our bourgeois founders. Our founders were not eager to go to the capitol to begin reforming the world. They were eager to go home to their plantations, law practices, and businesses. What went on in our public buildings never came close to telling the tale of what went on in America. The capitol was never the center of our society. We never really had a center, and therefore, we could never have a great, unifying moral project.

George Washington was not as interesting a man as Robespierre or Lenin, but then his heirs were not Napoleon and Stalin. It is in the banality of Washington that we can best understand the virtue of our regime. Although he was accomplished in many ways, Washington does not appear to have had great imagination in public matters. In his public life, he did what he had to do, reserving his imagination and zest for his private pursuits.

The energy of the American revolution went into business, church, and school, rather than into politics. When it did involve public life, it was more likely to concern one's village than national matters. Nothing great was expected from the central government. Going home to open a hardware store would not be seen as a betrayal of the American revolution, in large part because the American revolution did not draw its energy from the dangerously seductive power of the revolutionary moment. The American revolution, between the cerebral brackets of the Declaration of Independence and the Constitutional Convention, was a long and dreary war — long on pain and drudgery, short on glory and beauty. The main wish of the American revolutionaries was that the war should end so that they might go home in peace. One could long for Red October or 1789. Who could pine for Valley Forge or the cool deliberations of Philadelphia?

This is a lesson that a man like President Havel ought to ponder. Right now, all eyes are on Prague. During its peaceful revolution, great beauty and righteousness resided in Prague. Both the aesthetics of revolution and the realities of power

have converged on one place, the government buildings of Prague. If it goes on this way, the aesthetic sense will dissipate, and all that will remain will be the profane reality of centralized power. It will be centralized in two senses: in that power will be in the capital rather than in all of the small towns and cities, and more important, in that political life will be the central organizing sphere of society, rather than one limited sphere among many.

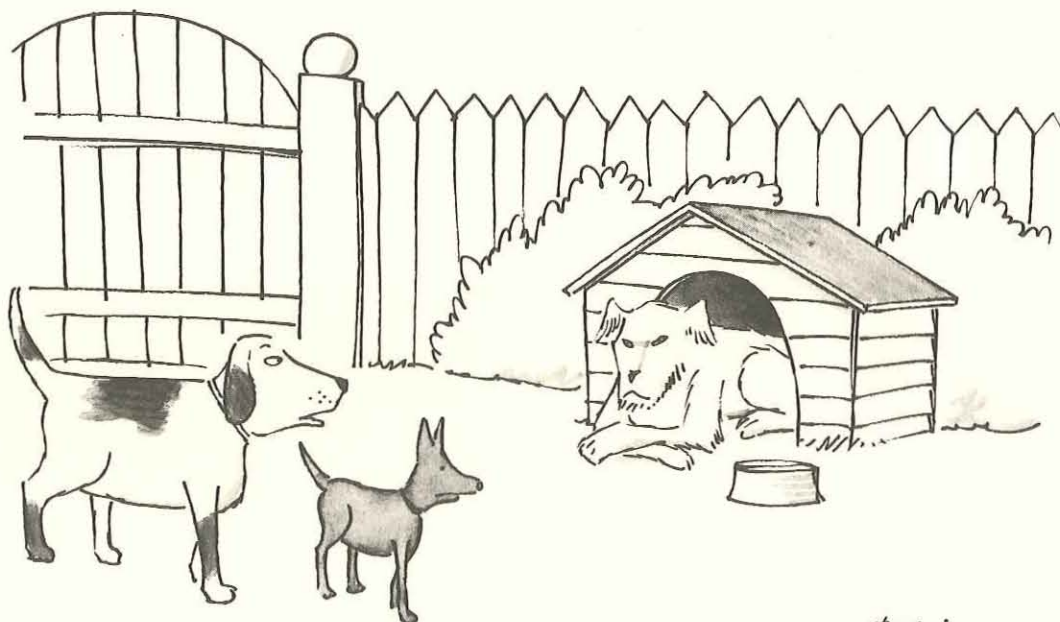
Havel is an artist. He surely saw the beauty of the Prague rising. It is not clear whether he sees beauty's danger. If Havel succumbs to the danger of picking and choosing as if he were an engineer, while seeing the state as society's engine, little will have been won. If Havel the artist faces the threat that his own revolution poses, and repudiates its beauty, if he learns from the American revolution to value the banality of the hardware salesman, then he might escape the eternal return of European tyranny.

Eastern Europe must learn to love private life more than public. After the orgiastic pleasures of the revolution, this will be a hard lesson to learn. Victorious revolutionaries are rarely modest men. It is not easy for the victorious to be modest. To go home to make a living for one's family, after having danced on the Berlin Wall with a million other brothers and sisters, may be more than anyone's soul can bear.

This is the most important lesson that Eastern Europe can learn from the United States. The revolution over, it is time to go home, fall in love, raise children, make money, and see the sacred in the banality of everyday life. Unfortunately, the lure of the public buildings in "my Petrograd" might prove to be irresistible, after the revolution.

George Friedman, Professor of Political Science at Dickinson College, is the author of *The Political Philosophy of the Frankfurt School*, as well as numerous articles on Marxist thought. He is currently writing a book about the coming crisis in U.S.-Japanese political and military relations.

Drawing by P. Steiner; ©1990
The New Yorker Magazine, Inc.



"His roots are in the Cold War."

The Possibility of Market Socialism

by John E. Roemer

Since the fall from power of Eastern Europe's ruling parties, during the amazing events of the autumn of 1989, most commentators in the West and the East alike have proclaimed the death of communism. If communism entails the dictatorship of a single party, the administrative and central allocation of most resources and commodities, and the ownership of all firms by the state, then I agree with the diagnosis. But such communism is only one possible variant of what can be called socialist society, in which firms are publicly owned and the state has considerable control over what Lenin dubbed "the commanding heights" of the economy. During the next seventy years, we may see the development of socialist economies that compare quite favorably with capitalist economies, not only with respect to the distribution of wealth and the eradication of poverty, but also with respect to the pattern of economic growth and political democracy. I say *may* see because I know of no forces ensuring that the kind of socialist society I shall describe here must come to be. On the other hand, I see no forces that make it impossible.

Many people believe that public ownership of firms implies the allocation of resources by a central body, without recourse to markets except perhaps at the retail level. But to me, public ownership means that the people, through a democratic political process, decide on how the social surplus will be used: on what investments the economy should make, and how profits should be distributed. So there is no reason why socialist economies cannot use markets to allocate resources. On my view, what sluggishness, inefficiency, and corruption have been seen in the economies of socialist states during the first seventy years of the socialist experiment can be largely explained by the absence of political democracy and the failure to use markets.

In brief, Eastern European countries can learn two things from the West: multiparty democracy and the use of markets to allocate resources. They would do well, however, to shun private ownership of capital.

Government Control of Investment

Market socialism is not a new idea. It was discussed by Oskar Lange in the 1930s, by Włodzimierz Brus in the 1970s, and by Alec Nove and others even more recently. The challenge is to design an economic mechanism in which (1) markets are used to allocate resources, including labor; (2) firms are publicly owned; and (3) government is able to control the commanding heights of the economy.

I take "the commanding heights" to be the pattern and level of investment, for investment is a capitalist economy's most volatile variable. This volatility explains the recessions and depressions that are characteristic of capitalism. Furthermore, the laissez-faire investment process does not achieve a socially desirable distribution of investment. In any market equilibrium, the total amount of investment must equal the total amount that citizens are willing to save. But people may not save as much as they should: they may underestimate their own needs later in life, or may suffer from weakness of will, or may not care sufficiently about future generations.

To compound the problem, many projects requiring massive social investment are public goods — the environment, for example, or a national public transportation system. Yet such investment is typically undersupplied by the market, even if people desire these goods. Economists like Lester Thurow accordingly argue that America's economic performance lags Japan's because the U.S. refuses to allow substantial government interference in the private sector's investment plan, whereas Japan relies on it. So public control of investment is insufficient to characterize socialism, although it is necessary.

In a recent work, my colleagues Ortuño and Silvestre and I have presented various blueprints showing how a market socialist economy would function. What follows is only a sketch.

Suppose that the government, through the public banking system, controls interest rates. It announces different interest rates at which public firms in different industrial sectors can borrow funds to invest, as well as an interest rate at which citizens can save or borrow. Unlike a capitalist economy, the state essentially subsidizes sectors in which it wants high investment by posting low interest rates for those sectors. It announces a high interest rate for citizens if it wants to encourage savings. Public firms are run by managers (elected by workers or appointed by government), who are instructed to *maximize profits*. Facing market prices and posted interest rates, managers use the profit criterion to decide upon their firm's level of investment.

Because of its interest-rate subsidy program, there will usually be a central bank deficit — assuming, that is, that the government aims at a total level of investment higher than would have been achieved in an unregulated capital market. For in this case it collects interest from firms that borrow at low rates and pays out interest to citizens who save at a high rate. The deficit is covered by taxation, which can be levied on either corporate profits or citizens' total income. A citizen's income consists of two parts: her wage income, derived from selling labor on a labor market whose prices are determined solely by supply and demand, and her social dividend, i.e., the fraction of corporate profits that she receives.

Can Market Socialism Work?

Can this economy work? It can indeed. For a given pattern and level of investment that the government wants to implement, there is a tax policy and set of interest rates consistent with a market equilibrium at which the desired pattern of investment is actually realized. In the market socialist economy, both citizens and firms act just as they would in a capitalist economy. Citizens sell their labor on labor markets for the going wage, and they spend their income as they choose, purchasing goods at market-clearing prices.

By the same token, firms maximize profits without government's directing either the composition of output or the allocation of goods to consumers. Firms are given no instructions concerning the amount of labor to hire, or goods to produce, or investment to make. Only one thing is forbidden: a black capital market. (For example, a firm able to borrow

from the central bank at 3 percent is not allowed to lend, at 5 percent, to a firm able to borrow from the bank only at 7 percent.)

Citizens' incomes are more equal in a market socialist equilibrium than a capitalist one because the profits of firms are distributed more equally. Granted, incomes are not entirely equal: differences due to differential values of labor remain. But the two chief goals of socialism — control over the investment process and a relatively equal distribution of income — are still achieved, even while all economic transactions are decentralized to the level of individual firms and consumers.

Objections and Replies

This view of market socialism will surely meet challenges. Let me try to anticipate and reply to some of them:

1. *Private ownership of firms, by shareholders who can trade their stock, is necessary to ensure that managers maximize profits. Managers of public firms in socialist countries only try to feather their own nests.*

It seems likely that managers of public enterprises (in the Soviet Union, for example) try to do as they are told. Yet what they are told to do isn't feasible. Managers are forced to barter and bribe for inputs they cannot obtain through official channels. When they are able to acquire what they need on markets and must sell their output to realize profits, a managerial culture will develop in which a successful manager will be seen as one who provides quality products and runs an efficient enterprise, as is the case in advanced capitalist countries. Banks, to whom firms must come for investment funds, will monitor the performance of managers much as they do in capitalist Japan today.

2. *The government will not hold public firms to hard budget constraints. It will bail out failing firms, thus preventing the market from fulfilling its function of eliminating inefficient operators.*

Government bails out big private firms in capitalist countries, too. So I imagine that large firms in both advanced capitalist and socialist economies will continue to be underwritten by governments. The other key to producing

efficiently run firms, besides managerial culture, is competition. The international market provides the needed competition if the sector is involved in international trade. In South Korea, for example, international competition has made publicly owned steel firms some of the most competitive steel producers in the world. If a sector produces goods that are not internationally traded, then domestic competition may be necessary to promote efficiency.

3. *In socialist countries, each sector will be dominated by one or a few large public firms. Firms will behave as monopolists or oligopolists, not as price-taking competitors.*

This point does require some amendment to the model I've proposed. Of course, we can say that the government should create a number of public firms in each sector whose technology is not characterized by large scale economies (natural monopoly). But there are other solutions that may be more realistic: encourage the formation of private firms, or worker-owned firms, or both. The latter could be subsidized by taxes. Drawn by the subsidy, some workers would choose to leave the public enterprise, using their knowledge of its technology to set up competing firms of their own.

4. *In a market socialist economy, innovation will be rare. Only entrepreneurs, with the lure of monopoly profits, create new commodities.*

If this is true, then the socialist economy would require not only worker-owned firms but possibly a private sector as well. Successful private firms should be nationalized, with proper compensation to their owners, after they reach a certain size. Their founders would still make personal fortunes sufficient to bring forth their entrepreneurial ideas.

5. *The economy you have described isn't socialist. The vast majority of citizens will still be wage workers with no control over production. Only an economy with democratically run firms can be socialist.*

Socialism isn't characterized by local ownership of firms by workers, but rather by public ownership, which means that citizens as a whole control the distribution of profits. An economy with only a worker-owned sector and without government intervention is not, in my view, socialist.

Democracy and Public Debate

Democracy, as we understand it today, is not simply a matter of majority rule. Democratic procedures supplement majoritarianism with constitutional restraints that, in turn, oblige majorities to submit their decisions to ongoing criticism. Not any "will," but only a will formed in uncensored public discussion, is (and should be) granted sovereign authority. The First Amendment, one might say, ensures that the electoral majority will remain a majority capable of learning. Stated differently, a legally guaranteed right of opposition provides an essential precondition for the formation of a democratic public opinion. Popular sovereignty is meaningless without rules organizing and protecting disagreement: consent confers no authority unless the possibility of unpunished dissent is institutionally guaranteed. Indeed, unanimity on political questions

may be a sign of irrationality rather than of rational agreement. As Mill wrote, "unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable." For the sake of collective rationality, "a perpetual and standing Opposition" must be kept up. This way of thinking implies that the government has an affirmative obligation to protect and even encourage the expression of rival views. In the absence of public disagreement, of a civil kind, policies are likely to be unintelligent as well as badly skewed toward private interests.

Excerpted from Stephen Holmes, "Liberal Constraints on Private Power?: Reflections on the Origins and Rationale of Access Regulation," in *Democracy and the Mass Media*, ed. Judith Lichtenberg (Cambridge: Cambridge University Press, 1990).

6. In order to know what interest rates to set, so that they can influence firms' investment decisions as they wish to, the planners in a market socialist economy must know all the parameters of their economy: the technologies of firms, the preferences and labor skills of citizens. But they can never have such information. The virtue of capitalist market economies is that no economic actor needs so much knowledge.

Although, strictly speaking, this is true, the central planners will at least have estimates of demand, good information about the skills available in the working population, and some knowledge of technologies. So while the equilibrium that markets find, given a fixed set of interest rates, will not be exactly what the planners were aiming at, it will come close. As the planners watch the markets, they will adjust interest rates, just as the Federal Reserve Board adjusts the discount rate in our own economy.

Conclusion

It is too soon to say that market socialism will emerge in an Eastern European country or in the Soviet Union. The nationalist turmoils in the U.S.S.R. make it impossible to predict the outcome of any experiments with political democracy and the widespread introduction of markets. As for Eastern Europe, the experience with "communism" in certain countries has produced a deep cynicism that may preclude market socialist experiments in the near future. The

conditions for the emergence of market socialism are therefore far from optimal.

Nevertheless, I think that market socialism is on the historical agenda, although it may first appear in Scandinavia or Western Europe. Despite the clamor about privatization in recent years, the last century has witnessed a pronounced secular trend towards the increasing participation of the state in the economies of advanced capitalist countries. The trend will continue, for in these countries the working class keenly desires economic security, and its members have come to expect much more than capitalism can provide. As the environmental movement grows stronger, democratic control of investment may well become the political order of the day.

John E. Roemer is Director of the Program on Economy, Justice, and Society and Professor of Economics at the University of California at Davis. His most recent book is *Free to Lose: Introduction to Marxist Economic Philosophy* (Harvard University Press, 1988). The sources cited in this article are: W. Brus, *The Market in a Socialist Economy* (London: Routledge & Kegan Paul, 1972); O. Lange, *On the Economic Theory of Socialism* (Minneapolis: University of Minnesota Press, 1938); A. Nove, *The Economics of Feasible Socialism* (London: Allen & Unwin, 1983); and I. Ortuño, J. Roemer, and J. Silvestre, "Market Socialism," UC Davis Department of Economics Working Paper, 1990.

Post-Communist Constitutionalism

by Karol Sołtan

Timothy Garton Ash had the right idea when he ended a recent article on the Revolution of 1989 by quoting the opening lines of *Pan Tadeusz*, a famous Polish poem by Adam Mickiewicz: "Lithuania, my fatherland! You are like health. / How much to cherish you only those can know, who have lost you." The nations now emerging from communism have learned to cherish more deeply the tradition of constitutional republicanism because they lost it under communist rule. Replace Lithuania with Europe, Ash suggests, and you will understand the politics of the Revolution of 1989. And Europe is above all a symbol for the liberal, the democratic, and the constitutionalist political and economic ideals.

Faith in these ideals shines through the events of 1989 in Eastern and Central Europe. In the West this faith is less intense after long years of the secure acceptance and successful functioning of independent courts, free markets, democratic politics, and other institutions of constitutional republicanism. In the East constitutional republicanism is now a deeply cherished faith, while in the West it is an institutional reality, accepted but perhaps less deeply loved. From the East we can relearn the value of constitutionalism, but its meaning must still be learned in the West. What the West, and the United States in particular, lacks in constitutionalist passion, it makes up for in the practical experience necessary for designing stable institutions. Those practical lessons will be especially important in Eastern and Central Europe when the

democratic faith runs into serious crises and begins to weaken.

A True Political Test

The moment of disillusionment is likely to arrive soon, especially where communism collapsed most dramatically. The nonviolent mass politics of idealism will be replaced by day-to-day politics: manipulation, pandering to special interests, interminable squabbling, senseless last-minute compromises. Disillusionment may also arise from economic failure, or from bitter conflict between nationalities and ethnic groups, or in response to old and new forms of hatred and irrationality. The idealists will adapt, or they will be outmaneuvered, or they will withdraw to better-protected higher terrain.

The moment of disillusionment will be dangerous — a true political test. Constitutionalist commitments will then either disintegrate, or they will be transformed and take root. At that moment it will not be enough to have in place a democratically elected parliament or a market. Such institutions by themselves have often been borrowed in the past, but have succumbed to dictatorship or degenerated, in new settings, into caricatures of their former selves. Constitutionalism is a broader answer to political disillusionment, not confined to a few institutions. It is a collection of strategies that limit the politics of narrow interest in order to serve larger ideals,

but it is also a living tradition committed to the development of new strategies as they become required.

The sequence of events in the American colonies at the end of the eighteenth century was in some ways prototypical of the constitutionalist experience. Institutions that spring up in moments of enthusiasm as the old order collapses become corrupt, ineffective, and conflict-ridden. As narrow interests and manipulative politics take over, enthusiasm is followed by despair. Thus, America's crucial constitutional moment was 1787, not 1776.

Revolutions are extraordinary in at least two ways. First, they represent an unprecedented breakdown of the restraining force of social inertia. Institutions that seemed eternal, that have survived for decades or even centuries, collapse in hours; and good seems to triumph over evil almost effortlessly. Second, revolutions bring an extraordinary activation of human idealism. For once optimism about human nature seems vindicated: even despicable toadies of the old regime turn into idealistic reformers; fear and greed temporarily recede. Masses of people gain a rare courage and a willingness to sacrifice for their shared ideals.

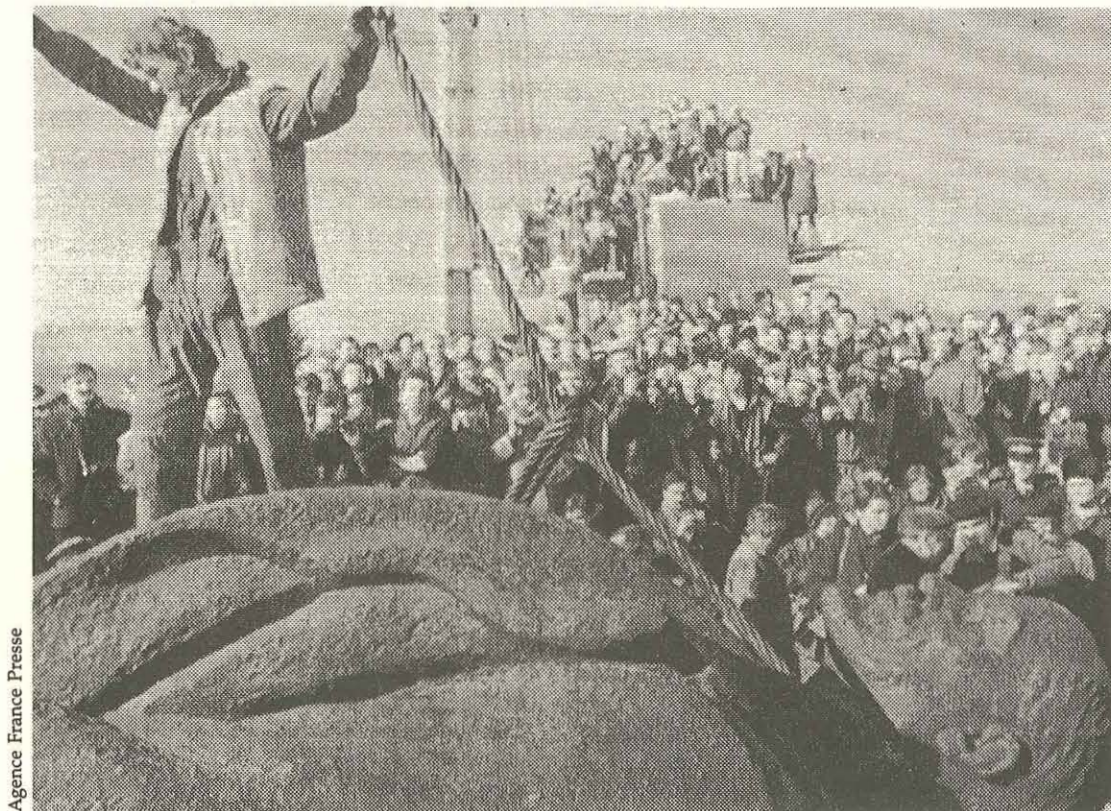
It will not last. The institutions emerging from the extraordinary moment of revolution will need to be modified at a later, more sober time. They will need to allow for the strength of institutional inertia and the weakness of idealism during periods of ordinary politics, as well as during periods of crisis and political despair. Revolutions need to be demystified and new institutions put in place that are adequate insurance against the vagaries of human nature. It is then, when the collapse of the old regime recedes in memory, that the serious business of establishing a self-governing republic begins.

The Democratic Ideal

The ideal of a self-governing republic — often called the democratic ideal — is sufficiently open-ended to give force to a wide range of political theories and programs, from radical participatory democracy to Madisonian constitutionalism. But I believe the central feature of the ideal is implicit in the very words *res publica*, "the public thing." The goal is to establish a set of institutions in which the power of narrow private interests, or "factions," as Madison called them, is limited so that the public good and impartial standards can more fully influence collective decisions.

The pursuit of the public good may require the protection of national unity, the establishment of justice, a guarantee of internal and external security, the promotion of national wealth, and the protection of individual rights, to cite only the goals the people of the United States set for themselves in their own constitution. It is arguably the main guiding principle of the U.S. Constitution to promote these goals by limiting the powers of faction. Much of American constitutional history can even be seen as the increasingly effective development of this basic idea. Thus, the special privileges of elite factions were weakened over the last two hundred years by the progressive democratization of the American constitutional system. More dramatically, the special privileges of the white faction relative to blacks were formally abolished; and they continue to be, however slowly and incompletely, eradicated in fact.

The basic institutional devices of American constitutionalism are designed chiefly to limit the power of faction, thus making more room for promotion of the public good. This is true of the separation of powers, checks and balances,



Agence France Presse

A crowd watches in Bucharest as workers, using a U.S.-built crane, remove a 30-foot bronze statue of Lenin.

the federal system, representative legislative institutions, and regular elections to all positions of power. In the economic sphere, the same is equally true of the market, a singularly effective method to limit the power of producers and force them to produce what consumers actually want to buy.

Few Americans would claim for these institutions more than limited success in the battle against factions. Indeed, the power of special interest groups is reflected in some of the deepest political and economic problems the United States now faces. The massive budget deficit and an incoherent system of taxation are just two prominent examples. Here, as elsewhere, the constitutionalist task is hardly complete.

The problem of faction is especially acute in the decadent stages of communism, when the transition to self-government and democracy begins. Ironically enough, the problem is often reinforced by a politics driven by a fear of faction bordering on clinical paranoia — a deeply irrational politics characterized by conspiracy theories, attacks on “the little people” (as in Shafarevich’s *Russophobia*, the current manifesto of Russian reactionaries), and by hatred of Jews, Masons, “speculators,” and other minorities. This exaggerated fear of faction and of conspiracies has always been especially common among members of groups that are themselves weakly organized. Unfortunately, in the transition from communism, virtually all groups are weakly organized. They form the pool of potential supporters for various forms of neo- and proto-fascism.

Institutional devices limiting the power of faction will also weaken this potential threat from the undemocratic right. Hence, as the new political and economic reforms proceed, it is essential to keep in mind the accumulated lessons of the constitutionalist tradition. Bringing back democracy, the market, and the rule of law will be only a beginning. Constitutional lessons are more general, and in the novel setting of post-communist societies they may well require institutional innovation.

In the East constitutional republicanism is now a deeply cherished faith, while in the West it is an institutional reality, accepted but perhaps less deeply loved. From the East we can relearn the value of constitutionalism, but its meaning must still be learned in the West.

Self-Limiting Social Movements

As the constitutional moment arrives in Eastern and Central Europe, the longing for a lost Europe will make itself felt. The desire to become *normal* societies again will make wholesale borrowing of Western (“European”) institutions a strong temptation. Institutional borrowing from the West also makes a relatively easy and reassuring first step of political and economic reform. Post-communist societies have suffered enough as guinea pigs for social experimentation. Simple borrowing is also gratifying to Western audiences, since it can legitimately be seen as a powerful vindication of Western

political traditions. It could even work to strengthen the constitutional faith in the West.

Nevertheless, a revived constitutionalism can flourish only if it becomes both intellectually and politically innovative. Institutional borrowing has often turned out badly in the past, and could easily do so again. Ten years from now the lesson from Eastern and Central Europe could well be once again about the fragility of liberal democracies and markets. And we could see more of this fragility in the West as well. Here, too, new institutional devices in a constitutionalist spirit are badly needed.

The lessons of Western experience can lead... to more than a simple extension of the sphere of market-based liberal democratic normality. As communism dies, it could give birth to a new constitutionalist form of social movement — one capable of giving real force to human idealism.

One such institutional innovation is at hand: a self-limiting broad-based movement of social reform, neither trade union nor political party. Organizations such as Solidarity, the Civic Forum, Sajudis, and the Ukrainian Rukh could all turn out to be temporary, of course, transformed in due time into ordinary Western institutions. But they could also remain as new additions to the constitutionalist lexicon.

They would be *constitutionalized* forms of revolutionary movements, self-limiting in their choice of both ends and means. As nonviolent movements, in the spirit of Gandhi and King, they would be self-limiting with regard to means. They would also have an opportunity to continue limiting their choice of ends. Instead of some large, elaborate, utopian program, they can continue to demand — again, in the spirit of Gandhi and King — only the correction of obvious irrationalities and injustices. This might well be the only way to focus effectively the limited moral energies of mankind. Self-limiting social movements, of the kind that spontaneously emerge as communism dies, could thus be the new organizational weapon to help us mitigate the effects of political disillusionment.

More generally, communism’s lasting achievement may lie in the cultural changes and institutional innovations that develop in the struggle against it and come into their own as communism dies. The lessons of Western experience can lead then to more than a simple extension of the sphere of market-based liberal democratic normality. As communism dies, it could give birth to a new constitutionalist form of social movement — one capable of giving real force to human idealism.

Karol Softan is Associate Professor of Government and Politics at the University of Maryland. He is now writing on constitutionalism in general and on the constitutionalist turn in Eastern and Central Europe in particular.

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

Acts that take from some to give to others, as so many government acts do, cannot be justified. . . . Those acts are naked takings, designed to help one part of the population at the expense of another.

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."

*What the modern vision fears. . .
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. . . .*

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.

The Staff of the Institute for
Philosophy and Public Policy

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-

*...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.*

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.

Announcing a New Volume in Cambridge Studies in Philosophy and Public Policy **Democracy and the Mass Media**

edited by Judith Lichtenberg

Cambridge University Press, 1990

\$44.50 hardcover; \$14.95 paper

Special 20 percent discount available June 1–December 31, 1990
for readers of *Philosophy and Public Policy*

Introduction

Judith Lichtenberg

1. **Liberal constraints on private power?: reflections on the origins and rationale of access regulation**
Stephen Holmes

2. **Liberalism and free speech**
David Kelley and Roger Donway

3. **Foundations and limits of freedom of the press**
Judith Lichtenberg

4. **Why the state?**
Owen M. Fiss

5. **Practices in toleration**
Onora O'Neill

6. **Access in a post-social responsibility age**
Carl Sessions Stepp

7. **Who decides?**

Frederick Schauer

8. **Four criticisms of press ethics**
Jeffrey B. Abramson

9. **Political communication systems and democratic values**
Michael Gurevitch and Jay G. Blumler

10. **Mass communications policy: where we are and where we should be going**
Henry Geller

11. **Content regulation reconsidered**
T.M. Scanlon, Jr.

12. **The rationale of public regulation of the media**
Lee C. Bollinger

13. **The role of a free press in strengthening democracy**
Sanford J. Ungar

To order, write to Cambridge University Press, 40 West 20th Street, New York, NY 10011. All orders must be prepaid. VISA and Mastercard accepted. Postage and handling paid by Cambridge University Press. ISBN 0-521-38122-3 (hb); 0-521-38817-1 (pb).

Established in 1976 at the University of Maryland and now part of the School of Public Affairs, the Institute for Philosophy and Public Policy was founded to conduct research into the conceptual and normative questions underlying public policy formulation. This research is conducted cooperatively by philosophers, policymakers and analysts, and other experts from within and without the government.

All material copyright ©1990 by the Institute for Philosophy and Public Policy, unless otherwise acknowledged. For permission to reprint articles appearing in this publication, please contact the editor.

STAFF:

Mark Sagoff, Director
Robert K. Fullinwider, Research Scholar
William Galston, Research Scholar
Judith Lichtenberg, Research Scholar
David Luban, Research Scholar
Douglas MacLean, Research Scholar
Jerome Segal, Research Scholar
Alan Strudler, Research Scholar
Robert Wachbroit, Research Scholar
David Wasserman, Research Scholar
Douglas MacLean, Adjunct Professor
Robin West, Visiting Fellow
Frances Harbour, Visiting MacArthur Fellow
Bonnie Kent, Research Associate
Kathleen Wiersema, Assistant to the Director

Institute for Philosophy and Public Policy
University of Maryland
College Park, Maryland 20742

Address correction requested.

THIRD CLASS BULK Non-Profit Organization U.S. Postage PAID Permit No. 10 College Park, Md.
