

## Reconciling Liberty and Progressive Government

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Libertarians with progressive sympathies (or progressives with libertarian sympathies) are confronted by a nagging conundrum: that individual freedom and the common-good, almost by definition, seem to be mutually exclusive. If we indiscriminately elevate individual free-will, we risk tragedy-of-the-commons issues; by contrast, if we indiscriminately enact progressive legislation for the common good, we run the risk of inflicting death by a thousand cuts on individual liberty.

A concept we may call "Progressive Liberty" is an attempt to reconcile the seemingly contradictory concepts of individual liberty and the common-good. Looking first at the "liberty" half of the phrase, America was founded, first and foremost, to preserve individual freedom from oppressive government. This part is nonnegotiable. America's founding documents - the Declaration of Independence and the Constitution - make the point clearly: the single irreducible value eclipsing all else under the American constitutional regime is liberty. The eminent historian Eric Foner explains, "No idea is more fundamental to Americans' sense of themselves as individuals and as a nation than "freedom" ... or "liberty," The Declaration of Independence lists liberty among mankind's inalienable rights; the Constitution announces as its purpose to secure liberty's blessings..."

Historian Bernard Bailyn reports that the most basic goals of the American Revolution were to "free the individual from the oppressive misuse of power, [and] from the tyranny of the state." To conceptualize, imagine if you will the "Google-Earth" feature of Google; except here, written answers to basic constitutional questions may be viewed in greater or lesser detail by zooming-in or zooming-out. Zooming-out to view the question, "What single value does the Constitution stand for?," from the widest possible angle, where all detail has been lost leaving only one answer to the question, the answer would read, "Liberty." Zooming-in, we could next read, "Equality," "Democracy," then "Property," and so on. These more detailed values are simply means to the ultimate end – which is liberty.

What to do when government intrudes upon liberty? The framers of the Constitution envisioned that the judiciary would play a key role in protecting liberty from majoritarian excess. James Madison, arguing in support of passage of the Bill of Rights before the First Congress, said, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive." Addressing a French correspondent, Thomas Jefferson wrote, "the laws of the land, administered by upright judges, ... would protect you from any exercise of power unauthorized by the Constitution of the United States." And in Federalist 78 Alexander Hamilton commented that "the interpretation of the laws is the proper and peculiar

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province of the courts.... If there should happen to be an irreconcilable difference between [the Constitution and a legislative act]..., the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”

This is something upon which judges and scholars from across the political spectrum can agree. Conservative icon Robert Bork, for example, has written that “there are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom.... Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.”

In practice, however, conservative ideology has latched onto the idea that the use of judicial review is “undemocratic” and “activist”; and will almost always constitute inappropriate “legislating from the bench.” What this argument ignores, of course, is that the whole *point* of the Constitution’s scheme of majoritarian government in the first place is to protect liberty and equal justice. As explained by Madison, Jefferson and Hamilton, the true original intent of the framers was that constitutionally-protected liberty and equal justice are *not* to be sacrificed to majority will.

When the Court fails to properly exercise its power of judicial review, liberty and equal justice suffer, because there is simply no other institution left to protect individual and minority rights. During World War I, for example, the Court upheld vast legislative prohibitions on speech; and during World War II it refused to curb executive forced-relocation and internment of thousands of innocent Japanese-Americans. America would look quite different today if the Court – largely under the leadership of Chief Justice Earl Warren, whose strong support of judicial review prompted President Dwight Eisenhower to grumble that his 1953 appointment of Warren to the Court was “the biggest damn-fool mistake I ever made” - had not eventually returned to checking the unconstitutional excesses of the democratically-elected executive and legislative branches.

As for the other part of the progressive liberty equation, how are we to understand how progressive government may proceed in acting for the common good? The first thing to understand is that, as compared to non-negotiable liberty, the “progressive” part of progressive liberty IS negotiable. In a democratic republic, it is the will of the people what sort of society they will have. So long as the government is not infringing on individual freedom, it can set widely varying policy - anything from a minimalist caretaker state to a more progressive social welfare model of the sort seen in Western Europe (or indeed, something more different still than either of these).

An energetic position, one that a progressive libertarian would favor, suggests that it is the government's duty to enact humane policy that looks out for people who can't help themselves, and that provides equal opportunity to all. Among other things, this means that government should guarantee that every man, woman, and child have access to basic healthcare. (Incidentally, the framers appeared to be “progressives” of a sort themselves, in that they advocated an energetic government. “Energy in the [government] is a leading character in the definition of good government,” Hamilton wrote in the Federalist 70. Madison agreed. “Energy in government,” he said in No. 37, “is essential to that security against external

and internal danger, and to that prompt and salutary execution of the laws, which enter into the very definition of good government.”)

Does this mean that the Constitution *mandates* such government involvement?

In a word: No. The Constitution sets up the republican form of the government and imposes strict limits on governmental infringements of individual liberty; but it leaves the details of social and economic policy to be worked out by the people through the democratic process. Whether the people prefer a Progressive Society, a Minimalist Society, or some other sort of Society, they control their destiny by voting for representatives who will legislate to that end. That's republican democracy: accountable majorities enacting policy; and if the majorities don't adequately reflect the people's wishes, others are elected who will. Then if at any time the democratically-accountable majority legislates in ways that inappropriately infringe individual liberty, the *Constitution* (as enforced by the Court) steps in. That's what liberty is about - limited government constrained by a Constitution that protects, above all else, individual freedom.

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Now that we have a definition for progressive liberty, let's look closer at the title of this paper, "Reconciling Liberty and Progressive Government." Specifically, how are we to know the threshold beyond which a progressive, energetic government may not go, lest it infringe upon constitutionally-protected liberty?

An excellent place to start (and perhaps end) is with the "harm principle" enunciated by J.S. Mill in his 1859 classic, "On Liberty":

*[There is but] one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, ... that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.... The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."*

Putting this into practical terms that government policymakers can apply, we might "think of the harm principle as operating in two steps," Professor Ian Shapiro suggests. "When evaluating a particular action or policy, the first step involves deciding whether the action causes, or has the potential to cause, harm to others. If the answer is no, then the action is in the self-regarding realm and the government would be unjustified in interfering. Indeed, in that case the government has a duty to protect the individual's freedom of action against interference from others as well. [The second step occurs] if, however, the answer to the initial query is yes, [in which case] different considerations arise. We are then in a world in which harm is being committed willy-nilly, and the question is: What, if anything, should the government do about it?," and it is up to the democratic process to work that out.

In other words, society may legislate – whether progressively or not – either when the legislation (a) simply does not affect individual liberty, and/or (b) when a person’s conduct in exercising individual liberty prejudicially affects, or harms, the interests of others. (Incidentally, some, such as Randy Barnett, would define this latter situation as not involving “liberty” at all, but rather as “license” (which is not protected by the Constitution); on the reasoning that liberty, by definition, cannot harm others). In either case it is open to discussion through the democratic process whether the common good will be promoted. So conceived, the society *may* strike a balance between liberty and progressive government.

It is important to re-emphasize Shapiro’s conclusion, however (perhaps to the point of tedium), that according to the Harm Principle, “short of the point at which a person's conduct affects the interests of no persons besides himself, there is no room for [memorializing into law any such policy discussion.]” Individual liberty prevails in such cases, not to be touched by government.

This last point is crucial, in light of government's unceasing, inexorable, and perhaps-inevitable tendency to interfere inappropriately in individual conduct. Alexis de Tocqueville presciently identified the danger of an overactive government in his 1830 masterpiece, *Democracy in America*, stating: “[In a maturing democracy,] a wholly new species of oppression will arise. Among citizens equal and alike, the supreme power, the democratic government, acting in response to the will of the majority, will create a society with a network of small complicated rules, minute and uniform, that none can escape. Ultimately, then, the citizens of a democratic country will be reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.” To some in America today, this scenario sounds uncomfortably familiar.

Once again, under our constitutional regime it is the role of the *judiciary* to prevent this sort of creeping tyranny from occurring. One difficulty, though, is that ever since 1937 the Supreme Court has applied a disproportionately deferential standard of review to government action - to the detriment of individual liberty. (This occurred largely as a backlash to the Supreme Court overstepping its bounds during the mid-1930s when it aggressively struck down FDR’s New Deal legislation. Throughout the rest of the 20<sup>th</sup> and into the 21<sup>st</sup> century, the Court has swung too far in the other direction by not going far enough in requiring government (particularly state and local government) to justify its actions that may potentially affect liberty interests.) A more deferential-to-*liberty* standard of judicial review is needed, perhaps modeled on the Court’s existing First Amendment “reasonable time, place and manner” doctrine, as I suggest in a 2007 *Louisiana Law Review* piece. This approach, already championed on a narrow basis by the Third Circuit Federal Court of Appeals in *Lutz v. York* in 1990, more accurately honors the Constitution’s core Liberty-first ideals, while also recognizing the proper constitutional role of government in maintaining law and order.

In conclusion, government is liberty’s servant in America. Government – and democracy itself - exists primarily to protect liberty, with the Constitution serving as the bulwark against inevitable government attempts toward overreaching. The framers understood that men are not angels and that power has the overwhelming tendency to corrupt, so they constructed a limited government of separated powers with the ultimate power reserved to the people to operate within their own self-imposed constitutional constraints.

That said, to the extent government action does *not* implicate liberty, the details of social and economic policy are to be worked out by the people through the democratic process. One can be a staunch supporter of liberty on one hand; while working actively through the democratic process to enact progressive, energetic policy. That, in essence, is progressive liberty.