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On the Foundations of Economic Liberty

by Roger Pilon

I. INTRODUCTION: TWO KINDS OF LIBERTY?

As the celebration of the bicentennial of our Constitution continues, we are coming increasingly to appreciate the connection between our economic liberties and our judiciary. It is a commonplace, of course, that enterprise has come under increasing restraint and regulation over the course of this century. In a review of yet another proposal to Federally charter the corporation, for example, L. E. Birdzell, Jr., writing in the bicentennial year of our independence, pointed to some 40 to 50 significant Federal statutes that "may reasonably be viewed as imposing requirements on corporate management in favor of employee, consumer, investor or environmental interests, ranging all the way to comprehensive regulation of entry, prices and services in much of the transportation, communication, energy, and banking industries."[1] The dozen years that have passed since that bicentennial have witnessed no appreciable measure of relief. On the contrary, in many areas the burdens upon enterprise have only increased, so much so that President Reagan, speaking from the Jefferson Memorial on the eve of last year's celebration of our founding, thought it fitting to call for an Economic Bill of Rights, which he later characterized as a "fundamental reform that sees to it that our economic freedom is every bit as protected as our political freedom."[2]

That the President was thus driven to distinguish economic from political freedom is a mark of our times, of course. Two hundred years ago one could scarcely imagine so peculiar a distinction, so entwined were economic and political liberty thought to be. Indeed, in the recently discovered working draft of the Bill of Rights, written by Roger Sherman in July of 1789, Article 2 declares that "[t]he people have certain natural rights which are retained by them when they enter into Society"; listed second in that Article, after rights of conscience but before rights of speech, writing, and publishing, are rights "of acquiring property, and of pursuing happiness & Safety,"[3] understood ordinarily as rights of pursuing economic well-being. In so conjoining economic and political liberties, as we would now speak, Sherman reflected simply the wisdom of his age. By way of evidence we need look no further than to John Locke, the philosophical father of our Revolution: "Lives, Liberties and Estates, which I call by the general Name, *Property*."[4]

There is more at issue here, of course, than a mere distinction, a semantic refinement. For behind this distinction is a set of ideas, a history of ideas—indeed, a whole vision that separates us from our forefathers. Yet the vision with which we are living today is increasingly being called into question: in economics, in law, in philosophy, the suspicion is developing that the Founders may have had the better of it—analytically, morally, and practically. A growing literature, pointing often to the opinions of our judiciary by way of evidence, is saying that along the way we lost our bearings.[5]

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II. OUR IDEOLOGICAL ROOTS: INDIVIDUALISM

To explore these issues of ideology more fully, albeit briefly, we need to begin at the beginning, at our beginning, with the essence of the Founders' vision, nowhere set forth more clearly than by Thomas Jefferson in the Declaration of Independence. In the space of a mere seven phrases the Declaration distills the moral, political, and legal vision of the classical liberals, beginning, not surprisingly, on a point of epistemology, that the conclusions that follow are asserted not as empirical, much less as evaluative, but as "self-evident" truths, truths of reason. Far from the stuff of a living, evolving conception, these are the truths that speak eternally and unchangingly to the human condition, transcending both time and circumstance. The moral truths come first, beginning with the premise of moral equality: "that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness." Then come the political and, by implication, the legal truths: "that to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed." Finally, to make it clear that political power derives from and remains ultimately with the people, the Founders point to the right of the people to alter or to abolish their government and to institute new government in its place.

As has often been noted, what we have in these few, revolutionary phrases is nothing less than the inversion of the ancient order. No longer would politics come first, ethics second.[6] No longer would we begin with the group, the individual deriving his meaning, and his rights, from the group. No, we would begin instead with the individual. It is the individual who first has rights, which he has by nature, not by government grant. Indeed, it is government that gets its rights, or authority, by grant, from the individual, who yields up to government whatever rights he does, rights to be exercised on his behalf.[7] Thus it is that governments derive their *just* powers from the consent of the governed.

A. Political Legitimacy: Grounded in Consent

This final point—that to be just, government's power must be grounded in consent—marked a critical insight. Political legitimacy, the Founders were saying, is not a function of results but of process. It is not from the good deeds it does that government derives its legitimacy: if that were the case then the King's rule too would be legitimate, provided only that he produced good results—indeed, would be more legitimate than democratic rule if the results produced were better. No, political legitimacy has nothing at all to do with consequences, good or bad, but instead has everything to do with process. As with any ordinary contract, the distribution of power that results from the social contract will be legitimate only if the parties consent to that distribution. How else could individual autonomy, the right of the individual to rule himself, be respected and preserved unless the individuals over whom political power is exercised have consented to that exercise?

B. The Limits of Consent Theory

But if political legitimacy depends upon thus preserving individual autonomy, if powers of government are legitimate only if consented to, then a moment's reflection will suggest how difficult it is to establish political power that is morally legitimate. Because the argument here has been long known, if not widely known, let me simply summarize it.[8] It begins by amplifying the points just made, that if a particular grant of government power arises from unanimous consent, it is legitimate: that, after all, is precisely what "deriving their just powers from the consent of the governed" means. The problem arises when there is less than unanimous consent, which of course is almost always the case in the real world. For even if a supermajority consents, we are still left with the basic question: By what right does that ma-

jority exercise power over the minority when the minority, by definition, has not consented? If consent is the foundation of political legitimacy, then political power exercised over a minority on behalf of the majority is simply illegitimate. Since the numbers per se carry no moral weight—we don't suddenly get legitimacy once we've gotten over the 50 per cent threshold—the majority is in no better position than the King when it comes to justifying its exercise of power over the minority.

The classical solution, of course, was by way of a social contract with two levels of consent. Turning once again to process, this solution provided that political power exercised with less than unanimous consent would be legitimate if but only if there had been prior unanimous consent to be bound by the outcomes of subsequent votes. We still need unanimous consent, that is, but only to get the government off the ground, to give it legitimacy in the first place. After that, whatever rules had been unanimously agreed to at the outset must be followed, including decision-making rules that enable subsequent adoption of other rules by less than unanimous consent. Thus on any given vote the minority could be legitimately bound by the result because it had previously agreed to be so bound. Indeed, this is precisely the theory that underpins our government, at least as between the states. Article VII of the Constitution reads as follows: "The Ratification of the Conventions of nine States, shall be sufficient for the establishment of this Constitution *between the States so ratifying the same*" (emphasis added). Satisfaction of this provision enabled the Constitution to get off the ground. But by implication, states not so ratifying could not have been bound by the subsequent decisions of ratifying states.

While this solution may have worked among the states, especially since all did vote to ratify, the problem it poses for individuals is of quite a different order: that problem, quite simply, is that in point of historical fact, no such prior unanimous consent by individuals can be located, not even in America, where we came closer to it than perhaps anywhere else in the world. Moreover, even if we could locate such primordial unanimous consent, if we take the individual seriously, as indeed we do, then the theory affords no solution at all to the problem of how to bind succeeding generations: those who in fact consented could be bound, but they could hardly bind their heirs.

Consent theory finds its last refuge, then, in the idea of "tacit" consent: even if we don't give explicit consent, this argument runs, by staying we implicitly bind ourselves. But the argument from tacit consent is plausible only if we don't press it. Once we do, the problem becomes apparent. For it amounts to the majority saying to the minority: "Come under our rule or leave." It amounts, that is, to the majority putting the minority to a choice between two of its entitlements: its right not to come under the rule of the majority—the very hurdle the majority has to overcome if its power is to be legitimate; and its right to stay where it is, free from the will of the majority. To argue otherwise, quite simply, is to beg the very question at issue, namely, how does the majority come to have authority, or legitimate power, over the minority? The argument from tacit consent, in short, is patently circular.

What this all comes down to, then, is not a little disturbing to those who have grown up with the belief that democracy is the final word in matters of political legitimacy. Democracy may indeed be the best word we have, but it is not the final word. For if legitimacy can be derived neither from results nor even, as a practical matter, from process, then we are left with the conclusion that government per se has a certain air of illegitimacy about it. Yet the Founders seem to have understood this point, however disturbing it may be to some today. As Professor William Stoebuck has written, Locke's social-contract theory, which says that "[g]overnment is a servant, necessary but evil, to which its subjects have surrendered only what they must, and that grudgingly, . . . was the accepted theory of government when the [Constitution] was being hammered out."[9] In sum, the Founders understood both the moral virtues and the moral limits of democratic rule.

C. The Solution: Limited Government

If government is a necessary evil, then, necessary largely because of the practical problems

that surround attempts to secure our rights in a state of nature,[10] but evil because of the impossibility of satisfying the consent condition that alone would make it legitimate, what follows is as straightforward as it is compelling, namely, that government should be called upon to do no more than is necessary to enable it to carry out its principal purpose, securing our rights. From considerations of morality, from respect for the moral right of every individual to be free to live his own life, we may call upon government only in a limited way: we must settle, in short, for limited government, for to do otherwise is to violate the rights of those who ask only to be left alone.

The world that emerges from this vision is also straightforward. It is a world in which individuals are left free to pursue their own values, to live their own lives as they think best, to chart their own courses through life, alone or in association with others, free from government dictate or interference, provided only that in the process they do not violate the rights of others, which it is the business of government to prevent. Notice that there is no distinction here between economic and noneconomic pursuits. Why should there be? Provided, again, that they respect the rights of others, individuals or groups are free to pursue whatever ends they wish—artistic, entrepreneurial, political, eleemosynary, worthy or foolish. That, after all, is what freedom is all about. Notice too how different this conception of government is from the conception so common today: government is a necessary evil, instituted simply to secure our rights, not an instrument through which to pursue social goals, even worthy social goals. I will say more about this contrast shortly. For the moment, however, I want to draw very briefly a still sharper contrast, between the classical vision and the vision that is its polar opposite.[11]

III. THE OPPOSITE IDEOLOGY: COLLECTIVISM

A. Rights as a Product of Development

That opposite vision stems from Karl Marx, of course, at least in its modern version. In 1987 I had the privilege of attending the 43rd Session of the U.N. Human Rights Commission in Geneva, where I served as the political adviser to the head of the American delegation. Representing the Soviet Union at one point in those proceedings was Boris Kravtsov, the Soviet Minister of Justice, who told the assembly that in his country "insuring human rights was one of the main aims of social, political, and economic development." In so putting the matter, Mr. Kravtsov clearly was speaking of a very different conception of rights and of social organization than we have thus far been considering here. Rights, on this view, do not belong to individuals as such; rather, they are "by-products," if you will, of development. Indeed, Mr. Kravtsov went on to say: "Recently we gave certain collectives the right to participate in these developments." And again, "we are giving unions the right to participate in state and social life." Like the *ancien régime,* the Soviet government gives rights. Individuals do not have rights by nature; instead, they get them from government. And "government," Article 6 of the Soviet Constitution tells us, means the Communist Party.

What is most striking about this vision, because most fundamental, is that it begins not with the individual but with the group, as represented by the government, which inevitably means the Party. For all its pretense to historical progress, the system is thus a throwback to the ancient order, with the Party standing in the place of the King. The Party "determines the general perspectives of the development of society"—I quote here from Article 6 of the Soviet Constitution. As development progresses, presumably, "rights" to jobs, housing, and so on get distributed by the Party, all according to the plan. Social and economic development are thus conscious undertakings, centrally planned

by the Party, in pursuit of which the individual is an instrument to be used.

B. Using the Individual for the Common Good

Setting aside the economic impoverishment that necessarily accompanies central planning, I want to focus here on the moral impoverishment this vision entails. It begins, of course, with the sublimation of the individual, with the assumption that the individual has no rights that his government has not first given him, and the implicit assumption that government has rights to give out in the first place. But in making rights a function of development, the burden, if rights are to be insured, is placed upon continuous development; for without it, there would be no rights. This means, however, that if individuals are to have rights they will be obligated to contribute to this centrally planned development, however out of their hands the decisions and planning of the development may be. What started out as a *right* to work, then, has suddenly become a *duty* to work. Indeed, as has often been noted, the central moral problem with socialism is that it *uses* people. It treats individuals as means, not as ends—to be used in carrying out the Party's development plan.

The socialist system thus violates the cardinal principle of ethics, as articulated by John Locke, by Immanuel Kant, by every great religion, that the individual is not to be used, is not to be treated as a means, but rather is to be treated as an end in himself. He has a right to be so treated, a right to what is his, a right to chart his own course through life, a right not to be chained to the pursuit of someone else's vision, whether Marx's, or Lenin's, or Stalin's, or the Central Committee's, or whoever's. To so chain him, to so use him in pursuit of the chimera of development is to deny him his right to choose for himself, to strip him of his inherent dignity, to deny him his fundamental right to be free. Is it any wonder that around the world people have fled and are continuing to flee from socialist systems? For in the end, individuals cannot but choose for themselves. Either they flee, often at great, even tragic personal cost, or they resign themselves to lives of quiet desperation, serving a master they did not choose, leading a life they could not wish.

Now I have drawn this contrast not because I believe that in the 200 years since our founding we have come close to the Soviet model—let me be clear about that—but because the contrast between the vision of the Founders and the vision that is Soviet reality sharpens our appreciation of the essential moral issues. At the same time, a number of disturbing parallels have developed over these 200 years, if not in scope at least in kind, so much so that a decade ago we heard much about the convergence thesis, the idea that in their social and political organization the two societies were converging. In this decade the convergence thesis seems to have waned—in part, no doubt, because there are many who have come to realize that the Soviet Union, by its very structure, is indeed an evil empire. Nevertheless, the not unrelated moral equivalency thesis remains very much alive in many quarters, the idea that as a moral matter there is not much difference between the two societies, suggesting a substantial measure of confusion as to what the moral issues really are. Let us return, then, to the Founders' vision to see what has happened along the way that might help to account for this confusion.

IV. THE DEMISE OF THE CLASSICAL VISION

A. The Democratic March: From Rights to Results

The first thing that happened, one could say, was the demise of the natural rights foundation on which the Founders' entire vision rested. David Hume, the Scottish philosopher who died in the year America was born, prepared the ground for that demise when he observed that from factual propositions no normative conclusions could be drawn,[12] an epistemological observation so startling that it awakened Kant from his dogmatic slumber, as he later put it. But while Kant was struggling mightily to

restore the rational foundations of ethics, Jeremy Bentham, the father of British utilitarianism, was declaring that talk of moral or natural rights was "simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts."[13] Thus began the long emergence over the course of the nineteenth century and into the twentieth of utilitarianism, rooted not in reason but in values, which held that acts, or laws, or policies were just not by virtue of their respect for individual rights but by virtue of their serving to produce the greatest good for the greatest number. In America, especially as we worked our way into the twentieth century, utilitarianism had its counterpart in law in what Professor Robert Summers has called "pragmatic instrumentalism," the conception of law as an instrument for accomplishing social goals.[14] The Progressive Era was the intellectual seedbed for this view, although it reached fruition only with the New Deal.

By itself, however, pragmatic instrumentalism in law, even coupled with utilitarianism in ethics, could not have brought about this shift from rights to results. For results-based rationales of policy and law have always failed to deeply satisfy: first, because of the impossibility of computing the utilitarian calculus, owing to the incommensurability of interpersonal comparisons of utility;[15] second, because even if we could compute that calculus, we are still left with Hume's dilemma, that from factual knowledge of the greatest good for the greatest number it does not follow logically that we ought to pursue that good; and third, even if we could compute that calculus and could make that logical leap, we are left with a nagging doubt, even absent a well-grounded theory of rights, that pursuing that good, especially when doing so would be at the expense of some among us, would not be right, might even violate rights.

Enter, therefore, democratic theory, which emerged through the nineteenth and twentieth centuries as the handmaiden of utilitarianism and pragmatic instrumentalism. What democratic theory purported to supply was both a solution to the problem of making the utilitarian calculus—we find out what the greatest good for the greatest number is by taking a vote—and a moral rationale—democracy is merely the moral right of each to rule himself writ large. Armed with the explanatory and justificatory force of democratic theory, or so we believed, we could shift our focus from rights-based to results-based policy and law, we could shift from limited government, instituted to secure our rights, to expansive government, engaged to pursue our goals—we could shift, in short, from government as a necessary evil to government as an engine of good.

B. The Institutional Manifestation: Judicial Abdication

Because this shift, at bottom, was from a reason-based vision to a will-based vision, it is not surprising that as an institutional matter the locus of the evolution was in the Congress and the Executive, the will-based branches of government. With the growth of the democratic impetus and the increase in the scope of the franchise, the pressure grew to enact "the will of the people." Standing athwart this democratic engine over the years had been the judiciary, the reason-based branch of government. But even the judiciary was not immune to the march of ideas, especially in the absence of satisfactory countervailing ideas, and so in time it too joined in the procession, abandoning reason to will, nowhere captured more clearly, perhaps, than in Mr. Justice Holmes' famous dissent in the infamous *Lochner* case—or so the conventional characterization would have it.[16]

In *Lochner,* you will recall, the Court found that a New York State statute regulating the hours of employment of bakery workers violated the liberty of contract protected by the Fourteenth Amendment to the Constitution, prompting Holmes to declare, in dissent, that the case was "decided upon an economic theory which a large part of the country does not entertain" and to offer further that his "agreement or disagreement [with the theory] has nothing to do with the right of a majority to embody their opinions in the law."[17] Having thus characterized the Court's decision as grounded not on a legal and moral but on an economic theory, having then disparaged the

Court for reading its economic philosophy into the Constitution, Holmes proceeded to read out of the Constitution all economic substance, saying that "a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire."[18] In so emptying the Constitution, Holmes ignored a number of its powerful substantive clauses, of course, from the takings, to the contracts, to the privileges and immunities, to the due process of law clauses, not to mention the histories of their enactment, which would have given additional weight to this substantive understanding.[19] And in place of a substantive reading he erected "the right of a majority to embody their opinions in law," which of course is nowhere to be found in the Constitution and indeed was carefully constrained by the Founders.

So powerful was this majoritarian impulse, however, that in time it prevailed even with the judiciary. By the time we reached *Carolene Products*[20] in 1938, following *Nebbia*[21] in 1934 and *West Coast Hotel*[22] in 1937, the distinction between economic and political liberties was finally established, as was the idea that these "different" rights should be subject to different levels of judicial review—the operational manifestation of the distinction. Once again, this distinction and its operational manifestation, like Holmes' "right of the majority," was nowhere to be found in the Constitution. But ignoring this and oblivious to the moral limitations inherent in democratic theory itself, yet driven by the unrestrained democratic vision, the Court simply abdicated its responsibility to protect the rights of the minority in their economic activities. Rights of democratic process would be protected, for this was what the unrestrained vision called for; but rights of economic substance would go unprotected, for deciding these was what the process was all about.[23]

V. THE MARCH OF IDEAS: RESTORING OUR ROOTS

Thus have we continued to the present, but there are signs that changes may be in the offing. In 1984, for example the Supreme Court decided a case called *Hawaii Housing Authority* v. *Midkiff*,[24] reversing a Ninth Circuit opinion that had found unconstitutional a Hawaii statute that permitted the state to condemn private land not so that it could be converted to public use but so that it could be purchased by private tenants who occupied it. What was noteworthy about this case was not the Supreme Court's opinion—far from it—but the Ninth Circuit opinion the Court reversed, which had held that "it was the intention of the framers of the Constitution and the Fifth Amendment that this form of majoritarian tyranny should not occur."[25] That language, together with the Supreme Court's opinion to the contrary, prompted an outpouring of critical comment, all of which may have played into the Supreme Court's more recent decisions in the land use area, at least to the extent that the Court remains susceptible to the march of ideas. I allude here to the *First English Evangelical Church*[26] and to the *Nollan*[27] decisions in 1987, both of which appear to be moving back toward a regime of restraint on public power over private individuals in the economic domain.[28]

And why should the judiciary not be susceptible to the march of ideas if indeed it is our reason-based institution. Earlier I noted that the rise of utilitarianism, pragmatic instrumentalism, and democratic theory was unaccompanied by satisfactory countervailing ideas. Well, that has changed in recent years. On the critical side, the idea that democracy affords a solution to the problem of deriving the utilitarian calculus has been exposed by the work of decision theorists, including those working in the area of public choice.[29] And in moral theory the idea that democratic rule is self-rule writ large has long been exploded, as earlier discussed. But on the constructive side also, much work has been done, aimed at developing the foundations for natural rights theory that admittedly were not there at our founding.[30]

All of which should encourage those judges who are disturbed by the march of the public domain to dip into this literature, the better to

gain the intellectual confidence that is helpful when standing against this march.[31] For the ultimate outcome of the march of the public domain is not a pretty picture, as earlier outlined. When all is public then by definition there is no private domain, no place to go to escape the public demand, as those who manage to flee such regimes will attest. By the design of our system we depend upon an unelected judiciary to brake the democratic engine, to protect the right of the individual, alone or in association with others, to live his own life, free from tyranny, free even from majoritarian tyranny. That was the original vision. It continues today to be the only vision that can ultimately be justified. □

1. Birdzell, "Constitutionalizing the Corporation: The Case for the Federal Chartering of Giant Corporations," 32 *Bus. Law.* 317 (1976).

2. Remarks by President Reagan to the citizens of Port Washington, Wisconsin (July 27, 1987). White House Press Release.

3. "Handwritten Draft of a Bill of Rights Found," *The New York Times*, July 29, 1987, §A, at 1.

4. J. Locke, *The Second Treatise of Government* §123 (P. Laslett ed. 1966).

5. *See, e.g.*, B. Siegan, *Economic Liberties and the Constitution* (1980); *Economic Liberties and the Judiciary* (J. Dorn & H. Manne eds. 1987); *Public Choice and Constitutional Economics* (J. Gwartney & R. Wagner, eds. 1988).

6. *Cf.* Aristotle, *Nicomachean Ethics*, Bk. I, ch. 2.

7. *See* R. Nozick, *Anarchy, State, and Utopia* 6 (1974). *Cf.* the text at note 3, *supra*.

8. *See* Nozick, *supra* note 7; R. Wolfe, *In Defense of Anarchism* (1970).

9. Stoebuck, "A General Theory of Eminent Domain," 47 *Wash. L. Rev.* 553, 608 (1972).

10. These practical problems are surveyed in Locke, *supra* note 4, and Nozick, *supra* note 7.

11. The contrast that immediately follows draws from my monograph *Human Rights and Politico-Economic Systems*, the Cato Institute, Washington, D.C., 1988.

12. D. Hume, *Treatise on Human Nature*, 469–70 (Selby-Bigge ed. 1888).

13. J. Bentham, Anarchical Fallacies, in 2 *Collected Works* 501 (Bowring ed. 1843).

14. Summers, "Pragmatic Instrumentalism: America's Leading Theory of Law," 5 *Cornell L.F.* 15 (1978).

15. The classic attempt was by Henry Sidgwick, *The Methods of Ethics* (7th ed. 1907); *See* A. Donagan, *The Theory of Morality* (1977).

16. *Lochner* v. *New York*, 198 U.S. 45 (1905).

17. *Id.* at 75.

18. *Id.*

19. See especially Siegan, *supra* note 5; R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

20. *United States v. Carolene Products Co.*, 303 U.S. 144 (1938).

21. *Nebbia* v. *New York*, 291 U.S. 502 (1934).

22. *West Coast Hotel* v. *Parrish*, 300 U.S. 379 (1937).

23. For a contemporary version of this view *see* J. Ely, *Democracy and Distrust* (1980).

24. 467 U.S. 229 (1984).

25. *Midkiff* v. *Tom*, 702 F.2d. 788, 790 (1983).

26. *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles, California*, 107 S. Ct. 2378 (1987).

27. *Nollan v. California Coastal Commission*, 107 S. Ct. 3141 (1987).

28. For an outline of a resolution of the takings question *see* my "Property Rights, Takings, and a Free Society," 6 *Harv. J. L. Pub. Policy* 165 (1983).

29. *See, e.g.*, K. Arrow, *Social Choice and Individual Values* (2nd ed. 1963); Riker, "Implications from the Disequilibrium of Majority Rule for the Study of Institutions," 74 *Am. Pol. Sci. Rev.* 432 (1980); and the classic by J. Buchanan and G. Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962).

30. *See, e.g.*, A. Gewirth, *Reason and Morality* (1978). *Cf.* R. Pilon, *A Theory of Rights: Toward Limited Government* (1979) (Ph.D. dissertation, University of Chicago). For an application in the area of economic liberty, *see* Pilon, "Corporations and Rights: On Treating Corporate People Justly," 13 *Ga. L. Rev.* 1245 (1979).

31. I have discussed the issues of judicial review more fully in "On the Foundations of Justice," 17 *The Intercollegiate Rev.* 3 (1981); "Legislative Activism, Judicial Activism, and the Decline of Private Sovereignty," in *Economic Liberties and the Judiciary*, *supra* note 5, at 183.

Overbearing Majorities

IDEAS ON LIBERTY

"Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its Constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents."

—JAMES MADISON, *in a letter to Thomas Jefferson, October 17, 1788*