

Liberty, Democracy, and the Right

I am mystified by the claim that the long-standing libertarian critique of democracy furnishes aid and comfort to conservatives who display a taste for populist authoritarianism. Let me say at the outset that the libertarian critique has nothing to offer those who would impose legal or social disabilities on racial, ethnic, religious, and other minorities. If white supremacists see something helpful here, they are mere opportunists who would find something helpful to their cause in *anything* they looked at.

Right off the top we may ask where is this right-wing antipathy to democracy. On the contrary, I see a right-wing *embrace* of democracy even in the age of Trump. (Rush Limbaugh has long called himself the “doctor of democracy.”) Which branch of government have conservatives all of all stripes railed against most vigorously for decades? It’s the judiciary, especially the U.S. Supreme Court. And what have the courts done to make conservatives so angry? They have invalidated actions of legislators — the supposed elected representatives of the people. Robert Bork and Antonin Scalia were not the first conservatives to inveigh against unelected judges for vetoing the will of the people as expressed through the democratic branches of government. Bork, whose defeat at the hands of Democrats as Ronald Reagan’s nominee for the Supreme Court, energized conservatives with his articulate defense of — wait for it — majoritarianism. Libertarians opposed him for that reason. I once heard Scalia say his job was not to strike down legislative acts that were unconstitutional, just those that were “*really* unconstitutional.” (I did not add the emphasis.)

(We note here in passing that public choice analysis demonstrates that majority rule is in fact a chimera because special interests, as a result of collective-action problems among other things, are better positioned than the unorganized masses to achieve decisive clout over policymaking. Moreover, representative government was devised as a scam to defuse public opposition to what they’re rulers were doing.)

By pointing all this out, I do not deny the authoritarian element on the right, which Trump has brought to the forefront. There’s an unappreciated connection among democracy, populism, and authoritarianism, which Hayek noted in *The Road to Serfdom*. Democracy is inevitably slow and messy; it can bog down in endless debate and factionalism. Then, under certain circumstances, it can produce a strongman who condemns the dithering and promises swift action to carry out the “will of the people.”

In contrast to conservatives, so-called liberal Democrats typically applaud court interference with legislatures, including Congress. (Remember, among others, *Brown v. Board of Education* and *Roe v. Wade*.)

So who are the *democrats* and who are the anti-democrats? Are libertarians responsible for the Democratic Party's support for judges who strike down democratically enacted laws?

To be sure, both "liberals" and conservatives are opportunists. They support judicial activism when it suits their agendas and oppose it when it does not. And, as Ilya Somin notes, each side tries to keep the other side's supporters from expressing themselves democratically, for example, through gerrymandering. But neither has been influenced by the libertarian critique of democracy.

Still, it is conservatives who make opposition to the courts their signature issue — to the point of being willing to elect any Republican president on the grounds that judicial appointments matter above all else.

It is libertarians (such as Randy Barnett) who have consistently espoused "principled judicial activism" over the conservatives' beloved "judicial restraint." Principled judicial activism is the maxim that judges should refuse to defer to the people's legislatures when freedom is at stake. It is otherwise known as the presumption of liberty.

More generally, progressives, such as those who dominate the Democrats today, have long favored anti-democratic entities like independent regulatory agencies, which have proliferated since before the Progressive Era. On the other hand, populists, in their anti-elitism, are more prefer rule by elected assemblies to rule by unelected experts.

Moving on, we must consider whether radical libertarianism provides ammunition to conservatives. Somin notes that the libertarian insistence on robust property rights cannot have emboldened the right because the right has become increasingly less interested in property rights. Oh sure, conservatives may invoke property when it lines up with their prejudices, but they are more than happy to jettison it in other issues close to their hearts. I've yet to hear an advocate of the planned wall along the Mexican border demand that it be built without eminent domain. The same goes for the various energy pipelines about which they are so excited. Property rights also don't figure in their enthusiasm for cracking down on immigration, legal and illegal. (Why do I need government permission to hire, sell to, or rent to an immigrant?)

If conservatives have been inspired by the libertarian commitment to property rights, then they have badly misread the fundamental works of the most influential libertarians of our time.

A debate of sorts has opened between Somin and Will Wilkinson over whether property is at the heart of the libertarian critique of democracy. Wilkinson blames the "libertarian theory of ironclad 'natural' property rights" for bolstering the allegedly anti-democratic right. We've already seen the problem with that claim. Moreover, Somin correctly points out that much of the libertarian critique of democracy stems from other concerns, such as

the Hayekian knowledge problem and public choice incentive problem. That's true, but property rights remain a major objection to majority rule. What's attractive about a system that permits a majority of voters to take someone's justly acquired belongings or to anoint politicians who promise to do so? (Among the better motivations for the U.S. Constitution was the concern that unrestrained state legislatures could confiscate people's land.)

Property, knowledge, and incentives aside, we have grounds to question the legitimacy of democracy the moment we encounter Bastiat's insight that no group can have rights that are not possessed by the individual members. Since that is the case, no majority may impose anything on others that individuals may not impose on them. If that invalidates taxation and the state, so be it. Of course, this insight also invalidates the authoritarianism that the right wing seems more and more disposed to favor.