

4-1-1945

## Collectivism and Constitutional Liberty

Kenneth C. Cole

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Constitutional Law Commons](#)

---

### Recommended Citation

Kenneth C. Cole, *Collectivism and Constitutional Liberty*, 20 Wash. L. Rev. & St. B.J. 73 (1945).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol20/iss2/1>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

# WASHINGTON LAW REVIEW

and

## STATE BAR JOURNAL

---

VOLUME XX

APRIL, 1945

NUMBER 2

---

### COLLECTIVISM AND CONSTITUTIONAL LIBERTY

KENNETH C. COLE

Most of the current discussion of collectivism (by which is meant all varieties of a state controlled economy) tends to center upon the question of its efficiency. Advocates of "free enterprise" have consistently depreciated the capacity of a socialized economy to produce goods as cheaply as a capitalist economy. But whether socialism is, or is not, conducive to an efficient economic order, it represents a political order in which power may become so concentrated as to be a threat to liberty.

It is quite true that this danger may easily be over emphasized. We know that an economic order in which state interference is reduced to a *minimum* certainly does *not* preserve liberty. Hence it cannot be inferred that liberty is in inverse proportion to the amount of government interference. Nor can it be inferred without reservations that power always corrupts.

These were misconceptions peculiar to classical 18th century individualism, and it has been the legitimate function of 19th century liberal thought to correct both the juridical and psychological postulates of the natural rights school. It has been pointed out, for example, that the kind of liberty which results from a doctrinaire approach to free-contract is an *abstract* liberty which is of no help to the party in a poor bargaining position. And it has also been pointed out that an accretion of power may heighten the sense of responsibility of its possessor. So in both respects a good job has already been done in counteracting the atomistic tendencies of old-fashioned individualism and in laying the basis for democratic government which is also strong government.

But it must still be insisted that this new doctrine be accepted as a corrective and not as a substitute for the old, for it is just as bad to go to one extreme as to the other. It is simply not true, for instance, that a legal order can afford to drop the postulate of free will entirely. Thus, if we say that real liberty results only when the *interests* of the individual instead of his *freedom of choice* are protected by the law, there is an end to liberty. His interests will have been determined for him by a paternalistic government.

And if we assume that human nature is such that ever-widening discretion for the magistrate means ever-widening scope for social justice,

there is an end to government by law. A Puritanical suspicion of power has been displaced with a naive naturalistic faith in the goodness of one's fellow man which simply invites arbitrary government.

We must be very careful, therefore, not to accept easy generalizations tending to inflate a partial and relative truth into an absolute guide for political action. Concentrated power is still a threat to a free society even after all the necessary concessions are made to administrative efficiency and social solidarity. It is not easy, of course, to specify the point at which this threat is likely to materialize. But it is clear that we shall reach and pass it in due course if present trends are projected sufficiently far. For example, we are already committed to what Walter Lippmann has called the "New Imperative" in government, *i.e.*, the principle that government must not permit economic depressions to run their full course in widespread liquidation of debtors.\*

Following the same general drift, it is evident that the use of government credit to iron out business cycles leads to the multiplication of government regulation of business in order to make sure that business will not get itself in another similar jam in the future. In other words, some collective agency will have to the *planning* for production if good public money is not to be thrown after bad. Planning leads to control of labor and investment as well as prices and services. It means, in fact, that the regulatory functions of government which we have become familiar with over quite a long period will become managerial functions. These managerial functions may well gravitate into the hands of a bureaucratic hierarchy destructive of local government powers. A vast army of public servants under centralized control will make a two party system unworkable. The absence of organized opposition plus the expertness required of the administration will make the latter scornful of public opinion. The enforcement of a mass of minute regulations will entail the brutalization of punishment. The elimination of property rights will bring about the decay of personal rights, and some sort of dictatorship is not far in the offing.

It would be unduly alarmist to state that these things are inevitable. But the confused state of the public mind with respect to the relation between democracy and collectivism may well permit us to drift in the manner just indicated. So there may be some virtue in analyzing certain glittering generalizations which serve to conceal the divergences between them.

One of these easy generalizations is that equalitarian measures are always "democratic." Now the leveling of all social barriers between individuals and classes is, indeed, always democratic in the sense of a

---

\* Security, in this sense, was undertaken by Mr. Hoover before Mr. Roosevelt assumed office, so we are not dealing with a program peculiar to the Democratic party.

social dynamic. Uniformity of social circumstances is one of the means of inspiring people with a sense of community—a feeling of common devotion to a common cause. But whether it is also democratic in the sense of a rational and empirically free society depends on other things.

If, for example, political leadership has already become highly personalized, equalitarian measures may operate as a means of breaking down local centers of loyalty as incubators for a challenging leadership. In other words, the elimination of a graduated social system is a well-worn device by means of which a dictator makes use of democratic sentiment as a means of insuring himself against competition. Absolutism is as much the enemy of aristocratic special privilege as democracy.

The most perfect "equality" for the peoples of the ancient world was brought about in 212 A.D. by the Emperor Caracalla when he decreed a universal Roman citizenship for all persons in the Empire. The path to Tudor despotism in England was strewn with the wrecks of noble houses. And the totalitarian governments of the present day have systematically fostered equality by breaking down traditional distinctions between different groups in the population.

Hitler's version of equality, to be sure, is reserved for persons of what he calls Germanic race. But let us not forget that there were other respects in which he pursued a policy which looks beautifully equalitarian. In fact, no democratic reformer in education ever moved faster than did Hitler to remove caste from the great universities. The Republic tried to abolish the aristocratic *corps* with very indifferent success. Hitler abolished them overnight. Equality is a doctrine which both democracy and dictatorship employ. One may have to scrutinize a particular situation carefully to see which end equalitarian measures are calculated to serve.

Economic equality, like social equality, is a Janus-faced notion. We are frequently told that economic democracy is a necessary complement to political democracy, which is true enough within limits. But it is also true that economic democracy means the elimination of one substantial prop for the individualism associated with political democracy. Thus, individualism in property relationships is necessarily condemned by all brands of socialists.

Now it is all very well to say that we don't want this kind of individualism anyhow because the only kind worth having is an individualism in *being* instead of *having*. And it is undoubtedly true that the latter is a relatively crude product. On the other hand, it is doubtful whether the average man can be expected to find expression for his personality in abstract creations of the intellect. Short of the millenium (which shows few signs of arriving) the average man will find this expression through the manipulation of things which he owns.

But the most significant *caveat* to enter with respect to economic democracy is the fact that even the most abstract freedoms have had their only development in close conjunction with the property freedom. Hence those who suggest that what are called "human" or personal rights may be saved while discarding property rights are not very convincing. They forget, for example, that the vested rights of property were the antecedents of all English liberties, and they indulge a very dubious hope when they assume that our most abstract liberties no longer derive sustenance from our most concrete liberties. As a matter of fact, judicial maintenance of free speech and religion has frequently leaned heavily on the incidental deprivation of property without due process.

Property, it is well to remember, is a form of power. It was once indistinguishable from public or political power. In the hey-day of capitalism it became a form of economic power which threatened to eclipse public power—a circumstance which the liberals of that period were right in denouncing. And the liberals of the present day should be among the first to recognize that the power of property is the most effective check upon political power.

It is such actual checks on power that socialization tends to do away with. And this brings me to what is perhaps the most crucial question of all: namely, what checks upon power will be left in a completely socialized economy? It is one of the favorite assumptions of current liberalism that democratic electoral procedures will provide complete assurance that power will not be abused. As to this, there are several observations. In the first place, I believe it is significant that constitutional government has never anywhere survived on such a thin diet. Historically, checks and balances and not popular elections have been the most conspicuous means of preserving liberties. A sharing in power by organs representing different interests, or by strong local governments, have furnished the traditional checks on absolutism. Socialization inevitably sets in motion strong forces which first sweep away these checks and balances and then tend to sap the foundations of popular government itself.

Let us see whether these dire forebodings have any basis in fact. It is relatively easy to show that our traditional checks and balances have been already weakened. For example, our national legislature has declined in influence as compared with the executive. In part this is only illustrative of the periodic ups and downs in this relation. But it is also true that in a socialized economy legislation is largely a matter of setting up executive agencies to regulate some phase of our economy. Representatives of the executive write this legislation in the first place, and, much more important, they make the detailed regulations which affect the citizen directly. In short, under our system an executive establish-

ment, with the greatly increased functions imposed upon government by socialism, cannot be balanced by the legislative department.

Similarly in the case of what we used to call states' rights. These, too, have been in growing eclipse for a generation. This is mostly because effective regulation of business must be standardized over the entire area in which business operates. It is also because the federal government has the *money* to spend, and state programs of various kinds have to be carried on in accordance with instructions from Washington if they are to receive this all-important federal aid. Even today, therefore, there is not much real division of power between the states and the national government. And if public ownership becomes the order of the day, there won't be any. There is some chance for *two* public authorities to share control of *private* enterprise. There is no chance for two governments to share control of public enterprise.

But there are other more ominous, if less obvious, possibilities in increasing socialization. We may, for example, easily go so far in our attachment to the cult of the expert in government that government by the people will become quite meaningless. Consider several hundred government agencies with the highly technical functions required to direct the national economy. Consider several millions of officials called upon to determine in the utmost detail what is good for their fellow citizens. Unless we are careful to set up lay bodies for consultation purposes at all key points in administration the bureaucratic mind will have a field day at the expense of that public opinion which democracies are supposed to cherish.

Not only this, but it is also true that an executive establishment having a high percentage of the population in its direct pay and millions more dependent on its bounty could easily wreck our two-party system. Bear in mind here that I am not implying that bureaucrats conspire to any such results. Indeed, most of them assume in all sincerity that their new kind of government which manages everything as a public trust will be exposed to the traditional democratic criticism from an opposition party. And they also assume, no doubt, that the opposition party will alternate with the government of the day to provide fairly frequent changes in government personnel.

But these assumptions leave the practical side of politics out of account. As a practical matter, an opposition party must have something to feed upon. It takes money and influence to run a political campaign and if the government of the day has its hands on all the economic resources of the country as well as a vast army of job holders, what real prospects has an opposition party?

Some good people think, of course, that the one-party systems of the European dictatorships represent merely the personal ambitions of bad men who happened to get into power in those countries. Well, far be

it from me to deny that the one-party monopoly is an important technique of dictatorship. But it is also worth bearing in mind that what we call the party *system* has never existed under any other regime than the liberal-democratic regime. And the probable reason is very simple: Only a liberal-democratic regime leaves enough power outside the clutches of official personnel so that an organized opposition, which is also a legal opposition, can flourish.

The moral of what has just been said is that there are many characteristics of arbitrary government which cannot be dismissed as bad policies peculiar to the dictators. They are already implicit in many socialistic developments which appear innocent enough on their face. And there is another example of this in the brutality of punishment which we see manifested in the dictatorships of Europe. Hardly a day passes but we see some reference to the death penalty being established for the breach of this or that administrative regulation, and we marvel at the calculated cruelty of the regime involved.

Of course, dictators are not noted for sweet reasonableness when violations of their own ordinances are concerned. But let us look at the technical problem of enforcing a vastly increased number of regulations affecting all aspects of conduct. When one comes to think of it, the only practical way to deal with this situation is to "step up" the penalty out of all proportion to the magnitude of the crime. The point is that no regime—no matter how well equipped with secret police—can expect to catch *many* offenders against such regulations. The government cannot normally rely upon the cooperation of the injured party to bring the culprit to justice. So the government has to compensate for the lack of *certainty* in punishment by the *terror* of punishment—the chances of being caught are not high, but if you *are* caught, you may have your property confiscated and be sent to a concentration camp.

There are two obvious ways in which these various tendencies may be checked or their effects neutralized. In the first place, we shall have to keep the central executive insulated from direct control over the public agencies set up to run the national economy. This will require both effort and some sacrifice of efficiency. It will require effort because the trend in all administration has been toward centralization of authority. It will mean some loss of efficiency because the most effective coordinator of administrative policy is the central executive. Nevertheless, we shall have to insist that many of the most significant agencies report to Congress and that their heads be protected from the presidential removal power except for cause stated and proved to the satisfaction of Congress.

More important than this, however, is the necessity of maintaining an independent bench and a conception of law which retains some reference to justice. The new, absolute governments have levelled this last barrier against absolutism. They do not recognize this conception

of law nor the independent role of judges in applying fixed rules to the disputes of citizens. But again, let it be noted that this condition did not derive suddenly and solely out of the ambitions of some dictator. The way was smoothed for it by a number of developments, all of them associated with the modern movement for socialization.

In the first place, scientific socialism, like other forms of scientism in politics, has no use for traditional forms. It dismisses as pure fiction the notion that judges apply principles of justice. In fact, it even denies that law consists of principles at all. The most that can be said for law is that it consists of the policies of the government or class in power. And, of course, the use of precedents by judges (which is the technical device by means of which continuity of judicial decision is secured) is decried because precedents tend to prevent judges from being swayed by the immediate policy of the situation—which is just what judges *ought* to be influenced by, according to the socialist view.

Again, *any* socialism demands individualization of treatment for offenders. This may sound contradictory, but it is clear enough when one reflects that socialism denies the assumption of individual responsibility. We are all to be exclusively regarded as creatures of our environment and this means in turn that all the circumstances of each individual case should be considered by the magistrate. So, instead of applying fixed rules under which the punishment fits the crime, the magistrate must be given wide discretion to make the punishment fit the individual. This may often be a good thing. But it can lead to a highly discriminatory administration of justice.

Third, any socialism demands elimination of the concept of *private* law with its *private* rights and duties. In effect, all law becomes composed of public duties enforced, as our criminal law is enforced, by state prosecution. The prospects for maintaining an independent bar, representing private suitors, is accordingly greatly diminished; and, of course, judges will not be able to lean upon such an independent legal profession instead of upon the state government.

It is evident how vulnerable such a legal institution would be, supposing the government were to get into the hands of an unscrupulous individual or group. Judges have become securely tied to the administrative machine, subordinated to the will of such a government. They have become as much bureaucrats as any other officers of the state. And herein lies the greatest danger to constitutional government—a danger which has been thoroughly exploited in Hitler's Germany in particular, and in all dictatorships in general.

It is fortunate that one can testify to the continued strength of our traditional legal institution. There are few if any signs of cracks in this particular constitutional edifice. Even those judges whose appointments have had a peculiarly partisan flavor have generally accommodated



themselves to the discipline of the professional bar. In doing so, they may also have succumbed to a kind of conservatism which is not always particularly "progressive." But what is progressive in politics is a matter of time and condition. Many very old-fashioned notions can sometimes be dusted off and applied with great contemporary profit.