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"Economic Liberties and the Law"

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Preview: *In this issue, Richard W. Duesenberg notes that there has been a virtual explosion of state and federal regulation in America. To explain why, he offers a brief history of changing interpretations of the Constitution and of our economic liberties. Mr. Duesenberg spoke at Hillsdale's Center for Constructive Alternative seminar, "Politicization of the Law: Landmark Decisions and Trends in U.S. Legal History," in November, 1993.*

The Cost of Regulation

The cost of government regulation is truly staggering—it is also a barometer of how free we Americans are to pursue our own interests and to determine the course of our own lives.

In the late 1970s, Washington University's Center for the Study of American Business estimated that the total annual cost of implementing government regulations was about \$64 billion. By the late 1980s, its estimate more than doubled to reach \$137 billion. Other studies reveal even starker figures. The Rochester Institute of Technology estimated in 1990 that federal regulations were costing Americans \$395-\$510 billion, or \$4,100-\$5,400 per household, each year.

Financial costs are not the only burden. Regulations also result in a tremendous loss of one of our most valuable and limited resources—time. In the 1980s, the U.S. Office of Management and Budget reported that the private sector was spending over 5 billion hours a year just to meet government paperwork demands. It is spending even more time

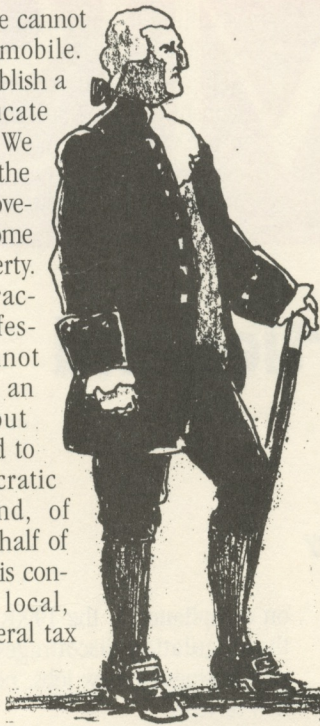
on compliance in the 1990s. It is no wonder that regulation discourages the creation of new businesses, new jobs, new products, and new services.

Today, every single aspect of business activity requires seeking the approval of one or more government agencies. A businessman may not even interview a job applicant without first knowing all the federal and state regulations that govern the interview process. These determine whom he may interview, what questions he may ask, and how he may determine an applicant's qualifications. Regulations also dictate to the person seeking a job, from stipulating the number of hours he may work to limiting the kind of the work he may perform.

Looking to invest in a business? You need a lawyer to help sort through all the complex regulations related to raising and investing capital. Erecting or remodeling a building? If you are very lucky, you will get a permit, but then be prepared for even more costly restrictions. Setting salaries or other compensation? Call your lawyer again to find out all the regulations on minimum benefit levels, nondiscrimination, selective disclosures, etc. Developing a product? Send tons of reports to the government and cross your fingers in the hope that you will get permission to sell it—within a decade, that is. Setting a price? Not without checking with the state once again to see if it considers that price "fair" and "equitable." And that's just getting started in your new business—it is even tougher to *stay* in business.

Each of us is affected—intimately—every day by regulation. Without approval from the

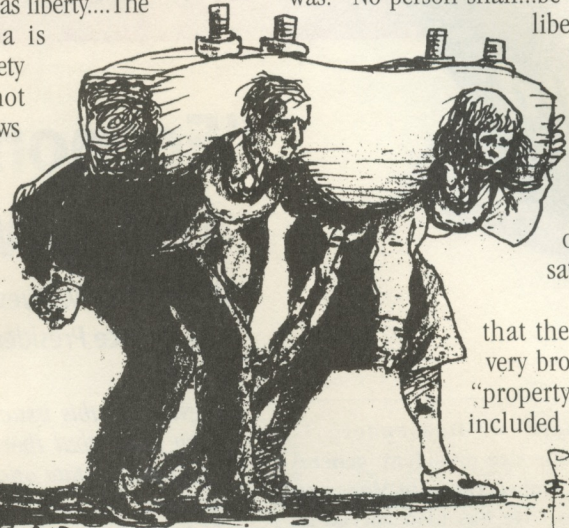
government, we cannot drive an automobile. We cannot establish a school to educate our children. We cannot make the smallest improvement to our home or other property. We cannot practice any profession. We cannot even contract an illness without being reported to some bureaucratic authority. And, of course, up to half of what we earn is confiscated by local, state, and federal tax collectors.



compact and to every principle of sound legislation.”

In his *Defense of the Constitutions of Government*, John Adams also raised the issue of property rights as “natural rights”:

“property is surely a right of mankind as really as liberty....The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.”



against laws impairing the obligation of contracts.

But there were even more important references to property rights in the Bill of Rights attached to the Constitution. The famous language of the Fifth Amendment was: “No person shall...be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.”

Keep in mind that the framers had a very broad definition of “property” that not only included land, merchandise, and contracts but much more.

M a d i s o n

explained that it meant “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.” He added, “In its larger and juster meaning, it embraces everything to which a man may attach a value and have a right; and which leaves to everyone else the like advantage.”

Property, then, extends to our opinions and the free communication of them, our religious beliefs, our safety, and our liberty of person. “In a word,” Madison concluded, “as a man is said to have a right to his property, he may be equally said to have a property in his rights.”

Economic Liberties and the Early Supreme Court

I t was with this broad definition of property rights, springing from natural rights philosophy, that the early Supreme Court began its work. From the start, the justices interpreted the Constitution to mean that the government could not abridge the rights of its citizens except in rare circumstances, and that even then it would have to provide compelling proof that intervention was necessary. In one of the earliest cases involving property rights, Justice William Paterson wrote:

“The right of acquiring and possessing property, and having it protected, is one of the natural, inher-

Economic Liberties and the Constitution

G overnment control over our lives has increased as protections of our economic liberties have decreased. But this is a fairly recent phenomenon. Throughout most of our history, we have been free from the heavy yoke of regulation. We have viewed government with suspicion, and we have been protected from government, not by government. We have also recognized that there is no meaningful freedom without freedom of enterprise—our political and economic liberties are interdependent.

Over two hundred years ago, our economic liberties were foremost in the minds of the framers of the Constitution. In *Federalist*, No. 10, James Madison argued that men have different “faculties,” i.e., different talents and abilities, and that this is why property rights are essential: “From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results.” And he emphasized, “The protection of these faculties is the first object of government.”

Madison furthermore criticized the “rage” for “an equal distribution of property,” and condemned it as an “improper or wicked project.” On laws impairing the obligation of contracts, he wrote that they were “contrary to the first principles of the social

Does this resound with self-interest from the landed and propertied classes? Of course it does. But, more important, this natural rights view explains why America has not only been “the land of the free” but “the land of opportunity” for millions of men and women of every race, every social class, and every economic condition.

It may seem surprising that the framers referred only briefly to property rights in the Constitution. This was mainly because the document was so short, consisting merely of a preamble and seven articles. But it was also because the framers believed that a lengthy defense of any form of rights was unnecessary. Rights originated with the people, not with the state: delegation to government, not from it—that was the idea. As Alexander Hamilton expressed it, “[T]he people surrender nothing; and as they retain everything, they have no need of particular reservations.”

So the document that emerged from conference on September 17, 1787 and that was effectively ratified on June 21, 1788 made only two references of any significance to property. In Section 9 of Article I, there was a proscription against bills of attainder (depriving the accused of rights without judicial trial) and *ex post facto* legislation (retroactive punishment for activities that were once legal). In Section 10, the same prohibitions were applied to state legislatures, and there was an added restriction

ent, and inalienable rights of man.... No man would become a member of a community in which he could not enjoy the fruits of his honest labor and industry.”

He judged that the legislature had no authority to make an act divesting one citizen of his freehold and vesting it in another without just compensation, and in ringing terms he concluded with the declaration that such conduct

“is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace, and happiness of mankind; it is contrary to the principles of social alliance in every free government....”

In an 1810 case, *Fletcher v. Peck*, Chief Justice John Marshall relied on both natural rights language and the contracts clause to declare unconstitutional a Georgia statute canceling title to a 35 million acre tract of land that had been purchased in good faith. But it was a dissenting opinion written near the end of his tenure on the Court that best describes Marshall’s view. “Individuals,” he wrote,

“do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contract by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society but are brought into it.”

Justice Joseph Story expressed the same view in an 1829 opinion:

“The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being....”

Unfortunately, the early Court failed to take advantage of some important opportunities to protect property rights. For example, in 1798 the Court ruled that the *ex post facto* clause only applied to criminal cases. (It was not unanimous on the point, and many subsequent justices and legal scholars have argued that the position was in error.) Since much of today’s legislation has a retroactive effect, the Court’s failure to use the *ex post facto* clause broadly has had a huge negative impact on the protection of lawful private action recently, especially in the area of environmental law. As for the contract clause, an 1827 decision upholding a state bankruptcy law gave government a power over individuals and businesses that might not otherwise have emerged.

But even with its weak interpretations of these provisions, the early Supreme Court was a strong defender of economic liberties in general. In a case applying the Fourteenth Amendment against a piece of state legislation that made it illegal to purchase insurance from an unlicensed out-of-state carrier, the Court found that the amendment

“means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.”

The Court also reiterated the principle that if the government chose to restrict an individual’s “inalienable right” to pursue any of the commonplace occupations of life, then it bore the burden of justifying its action.

Probably the most famous case declaring a statute unconstitutional because it infringed upon freedom of contract was *Lochner v. New York*. The state of New York had passed a law limiting the number of hours that could be worked in one week in a bakery. It was justified on health grounds, but if one looked behind the statute, its political *raison d’être* was not hard to find. An employer had been indicted for violations, so it was a criminal case. His defense was that the state law violated his liberty of contract, i.e., his liberty to engage a worker for whatever number of hours per week he

was willing to pay and the worker was willing to labor.

The Court declared the New York law unconstitutional, not because a state could not pass health-related legislation, but because if it used its police power to restrict economic liberties, it had to show that the exercise of those powers was fair, reasonable, and appropriate. Whether the act in question met those standards could be answered “in a few words,” the Court declared. “There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.” Bakers could decide that for themselves. After all, the Court reasoned, they were citizens of average intelligence, not wards of the state, and they did not need its help to determine how many hours they were willing to work. The mere assertion of health considerations was not enough for the state to save its legislation.

Lochner was an early 20th century decision—1905 to be exact. The Court had reached the zenith of its protection of economic liberties, primarily through the due process clause of the Fifth and Fourteenth Amendments.

Economic Liberties and the Modern Supreme Court

Oliver Wendell Holmes, who was just beginning a 30-year career as a Supreme Court justice, filed a dissenting opinion. He criticized the Court’s decision for being based, he alleged, “upon an economic theory which a large part of the country does not entertain.” But whether he agreed or disagreed with that theory, he insisted, had nothing to do with “the right of the majority to embody their opinion in the law.” Consistent with this, in 1915 Justice Holmes wrote another dissenting opinion:

“Regulation means the prohibition of something, and [in interstate commerce] I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid.”

Such language signaled that a truly monumental shift in constitutional interpretation was about to take place. The principle that government derives its

authority only from the individual was being supplanted by the principle that legislation becomes legitimate through the action of the majority.

The framers of the U.S. Constitution feared the rule of the majority. In *Federalist, No. 51*, Madison wrote that it was critically important that a republic guard the rights of the minority. He was aware that democracy can justify its own expansion of power better than any other political system.

A government that is derived from the authority of the people is, after all, seemingly authorized to do *everything*.

But the fear of the majority faded in the first several decades of the 20th century; constitutional protections of economic liberties—which we may call “substantive due process”—were gradually abandoned. In case after case, price support laws, price discrimination

laws, minimum wage laws, laws setting fees in various industries, laws limiting work hours in various trades, laws on union organization and membership, laws on child labor, and laws on product contents kept coming back to the Court. And Holmes was joined on the bench by other pro-interventionist justices like Louis Brandeis, William Douglas, and Hugo Black. Finally, in the mid-20th century, the constitutional edifice the framers built collapsed.

Keep in mind the historical setting for this drama: The Great Depression had ravaged society, and socialist factions had risen to power in Europe. Intellectuals everywhere had been seduced by the temptations of the Left. A leading theologian, Reinhold Niebuhr, idealized socialist Germany as the place “where all the social and political forces of modern civilization have reached their most advanced form.”

The abandonment of constitutional protections of economic liberties meant that the state no longer had to prove the necessity of intervention. In *Nebbia v. New York*, a 1933 decision upholding milk price controls, the Supreme Court pronounced that the guarantee of due process “demands only that the law shall not be unreasonable, arbitrary, or capricious.” Many years later, Justice Black would add with satisfaction that

the “modern” Court refused

“to sit as a ‘superlegislature to weigh the wisdom of legislation,’ and we emphatically refuse to go back to the time when courts used the Due Process Clause to ‘strike down state laws regulating business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought.’”

“...to most Americans, the pursuit of happiness is the pursuit of economic liberties. Being able to hang from a tree and utter vulgar epithets at the emperor is not nearly so dear to us as being able to own and dispose of property, to engage freely in our own chosen trade or profession, to pass our possessions on to our heirs.”

Unbounded legislative discretion, coupled with the principle that “the majority rules,” became the new standard for constitutional interpretation. Justices could, at their own discretion, grant or deny economic liberties. So-called “personal liberties” (like the “right of privacy,” which is nowhere mentioned in the Constitution) outweighed economic liberties.

The Pursuit of Happiness

But to most Americans, the pursuit of happiness is the pursuit of economic liberties. Being able to hang from a tree and utter vulgar epithets at the emperor is not nearly so dear to us as being able to own and dispose of property, to engage freely in our own chosen trade or profession, to pass our possessions on to our heirs.

While there are indications that the Court might be resuming some sensitivity to property (e.g., under the takings clause) the deference it gives to legislative action is still near-absolute. If a law or regulation simply stresses “urgent need” or “the public interest,” the Court is sure to let it stand. The judicial review process is so biased that only the most absurd edicts are found unconstitutional.

Legal scholar Bernard Siegan has noted that this bias has led to the impeding of the democratic process. If the Court refuses to review the legitimacy of economic regulation, then the government is essentially free to dominate the entire American business community and, indeed, the life of every American citizen. This is socialism—and socialism does not work any better in this country than it has anywhere else. We just seem to be the only country that still doesn’t

want to admit it. Our most pressing social and economic problems have only been made worse by government intervention. Even more alarming is the loss of freedom that has accompanied growing government involvement in our affairs. But freedom is valueless to the government planner. He requires coercive force in order to have his way, and he regards centralized planning as far superior to the

untidy, unpredictable actions and decisions of free men and women.

Recently, Hillary Clinton was quoted as saying that one of the federal government’s tasks is “redefining who we are as human beings in the post-modern age.” Heaven help us! We’ve had enough politicians in this century who have made redefining humanity their goal. Millions of lives have been destroyed as a result. We should recall that the framers of the Constitution did not try to “redefine” or “remake” human beings. They sought to understand them and to protect their natural rights. They also stood firm with John Locke, who warned in his *Second Treatise on Civil Government*:

“He who attempts to get another man into his absolute power does thereby put himself into a state of war with him....For I have reason to conclude that he who would get me into his power without my consent would use me as he pleased when he had got me there, and destroy me too when he had a fancy to it; for nobody can desire to have me in his absolute power unless it be to compel me by force to that which is against freedom, that is make me a slave.” ♣