Regulation

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REGULATION was first published in July 1977 "because the extension of regulation is piecemeal, the sources and targets diverse, the language complex and often opaque, and the volume overwhelming." REGULATION is devoted to analyzing the implications of government regulatory policy and its effects on our public and private endeavors.

Recasting Morriss's Bootleggers

Andrew Morriss's "Bootleggers, Baptists, and Televangelists" (Summer 2008) left me confused. First, Morriss's casting assignments — tobacco companies as bootleggers, regulatory agencies and anti-smoking groups as Baptists, and the private bar and state attorneys general as televangelists — do not square up with the analogy Yandle introduced in 1983. In Yandle's political drama, bootleggers (an interest group with an economic interest in regulation) and Baptists (those having a moral interest in regulation) somehow teamed up to defeat the legal liquor sales industry, a more powerful interest group. In Morriss's remake, however, the tobacco companies — say, in the early 1960s — had no economic interest in regulation and were not pushing for regulation of any kind. True, there were Baptists, but they had no economically motivated allies, that is, no bootleggers to call upon, in their efforts to regulate tobacco manufacturing or sales. Thus, the early version of the tobacco story would more accurately be called "Bootleggers Wanted."

In the most recent version of Morriss's story, in which state attorneys general teamed up with plaintiffs' attorneys to recover the medical costs that states had incurred in paying for tobacco-caused health harms, the Baptists had finally found their bootleggers. The attorneys general had an economic incentive to bring litigation in order to recover for those harms; private attorneys had an economic incentive to recover for their state clients: attorneys' fees.

The modern story varies in two ways from Yandle's tale. First, the action takes place in a courtroom and not in an administrative forum or a congressional hearing room. Second, the attorneys general and private bar "bootleggers" were not actually doing anything illegal.

This second point leads to a broader criticism of the original Yandle theory, which has been used to explain a range of successful regulatory efforts. By using criminals (bootleggers) to represent the economically motivated interest group, the theory makes it seem as though pushing for regulation that provides economic benefits to some members of society, while at the same time increasing overall welfare, is somehow a bad thing. In fact, there are many examples of economic/moral coalitions joining forces against entrenched economic interests and achieving regulatory wins for society. The lobbying effort to create Yellowstone Park, for example, was led by railroads and tourism interests (economic) as well as conservationists (moral). As long as social well-being increased after the passage of the Yellowstone Act, why does it matter whether it transferred wealth from miners and loggers to railroad and hotel owners? Is cross-interest coalition-building inherently detrimental to the proper functioning of the political system?

Morriss seems to argue that the real problem in the tobacco story was not a welfare loss, but defects in process effected by the change in forum, from agency/legislature to the courtroom. At the same time, he argues that the tobacco companies continued to play the role of bootleggers, seeking to gain from the "regulation by litigation." While it may be true that the tobacco companies gained some benefits from the settlement, it seems unlikely that those benefits were worth the $206 billion that the firms ultimately had to disgorge. In other words, the tobacco companies were not the bootleggers but, rather, the bootlegged.

Yandle's original analogy is a useful positive tool, capable of explaining why some efforts to regulate succeed while others fail. It is not clear that it is a useful normative tool, capable of distinguishing beneficial regulations from harmful ones.

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Property Rights Apologia

Alexandra Klass takes the eminent domain reform movement to task for not emphasizing natural resources takings, whereby extractive industries are given the power to condemn land for private enrichment. ("The Frontier of Eminent Domain," Summer 2008). By focusing only on *Kelo*-style redevelopment condemnations rather than takings of natural resources, she claims that "legislators and interest groups have clouded the issue by framing it as one solely of government abuse of eminent domain authority."

In fact, the movement for eminent domain reform has chosen to emphasize redevelopment takings for important reasons. As nonprofit organizations with limited funds, groups like the Pacific Legal Foundation and the Institute for Justice must pick their battles, and do so in ways that will most effectively raise the relevant constitutional issues both in the courts and in the eyes of the public. Focusing on mining and timber companies is simply not as effective at drawing the attention of busy news consumers as are stark cases like *Kelo v. New London*.

In addition, the backlash against eminent domain abuse is led by a coalition of liberals, conservatives, and libertarians, groups who disagree about many things. A narrow focus is essential to keeping that coalition together. Recent ballot initiatives combining eminent domain reform with related, but different, property rights issues demonstrated this fact by chasing away liberal supporters.

More importantly, our choices of where to devote resources are not made entirely on the basis of potential publicity and political reform, but also on the basis of philosophical considerations. The abuse of eminent domain is not a new phenomenon, and *Kelo* did not come out of the blue. These abuses grew slowly, caused by many factors, among which the leading culprit is the Progressive Era revolution in political philosophy, which placed democracy at the center of American constitutionalism, instead of liberty, and discarded the Founders' concepts of natural rights. One of the leading principles that Progressive intellectuals sought to incorporate into law was the idea that government exists to "adjust" economic and moral forces to accomplish what "the people" want — as opposed to protecting individual rights. The Progressives were so successful in altering the philosophical foundations of American law that they virtually ejected from public discourse the natural rights principles on which the Constitution was based.

Klass herself is a progressive, and assumes that government is the entity that shapes society's destiny. She writes that property rights are "allocated" by "society" in order to "meet the needs of the public," and that "such allocations should change as times and circumstances change." In fact, property rights are not allocated by society but derive from a person's inherent right to his own life and labor. "Society" — i.e., government — has no legitimate authority to "alter" the "allocations" of property to meet the "times." Those sorts of "alterations" are exactly what eminent domain abuse is all about. What was *Kelo* if not an attempt to "alter" the allocation of Susette Kelo's property in keeping with bureaucratic perceptions of "changing times and circumstances"?

What the eminent domain reform movement is attempting is not so much a particular reform in a specific area of property law, but to reawaken Americans to their lost constitutional heritage: a legacy centered on recognizing the natural liberty to which we all have an equal claim by the fact of our being human. By calling us back to our founding principles, we in the property rights community hope to introduce ideas like free markets, limited government, individual responsibility and personal choice to the many people who have little or no acquaintance with such things. In other words, our job is primarily one of education, not litigation. Lawsuits like *Kelo* are an opportunity to teach people about what it really means when a legal intellectual claims that "society" should "alter" the allocation of property rights to meet the needs of the public. In practice, such statements mean people lose their homes so that wealthy, politically influential developers can build shopping centers and high-rise condos.

Natural resources takings are, of course, one of the many sad examples of how the Progressive attack on property rights protections in the 20th century does violence to freedom and security. Thanks to that attack, America's intellectual elite, and even many average citizens, have lost touch with the principles underlying those rights. Awakening them to those principles is a slow, sometimes frustrating process. But it is that process, and not specific reforms or particular precedents, that is going to revive this country to its precious inheritance of freedom.

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