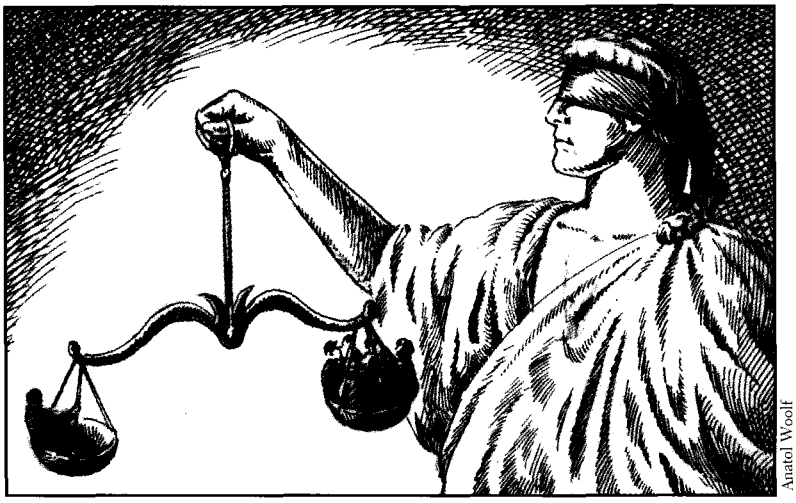
Every Neighbor a Litigant

The Individual Versus the Community

by Stephen B. Presser



Anatol Woolf

Goethe taught us that true happiness comes from being engaged with others in productive projects, and we have known since Plato and Aristotle that man is a social animal, but we would be hard put to reach these conclusions if our only guide were the current state of American law. Far too often the American legal system, at least at the federal level, is obsessed with the purported rights of individuals and gives short shrift to collective enterprise.

Until the New Deal, the U.S. Supreme Court understood that the bedrock of constitutional law was the system of property and contract law that the Framers thought their new Constitution would secure. Property and contract are classic means by which the legal system binds us together and allows individuals to form meaningful relationships. In the period between our break with Great Britain in 1776 and the drafting of the federal Constitution in 1787, property and contract were at risk, as irresponsible state legislatures passed moratoriums on the collection of contractual debts and repeatedly issued increasingly worthless paper money as legal tender. By placing matters concerning currency in the new national government and by forbidding the state legislatures from interfering with contracts, the Framers believed that the country could achieve prosperity through the creation of a climate in which property, contracts, commerce, and relationships would thrive. We were to be a great commercial republic, and, in spite of everything, so we still are.

The Framers understood that the keeping of promises and the carrying out of our just obligations to each other were the means to build up virtue in the citizenry and help guarantee the kind of disinterested public decision-making which is essential to a stable republic. Cooperation and productivity were vital, and individuals were valued to the extent that they contributed to the community. The Framers were not strangers to the dark parts of the human heart and soul, however, and the constitutional scheme was to create a structure whereby selfish special interests in society and government were played off against each other, so that the true national interest—virtue, stability, prosperity, cooperative endeavor—could be achieved. The Framers understood that unchecked democracy leads to anarchy and license, so the republican scheme they erected had anti-democratic elements, including an upper house, a President not subject to direct popular election, judicial review, and a Bill of Rights.

The Framers were convinced that a virtuous citizenry would be required to preserve the governmental structure, and they would probably be shocked to see how the edifice they erected has been torn down, piece by piece. Arguments masked as promoting democracy or benefiting allegedly disadvantaged individuals or groups have undermined the foundation of American community and put at risk property, contract, and commerce.

The 16th Amendment, allowing direct taxation on income

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by the federal government, rendered property insecure and transferred the wealth of one class of society involuntarily to another, while creating a vast national bureaucracy which seeks to sustain itself by maintaining the mechanism of wealth transfer and a high level of taxation. The 17th Amendment, by mandating the direct election of senators, removed an essential check on democracy and led to an upper house moved more by opinion polls than constitutional obligations, as we saw most vividly in the recent travesty of the Senate trial on President Clinton's impeachment charges. The informal practice by which the Electoral College has become dominated by the national parties has led to a circumvention of the indirect scheme for presidential election, as presidential candidates are now picked through an increasingly demagogic state primary election process instead of through the reasoned deliberation of specially chosen, nonpartisan electors.

Rather than picking public officials as a result of their reputation for wisdom and virtue, as the Framers hoped, we pick them on the basis of their telegenic qualities, their appeal to our special interests, or the ingenuity of their campaigns, which pander to our baser instincts. This is not a new problem, of course: The formation of national factions and a press capable of supporting such campaigns have been with us since the turn of the 18th century. But it is only in recent years that the legal and constitutional supports which protected us from ourselves and our officials have very nearly collapsed under the combined weight of a misguided Supreme Court, an overly active legislature, and a venal executive.

The Supreme Court's abandonment of constitutional safeguards is a well-known story, but one still worth reviewing for the light it casts on the dismantling of the Framers' design in the other branches. The story begins with the replacement of the "Nine Old Men" on the pre-New Deal Supreme Court with lawyers and politicians active in the New Deal and in post-New Deal Democratic politics. Before the New Deal, the Court's vision of constitutional and private law was a conservative one, and it was not unusual, even, for members of the Supreme Court to declare that ours was a Christian country, to permit prayer in the public schools, and to allow the enforcement, by law, of a morality of cooperation and deference. The theoretical rights of the individual were much less important than the security of the community. The Bill of Rights was used to restrain the federal government, as it was intended to do, and state and local governments enjoyed the freedom to function, in Justice Brandeis's famous phrase, as "social laboratories" working out divergent recipes for community and social solidarity.

Perhaps carried away by the grander schemes of the national government under the New Deal, and appalled by what they perceived to be the failure of state and local governments to improve the lot of black Americans, the justices of the Supreme Court, from the 1930's on, broadened the powers of the federal government by ignoring prior constitutional restraints and allowing individuals greater freedom to assert newly created constitutional rights. The process began before the Warren Court, but with the ascendance of Earl Warren it accelerated; state and local governments were soon told by the Supreme Court how to conduct their schools, their police procedures, and even the composition and work of their legislatures.

The Bill of Rights, through the dubious "incorporation" doctrine, was read into the 14th Amendment and turned against the state and local governments it was supposed to have aided. The democratic, secular, and highly individualistic vision of the Warren Court survived the Burger and Rehnquist courts, reaching its apotheosis in the "mystery passage" of *Planned Parenthood* v. *Casey*. In that notorious case, a plurality of the Court, refusing to recognize that it had no legitimate business in prohibiting the states from solving the difficult problem of abortion on their own, reaffirmed that the right to seek an abortion was embedded in the Constitution because "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

This purported "right" seems to endorse individualism only for its own sake, and its expression by the Court indicates it has forgotten the wisdom of Goethe and the Greeks, that meaning in life arises only from our relationship with others. It is no surprise, then, that the Court has too often allowed the supports for the building of stable communities at the local and state level to erode, and, unfortunately, the record of the federal legislature has not been much better.

Congress has not been without its recent successes, such as the defeat of the Clinton health-care initiative and the enactment of the Private Securities Litigation Reform Act of 1995, a badly needed law which made it more difficult to file frivolous lawsuits against corporations and their officers and directors (and the only substantive measure Congress has managed to pass over President Clinton's veto). But many other congressional measures have driven wedges between American citizens, between employers and employees, and between corporations and their constituencies. Many of the recent civil rights and voting laws have led as much to expensive litigation, arbitrary administrative enforcement, and racially and ethnically divisive politics as they have to more participation in the political process or the building of stable communities. When the Equal Employment Opportunity Commission believes it is wise to compel Hooters Restaurant to hire males as waiters in place of the eponymically endowed Hooters girls, things have gone too far.

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The federal Americans with Disabilities Act (ADA), a measure passed and, surprisingly, not vetoed during the Bush administration, is typical of nanny-state legislation, which all but obliterates the discretion traditionally permitted by the law of contract. The ADA requires businesses involved in interstate commerce not to discriminate in hiring those with disabilities who, with "reasonable" accommodation by the employer, can do the jobs for which they have applied. Such "reasonable" accommodation can include forced flexible work schedules, additional construction or equipment, and many other measures

which can require considerable expense and can seem anything but "reasonable" to an employer sued by a disgruntled or rejected employee.

When the ADA was passed, it was conceded that it might give causes of action to more than 40 million Americans; as this goes to press, the Supreme Court is trying to decide whether the wearing of eyeglasses might constitute a "disability" under the Act and whether, even if other federal law would bar a disabled employee from a job, the ADA trumps such legislation. There have been holdings suggesting that virtually all mental diseases or defects might qualify as disabilities, and we will know in a few months whether the Act is to be construed so broadly that more Americans can be considered "disabled" than are "able." Fortunately, some congressional efforts to regulate (the content of the Internet in particular) have foundered, but, to too great an extent, Congress seems still to be following the maxim, "If it moves, regulate it; if it doesn't move, kick it; and then, when it moves, regulate it."

Whole classes of victims have also been created by federal environmental legislation, which has promoted the multiplication of claims against alleged polluters or their affiliated corporations. At times, the protection offered by the corporate form itself has all but disappeared in the rush by some federal courts to do away with the shareholder protections of state corporate law in the service of some purported federal legislative goal. In this particular matter, the Supreme Court has rendered some helpful guidance, recently reaffirming that, absent express congressional directives, the traditional protections of state corporate law should be left undisturbed. At this time, however, it is unclear whether the lower federal courts will heed the directives of the Supreme Court.

Oddly enough, much of the hope of reviving American ideals of cooperation and virtue may lie in the law of corporations and of business enterprise. The law of corporations—a body of doctrines, principally of state law, little understood by laymen—is one of the great American vehicles for the preservation of the law of property and contract. Individual or corporate shareholders join together not only for investment purposes, but—especially in the case of small, closely held corporations—to create meaningful employment possibilities and to improve the economy and society.

State law has been particularly serendipitous in this regard, not only in the formation and maintenance of corporations but also in the invention of the newest business vehicle, the limited liability company, which combines the limited liability and centralized management of the corporation with the tax advantages of the partnership or sole proprietorship. Federal taxation of corporations—or "double taxation," as it is properly called, since the corporation is taxed and then dividends distributed to shareholders are taxed a second time—has often driven corporate policy in strange directions, significantly distorting both tax law and corporate enterprise. Academic study of the corporation has focused almost exclusively on how it can be made to comply with the plethora of new federal regulations or serve favored interest groups rather than how it might better contribute to the promotion of community and productive enterprise. But there are signs that this is beginning to change.

Americans have always valued individualism, but lately the federal courts, the federal legislature, the federal administrative agencies, and the federal executive appear to have forgotten that we valued American individualism because it led to the performance of individual acts of genius which would contribute to the overall welfare of the community. The pressures for conformity in American business and American life, particularly where that conformity betrays our rich heritage of religion, morals, and private enterprise, need to be resisted, but individuality of the kind suggested in the Casey "mystery passage" is as dangerous and vacuous as unthinking conformity. It is doubtful whether the builders of local communities and grassroots productive enterprises can look to any branch of the federal government for much help.

It is alarming, then, that most Americans seem to have accepted, unquestioningly, the idea that the federal government is the source of salvation. Federal programs, benefits, civil servants, and politicians seem to be the only providers of resources or direction in American society. But federal court decisions, legislation, and administrative practice have brought us to a place where we seem to be a nation of potential victims and litigants, with our fabric of community alarmingly frayed.

We seem a nation of isolated individuals, united only in our relationship to a federal government that frequently appears as lost as we are. If there is a remedy for our condition, it lies in the nourishing of local politics and intermediate associations between citizens and the federal government. At the very least, this ought to mean paying more attention to community organizations, state and local governmental bodies, and local schools and churches. We ought to be doing more to encourage divergent approaches through voucher programs, which would allow individuals to build communities by choosing particular religious, ethnic, or regional approaches to education. We might consider extending the voucher idea to encourage participation in education and childcare by local businesses, both as a means of providing for their employees and of providing services to help communities in their work of revival and renewal.

We ought to rethink the nature of American government, and how we might rebuild our shattered structure of virtue-enhancing institutions. The Internet offers a variety of different approaches to communication which might cultivate communities of productive endeavor of a kind that we can barely conceive now. The last few months have seen the apparent creation of billions of dollars of additional wealth because of the stock-market boom, and if this is sustained, there should be additional resources for venture-capital formation and for new companies and corporations which can contribute to community solidarity and individual creativity.

Some sensible constitutional theorists have concluded that we need a new Constitutional Convention to return us to the Framers' wise design, but perhaps the lesson of the last few years is that we would do better to worry less about the federal government (which ought to be allowed to diminish a bit through benign neglect) and more about strengthening state and local communities and businesses. We certainly should spend less time trying to redistribute resources through litigation or legislation and more trying to lay the foundation for a renewal of local enterprise. Following the failure of the planned socialist economies in Eastern Europe in the late 80's and early 90's, critical legal studies and feminism eventually concluded that bold revolutionary strokes were impossible and that the way to change the world was little by little, as enlightened individuals sought to build better communities. This was Goethe's insight too, and here the right might productively learn from the left.

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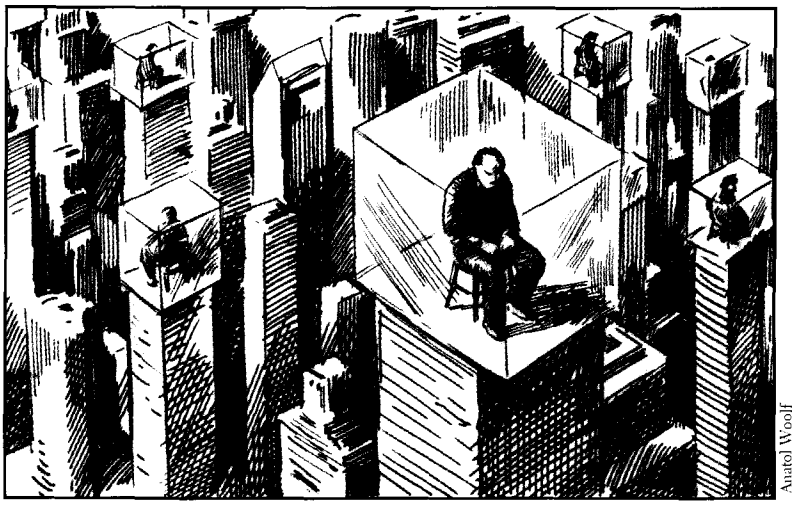
The Strange Career of Individualism

Choice Is It!

by Donald W. Livingston



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What is individualism? John Stuart Mill answered this question with a theory of rights. Mill looked for a "simple" theoretical principle that could distinguish the liberty of the individual from that of the state. Not only is there no such principle, but we miss the full character of individualism if we try to grasp it in terms of a philosophical theory of individual rights. What we value as individuality is not a theory but an historic practice. Like all practices, it was a long time arriving, and its character has been quite different in different periods. The ethic of this practice flows from a desire to live a life determined as much as possible by one's own choices. Every civilization has produced remarkable individuals who were self-determining, but only the West developed an ethic demanding self-determination for all human beings. In its pure form, it became the modern doctrine of moral autonomy: One is bound only by the laws he imposes upon himself.

Although the ethic is not necessarily Christian, it is perhaps not an accident that it developed in Christian culture. One way to hold society together is through kinship, tradition, and extensive ritual. Jewish society followed this path. The gospel, however, provided Christians with a different one. Attention shifted away from blood, custom, and ritual to the working of God's grace in the individual soul, whatever its historical origin might be.

But the modern ethic of autonomy did not appear until the 17th century. Nothing resembling the philosophical theory of inalienable natural rights of individuals appears before the late Middle Ages; nor is a counterpart to be found in the ancient languages of Hebrew, Greek, and Latin. If there are natural rights of individuals, self-evidently known to all rational beings, it is strange that the language needed to formulate them did not surface until modern times. Natural rights are in fact merely abstractions and idealizations from a particular way of life that prizes choice-making. Those who first enjoyed individuality did not invoke the language of natural rights because no such language had yet been invented. They boldly asserted their interests, and these later came to be transformed into legal rights, as, for example, in Magna Carta. Rights are the public and legal recognition of interests.

As the ethic of individualism gradually spread from men of noble class to men of middle class and, in time, to men of lower class and to women, it seemed to many that the main part of happiness was choice-making itself, and that, consequently, an entirely new conception of human nature, rationality, morality, and politics was needed. The chief obstacle to making autonomy the whole of the moral life was the Aristotelian-Christian tradition, which taught that *what* is chosen is more important than that the choice is one's own. In this tradition, the first question of reason, morality, and politics is, What is the highest good for man and what institutions are needed to educate the passions to desire that good? By the 17th century, Thomas Hobbes had inverted this understanding of moral and political life. There is no highest good that men pursue. There are only egoistically driven individuals, each disposed to pursue his own power and glory without limit unless acted upon by an outside force. Government is to be that force and to establish conditions in which individuals can pursue their own ends, whatever those might be, with a minimum of collision.

Although a number of refinements would be made, the Hobbesian state became the model for the modern state. But there was a catch. In order to secure the individual's autonomy,

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