What Makes for Real Prosperity?

The Small Businessman and Regulatory Discontent

by Stephen B. Presser

H. Ward Sterett

Supreme Court Justice Rufus Peckham put it best, in the *Trans-Missouri Freight Association* decision in 1897. Broadly interpreting the Sherman Antitrust Act as a means to rein in large economic organizations that had spun out of control, Peckham acknowledged that bigger businesses, because of economies of scale, could occasionally reduce prices to consumers. He went on to state that

> Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class.

Worse, it was in the power of any "combination of capital" in control of a commodity to raise the commodity's price after it had driven its smaller competitors out of business, and, even though those driven out of business by trusts and others might eventually find employment with them, this was not good for the nation. "[I]t is not for the real prosperity of any country," Peckham warned,

> that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.

There was some difficulty in applying Peckham's logic to the case at hand, involving the railroads, because his "Mom and Pop" business model might not have precisely fit the needs of capital-intensive intercontinental transportation of freight and passengers over tracks by steam locomotives, but the famously wooly-minded 19th century patriarchal judge had a point. His conception, essentially Jeffersonian in nature, of the yeoman local businessman—secure and independent, in command of his own modest farm, firm, or shop, interacting productively and morally with his similarly situated neighbors—remains idyllically appealing. Napoleon and Talleyrand derided the British as a "nation of shopkeepers," but that community-building aspect of the British is part of our heritage as well, and defending the small business man is a staple of American politics, if not American culture. So important is small business to the success of America that there is a whole federal agency, the Small Business Administration (SBA), with an annual budget of approximately $900 million and administering a loan portfolio of $45 billion, devoted to it. Unfortunately, the rest of the trillion-dollar federal government often operates in a manner that favors "big business" and accomplishes precisely what Peckham feared.

Each year, federal agencies issue more than 4,000 regulations, and many of these are expensive, if not ruinous, for small-business owners. Many of these regulations directly impact small businesses' bottom lines. The SBA estimates that the costs to small businesses of simply complying with the federal government's paperwork requirements, are, as Ohio Senator George V. Voinovich described it, "a staggering $5,100 per employee." Paul N. Gada, a writer for the Commerce Clearing House (a publisher of commercial reporters) observed in a re-

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cent internet piece that the Congress is aware of this danger, and has actually enacted two laws to deal with it, the Regulatory Flexibility Act of 1980 (RFA) and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). Those acts "require federal agencies to examine the impact of their proposed and final rules on 'small entities' (small businesses, small governmental jurisdictions and small organizations)." While Gada observes that, "More specifically, federal agencies are required to examine whether a particular proposed regulation will have a 'significant economic impact on a substantial number of small entities' before finalizing it," he also notes the warning in an April 24, 2001, report from the Government Accounting Office (GAO) that "the laws intended to protect small businesses from overly burdensome federal agency rules are not working." This report makes clear that a continuing problem is that Congress, according to Gada, "never defined what it meant by 'significant economic impact' and 'substantial number of small entities.'" The hortatory statutes left it up to the individual federal agencies to interpret these terms, and the result is continued regulatory disaster for small business. It is no surprise that the RFA and the SBREFA have failed to do much, since the real problem is Congress itself. The federal regulatory process contains inherent biases against small businesses.

The most obvious bias toward big business can be found in the manner in which federal regulations and laws are passed. In the words of Otto von Bismarck's famous dictum: "To retain respect for sausages and laws, one must not watch them in the making." I claim no expertise with regard to meat products, but I have participated in the drafting of some legislation and proposed constitutional amendments, and, as you might expect, the process is heavily dominated by the parties purportedly regulated by the legislation, their lawyers, and their lobbyists. Many (if not most) bills that eventually become laws have been drafted by these people, not by the actual members of Congress, or even their staff. True, at some point the drafting wizards in the bowels of Congress will refine bills to make them do what their proponents want, but the substance of the legislation often takes form in offices on K Street, not in the halls of Congress. This means that those who cannot afford the lawyers, lobbyists, and public-relations firms for drafting purposes, or for the related ends of wining, dining, and persuading legislators, do not leave much of an imprint on legislation or regulation. Generally speaking, only large organizations can afford to hire this kind of representation in Washington, and while there are some groups that do lobby for the interests of small businessmen, they do not generally have the clout possessed by the hired guns for the more humongous firms. The lobbyists for big business will, of course, be more interested in protecting its interest than those of the smaller firms. Indeed, it is in the interests, generally, of the bigger firms to crush the smaller ones, to give the victors more flexibility to set prices in the market, especially as they acquire more and more monopoly power. This is what prompted our antitrust laws in the first place, and this is what Peckham was worried about in *Trans-Missouri*.

And even if large firms were not driving the process of legislation and regulation and crafting provisions in their interest, it is more likely that large firms will be able to absorb the costs of regulatory compliance than will small firms. Construction or modification required by the Americans with Disabilities Act (special stalls in bathrooms, ramps, elevators, and all the other accoutrements which may have to be specially crafted to accommodate wheelchairs), special appliances or workplace procedures mandated by the Occupational Safety and Hazards Administration (OSHA), or (especially burdensome for local governments and taxpayers) compliance with regulations issued by the Federal Emergency Management Administration (FEMA) can be crippling for the owner/managers of small businesses. In a large business, however, these costs can be passed on more easily to customers, or absorbed (often unwittingly) by shareholders of a publicly held concern. Indeed, when regulation crushes an industry, it is even easier for large firms to get federal bailouts, while the small firms, unable easily to assemble the wherewithal to seek relief, often find themselves in Chapter 11. We may see something like this happen if there is an airline bailout following the disastrous events of September 11. The great carriers (or some of them) will be bailed out and survive, but many of the weaker regional airlines, the smaller recreational flight concerns, and local airports will fold.

The very traits that Peckham understood to be necessary for the success of the yeoman small businessman are those that make it unlikely that he will seek aid from others in the way that big business routinely does. Corporate executives rarely see shame in asking for help from the federal government, or asking for special treatment, as their foibles can always be blamed on the previous executive in office. The separation of ownership and management in large organizations, the rise of a professional managerial class, and a revolving door that allows corporate officials to move from business to agencies of government, lobbying organizations, or even law firms, and in and out again repeatedly over their careers, can result in a lack of accountability and of real responsibility. In small businesses, where there is no separation of ownership and management, those running the businesses, typically related by close ties of friendship or family, feel keenly their successes and failures and, cherishing their independence, are less likely either to ask for handouts or to court a cozy relationship with governing authorities. For most small businessmen, opportunities for advancement do not involve revolving doors, and meaning in professional life comes from the economic and other successes of their enterprises. Thus, they are both psychologically and temperamentally disinclined to get themselves involved in the regulatory process, even if their single-minded devotion to their businesses or their professional training permitted them the time and resources to do so.

And if the perils of regulatory compliance were not daunting merely because of the ADA, OSHA, and FEMA, other machinations of the federal government have created a climate in which the small businessman finds himself at a disadvantage compared to his grander competitors. He cannot seek public financing without having to comply with a plethora of examinations and submissions to the Securities and Exchange Commission that require, at the very least, high priced lawyers and, often, expensive investment bankers and consultants to complete. Indeed, the onerous nature of the compliance process of the SEC, combined with the rise of large institutional investors, has led even the largest firms to eschew the public-financing process and has driven them to seek private financing, further drying up the opportunities for funding of small businesses from the private sector. Some small-scale high-technology start-ups still find it easy (all things being equal) to get financing from venture-capital firms, but most small businesses in this country are involved in manufacturing and services of a kind that are

not so glamorous.

What should the federal government do to help the small businessman? Perhaps the answer is *as little as possible.* The federal government might consider the Hippocratic directive to "first, do no harm" and then abolish the thousands of regulations that do more harm then good, particularly to small businesses. In the last decade, the U.S. Supreme Court has begun, for the first time in more than 60 years, to reverse the kind of constitutional analysis that permitted the federal government to intrude in all areas of state economic life. In 1995, in *United States* v. *Lopez,* the Court ruled that the federal government could not prohibit firearms within 1,000 feet of any of the nation's schools, because education is supposed to be the job of the states. Similarly, in *United States* v. *Morrison* (1999), the Court tossed out some provisions in the federal Violence Against Women Act, that allowed prosecutions in federal courts, because basic enforcement of the criminal laws is supposed to be the preserve of state and local authorities. In like manner, the Court has recently begun to cut back on lawsuits brought against state officials and on unfunded federal mandates that conscript state officials into the enforcement of federal law. All of this has been labeled the Court's "New Federalism." It has been bemoaned by editorialists at the *New York Times,* and lamented in congressional hearings by those who believe that only the federal government is capable of protecting the rights of Americans and only increased federal legislation can do the trick. But the "New Federalism" has been cheered by those who understand that our Constitution wisely placed most of the powers of government in the state and local governments, which are closest to the people.

Perhaps it is time to remember Rufus Peckham and to balance the costs and benefits of our current regulatory environment more carefully. It may be that OSHA, the ADA, and the Environmental Protection Agency (EPA) enforce important American values, and that a safe and pollution-free workplace and the absence of discrimination against those who are physically challenged are laudable goals. It is by no means clear, however, that these goals, and many others of federal legislation, cannot better be accomplished by leaving the matter to the states, especially if enforcement at the federal level is fatal to "the small dealers and worthy men" who are vital to maintaining the quality of American life. "Enlightened" opinion in the 1950's, 60's, and 70's spurned the values of Babbitt and the Rotary, but as Americans rediscover the pleasures and virtues of life on Main Street and become more sensitive to the inadequacies of life on Wall Street, Madison Avenue, or Pennsylvania Avenue, this is changing. Even mainstream intellectuals are now starting to celebrate a return to community life, and maybe even they can understand that Peckham got it right. Peckham's "independent businessman," like Jefferson's independent yeoman, is crucially important to a republic that must inevitably rely on a citizenry willing to assume the responsibility of self-government and capable of understanding the Jeffersonian notion that a government big enough to provide for all of society's wants tends to destroy the means of its own sustenance. We have failed to recognize the devastating costs of compliance with federal regulation and, thus, to weigh the cost against the concrete benefits such regulation actually achieves. Whatever the benefits, the ruination of small business in America is too high a price to pay.

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Zebra

by Charles Edward Eaton

The opposition of the world is always here,
Point-blank, in your face, the oath, bruise, crushed limbs:
Do not expect the crocodile to shed a genuine tear.

Almost submerged, one amber eye half-open, he watches
yours and mine—
The poet waits on the leafy bank of the river:
Don't move until you know exactly how to write that line.

The yellow eye watches in the hazy, golden, city street—
You may have a penthouse, but his sight is long and
sharp,
Lurking in the half-suspicious eyes of nearly everyone
you meet.

Back to the pale youth on some brilliant day,
Taking notes as zebra, wildebeest, gazelle cross over:
The glistening poem is the one that got away.

Not a mark on it, that arching back, the beautiful striped
skin—
It is always a singling out, a majestic reverence if you will:
The bleeding corpse, the thundering herd, private
passions folding deep within.

It is a decorated, devious way to meet the world, disarm
The memory of jaws that slash and stitch the void:
As long as sunlight lasts, stand at the window and see if
golden stripes upon your skin have lost their charm.