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# *The Death of Economic Liberty and the Birth of Crony Capitalism*

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The sordid history of crony capitalism in America was highlighted in *Hettinga v. United States*, a recent opinion by Judge Janice Rogers Brown of the United States Court of Appeals for the District of Columbia Circuit. Contrary to popular belief, that history didn't begin when big businesses and billionaires began spending fortunes on lobbying and campaign contributions. It began when the New Deal-era Supreme Court stopped protecting fundamental economic liberties guaranteed by the Constitution.

*Hettinga* arose from a challenge by an enterprising dairyman to the dairy industry's regulatory stranglehold on milk distribution. As the *Washington Post* reported in 2006, Hein Hettinga is a Dutch-born immigrant who, by bottling milk from his own cows, was able to work outside the antiquated, industry-backed system of milk regulation. This "loophole" allowed him to charge 20 cents less per gallon than his competition. Unfortunately for him, his competition was "big dairy," and they didn't appreciate being undercut in price. According to an economist for the Dairy Farmers of America, Hettinga's cheaper milk was "damaging to the marketplace," even though the existing regulatory system raises costs to American consumers by nearly $1.5 billion per year.

Big dairy eliminated their competitor by lobbying Washington, D.C. lawmakers to close the "loophole" that was being "exploited" by Mr. Hettinga. Senators John Kyl (R-Ariz.) and Harry Reid (D-Nev.) compromised on a deal that would exempt milk producers in Nevada from the regulatory framework and make Mr. Hettinga pay dues into the price-controlled pool, effectively subsidizing his competitors.

Mr. Hettinga brought suit to challenge the new law as both an unconstitutional bill of attainder -- that is, a piece of legislation that punishes a single person or a small group of people -- and as a violation of his economic liberties guaranteed by the Due Process Clause of the 14th Amendment. The D.C. Circuit was obliged to apply the law as the Supreme Court has articulated it and thus they dismissed the suit.

In a separate concurrence, however, Judge Brown, joined by Judge Sentelle, wrote to criticize the Supreme Court's long history of providing inadequate protection to economic liberties. Brown emphasized how that history "reveals an ugly truth: America's cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s."

Recently, Doug Kendall of the Constitutional Accountability Center lambasted Judge Brown's opinion as partially "gibberish" and totally "radical." While it is certainly not gibberish, I agree that, in this day and age, it is radical to believe that American workers and businesses should receive some constitutional protection from the ever-increasing alliance between big business and big government that often masquerades under the guise of helpful "regulation." Mr. Kendall also raises the specter of *Lochner v. New York*, a perpetually misunderstood case that struck down a New York statute that limited bakers to a 60-hour work week. Recent scholarship has shown that the law in *Lochner* was passed for partially ignoble reasons: large, unionized bakeshops were hoping to hamstring their smaller, often family-run competitors whose employees worked longer hours in order to compete against larger, mechanized bakeshops. *Lochner* even has undertones of xenophobia, as the smaller competitors were often run by recent immigrants.

The "*Lochner*-era" ended in the 1930s, which Judge Brown rightly pointed to as ushering in the modern era of crony capitalism. Ironically, the 1938 case that is arguably most responsible for crony capitalism, *United States v. Carolene Products Co.*, also arose from a challenge to a law pushed by the unabashedly protectionist dairy industry. The case concerned the Filled Milk Act of 1923, which banned a cheap and healthy alternative to typical dairy products. Filled milk (which still exists) is easily canned and transported, and because it doesn't need to be refrigerated, it was particularly appealing to poorer consumers without refrigerators.

It was not appealing to the dairy industry, however, which mobilized stop to the harmless and useful product. They petitioned Congress to ban filled milk, arguing incorrectly that filled milk lacked vitamins, was fraudulent, and that it did harm to a vital national industry. In the spirit of*Lochner*, the dairy industry even appealed to the racism of members of Congress. In the words of one contemporary Congressman, "The superiority of the white race is due at least to some extent on the fact that it is a milk-consuming race."

When the challenge to the Filled Milk Act reached the Supreme Court, the Court did not take into account the shameful history of the law, instead writing that the "existence of facts supporting the legislative judgment is to be presumed." This was the same level of deference that the D.C. Circuit applied in *Hettinga*, and it is this level of deference that has allowed crony capitalism to run rampant in this country.

Businesses understandably will choose the lowest cost path, and, in *Carolene Products*, the Supreme Court laid down that path. For many businesses, particularly large, established businesses, it is now easier to have Congress regulate a competitor out of business than it is to out-compete them on a level playing field.

In the wake of the oral arguments over the Affordable Care Act, many supporters of the law attacked the challenge to the individual mandate as an attempt to roll-back the Constitution to its pre-New Deal form. If limiting Congress's ability to pick winners and losers means going back to some pre-New Deal doctrines, then it's time we seriously consider the option.

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