

# The Erosion of Our Economic Liberty

By Timothy Sandefur

For many people, owning a business is the American dream, but attaining that dream has grown increasingly difficult due to laws and regulations that interfere with an individual's right to earn a living. Timothy Sandefur, who has defended many citizens against government restrictions on their economic liberty, explores the legal and constitutional history of the right to earn a living without unreasonable government interference, and reveals the many ways in which that right is threatened today.

## BOOK EXCERPT

One recurring theme in the law of economic liberty is the issue of protectionism. The government's power to regulate products and services can also be used to insulate one business from competition by others. Because such protection can bring a lot of money to the protected company, businesses are willing to invest a great deal of time and money in efforts to influence of that power in their favor. In a free market, a company that wants to succeed and grow must increase the quality of its products, decrease its prices, or find some other way to appeal to consumer needs. But businesses that cannot or do not want to compete in this way will often try to exploit government authority for their own advantage, by illegalizing their competition or by making competition inordinately expensive through the creation of what economists call "barriers to entry": rules that bar new companies from entering the marketplace.... Political leaders often impose such restrictions in the name of patriotism or "protecting jobs." In reality, such laws amount to taxes levied on consumers, "taxes" that do not fund government programs but instead transfer wealth to private businesses in the form of higher prices and decreased competition.



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In 1932, the United States Supreme Court decided the case of *New State Ice Co. v. Liebmann*. *Liebmann* challenged the constitutionality of an Oklahoma law limiting the number of businesses that could deliver ice to customers. The law set up a government agency to grant or withhold permission to entrepreneurs who wanted to enter the ice trade. An applicant who wanted to start a new business was required to prove to the board's satisfaction that a new ice company was necessary; if the board was not convinced, permission would be denied. Justice George Sutherland, writing for a 7-2 Supreme Court, found the law unconstitutional under the Fourteenth Amendment's Due Process Clause because it served the private interests of politically influential businesses rather than the genuine public good. "Stated succinctly, a private corporation

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here seeks to prevent a competitor from entering the business of making and selling ice," he noted. "There is no question now before us of any regulation by the state to protect the consuming public.... The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it." Most important, the law interfered with the basic right of all Americans "to engage in a lawful private business," without interference by the government.

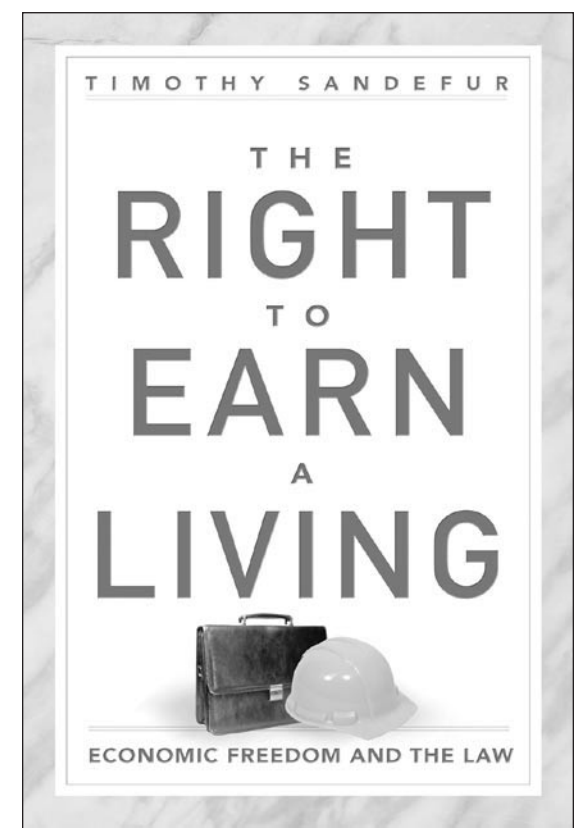
In dissent, Justice Louis Brandeis, an outspoken Progressive who enthusiastically endorsed government regulation of the marketplace, defended the law. States, he argued, should be free to experiment with legislation. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." But while this statement has become an icon of federalism, Justice Sutherland's

response to it is less often quoted. The Constitution, Sutherland answered, does not allow states to "experiment" in ways that deprive citizens of their liberty. "It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the Federal Constitution.... [T]here are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments." For example, states were not allowed to "experiment" with censorship, or to "experiment" by depriving people of their religious freedom. The right "to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection."

This basic conflict between the constitutional limits on government designed to preserve individual liberty and the power of government to enact its preferences into laws that limit liberty was and remains a recurring theme in American law, and particularly the law of economic freedom. Moreover, the question of whether regulatory agencies serve the public welfare or the private interest of insiders is inescapable. If government controls an industry in ways that protect some groups from competition by others, businesses will invest resources in trying to convince the agency to act in ways that will benefit them — all under the pretext of advancing the public welfare.

Although the regulatory scheme struck down in *Liebmann* may seem bizarre by present standards — how could "too many" ice businesses possibly endanger the public? — it is today the model by which most major metropolitan areas regulate taxis and other forms of transportation. Most cities require taxis to obtain government licenses, called "medallions," before operating, and getting such a license requires an entrepreneur first to obtain a "certificate of necessity" — he or she must prove to the government's satisfaction that a new taxi company is "necessary." This is usually extremely difficult, especially if the regulatory agency is staffed by people with close ties to the existing companies that want to forestall competition. But constitutional challenges to this regulatory scheme have failed, thanks to the rational basis test courts use when evaluating such laws.

Laws like these present problems for entrepreneurs trying to earn a living. "Certificate of necessity" schemes impose a nearly impossible burden on newcomers. Proving that a new business is "necessary" is virtually impossible, even with extensive polling data and research. Existing companies can always



argue that a newcomer is not "necessary" because the existing businesses could handle any increased consumer demand by increasing their prices, adding another office, or getting a government subsidy. What's more, many businesses that consumers enjoy patronizing are not strictly "necessary" but only convenient. Are cell-phones really necessary? What about decorative covers for cell-phones, or amusing ring-tones? The term "necessary" is itself hard to define, and the notion that a government bureaucracy can decide what businesses are or are not necessary for consumers is a fantasy, and a dangerous one at that since it plays directly to the self-interest of established businesses that seek protection against competition. The only group capable of deciding whether a business is really necessary for a community, and the only group that can be trusted with the power to make such a decision on behalf of consumers, is consumers themselves.

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# Is Friendship on the Decline?

By Ethan J. Leib

In "Friend v. Friend: The Transformation of Friendship — And What the Law Has to Do with It," Ethan Leib discusses friendship and its ongoing transformations, contending that it does need some help from our public policies. Leib shows that the law has not kept up with changes in our society: it sanctifies traditional family structures but has no thoughtful approach to other aspects of our private lives.

## BOOK EXCERPT

You loan a friend \$25,000. You don't write up any formal paperwork because the transaction seems to be predicated on trust, and you think it wouldn't make sense to formalize the loan because of the friendship. In any case, she loaned you that much a few years back. She fails to pay you back even though she seems to have the money. Are you precluded from suing in a court to get your money back?

A close friend steals your business idea, runs with it, and doesn't share profits with you. Do you have any recourse other than ending the friendship?

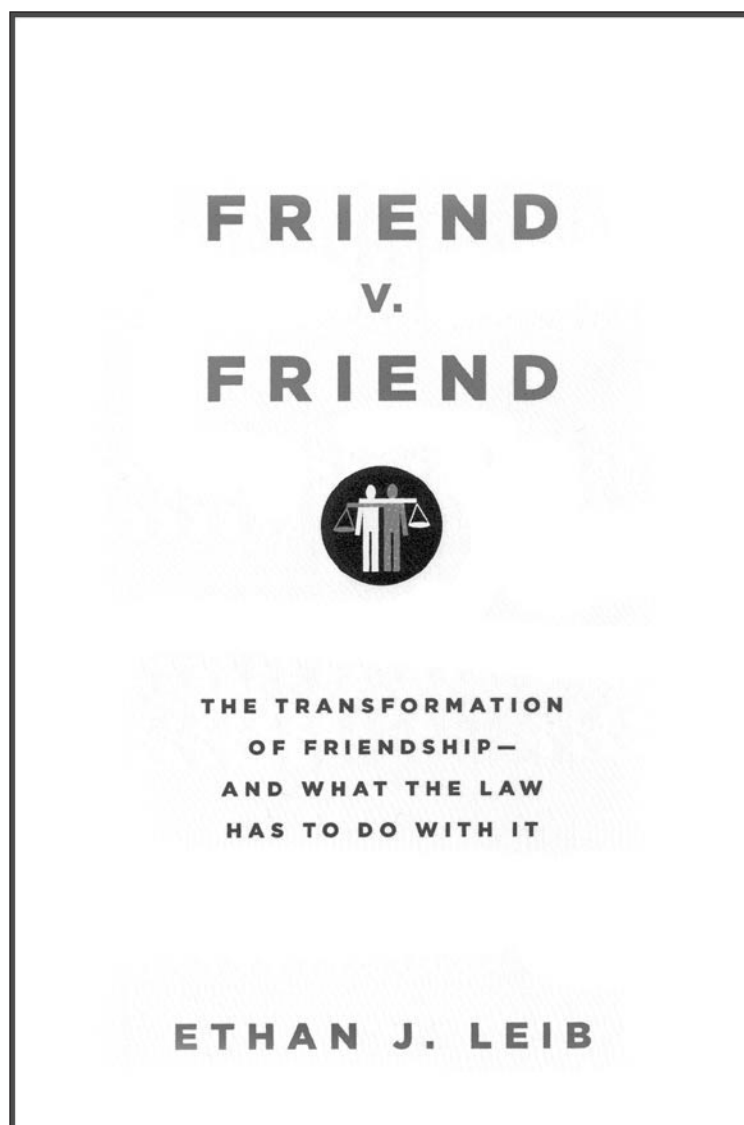
You are comatose and have failed to designate an end-of-life decision-maker for your health care decisions. You have discussed your desire not to remain in a vegetative state with your friends but not with your religious family, who would not approve of your preferences. Should the hospital listen to your family or your friends? Should we have regulations that clarify which person in your circle of intimates is the most reliable proxy for your views?

Your best friend is extremely ill. Four different colleagues in your office got legally mandated time off to care for family members who had the same type of cancer as your best friend. Should the law require your employer to give you the same rights as your colleagues to help your best friend through his illness?

This book helps you think through these hard problems. They aren't hypotheticals. These are everyday real-world scenarios



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that present themselves to us and to our public institutions with frequency. They are manifestly important because the viability of our legal institutions and of friendship itself may turn on them. And we have thus far lacked substantial guidance about what to do about them.

Sometimes when I tell people that I'm working on friendship and the law, they quickly tell me that they really don't want to be my friend if it is going to involve any legal obligation! I certainly understand the visceral reaction that there is something wrong with the law nosing into our private lives. For most of us, friends have a place at the center of our lives, and we want to believe that friendship is a special part of our private spheres that the public sphere of the law can't touch. We want to

think that friendship is pristine and unadulterated by anything law-like.

In spite of its importance, though, friendship as an institution may very well be in decline. Some sociologists tell us that we have fewer people with whom we can share important matters than we once did, and — the Internet and social networking platforms notwithstanding — our nonkin circles of intimate affection seem to be getting smaller and smaller. We may text our friends regularly, tweet through Twitter, and communicate through Friendster and Facebook, but some social scientists are still finding our networks of truly intimate friends smaller than ever. It seems likely that mass e-mails, 140 characters typed on very small keyboards, and bulletin board postings are not optimal ways to engage in deep friendships. Still, one might think that these technologies should be helping us maintain intimacies formed elsewhere. But friendship may very well be suffering, and no one is doing anything about it from the perspective of public policy.

It isn't easy to say why our friendships are suffering exactly, or even if they actually are. Perhaps we are being spread too thin. As our social networks expand, it

is harder to stay close with only a few people. Intimacy suffers at the hands of the need to keep in touch with so many, diluting our ability for focused engagement. Or maybe the undifferentiated nature of our Internet personas, traceable to the interface designs of social networking platforms, makes it difficult to draw people ever nearer to us without alienating too many others who don't want to know that they are only "colleagues" without access to our profiles made available to only our "true" online friends. Some blame TV, atomistic shopping over the Internet, or capitalism more generally. Others might blame the Internet's facilitation of divulging confidences too easily — and anonymously, to boot — leading people to be more cautious with bringing people into their most personal lives. Some might trace our intimacy issues to our high level of mobility relative to older societies: because we can often leave somewhere on a dime, friendship ties might suffer. Good ones probably require some actual time spent together in the same place. If we are always on the go, it is hard to go deep.

One might also draw on an analogy to Anthony Giddens's famous thesis in his book *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies*, that reproductive technologies led to the "plasticity" of sexuality in modern life, unmooring sex and intimacy from reproduction. One could plausibly say that our communications technologies and social networking platforms have led to the "plasticity" of friendship, disaggregating friendship from real affect, which must always be at its core to function properly. When starting a friendship means only "clicking the link," it is perhaps no surprise that friendship doesn't mean what it used to. We have always had multiple and competing definitions of the friend to contend with, which has always risked diluting the real deal. But perhaps something different really is going on in the current age when friendship has been disaggregated so publicly and so universally from emotion, when "friending" is really just networking. The art, practice, and social institution of friendship has transformed into a verb you can do casually with thousands, sitting alone behind a screen.

Whatever the causes — and no social science will reveal them definitively in any case — is this something to worry ourselves about? And even if it can't be shown conclusively that friendship is being eroded in modern society (for social scientists like to argue about whether there really is such a decline), is it an institution that

commands the attention of our policy designers?

I think friendship is a public policy concern, even if it isn't perfectly clear whether friendship is on the decline. Friendship isn't just a good like nice shaving cream; it is an essential part of living the good life and keeping our society cohesive. It helps us psychologically, keeping us from depression and helping us manage our anxiety. It helps us physically, nurturing us when we are sick or old. Indeed, studies have shown that friends can do more for our health when we are sick than family does. And friendship helps us individually and collectively in an economic sense, as well: friends provide material support in times of need and they furnish capital

to get businesses off the ground and keep them afloat. Friendship of a certain sort oils the wheels of commerce. People with close friends at work are likely to be more productive than their counterparts, and businesses that help coworkers develop close friendships within the organization respond more effectively to change. Friendship saves the state money by supplying care and services during emergencies. If the state helped friends with small incentives it could potentially make a big impact.

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