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♦ TBA BRIEFINGS ♦

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Defining Liberty

By Jim Rankin

Every individual is continually exerting himself to find out the most advantageous employment for whatever capital he can command. It is his own advantage…and not that of society, which he was in view.

* * *

[H]e is…led by an invisible hand to promote an end which was no part of his intention.

—Adam Smith, The Wealth of Nations, Bk IV, Ch II, 1776

Forty-three years ago this month, my friend Tom Theis, yes *that* Tom Theis, and I were marking time in Edinburgh waiting for the London train. Bored, we decided to walk over to Canongate kirkyard, hoping to find the last resting place of the world's first modern economist, Adam Smith. After some searching, we found Smith's tomb. Forty-three years ago, Smith's theories were generally ignored or viewed with disfavor by British and American politicians, jurists and academics. In less than a decade from our walk to his tomb, however, Smith's themes would provide the foundation for a surprisingly new conversation regarding economics and the value of an open and competitive marketplace. The resurgence of free market thinking began first in academia, then in politics, and finally in the courts.

Adam Smith was born June 16, 1723, in Kirkcaldy and died in 1790 in Edinburgh. During his prodigious career, he wrote on most aspects of moral philosophy including jurisprudence. His most famous work, published in 1776, was An Inquiry into the Nature and Causes of the Wealth of Nations, now known by the shortened title: The Wealth of Nations. Book IV of The Wealth of Nations challenges the state-centric mercantilism practiced within (and without) the British Empire during the 18th century. The purpose of mercantilism as a national economic policy was to maintain a positive balance of trade in order to strengthen state power. High tariffs, development of colonies, limiting wages, and restriction of colonial free trade with countries other than the colonizer were some of mercantilism's features. Mercantilism was economic absolutism and, eventually, the mercantilist policies of Great Britain contributed to the grievances of American colonists.

Smith's economic views—at least with regard to international economic activity—were not universally accepted by some in America. Alexander Hamilton opposed Smith's views in this regard. Hamilton argued for national control of many aspects of the new republic's economy including restrictive tariffs in order to protect fledgling industries. Thomas Jefferson, on the other hand, believed an overly strong national government would ultimately threaten individual liberty and only grudgingly accepted tariffs as a necessary evil. So, the great American political debate over government's size and economic scope began.

Initially, American courts were deferential to economic freedom in private business affairs. There was no other way to address commercial problems.

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Contracts, which were typically private party matters, were rooted in common law principles and as confirmed by Justice Marshall in *Fletcher v. Peck*, 10 U.S. 87 (1810), were protected by the Constitution from state abrogation.

Even in early America, however, the common law police power doctrine was understood. Thus, private matters and uses could not proceed if they were deemed harmful to others. In 1877, the Supreme Court in *Munn v. Illinois*, 94 U.S. 113 (1877) upheld a state's right to set maximum rates for grain storage and rejected reading a liberty of contract concept into the Due Process Clause of the 14th Amendment. Later in *Mugler v. Kansas*, 123 U.S. 623 (1887), the U.S. Supreme Court agreed with the Kansas Supreme Court's ruling affirming Mugler's conviction for violating Kansas law prohibiting the manufacture of alcohol. The Court, however, indicated a willingness to examine the legitimacy of a state's use of police power where a "palpable invasion of rights secured by fundamental law" might be implicated. The Court stated it had a duty to assess the truth claims of federal or state authorities that a given statute was designed strictly to protect people's health, morals, or safety. Otherwise, the fundamental law buried in the Constitution could not be given effect. Ten years later, in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), the Court found that the 14th Amendment includes:

> "[T]he right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In 1905 the U.S. Supreme Court decided *Lochner v. New York*, 198 U.S. 45 (1905), and it was this case which lent its name to an era ending only in the second administration of Franklin Roosevelt. During the Lochner era, the Court decided at least fourteen cases where it struck down state or federal legislation deemed to interfere with individual rights to personal liberty or the right to freely enter contracts to provide labor services.

Eventually, the Supreme Court's justices inclined toward free market principles and the liberty of contract doctrine began to leave the Court. Also, at least one member of the Lochner era majority became convinced by the overwhelming 1936 election victory of Franklin Roosevelt to adopt a more tolerant view of state and national intervention into private economic matters. In *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court ended the Lochner era upholding the constitutionality of Washington State's minimum wage legislation requiring payment of at least $14.50 per week regardless of a chambermaid's prior agreement with her employer to work for less. Chief Justice Charles Evans Hughes wrote:

> "[T]he violation alleged … is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract…[T]he liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable..."

West Coast Hotel signaled approval of the regulatory state and the end of the liberty of contract doctrine.

The view that courts should repudiate the constitutional philosophy underlying the economic rulings of the Lochner era continues to this day. During the second day of his September, 2005 confirmation hearings, now Chief Justice John Roberts commented:

> "You go to … the *Lochner* case, you can read that opinion today and it's quite clear that they're not interpreting the law, they're making the law…"

But, is this the end of the matter or does the long standing conversation continue even in the courts? Recent scholarship and political opinion suggests the Lochner era Court may not have been either so reactionary—as the Left supposes—or as activist—as is supposed by the Right. Indeed, when read fairly, one could conclude that *Lochner* and similar cases of the period fit fairly well into their historical context running back to the founding of the Republic. This is perhaps brought into stark relief considering the colonists' reaction to British mercantilist policies. Nevertheless, no one today seriously argues that the government should have no role in regulating private enterprise.

West Coast Hotel means that the courts will uphold economic regulation as long as it is reasonable. Nevertheless, the current Supreme Court may be willing to read legislative enactments literally regardless of whether to do so might frustrate a duly enacted plan of economic regulation.

During March 2015, the Supreme Court heard arguments in *King v. Burwell*. *King* and its companion

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Law Day Highlights

Coloring Contest Winners: ***Adrianna Leinwetter****, kindergarten at Farley Elementary;* ***Gavin Bellquist****, first grade at Shawnee Heights Elementary;* ***Mikayla Raney****, second grade at Whitson Elementary;* ***Destiny Ochs****, third grade at Wanamaker Elementary;* ***Omarion Baylor****, fourth grade at Stout Elementary; and* ***Audriona Acquaye,*** *fifth grade at Shanner Elementary.*

Special Thanks to Law Day Service Project Volunteers: Barb Rankin, Jeremy Kohn, Judge Evelyn Wilson, Laura Graham, Jim Rankin, Nicole Revenaugh, Vince Cox, Lisa Brown, Andy Mayo, Sarah Morse, Kayla Roehler, Jason Pollock, Rich Hayse, Alison St. Clair, Randy R. Debenham and Nick Jefferson (not pictured).

2015 Liberty Bell Award Recipient: ***Kansas' Informed Voter, Fair Judges' Project Committee, a project of the National Association of Women Judges****. Shawnee County District Court Judges Hon. Evelyn Wilson and Hon. Cheryl Rios accepted the Award. TBA President Jim Rankin, Hon. Rebecca Sanders, Chief Justice Lawton Nuss and TBA Law Day Chair Vince Cox pose with Liberty Bell Award recipients.*

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cases turn on whether four specific words in the Affordable Care Act (ACA), regarding federal monetary subsidies available only to citizens of those states electing to establish a state medical plan exchange, mean that the citizens of states refusing to implement ACA exchanges are precluded from receiving federal health insurance subsidies. The Supreme Court's decision in *King*, expected later this month, will not be decided by the *laissez-faire* principles of the Lochner era. The case should turn entirely on the two-step analysis established by *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). During arguments, Justice Kennedy remarked:

"If it's ambiguous, we think about *Chevron*. But it seems to be a drastic step for us to say that the…[IRS]… can make this call one way or the other when there are … billions of dollars of subsidies involved here?"

If congressional intent is clear, *King* should win as there is no statutory ambiguity for the Internal Revenue Service to interpret. *If* the plaintiffs prevail, we might conclude that economic liberty may only be limited by clear expressions of the legislature, not rewriting of rules by executive agencies. The irony, however, is that if the regulating scheme of the ACA begins to collapse a short- and long-term "fix" must be constructed by a Republican congress. Even some Republicans would agree that the decades since the progressive era have shown that Adam Smith's "invisible hand" is too weak, on its own, to guide certain segments of our massive and complex economy. Regardless of the outcome in *King*, however, the political debate over government's size and economic power will continue.