22. *A* **Bill of Rights** *tor* Businesspeople

The 104th Congress has a historic opportunity to return the American government to constitutionalism. Such a revolution cannot be accomplished overnight, of course, but the 104th Congress can get the process started by immediately restoring the Bill of Rights for the businesspeople of America.

Contrary to popular belief, the Supreme Court holds no monopoly on constitutional matters. In fact, Congress's most important institutional responsibility is to "check" the executive branch, the state governments, and even the Supreme Court whenever it finds constitutional rights to be in jeopardy. The constitutional rights of businesspeople are unfortunately beyond jeopardy. Under the modern constitutional orthodoxy, businesspeople are essentially rightiess creatures. Since the New Deal era, the courts have sacrificed the rights and privileges of businesspeople to accommodate the federal government's relentless quest to "control the economy." The results have been disastrous: weakened constitutional guarantees, government domination, and economic stagnation. The leaders of the 104th Congress, to their credit, seem perfectly willing, even anxious, to accept the stewardship of U.S. economic policy, but they must also accept responsibility for the state of American constitutional order—and act accordingly.

The 104th Congress should reinvigorate the original provisions of the Bill of Rights for entrepreneurs and businesses by adopting the following reform measures:

- **Restore the First Amendment rights of businesspeople by overriding the "commercial speech doctrine."**
- **Restore the Fifth Amendment property rights of landowners and developers by requiring federal agencies to** assess **the constitutional implications of their rules.**
- **Restore the Fifth Amendment privilege against self-incrimination by extending prosecutorial immunity to reporting and record-keeping requirements.**

- **Restore due process rights by eliminating the doctrine of strict criminal liability and by enacting an "ignorance-of-the-law" defense.**
- **Restore Fourth Amendment privacy rights by extending the traditional warrant criteria to commercial property.**

Free *Speech*

The First Amendment guarantees freedom of speech, but the Supreme Court has inexcusably condoned substantial governmental regulation of "commercial" speech. The Court's "commercial speech doctrine" suffers from a number of infirmities. Fkst, and most important, not only is there no basis for the doctrine in the Constitution, but the First Amendment plainly forbids the regulation of speech, commercial or otherwise. When the Court announced the doctrine in *Valentine v. Chrestensen* (1942), its decision was completely devoid of analysis; it cited no legal authority; and there was no discussion of First Amendment principles. Justice William O. Douglas once remarked that the *Chrestensen* ruling was made "casually, almost offhand."

Second, the commercial speech doctrine is based on the paternalistic notion that the American people need protection from business advertisements. That idea turns the First Amendment on its head. The Framers of the Constitution believed that people were capable of making up their own minds about what was good for them, that they did not need government interfering with their choices or with the free flow of information.

Third, the federal and state courts are hopelessly divided on the definitional question of what constitutes "commercial speech." For example, can the government regulate the television advertisements of evangelists who sell Bibles and sermons on audio cassettes? What about billboards that parody public officials? Or the regulation of cable TV? The divergent rulings of the courts in the area of commercial speech have led to a jurisprudential quagmire.

Fourth, the inevitable result of the commercial speech loophole in the Fkst Amendment is that "politically incorrect" industries—such as firearms, liquor, and tobacco—will be effectively muzzled should the government attempt massive regulation or prohibition. Civil libertarians know that when the rights of any individual or group are violated, the rights of every other individual and group are threatened. The recent health care debate is a good example of how industry advertising can influence

public policy. If the health care industry had not been allowed to run its "Harry and Louise" advertisements, the Clinton administration's plan for a massive government takeover might very well have succeeded.

The 104th Congress should correct the Supreme Court's anomalous and often contradictory precedents by extending traditional First Amendment principles to commercial speech activities. A federal statute could be modeled after the Religious Freedom Restoration Act of 1993, which effectively overturned the Supreme Court's decision in *Employment Division v. Smith* (1990). Such legislation is straightforward and uncomplicated. First, Congress should expressly disavow the Court's original commercial speech precedent, *Valentine v. Chrestensen* (1942). Second, Congress should announce that regulation of commercial speech is subject to the same high level of judicial scrutiny as regulation of any other form of speech. Congress should make it clear that rules and regulations that impinge on commercial speech are unconstitutional unless they can meet the heavy burden of justification that the courts require for regulation of political speech.

Property Rights

Federal and state governments have shown little regard for constitutional provisions that protect private property. Too many legislators have turned a deaf ear to the grievances of landowners and developers. Those legislators apparently accept the response offered by the environmental lobbyists with respect to regulatory abuse. That response is as follows: "If the regulatory agencies go too far in any given case, a lawsuit can be filed and the courts will order an appropriate remedy." That dismissive posture ignores two important points. First, the "playing field" is uneven. Few property owners have the financial wherewithal to wage a legal battle against the U.S. government. In fact, the costs of litigation are often prohibitive. The regulatory systems that have been constructed by federal agencies have, in short, successfully foreclosed an effective remedy for properly rights violations.

Second, Congress should never indulge in the assumption that the courts will correct regulatory abuse. As previously noted, Congress has an independent responsibility to ensure that the constitutional rights of citizens are respected. That type of work may not garner headlines in the newspapers, but it is a congressional duty nonetheless.

A number of property rights bills have been introduced in Congress in recent years. Those bills vary in certain particulars, but they would

essentially force the federal regulatory agencies to assess the constitutional implications of proposed regulations *before* those regulations go into effect. The bills are modest in the sense that they will not affect the Voluminous regulations that have already appeared in the *Federal Register,* but they would represent a paradigmatic shift in the way the federal bureaucracy operates.

Self-Incrimination

The Fifth Amendment codified the common law guarantee against self-incrimination, but a dubious Supreme Court precedent has upheld record-keeping and reporting requirements that undermine that guarantee. The Superfund environmental statute, for example, requires individuals and businesses in the waste disposal industry to maintain records prescribed by Environmental Protection Agency regulations and to make those records available to EPA investigators during inspections. But as was recognized by Justice Robert Jackson, among others, the Fifth Amendment guarantee is essentially nullified if the government can "require a citizen to keep an account of his deeds and misdeeds and turn over or exhibit the record on demand of government inspectors, who then can use it to convict him" of a crime. Indeed, Justice Jackson noted sarcastically that government could simplify law enforcement by merely requiring every citizen "to keep a diary that would show where he was at all times, with whom he was, and what he was up to." The abominable practice of compulsory self-incrimination should cease immediately. Congress should make Justice Jackson's opinion the law of the land. The "price" of compulsory testimony, reporting, or record keeping ought to be prosecutorial immunity. That is, if it is necessary for government to use compulsory reporting or record keeping, the state should forgo the use of criminal sanctions against individuals and organizations that reveal regulatory infractions. The Fifth Amendment requires no less.

Due Process

The Fifth and Fourteenth Amendments guarantee every person "due process of law." The Supreme Court has invoked that broad constitutional guarantee on many occasions to protect individuals from unjust criminal laws and procedures, but the Court has been woefully inattentive to the plight of businesspeople and companies in the "regulatory crimes" context. The "criminal" label, for example, is being increasingly attached to legitimate activities that were undertaken in good faith. Congress should enact two simple reforms to rid our legal system of that noxious practice.

Reform of the federal criminal code ought to begin by eliminating the legal doctrine known as "strict liability." One of the fundamental legal tenets of the Anglo-American legal tradition was the idea that a "vicious will" was a necessary element of criminal liability. The doctrine of strict liability, however, converts regulatory violations—regardless of the circumstances—into criminal offenses. A company's good-faith effort to comply with the Clean Water Act, for example, is deemed irrelevant because that law imposes strict liability for any act or omission that results in "noncompliance." It is perfectly appropriate to require a company to clean up its own pollution, but it is unconscionable to attach the "criminal" label to an individual or organization that has attempted, in good faith, to comply with the law. Traditional legal defenses such as diligence, good faith, and actual knowledge ought to be restored.

Second, Congress should nullify the old maxim that ignorance of the law is no excuse. Sen. Hank Brown (R-Colo.), among others, has noted that the ignorance-of-the-law principle may have been appropriate for a society that simply criminalized inherently evil conduct, such as murder, rape, and theft, but that it is wholly inappropriate in a labyrinthine regulatory regime that criminalizes activities that are morally neutral. It is simply unfair to presume that the American people are aware of all the rules and regulations that have emanated from Washington over the years. With over 3,000 federal crimes on the books, Congress should either require U.S. Attorneys to prove that a violation was "willful" or, in the alternative, permit a good-faith belief in the legality of one's conduct to be pleaded and proved as a defense.

Warrantless Searches

The Fourth Amendment was designed to limit official entry onto private property, but Supreme Court rulings have laid out one set of legal standards for residential property and another for commercial property. Under current law, the Drug Enforcement Administration must obtain a search warrant before it can raid a crack house, but the EPA can conduct warrantless inspections of manufacturing plants virtually at will. Bom liberals and conservatives have defended that jurisprudence by seizing upon the Fourth Amendment's reference to "houses." That reference is offered as conclusive evidence that the Framers purposely left commercial property unprotected. Judge Elijah Prettyman answered that argument in 1949 when he wrote, "To view the [Fourth] Amendment as a limitation upon an otherwise unlimited right of search is to invert completely the true posture of rights

and the limitations thereon." The Framers of the Constitution knew it was impossible to enumerate all of our rights. They inserted the Ninth Amendment as a reminder to the government that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." The argument that the Constitution condones sweeping inspection powers over commercial property is, to borrow Judge Prettyman's phrase, "a fantastic absurdity."

Congress should repeal every federal law that authorizes warrantless entry onto private property. Absent consent or exigent circumstances, government agents should be required to obtain a warrant from an independent magistrate. Magistrates, in turn, should not issue warrants unless there is probable cause to believe that a law has been violated. If those Fourth Amendment procedures can be honored when agents of the Federal Bureau of Investigation are attempting to apprehend "America's Most Wanted," they can surely be followed by the regulatory police in the Occupational Health and Safety Administration and the EPA.

Conclusion

Restoring the Bill of Rights for businesspeople through legislative reforms would advance three important public policy objectives. First, it would help to restore the integrity of the constitutional text and dispel much of the sophistry that is modern constitutional law. Second, it would improve the administration of justice in America. Third, it would reaffirm the constitutional role of Congress in protecting the rights of the citizenry.

Suggested Readings

Cass, Ronald A. "Ignorance of the Law: A Maxim Reexamined." *William and Mary Law Review* 17 (1976).

Emord, Jonathan W. "Contrived Distinctions: The Doctrine of Commercial Speech in First Amendment Jurisprudence." Cato Institute Policy Analysis no. 161, September 23, 1991.

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Wax, Steven T. "The Fourth Amendment, Administrative Searches and the Loss of Liberty." *Environmental Law* 18 (1988).

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