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Economic Liberty and the Constitution, Part 4

by Jacob G. Hornberger

After the end of the Civil War, the “carpetbag” legislature in Louisiana granted a monopoly to a group of butchers that gave them the exclusive privilege of operating the only slaughterhouse in the city of New Orleans. The law prohibited any other slaughterhouses from competing, and all butchers in the city were relegated to using the monopoly slaughterhouse.

Complaining butchers filed suit and the case ultimately reached the Supreme Court of the United States. The case, which became known as the *Slaughterhouse Cases*, is one of the most famous legal cases in the history of the Supreme Court.

The monopolists defended the law by claiming that under our system of government the state of Louisiana had the power to grant the monopoly under its “police powers,” that is, the traditional powers of state sovereignty that the state used to promote the “health, safety, and welfare” of the citizenry. The slaughterhouse law, the monopolists argued, was intended to produce more sanitary butchering facilities. (The truth was that the monopoly had been granted as a result of bribes that had been paid to the corrupt Louisiana legislators.)

The monopoly law actually hearkened back to the old mercantilist economic system that had held Europe, including France, in its grip prior to the Industrial Revolution. That was the system whereby the state would regulate the minute aspects of people’s lives. France had of course deeply influenced Louisiana culture and tradition. In enacting the monopoly law, the state of Louisiana was simply doing what France and other European countries had done for centuries — using the power of the state to give special privileges to some at the expense of others.

The plaintiffs contended that the economic system of the United States was freedom and free enterprise, not mercantilism. By enacting an economic regulation that deprived people of their right to pursue a livelihood and to compete against others, the state was violating the principles of liberty and free markets on which the nation had been founded.

Would such an argument be sufficient to persuade the Supreme Court to declare the law invalid? No, because the Court would not be concerned with the wisdom or lack of wisdom of a particular law. Its sole inquiry would be: Was the law constitutional or not? If it was constitutional, then the Court would permit it to stand, whether it was wise or not. If it wasn’t constitutional, the Court would not permit it to stand, no matter how wise or beneficial it was.

Was the Louisiana monopoly law constitutional? Recall that under the original Constitution, the Founders brought into existence a government whose powers were limited to those that were enumerated in the document. Moreover, the Bill of Rights expressly prohibited the federal government from interfering with specified rights of the people.

The state governments, on the other hand, were empowered to exercise any power they wanted as long as there was no express restriction against it in the Constitution (such as impairing contracts, emitting bills of credit, or making anything but gold and silver coin legal tender). Was there an express restriction in the original Constitution against a state's regulating economic activity, including granting monopolies? No, unless one stretched the restriction on impairing contracts to cover such a law.

The plaintiffs retained an attorney named John A. Campbell, one of the most fascinating lawyers in American history, to represent them. As described in the book *Lawyers and the Constitution* (1942) by Benjamin R. Twiss, Campbell was one of the premier lawyers responsible for integrating free-enterprise ideas into the Constitution. Twiss described Campbell as "the ablest attorney in the South."

Campbell had graduated from the University of Georgia at the age of 11 and was admitted to practice law in his home state of Alabama at the minimum age allowed. At the age of 42, he was appointed an associate justice of the U.S. Supreme Court (a lifetime appointment), resigning in 1861 because of his allegiance to his home state of Alabama and because he felt he "must follow the fortunes of her people." At the end of the Civil War, he was 55 and penniless but immediately established a very successful law practice.

Campbell was facing Matthew Hale Carpenter, who was considered the leading attorney in the Midwest, and Jeremiah S. Black, who had argued the government's side in the Supreme Court in what were known as the *Prize Cases*.

Campbell locked himself in his office for days, steeping himself in the history of mercantilism, feudalism, monopolies, and regulations. He also studied extensively the free-market ideas of Adam Smith and John Stuart Mill.

Campbell's primary job, however, was not to show that free enterprise was better than mercantilism, because that's more an argument for the populace or the legislature. As an attorney seeking a judicial declaration that the monopoly law was invalid, his job was to show that the law violated the U.S. Constitution.

For that, he turned to the new amendments that had been adopted after the end of the Civil War — the Thirteenth and Fourteenth Amendments. The former abolished slavery and the latter prohibited the states from denying any person the "privileges and immunities" of citizenship and equal protection of the laws and prohibited the states from depriving any person of life, liberty, or property without due process of law.

Campbell's written brief and oral argument before the Supreme Court have gone down in legal history as among the best ever. Justice Samuel F. Miller, who authored the majority opinion, wrote, "The eminent and learned counsel who twice argued the negative of this question has displayed a research into the history of monopolies in England and the European Continent, equaled only by the eloquence by which they are denounced."

Quoting the laissez-faire statements of the Frenchman Benjamin Constant, Campbell said,

“Society, having for its object the prevention of individuals from injuring each other, has no control over industry until it becomes harmful. The nature of industry is to struggle against a rival industry by a perfectly free competition, with efforts to obtain an intrinsic superiority Of the rights, that society certainly possesses, it results that it does not possess a right to employ against the industry of one, in favor of another, the power and the means that were given it for the benefit of all.”

He quoted from a report of 1858 of the French Commissioner of Agriculture, Commerce, and Public Works, stating, “It is admitted everywhere, it is a matter of universal experience, that if a profession be free, competition will establish a proper market.”

Quoting from Macalay’s *History of England*, he pointed out that the English people “cursed monopolies and exclaimed that the prerogative should not be allowed to touch the old liberties of England.”

Campbell read a section from Sir Edward Coke’s report of the English *Case of Monopolies*, which pointed out that monopolies produce high prices and poor quality and damage both sellers and consumers.

Campbell then integrated his economic arguments with legal ones by citing a book entitled *Constitutional Limitations* by Thomas M. Cooley, one of the most famous legal scholars of the time. Cooley had been a professor and dean of Michigan Law School, a judge on the Michigan Supreme Court, and a lecturer at Johns Hopkins University. According to *Life Sketches of Eminent Lawyers* (1895) by G.J. Clark, Cooley was “the most frequently quoted authority on American constitutional law.”

What was the significance of Cooley’s treatise? Here’s the way Twiss put it:

“Eighteen sixty-eight marks a turning point in American constitutional law. In that year laissez-faire capitalism was supplied with a legal ideology in Thomas M. Cooley’s *Constitutional Limitations* almost in a direct counter to the appearance a year earlier of Karl Marx’s *Das Kapital*.”

Campbell first argued that Louisiana’s monopoly law violated the Thirteenth Amendment’s prohibition against slavery. Comparing the law to the servitudes in feudalism, he wrote, “The privilege granted to these seventeen [butchers] is identical with the *banalitiés* in France and the *thirlage* in Scotland.”

But his strongest argument lay with the 14th Amendment — that the law violated the privileges and immunities of his clients, the equal protection of the laws, and the Due Process Clause. “The Amendment,” he wrote, “was designed to secure individual liberty, individual property, and individual security and honor from arbitrary, partial, proscriptive and unjust legislation of state governments.”

Quoting from the recent Supreme Court case of *Ward v. Maryland* (1871), Campbell said that the “privileges and immunities” of citizenship included the right to travel, enter into trades, purchase goods and services, engage in free industry, own property.

He described liberty thus:

“The power of determining, by his own choice, his own conduct; to have no master, no overseer put over him; to be able to employ himself without constraint of law or owner; to use his faculties of body and mind, at places and with persons chosen by himself, and on contracts made by himself.”

And the individual, Campbell argued, had “a social right to combine his faculties with those of others, to profit by the combination.”

Drawing on the ideas and philosophy of Adam Smith, John Stuart Mill, and Herbert Spencer, Campbell concluded,

“The most complete freedom in the exercise of all the faculties, and the most ample employment compatible with the exercise of the same faculties and rights by others, will alone meet the standard established by these fundamental laws.... What did the colonists and their posterity seek for and obtain by their settlement of this continent; their long contest with physical evils that attend their colonial condition; their long and wasting struggle for independence; by their efforts, exertions, and sacrifices since? Freedom. Free action, free enterprise — free competition. It was in freedom they expected to find the best auspices for every kind of human success. They believed that equal justice, the impartial reward which encouraged to effort in this land, would produce great and glorious results. They made no provision for ... monopolies.... What they did provide for was that there should be no oppression; no pitiful exaction by petty tyranny; no spoliation of private rights by public authority; no yokes fixed upon the neck for work, to gorge the cupidity and avarice of unprincipled officials; no sale of justice or of right, and that there should be a fair, honest, and faithful government to maintain what were the chartered free rights of every individual man, and are now the constitutional inviolable rights of an American citizen.”

In a 5-4 decision, the Supreme Court upheld the constitutionality of the Louisiana slaughterhouse monopoly. What was significant about the decision, however, was the opinions of two dissenting justices, Joseph P. Bradley and Stephen J. Field. Not only did those opinions embrace the arguments that Campbell had made, they amplified them. More important, those dissenting opinions had a powerful influence on succeeding generations of lawyers, setting the stage for the biggest constitutional battle in American history, a battle between the advocates of economic liberty and the supporters of the socialistic welfare state. It was a battle that would not be settled until 1937, at the height of Franklin Roosevelt’s New Deal for America, in a case entitled *West Coast Hotel v. Parrish*.

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