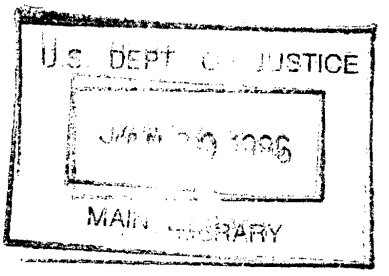
# Department of Justice




ADDRESS

OF

THE HONORABLE EDWIN MEESE III
ATTORNEY GENERAL OF THE UNITED STATES

BEFORE

ECONOMIC CLUB OF NEW YORK

8:30 P.M. EST
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NEW YORK CITY

NOTE: Because Mr. Meese often speaks from notes, the speech as delivered may vary from this text. However, he stands behind this text as printed.

It is no secret that this Administration has some definite views regarding economic philosophy. A fundamental confidence in the productivity and justice of a free enterprise economy underlies many of our policies. But the importance of economics has been rediscovered by others too. Debates over economic theory both inside and outside the government on questions of public importance have in recent years become a more celebrated aspect of our national political dialogue. This is as it should be.

Interestingly, many of the more significant participants in these debates on economic policy, and some of the government's key economic decision-makers, are lawyers. And I realize that gives the economists among you pause. Economics is increasingly thought of more as a science than an art. Mathematical tools are an important part of the economist's craft. But as we know, lawyers do not usually distinguish themselves with numbers. As the joke now goes at the law schools -- "Don't ask me to figure it out, if I could count I would have gone to business school instead."

But even acknowledging this handicap, it remains true that regulating economic transactions has always been a preoccupation of the law. In Roman times there developed a sophisticated legal distinction between personal and real property, and between ownership and possession. In medieval England the growth of the

common law was in large part a development of the law of title and inheritance, of determining rights to the possession and enjoyment of the land.

By the time of the American Revolution, legal thinking about economics centered on a philosophy of natural rights and property. Blackstone and Kent, whose writings greatly influenced the Founding Generation, declared the three "absolute rights" of man to include "personal security, personal liberty, and personal property." By propitious coincidence, 1776 was a year distinguished by the publication of both the American Declaration of Independence and Adam Smith's Wealth of Nations.

Today, as we approach and prepare to celebrate the 200th anniversary of the Constitution, most public and editorial discussion of our great charter focuses on the importance of the Constitution as a blueprint for government and a guarantee of civil rights. Certainly the Framers deserve eternal gratitude for their genius on both these counts. But focusing only on these aspects does an injustice. It forgets that the Constitutional Convention in Philadelphia, and several of the most important provisions of the Constitution, grew from the Founding Fathers' dismay over the state of national economic affairs under the Articles of Confederation, our first attempt at a national government.

The Constitution reflects the concerns of the Framers with the economic well-being of the Republic. One historian has noted that "the Constitutional Convention was called because the Articles of Confederation had not given the Federal Government

any power to regulate commerce." The biographer of John Marshall adds that "although it must be said that statesmanship guided its turbulent councils ... finance, commerce and business assembled the historic Philadelphia Convention ..." More than one commentator has opined that perhaps the greatest achievement of the Constitution was that it prevented the new states from becoming insular, Balkanized economic fiefdoms, by making possible a truly national economy.

The Constitution is quite explicit about the protection of some basic economic rights and the promotion of commerce in several of its parts. Section 8 of Article I gives Congress the power to regulate commerce. The same section empowers Congress to coin money, establish uniform bankruptcy laws and borrow on the credit of national government. Section 9 prohibits the states from impairing the obligation of contracts. And the Fifth Amendment requires that when the federal government takes private property for public use it must give the owner just compensation.

Taken together these provisions show clearly the Framers' concern with commerce and trade, with the sanctity of property rights and freedom of contract. But it would be a mistake to view these provisions as odd bedfellows in a document concerned with individual rights. The Framers were interested in a vibrant national economy. But more importantly, they perceived property rights and economic rights to be among the basic rights of man. We see the same philosophy among those who framed the post-Civil War amendments. In protecting civil rights from racial discrimination, the Framers of the 14th Amendment understood that

civil rights included important economic rights. As the Civil Rights Act of 1866, which laid the basis for the 14th Amendment in 1868, stated, "citizens of every race ... shall have the same right in every state and territory to make and enforce contracts, to sue, to be sued, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property ..."

The drafters of these amendments, like the framers of the original Constitution, understood that the freedom of man is inextricably linked to his right to participate on a full and equal basis in the economic life of the country.

Unfortunately, the economic rights protected by the Constitution, like the principles of classical economics, are not immediately evident to everyone. And just as various "schools" of economic theory have risen and fallen, so have the courts at different times interpreted the Constitution in conflicting ways.

From around the turn of the century until approximately the time of the New Deal, courts employed the doctrine of "substantive due process" to strike down a plethora of government attempts to regulate the economy. Not everyone agreed that these results were compelled by the Constitution. Justice Holmes chastised his colleagues in one case by saying that the Constitution "does not enact Mr. Spencer's Social Statics."

But this doctrine did not endure. With the New Deal, government attempted to assume more active management of the economy. Initial Supreme Court opposition to New Deal programs melted when the famous "switch in time" found the Court deciding

generally to uphold New Deal programs, thus taking the steam out of President Franklin Roosevelt's Court packing scheme.

There are several arenas today in which sound economics and the law have been in conflict. Let me touch on a few of these trouble spots.

Take for example antitrust law. Although enacted to promote consumer welfare, the antitrust statutes were, almost from their inception, subjected to overly expansive readings by the Federal enforcement agencies as well as by private plaintiffs seeking competitive advantage. In many instances, these theories actually had as their object the inhibiting of vigorous competition as a means of protecting less efficient competitors. Judges hearing antitrust cases often lacked any type of business experience, let alone any formal training in economics. The seemingly inevitable result of this combination of circumstances and incentives was the development of numerous antitrust doctrines which reduced, rather than enhanced, consumer welfare.

Over the years some of these doctrines have been modified by legislation or case law, but many experts and observers believe that many antitrust concepts are not appropriate in an age of global markets and rapidly advancing technologies. Indeed, Secretary of Commerce Malcolm Baldridge suggested about a year ago that Section 7 of the Clayton Act ought to be repealed in its entirety.

In an effort to modernize antitrust laws and to ensure that they are not used to hinder legitimate competitive activities, President Reagan directed our Cabinet to review, analyze, and

propose necessary changes in the antitrust statutes and regulations. This work was completed late last year and several proposals to reform the antitrust laws will be introduced early this session. These proposals are designed to modernize the nation's antitrust and related international trade laws in four important areas: Remedies, merger analysis, interlocking directorates, and import relief.

The time has come to reform private antitrust remedies. Our remedies proposal will address several related problems that we believe exist in the set of incentives and disincentives now facing antitrust litigants. At the outset of this discussion I should emphasize that the administration clearly recognizes the positive role that private antitrust regulation can play in punishing wrongdoers and in deterring antitrust violations. The current system of incentives to sue and settle antitrust cases does not distinguish between those private suits that are likely to promote competition and those suits that are designed to advance the interest of one or more competitors, at the expense of competition. Therefore, we propose changes in such areas as treble damages, attorneys' fees, and the amount of claims.

By allocating the treble damages remedy to consumers of businesses which have been injured by reason of overcharges, or underpayments, we will properly focus the full deterrent force of private treble damage enforcement on unambiguously anticompetitive practices. Victims of these practices would thereby retain the needed incentive to discover and challenge clearly harmful behavior.

In cases alleging other types of harm, limiting recovery to full compensation addresses the over-deterrence problem, but does not deprive a plaintiff with a just case of a complete recovery.

Next, our remedies proposal addresses the current imbalance in antitrust law regarding the award of attorneys' fees. Currently, only prevailing plaintiffs are entitled to reasonable attorneys' fees. To prevent lawsuits aimed at harassment rather than relief from anticompetitive practices, our legislation will provide for the award of costs, including a reasonable attorneys' fee, to a substantially prevailing antitrust defendant upon a finding that the plaintiffs' conduct was "frivolous, unreasonable, without foundation, or in bad faith."

The final piece of our remedies reform proposal is claims reduction, in which we will address the problem of joint and several liability and seek to develop a more equitable sharing of damages.

Without doubt, the administration's suggested revisions to Section 7 of the Clayton Act have been the most widely discussed aspect of the Working Group's mandate. The legislation to be proposed is designed to decodify advances in merger case law and in economic analysis. The revised Section 7 would make sure that the lawfulness or unlawfulness of a merger is based upon a real probability rather than a mere possibility of its having anticompetitive effect.

In addition to these changes in Section 7, our legislation will also seek to amend the Trade Act of 1947 in order to provide a new form of relief for domestic industries injured by import

competition. We propose to give the President authority to give a limited Section 7 exemption to mergers and acquisitions among firms in the injured industry as an alternative to protectionist relief under the Trade Act.

Finally, we will also seek to amend Section 8 of the Clayton Act, which now generally prohibits service by any person as a director of two or more competing corporations if any one of those corporations has capital, surplus, and undivided profits of more than one million dollars. Our proposal would raise the jurisdictional amount for statutory coverage and, perhaps more importantly, would create explicit de minimis standards for analyzing competitive overlaps between companies.

In briefly reviewing these proposals, I have not, of course, been able to include all the details or intricacies of the legislation being developed.

In tort law there is another kind of problem. The last two decades have featured an extraordinary growth in the size and number of damage awards. This has been accompanied by an erosion of some of the most basic precepts of tort law itself. For most of our history the purposes of tort law were relatively simple: compensation for the victim and some deterrence for the tortfeasor. In rare cases punitive damages were awarded to add an extra dose of deterrence. In any event, the concept of tort liability was clearly tied to the idea of fault. You had to do something wrong before you had to pay. This is no longer true.

Some developments in tort law reflect changes in assumptions about how the law -- and the courts -- should act to effect

transfers of wealth within our society. Moreover, redistribution under the guise of individual judgments is less susceptible to measurement and scrutiny than transfers made through the conscious decision making of the political process. Awards are made that greatly enrich particular plaintiffs (or at least their attorneys) but which wreak havoc with the public good and important sectors of the economy.

While antitrust and tort law are the two areas that have been getting the most public and legal attention, there is another area of the law, which has received comparatively little attention. Indeed, we have seen not only changing fundamental assumptions but a radical redefinition of one of the key concepts within our economic and political system -- the idea of property.

At one level the idea of property within our tradition has been relatively simple. We feel safe with the idea that the "property" protected under the Fifth and Fourteenth Amendments embraces at least "tangible" property -- real estate and personalty. It is also clear that the Framers were cognizant of the importance of intellectual property. In Article I they empowered Congress to "promote the Progress of Science and the Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Interestingly, this is the only reference to a "right" in the original Constitution. Today the continuing revolution in technology and communications is making the realm of intellectual property and intangible rights more important than ever before.

But there is another concept of property that made its debut more recently.

In the last several decades important court decisions have redefined property rights to include what are called "expectancies" in government benefits -- social security, food stamps, and a plethora of other so called "entitlements." At one time such benefits were viewed as gratuitous payments by government. But as they became permanent fixtures courts began describing them as rights, and invented a "property" interest in the beneficiaries' ability to receive them. This recharacterization may at first glance seem innocuous, but it has far reaching consequences. To vest such expectancies with the trappings of "property" radically changes how government may act. This is because the Constitution, in both the Fifth and Fourteenth amendments, prohibits the deprivation of property "without due process of law." Thus government decisions to grant or withhold benefits, or terminate funding, are easily transmuted into constitutional disputes.

Of course none of us wants to see pensioners and needy families arbitrarily cut off from that to which they are entitled by law. But it is questionable whether constitutionalizing questions of benefit entitlements truly benefits the very individuals who are intended to profit by such redefinition. Elaborate procedural and hearing requirements must be established. The addition of judges and lawyers to oversee every decision follows almost as a matter of course.

One consequence is that precious resources that should be

spent in the form of benefits to those in need are often squandered to uphold the trappings that accompany the transformation of a benefit into a constitutional property right. Moreover, the government's ability to reshape and tailor programs to better meet true social needs is hamstrung.

Well, at this point in the recitation you may think that I despair of law and economics ever living peaceably in the same house. That's not quite true. What I have in mind is a better working relationship. I favor an intelligent re-appraisal, and a relegation of each to its proper sphere. Fortunately, there is just such an appraisal now underway. In the last few years serious scholars, legal thinkers, and economists have combined to make valuable contributions to the way law and economics affect one another.

Let me go quickly through the problem areas I've described. In constitutional law, since the discarding of the turn-of-the-century version of substantive due process, the Supreme Court has mostly adopted a "hands off" approach to government's tinkering with the economy since the Depression. Whatever the wisdom of that doctrine, as I mentioned earlier in my remarks, the Constitution is very clear about certain things -- such as the prohibition against taking without just compensation, and the prohibition against the impairment of contracts. And where there is textual provision the courts should not be shy about vindicating the constitutional principles at stake. What is needed is an approach that vigilantly defends the limited but explicit economic statements of the Constitution, but withholds

judicial review from those matters on which the Constitution does not speak.

Turning to the area of antitrust, we have seen dramatic evidence how economic ideas can help bring sanity to the law. In the last 20 years sound economic analysis has helped slash through the thickets of bad antitrust case law. Using the powerful tools of price theory and consumer welfare analysis, the courts have been persuaded to discard many of the senseless shibboleths they had used to adjudicate cases. At the Justice Department we applaud this new rationality. We have worked hard to bring our guidelines and enforcement policies into line with these insights. And we are reviewing the antitrust statutes to suggest changes that will benefit consumers and business alike. The contribution of economics to the law in this area has been of vital importance.

In the tort area, economic analysis assists us in discovering the ripple effects of particular damage awards. At the current time a special Tort Policy Working Group at the Department of Justice is examining the problems of tort law, as are similar groups around the legal community. Economic analysis is essential in assessing whether or not tort law is actually compensating and deterring injuries, as well as in determining its harmful ramifications.

Even in the area of the Due Process revolution there is cause for hope. Some recent cases have moved away from imposing inflexible Due Process standards on government decisions. This is a trend that must be encouraged.

Finally, there is a new and fruitful interaction between economics and the law in the process of framing new laws and regulations. In the last few years consumers have benefitted from deregulation in a number of areas, including transportation and energy. Government is learning that the invisible hand of the market is often preferable to the heavy hand of regulation.

In the same spirit, through the work of the Bush Task Force on Regulatory Reform and OMB, the number of new entries in the Federal Register has been cut by more than 40 percent since 1980. And President Reagan has issued executive orders requiring that proposed regulations be examined to insure that their benefits exceed their cost for the economy.

In the final analysis, it is wise to remember that ideas have consequences. Particularly economic ideas. It is no coincidence that today much of the world lives in political slavery in part due to the mistakes of two 19th century German psuedo-economists, and that in the United States political freedom and economic freedom have flourished together.

In closing, and in the interest of impartiality, I turn to neither an economist nor a lawyer, but to a man of science, who nevertheless managed to capture well my sentiment on the function of law. "Everything", said Albert Einstein, "that is really great and inspiring is created by the individual who can labor in freedom." It is in order to make the great and inspiring possible that law and economics must join.

Thank you for inviting me here this evening.