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RELIGION AND REGULATION

*Reuben Guttman**

Nobel Laureate economist Joseph Stiglitz said that one man's freedom is the right not to be injured by another's wrongdoing. Stiglitz made that comment during remarks given at the 2011 International Bar Association's Annual Convention in Dublin, Ireland. At the time, the United States—and indeed the globe—was just three years removed from a financial crisis that nearly wrecked the economy.

The debate over whether to regulate or deregulate is an ongoing dialogue; it is reasoned discourse in a liberal democracy where there is a continuous effort to balance individual freedoms against the restraints of regulation.¹ Yet, acknowledging the need to balance is not the same as maintaining that all regulation is unnecessary. Opponents of regulation seemingly believe that people and companies in a free, unregulated market will do the right thing and may be even more productive. This premise has apparently been the rationale for the Trump Administration's sweeping attack on regulation.

Just ten days after his inauguration, on January 30, 2017, the President issued an Executive Order directing that “for every new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”² No doubt the Executive Order failed to account for the exhaustive administrative processes, and even court challenges, that typically create and temper regulation

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¹ An example of this balancing effort can be found in *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1207 (DC Cir. 2014). In that case OSHA imposed sanctions on Sea World under its “General Duty Clause” authority after a killer whale dragged a trainer under water leading to the trainer's drowning. The General Duty Clause of the Occupational Safety and Health Act of 1970, 29 USC 654(a)(1) provides that “[e]ach employer shall furnish to each of this employees employment and a place of employment which are free from recognized hazards that are causing and likely to cause death or serious physical harm to employees.” In *Sea World*, the DC Circuit noted that hazards could reasonably be abated without impeding the trainer's interaction with killer whales.

² See The White House, Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/>.

in the first place. Nor did the Executive Order account for the historical context of regulation; perhaps even a tragic event or loss of life leading to a rulemaking. To the contrary, the Executive Order approached regulation generally as a blight impeding man's ability to do good. Such logic ignores at least that of contemporary western legal tradition; it is a throw-back to the logic of *Lochner*, whose majority holding was attacked by Justice Holmes' dissent³ and later rejected by the Court through Justice Douglas' 1955 majority opinion in *Williamson v. Lee Optical of Oklahoma*.⁴ Curiously, this "Trumpian *Lochnerism*" should be antagonistic to Mr. Trump's purported evangelical base and yet it is not.

Setting aside Supreme Court logic of the past century, the western rule of law is premised on the age-old notion that even good men - or women - when left to their own devices, are prone to do bad things. We regulate to account for imperfections in the human existence; greed and jealousy, in particular, channel individual conduct across the line of propriety.

The notion that humans are imperfect and must be guided by a set of rules is fundamental to the Judeo-Christian tradition. Though the Old and New Testaments have their stories of heroes, they are also replete with tales of those who went astray. Begin with Genesis, 4:1-16, and the story of Cain and Abel, the first two children of Adam and Eve. Cain murdered Abel and was sentenced to a life of wandering. Or consider the story of Jezebel, 1 Kings 21:1-16 where Jezebel fabricated false claims about an innocent landowner who refused to sell his property to the king. It is the Judeo-Christian tradition that reminds us of man's imperfections and the need to account for them. The notion that humans in the modern world are somehow different is a notion without merit. The Book of Ecclesiastes, 1:9 reminds us that "what has been will be again, what has been done will be done again, there is nothing new under the sun."

It is, of course, not surprising that monied interests and corporate executives, who make their dollars on stock options that are taxed at lower rates than the taxes on the income of most wage earners, oppose any restraints on their method of operation. It is, though, a bit curious that these same people—using the ploy of a pro-life agenda—have created a coalition with the evangelical voters on a

³ See, e.g., Justice Holmes Dissent in *Lochner v. New York* 198 US 45, 67 (1905) ("The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import. This court has recently said, 'an absolute right in each person to be at all times and in all circumstances wholly freed from restraint.'")

⁴ *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-88 (1955).

mission favoring the elimination of the very regulation seemingly supported by fundamental biblical principles.

The Fifth Commandment, “you shall not murder,” can be taken to proscribe classic acts of violence, or perhaps even contemporary pharmaceutical marketing schemes that cause patients to take drugs that place their lives at peril.⁵ Or maybe the Commandment envisions a fact pattern wherein a mine owner’s dereliction of safety standards, embodied in federal agency regulations, leads to the type of “mining disaster” that causes death. Consider, for example, the Mining Disaster at the Upper Big Branch Coal Mine on April 5, 2010,⁶ where twenty-nine miners perished “in a massive coal dust explosion that started as a methane ignition.”⁷ A Department of Labor Report on the tragedy placed the mine owner’s conduct into context:

The investigation... revealed multiple examples of systematic, intentional, and aggressive efforts by PCC/Massey to avoid compliance with safety and health standards, and to thwart detection of that non-compliance by federal and state regulators.

The Upper Big Branch Mining Disaster is not an aberration when it comes to finding examples of corporate wrongdoing meriting both regulation and compliance enforcement. Countless lives have been lost because the asbestos industry concealed the hazards of a substance that is a direct cause of mesothelioma, a deadly cancer.⁸ One could also look at the tobacco industry, which for years concealed the hazards of cigarettes while continuing to market them to vulnerable populations.⁹

As scripture also makes clear, regulation is not just necessary to guard against physical injury or illness. The Seventh Commandment dictates that “you shall not steal.” While one could envision the proscription of theft involving some physical taking including a burglary or robbery, this Commandment also proscribes schemes designed to cause an unwitting individual to part with his or

⁵ Exodus 20:2–17.

⁶ U.S. DEPT. OF LABOR, UPPER BIG BRANCH MINE-SOUTH PERFORMANCE COAL CO. (2014), <https://www.msha.gov/data-reports/reports/Upper%20Big%20Branch%20Mine-South%2C%20Performance%20Coal%20Company>.

⁷ Brown, A., Caudill, S., Cripps, D., Maggard, C., Godsey, J., Moore, A., Morley, T., Page, N., Phillipson, S., Sherer, H., Steffey, D., Stoltz, R., Vance, J., *Report of Investigation—Fatal Underground Mine Explosion*, UNITED STATES DEPARTMENT OF LABOR (April 5, 2010), available at <https://arlweb.msha.gov/Fatals/2010/UBB/FTL10c0331noappx.pdf>.

⁸ *Asbestos Exposure and Cancer Risk*, NAT’L CANCER INST. (Jun. 7, 2017), <https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/asbestos/asbestosfact-sheet>.

⁹ *Tobacco Industry Marketing*, AM. LUNG ASS’N (May 7, 2018), <https://www.lung.org/stopsmoking/smoking-facts/tobacco-industry-marketing.html>.

her property; in contemporary terms, securities and consumer frauds are just various types of theft. Consider, for example, the statement of former New York State Attorney General, Eric Schneiderman, announcing the \$25 million settlement of a consumer fraud case against Trump University:

In 2013, my office sued Donald Trump for swindling thousands of innocent Americans out of millions of dollars through a scheme known as Trump University. Donald Trump fought us every step of the way, filing baseless charges and fruitless appeals and refusing to settle for even modest amounts of compensation for the victims of his phony university. Today, that all changes. Today's \$25 million settlement agreement is a stunning reversal by Donald Trump and a major victory for the over 6,000 victims of his fraudulent university.¹⁰

Once again, this is but one example. ENRON, Tyco, WorldCom, and Madoff are all tales of the theft proscribed by the Seventh Commandment. And every time a manufacturer falsely touts a product's attributes in order to cause unwitting consumers to part with cash, that too is theft. And where the product defect is so egregious that it may cause death, two Commandments are violated.¹¹

Too often, substantive wrongdoing is covered up by false statements or efforts to obstruct justice.¹² Of course while these modern-day wrongs are proscribed by contemporary statute, they actually have biblical origin. The Eighth Commandment states: "you shall not bear false witness against your neighbor." Isn't this really the genesis of our modern version of perjury or false testimony?

The commandments exist because if man were left to his own devices, self-interest would—as Stiglitz might opine—cause him to injure another. The myriad ways in which this can occur has required modern regulation at even the most intricate levels. Consider, for example, all the regulations governing conflicts of interest. They are embedded in the Bar rules governing the conduct of lawyers; they are embedded in rules governing government contractors, and they crop up in multiple other regulatory venues. They even became an issue

¹⁰ *Statement By A.G. Schneiderman On \$25 Million Settlement Agreement Reached In Trump University Case*, N.Y. ST. OFF. OF ATT'Y GENERAL (Nov. 18, 2016), <https://ag.ny.gov/pressrelease/statement-ag-schneiderman-25-million-settlement-agreement-reached-trump-university>.

¹¹ Ralph Nader, UNSAFE AT ANY SPEED 1965.

¹² See, e.g. 18 USC 1001.

with regard to a Trump Organization entity holding a long-term lease on the Old Post Office property on Pennsylvania Avenue in Washington, DC.¹³

Of course, concern over conflicts of interest is not new; it is age-old. The Book of Matthew, 9:24, says: “No man can serve two masters. Either you will hate the one and love the other, or you will be devoted to one and despise the other. You cannot serve both God and Money.”

To those who would argue that humans should be left to their own devices devoid of any external regulatory constraints, there is, as previously noted, the argument that regulation restrains innovation and the growth of capital. But what is the track record when captains of industry are left to their own devices? One need only look at the financial crisis of 2006-2007, for example, which was, in part, the result of financial products being foisted on unsuitable consumers with the risk passed to unwitting investors - including the pension funds of working Americans.¹⁴ Reflecting on that crisis, Stiglitz compared the conduct of banks to “gambling,” which, he said, is why regulation is so important.¹⁵

Clearly, the United States regulatory system is vast. We regulate—through statute or agency enactment—the workplace, the housing market, the environment, the economy, business with government, and even the airspace and the airwaves. Often, events—tragedies in particular—drive law or regulation. The environmental movement and the environmental laws of the 1970s were motivated and energized by Rachel Carson’s *Silent Spring* published in 1962. Carson’s book documented the impact of pesticides on the environment. Of course, our statutory environmental law is rooted in, among other sources, traditional common law doctrines of trespass and nuisance.¹⁶ Yet, they also have basis in scripture. For example, Genesis, 2:15 says “the Lord God took the man and put him into the garden of Eden to dress it and keep it.”¹⁷ Or perhaps this passage in Numbers 35:33-4 is relevant: “you shall not pollute the land in which you live.... You shall not defile the land in which you live...”¹⁸

¹³ Anne E. Marimow, Jonathan O’Connell & David A. Fahrenthold, *Federal Judge Allows Emoluments Suit Against Trump to Proceed*, THE WASHINGTON POST, Jul. 25, 2018.

¹⁴ See Reuben Guttman, *Fraudsters Lobby to Muzzle Whistleblowers*, MARKET WATCH, <https://www.marketwatch.com/story/fraudsters-lobby-to-muzzle-whistleblowers-2011-02-08>.

¹⁵ See Reuben Guttman, *Backing Barack*, THE GLOBAL LEGAL POST, <http://www.globallegalpost.com/blogs/commentary/backing-barack-91190962/>.

¹⁶ See, e.g., *Rylands v. Fletcher*, (1868) LR 3 HL 330.

¹⁷ *Genesis* 2:15.

¹⁸ *Numbers* 35:33-4.

In 1959, after Life Magazine published a photo exposé on the horrors of Thalidomide, which was used as an anti-nausea drug for pregnant women, causing the birth of limbless children, the Senate began oversight hearings. The result was the passage of the Kefauver-Harris Amendment to the Food, Drug, and Cosmetics Act (FDCA) which implemented stringent requirements for pharmaceutical companies to demonstrate the safety and efficacy of drugs before they are placed on the market.¹⁹ The Act also required stringent post-marketing activity.²⁰ It is axiomatic that having safe drugs is a good thing. But not surprisingly, one might also consider 1 Corinthians 6:19 which states: “don’t you realize that your body is the Temple of the Holy Spirit, who lives in you and who was given to you by God.”²¹ Once again, one can find support in scripture for regulation.

Regulation is not merely the product of what President Trump might call the Washington “swamp.” It is consistent with our western tradition: both our inherent values and our appreciation for man’s foibles and the potential for man to do injury to man. Yet, regulation is not just a matter of moral values.

Each day Americans rely on the belt and suspenders of our regulatory system in making critical life and death decisions. We take drugs because we know that they have been tested for their safety and efficacy and if, in the manufacturing process they have been adulterated, we know they will be pulled from the shelves. We put our children in car seats knowing that the seats have been tested for safety, a result of regulation. And we rely on food labels mandated by regulations to make sure that our diets are consistent with medical regimen and that we do not consume foods that may trigger life-threatening allergies. Americans are also confident that they can go to work each day knowing that regulation requires employers to maintain workplaces free from recognized hazard.

It is not just about health and safety, our securities markets are centers for global investment because they are regulated and transparent. Investors know that if securities regulations are violated, there is a Federal Agency—the SEC—that will enforce compliance with regulation, while private rights of action also exists to return money to injured investors.

¹⁹ See Caroline Poplin, *The First Amendment: Not One Size Fits All*, 3 EMORY CORP. GOVERNANCE AND ACCOUNTABILITY REV. 30 (2016). Dr. Caroline Poplin, JD/MD provides a concise history of food and drug law.

²⁰ *Id.*

²¹ 1 Corinthians 6:19.

Trump is indeed right that eliminating or rolling back regulations will benefit some people—just as the elimination of a security guard at a bank may enrich those in the business of robbery. Yet, over the long-term, regulation and its enforcement are essential for economic and moral reasons.

Unfortunately, the attack on regulation has not only been direct but it has come through procedural artifice often hard for the average person to appreciate. Consider that in the United States we leverage compliance enforcement through citizen-suits that enforce regulation or compel agency action. A litany of Supreme Court decisions have impeded the access to courts that is necessary for such litigation. For example, material changes to the pleading standards have led to the abandonment of the age old “notice pleading requirement” in favor of a new “plausibility” standard where a Judge can bring his own subjective views into the analysis of determining where a matter—absent any discovery and at the earliest stages of the litigation—is “plausible.”²²

Along the same lines of this plausibility standard, there is now a push among certain jurists to ignore or abandon what has become known as the “Chevron Doctrine” which arose out of the Supreme Court’s decision in *Chevron USA v. Natural Resources Defense Council, Inc.*²³ In a nutshell, that case established judicial deference to an expert agency’s interpretation of the very law that Congress empowered the agency to—in the first instance—interpret. Both of President Trump’s Supreme Court appointments have shown some antagonism to this doctrine with their view that jurists be permitted to impart their own subjective views in place of agency decision making that has been the product of rigorous administrative process.²⁴

Of course, when discussion of judicial appointments occurs, this matter of Chevron deference seemingly goes by the wayside in favor of another test of judicial qualification; the question of whether *Roe v. Wade*²⁵ should be overturned in furtherance of a “pro-life” agenda. Yet, slipping through the cracks is another agenda: one antagonistic to regulations, many of which are designed to safeguard life. It is indeed a disconnect that merits correction, especially for those who care about not just our common law tradition but also the teachings of scripture.

²² See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

²³ See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

²⁴ See *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014); *TransAm Trucking, Inc. v. Admin. Review Bd.*, 833 F.3d 1206 (10th Cir. 2016).

²⁵ *Roe v. Wade*, 410 U.S. 113 (1973).