

Introduction  
and  
First Three Chapters of

***By the People*** ..... by Chas Murray

**Introduction** - a few facts .

Growth in Gov't	Fed budget 1960 to 2012 (constant 2010 \$) 679 bill to 3.4 trillion
Growth in Exec Agencies	1960 -13 agencies — 2012 - 70 agencies
Code of Fed Reg	1960 - 22,877 pages — 2012 - 174,545 pages
State and Local Gov't	1/4 of expense comes from Federal govt with mandates - total state and local workforce grew from 7.2 mill to 19.3 mill from 1963 to 2012
Gov't Impact on Private "for profit" Companies	22% of private employees depend on Fed contracts worth \$500 bill per yr
Gov't Impact on Not For Profit	1/3 of NFP money comes from Fed gov't - NFP represent 11% of total US employment.
Total % of Spending From gov't	40% of all spending in the country is from gov't --24% from Federal --16% from State and Local

**Chapter 1** The Broken Constitution

The 1932 to 1942 Period	In 1928 the Fed budget was 38 billion (in 2010 dollars) today its 3.4 trillion
The Progressive View in the early 20 <sup>th</sup> century was found in many colleges	"Thought leaders" in America felt experts should organize and control life in general, but the Supreme Court had only 3 progressive with 6 conservatives when FDR was elected.
Supreme Court blocked FDR's progressive approach for 3 yrs.	In 1935 FDR threatened to pack the court adding 6 new justices that he would appoint. That caused two conservative justices to see the light and become progressive.

Cases that allowed progressive ideas to take hold and gov't to grow

*Nebbia v NY* allowed the state to dictate the retail price of milk

*Helvering v Davis* '37 (determined the legality of the social security system) allowed a expansive interpretation of the Constitution's "promote the general welfare clause" (Despite the fact both Madison and Hamilton had said this clause was limited to the enumerated powers enumerated in the Constitution and further limited by the 9<sup>th</sup> and 10<sup>th</sup> Amendments granting all power not enumerated in the Constitution to the states and the people.) This case basically gave Congress right to spend on almost anything that wasn't "arbitrary".

Individual Economic Rights further eroded

*US v Caroline Products* (which allowed Congress to prohibit a company from adding non-milk fats to milk to create a new product) This case restricted the right under the 9<sup>th</sup> Amendment of the people to engage in activities not specifically forbidden by the Constitution. It gave the Court and Congress the right to downgrade certain Constitutional rights so long as law or ruling has a "rational basis" and is not an arbitrary limit of freedom. If Congress enacts a law it is was thence forth presumed constitutional. The decision did have Footnote #4 which set a higher burden for laws that restricted minority rights. (Note: in 1955 the Warren court eliminated the "rational basis" requirement in *xxx v xxx*)

The Commerce Clause

*Wickard v Filburn* '42 (allowed the government to control a farmer's grain production grown for his personal use) the rational is he would have had to buy grain at the market if he had not grown his own.

*NLRB v Jones and Laughlin Steel* '37 allowed gov't to interfere in relations between workers and their employer.

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## Chapter II

## Entitled A Lawless Legal System” (with Manifestations of Lawlessness)

1) Why it is so costly that most can't afford.

1) Any lawsuit cost well surely go into five figures (only 5% of St Louis County people can afford to carry a case in St Louis county through a trial.)

2) Criminal Law now Lacks the requirement of evil intent

2) Traditionally a guilty mind and guilty act were always needed for criminal conviction. But ignorance of the law was no excuse. The two were not inconsistent because there were few laws that rarely changed. But not today, beyond state and local law the feds have 4400 criminal laws . Most do not involve things that are morally wrong or wrong in themselves. Additionally there is RICO where, for instance a officer of an offending corp. can be sent to jail even if he was unaware of the offending activity. In Alaska a manager was sent to jail because a worker had cracked a oil pipe with a back hoe and oil leaked into some water. The manager had no knowledge of the problem in fact he was off duty when it happened

3) Civil Law has damages without any showing of negligence

3) Today there is no requirement for some traditional legal grounds. ( e.g. Fraud, negligence, etc) to create liability . With 174,000 pages, Fed regulations are arbitrary and enforced irregularly depending upon the degree scrutiny or discretion being exercised by a particular regulators at a particular time. Some must comply, others avoid any difficulty..

4) Law is too complex

4) Madison said too much complexity in the law and/or too much change in the laws is impossible to follow. Consider the size of recent bills Obamacare 1024 pages, Dobb Frank 2300 pages, What about the restaurant owner who has a food inspector check the temperature of his cheese during a busy lunch hour. The max temp allow is 41 degrees, the temp of the cheese the grill man is about to put on some burgers is 44 degrees, the owner doesn't even argue but pays the fine. Not wanting to get the inspectors mad at him.. However, it all seems lawless.

5) To much discretion given to regulators and prosecutors

5) Hard cases make bad law that is why a good judge will not shade the law to accommodate a tough fact pattern. If he uses too much discretion the law disappears and there is nothing but discretion. There was also a standard that held that there could be no recovery without damages – today there is liability for all sorts of real and imagined injury.

This discretion extends to regulators and prosecutors who can bring charges of various severity depending on how quickly the target submits and agrees to behave a certain way. For instance, corporations threatened with enforcement actions are told we want one of your employees to swear to X and then we will lessen the charge against the company. The pressure on the employee to make such admissions is huge. This is sometimes done even when regulators want statements that are actually untrue.

6) Improper taking of private property by gov't

6) The Constitution says property can be taken if the government needs to actually use the property for public purposes. Today any "worthy" purpose like a new shopping center can justify taking private property to give to other private persons for their private purposes..

7) Strict liability on products (with services next?)

7) Strict liability means if someone is hurt someone else has to pay. So strict liability on products (such as step ladders) is widely known and understood. Lately there is talk of strict liability on services. So if a woman goes to the hospital and has a retarded baby, her doctor or the hospital must have done something wrong so she gets paid.

8) Lowering the bar to initiate a lawsuit

8) Formerly you had to plead specific facts supporting your claim and then produce evidence in support of those specific. Fishing expeditions were not allowed. Today you have notice pleadings where you allege a certain set of complains and say "factual evidence to follow" This leads to wide ranging discovery requests and runs costs up.

9) Little limit on discovery

9) Because of the nature of the pleadings judges can't effectively limit discovery requests. In the '50s the standard was tightened to "plausible on its face" from the 1930's standard of simply "conceivable". However in the 1970's more wide ranging discovery was again allowed.

10) More Forum shopping

10) .Today's rules allow cases to be filed where the plaintiff is likely to have the most favorable jury. In the past the forum was determined usually by the plaintiff's address.

11) Little self restraint by lawyers

11) Lawyers have less self restraint regarding the bringing of lawsuits. Advertising stirs up litigation and contingency fee arrangements does too.

Congress Indents Lawsuit

Law now encourages private actions. From 1965 to 2005 the number of such laws and resulting lawsuits increased by 9 fold. Incentives used include triple damages, defendants pay legal fees of plaintiffs, setting a low bar to prove injury, etc. An example is OSHA which does about 30,000 inspections each year but there are 160,000 enforcement actions, mostly private lawsuits per year.

Can this change

The various legal lobbyist groups will make it difficult to undo any of the above. Obviously a lot of legal time is consumed and fees generated helping people just to understand all this; much more is generated helping people cope with in proceedings.

### **Chapter III**

Extra Legal Regulatory State within the State

Basics of the Regulatory State

The basics here are simple. Gov't is assumed to be the honest expert able write regulation and rules and to judge possible violations of said rules and the courts operated with pre-assumed deference to the forgoing process should a regulatory case get into a real court .

Making the Rules

The creation of major regulations start with a public filing asking for notice and comment. Then the agency supposedly reviews comments and re-writes the final regulation. Once finalized the regulation goes in Federal register (175,000 pages ). If the regulation is significant (about 20% in all) there is a cost benefit analysis required; however, the assumptions used always favor a result preferred by the issuing agency. On small changes the agency issues guidance which require no review. Some "guidance" is huge. The Dept of Education issued "guidance " that redefined Federal standards on all aspects of school instruction, testing, etc. 34 pages plus 60 footnotes. Courts generally just accept "guidance" because it is considered s work in progress and not yet "final", but Federal aid can be effected if it is not followed. Since you are required to follow rules you would not risk irritating the regulator by not following their guidance as well.

Under their Thumb

Regulatory agencies can: require detail record keeping, require you to answer question and produce records on request, issue subpoena for info without probable cause (only "on vague suspicion"), can compel the disclosure of trade secrets to regulators, etc

Inside the Administrative Court	If you violate a regulation your case goes before an administrative law judge selected by the agency whose regulation you are accused of violating. Once convicted your route of appeal in first to an appeals panel of Adm Law Judges. Then you can go to federal court where Chevron deference is in force (see next section)
Chevron Deference	Chevron v. Nat'l Defense Council (1952) held that regulatory agencies have the right to be treated as neutral experts and are presumed to be objective in issuing regulations and judging the behavior of citizens. Regulatory agencies are even allowed to vary their regulations from case to case. The only exception is if Congress had specifically addressed a particular point of contention in legislation.
Origins of the Extralegal State	Marshall in 1825 and the Supreme Court again in Field v. Clark (1892) said Congress may not give general grants of authority to the Executive Agencies. There was slight erosion on "non delegation" policy over time. Finally in 1943 the Supreme Court in NBC v. US said anything that the FCC felt was in the public interest would be "ok".
– Executive Branch	Pres. Has little power to change regulation once the Congress gives a grant to regulate and the original regulations have been issued. However case by case enforcement is in the hands of the then sitting administrator and of greater importance the high ranking civil servants in the agency or dept.
– Legislative Branch	Congress has given away so much authority all they have left is power of the purse.
– Judicial Branch	Courts allow nearly any regulation and agency enforcement if Congress has given great of general authority in the area.
Why we can't Go Home	Gov't could not function without wide regulatory latitude
Lawlessness and Obama's Administration (examples)	Marked by unilaterally wavers of provisions required by law - e.g. delayed implementation of parts of Obamacare despite specific date requirements in the law, gave millions of illegal a pass on deportation required by law, etc