

**“THE WAGES (AND HOURS) OF SIN:
RERUM NOVARUM, LOCHNER V. NEW YORK, AND
NATURAL LAW CONSTITUTIONALISM”**

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*Beginning with an examination of the Supreme Court’s decision in the case of *Lochner v. New York*, this article examines the necessity of natural law jurisprudence for a proper sort of constitutional interpretation. Natural law jurisprudence, properly understood and applied, would not be a cover for judges to read their own preferences into the Constitution.*

Introduction

Lochner v. New York is often considered, by liberals and conservatives alike, a monument to the perils of using natural law principles to guide judicial decision making. In fact, *Lochner* stands as one of the few Court decisions—like *Dred Scott* or *Plessy v. Ferguson*—which is virtually universally reviled, regardless of political orientation, for liberals see in it the obduracy of the court committed to protecting the interests of the propertied against the modest efforts of the state to ameliorate the conditions of the workers (in Holmes’ stinging words, to “enact Mr. Herbert Spencer’s Social Statics”), where conservatives see in it the beginning of the Court’s forays away from the protection of textually-based constitutional rights, into the realm of judicial creativity in inventing new ones and so undermining democratic decision making. In fact, in *Griswold v. Connecticut*, the 1965 case in which a statute outlawing the distribution of contraceptives was found unconstitutional on the basis of a right to privacy found in the “penumbras and emanations” of the Bill of Rights, Justice Black’s dissent, ignoring the penumbras and emanations language for the nonsense that it is, specifically castigates the court for inventing the constitutional right to privacy out of whole cloth, using “the same natural law due process philosophy found in *Lochner v. New York*.”¹ It is undeniably true that the Supreme Court’s forays into this line of natural law jurisprudence in reality undergird the abortion decisions (which initially relied heavily on *Griswold* and the right to

privacy announced therein, and since the Casey decision in 1992 have focused on the “liberty interest” that a woman has in obtaining an abortion). Thus it is no surprise that those critics of the court most strongly opposed to the culture of death—such as the contributors to the *First Things* symposium “The End of Democracy?”—tend to be most dubious of the Court’s notions of natural law in general, and substantive due process in particular.

The purpose of this article is to will re-examine this understanding, focusing on three issues: first, the nature and adequacy of the natural-law reasoning used in *Lochner*, second, the general question of the relationship between constitutional law and natural law, and finally the substantive content of natural law jurisprudence. The argument will be that while *Lochner* is to some extent based on a type of natural law reasoning, it is the attenuated and impoverished Lockean version of natural law which Professor Holloway so brilliantly critiqued in his article “Evangelium Vitae and Modernity: The Philosophical Origins of the Culture of Death.”² Further, it will be argued that while *Lochner* was wrongly decided, the problem was not that it was based on natural law principles, but rather that it was based on the Lockean approach to natural law, which, while in many ways consistent with American political thought, is not consistent with constitutional jurisprudence. Thus the article attempts to make the case that while the *Constitution* both rests on and subsumes natural law principles, these principles are mediated, from the perspective of the framers, by prudential considerations. The conclusion will be an attempted articulation of the proper role both procedural and substantive for natural law principles in Constitutional adjudication. If this understanding is correct, a proper application of natural law principle by The justices would generally restrict, rather than expand, the role of judicial decision making, but would nevertheless serve as an important touchstone of principle to protect individual rights and social justice.

Preliminary Issues: What Was *Lochner v. New York* Really About?

The issue in *Lochner* was whether or not the law passed by the New York legislature forbidding journeyman bakers from working more than 10 hours a day or 60 hours a week was constitutional. The court found that this was a violation of Mr. *Lochner*’s “liberty to contract” which was implicitly protected by the part of the Fourteenth amendment which denied to the states the power to deprive anyone of life, liberty, or property without due process of law. Thus was born the constitutional concept of “substantive due process” the idea that the Fourteenth Amendment puts out of the reach of state power certain areas of regulation and control, regardless of the process that is used to enact such regulations (this concept is in contrast to the procedural

interpretation of the due process clause, which holds that the amendment contains no substantive restrictions whatsoever on the state, but only requires that any deprivation of life, liberty, or property be carried out in a procedurally regular form).³ Now any reasonably attentive reading of *Lochner* will indicate that this extreme form of substantive due process was not in fact invoked or even anticipated by the *Lochner* Court—the Justices were unanimous in holding that the state could legitimately invoke its police power in cases of regulating the hours of work (even though that would interfere with an individual liberty to contract) in order to advance legitimate interests that fall under the purview of the police power the protection of the life, health, safety and morals of the public—they simply disagreed about whether or not this regulation was in fact a legitimate invocation of the police power.

Much of the criticism of *Lochner*, however, is focused on the concept of substantive due process, and in particular the more extreme form which would hold that certain unnamed but implicit liberty interests can not be interfered with by the state for any reason whatsoever; it is argued that imbuing the clause with a substantive content distorts its meaning, gives free reign to the judiciary to substitute their judgment for that of the duly elected representatives of the people, and in general allows for an unwarranted expansion of judicial power. Perhaps the most famous, and certainly most felicitous, phrase capturing the essence of this critique is John Hart Ely's statement that "substantive due process' is a contradiction in terms—sort of like 'green pastel redness'". In other words (but still Ely's) "there is simply no avoiding the fact that the word that follows 'due' is 'process'."⁴

It is certainly true that in practice, the notion of substantive due process has been the funnel that has allowed the court to pour the culture of death into our constitutional framework. It is therefore eminently reasonable that many conservative commentators have argued that this concept—and indeed, any natural law oriented jurisprudence is fraught with the peril of judicial preference being substituted for constitutional principle, and thus have argued that the only appropriate framework for judicial review in a democratic society is original intent—that is, to only invalidate laws which violate the clear, textually based meaning of specific provisions of the *Constitution*. To go beyond the "four corners of the *Constitution*" is to invariably substitute judicial preference for legislative preference—the will of five rather than the will of the majority and hence to undermine democratic governance. From this perspective, the case for confining the due process clause to process, rather than substance, is quite clear; this is how it is described by Robert Bork: "Since the clause was designed only to require fair procedures in implementing laws, there is no original understanding that gives it any substantive content. Thus, a judge who insists upon giving the due process clauses such content must make it up. That is why

substantive due process, wherever it appears, is never more than a pretense that the judge's views are in the *Constitution*.”⁵

On the other hand, the issue may be less clear cut than many of the courts critics indicate. In the first place, there is a considerable body of evidence that at the time of the framing of the *Constitution*, the phrase “due process of law” was used interchangeably with the phrase “the law of the land” to refer to a common body of rights and privileges limiting the reach of the government, particularly in confirming substantive common law property rights.⁶

In the second place, with all due respect, one could point out, to Professor Ely and like minded critics, that the word that precedes “process” is “due”. That is to say, an argument can be made that the distinction between substance and process is murkier than *Lochner's* critics imply, because part of deciding what process is due in a given situation is weighing the substantive interest at stake. For example, it would be inconceivable either that the extensive procedural guarantees hedging around a death penalty case would ever be held necessary before the state could legitimately deprive someone of the amount of property it takes to pay a parking ticket; nor yet would the court consider that a person's liberty interests had been adequately protected if the rather informal procedures of traffic court were put into place trying those accused of a major felony. Nor can we say that there are no rights or interests which the concept of due process doesn't provide absolute protection, for it is inconceivable that the Supreme Court would ever recognize, no matter how regular the meeting of the legislature which enacted it, nor how fully in accord with Roberts' Rules of Order the vote authorizing it, a piece of legislation which transferred the burden of proof in a criminal case from the state to the defendant. Thus, even within the ambit of criminal procedure, which everyone agrees is encompassed by the due process clause, procedure and substance can be hard to separate.

Furthermore, it is hard to deny that there is “process” involved in the making, as well as in the enforcing, of law. If, for example, a body of persons who had not been elected to legislative office, but who nevertheless were convinced that they had some sort of mandate to govern, set up a court system and then passed a tax code and attempted to use these courts to enforce it, one could certainly see some point in the argument that this was a deprivation of property without due process of law, even if the procedures used during the hearings were perfectly legitimate.

Turning now to the “substance” involved in the substantive due process aspect of *Lochner*, we can examine the notion of “liberty to contract.” If it were not all tangled up with the substantive due process issue, it seems unlikely in the extreme that anyone would argue for a moment against the position that the fundamental concept of liberty, protected against invasion without due process

of law, includes the right to make contracts (in fact, the existence of the contract clause of Article I, which states that no state shall pass any law “impairing the obligation of contracts” clearly implies that the *Constitution* recognizes as implicit in our legal system the right to make contracts and the government’s obligation to enforce their terms); nor yet would even the most die-hard libertarian argue that there are some contracts that the state can regulate or limit, or even forbid altogether (e.g., contracts to kill). If *Lochner* had declared (as the Court did in the abortion cases) that liberty to contract was of such a fundamental nature that it “trumped” the state’s police power in all but the most extraordinary circumstances, then the ink spilled in inveighing against *Lochner* would be manifestly explicable. What the court actually said, however, is this:

The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal *Constitution*. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere.

The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal *Constitution* offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the 14th Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one’s property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal *Constitution*, as coming under the liberty of person or of free contract. Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract in regard to their means of livelihood between persons who are sui juris (both employer and employee), it becomes of great importance to determine which shall prevail,-the right of the individual to labor for such time as he may

choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state. (citations omitted)

One can certainly make the argument that what the court was investigating here was more analogous to process than to substance, if one looks at this as a police power case rather than a liberty to contract case. In other words, one could see the raising of the issue of liberty to contract only to establish standing (that is, that *Lochner* had in fact been injured by the law in question), with the real issue being whether or not the state legislature was authorized to pass legislation on this subject; the question of whether or not a particular body is authorized to undertake a given act is certainly definable as a procedural question.

Given this perspective, the decision in *Lochner* does not seem all that outrageous. In fact, given the arcanity of the facts of the case (the regulation of maximum hours for bakers); the modesty of the principle enshrined in *Lochner* (that the state can't violate an individual's liberty if the state is not competent to legislate in the area of the violation); and the minimal practical effect of the case (the Court in the years around *Lochner* upheld many maximum hours laws, and the case was specifically overturned in 1937), the most unusual thing about the case is that any one remembers it at all.⁷ Nevertheless, remembered it is, as the talisman of the perils of natural law jurisprudence.

With that in mind, it is useful to examine the natural-law reasoning in *Lochner*, both to understand how the case came to be such a powerful symbol and to consider whether or not this decision provides a satisfactory basis for a natural law jurisprudence. The preceding discussion of the holding in *Lochner* should serve to clarify the focus of the decision. In the case, the concept of liberty to contract was understood, not as an independent right conferring benefits on individuals and obligations on the state, but rather as a sort of fence or signpost signaling the limits of the state's police power. This view reflects the original understanding of the relationship between limited government and individual liberty: that it is the limitation on government power itself which preserves the liberty of the individual, and it is the concern for individual liberty which keeps government limited. This is the perspective expressed by Hamilton's famous defense of the lack of a Bill of Rights in the *Constitution* the idea that "the *Constitution* is itself, in every rational sense, and to every useful purpose, a bill of rights," and further, that to add a specific list of enumerated protected rights would be "not only unnecessary in the proposed *Constitution*, but would even be dangerous" because they would lead to the inference that the government in fact had power to legislate in areas not enumerated in the bill of rights, when in fact the concept of limited government itself should preclude all such legislation.⁸

Thus the decision in *Lochner* was based on a very different kind of reasoning than that in *Griswold* (and *Roe*, and so on down the line). In *Lochner*, the substantive due process question was whether Mr. Lochner could make the case that an aspect of his liberty had been infringed in order to justify a court inquiry into whether or not the state had the authority to legislate in this area. In *Griswold*, however, the state was unquestionably legislating in an area within its police power—the protection of the morals of the community (or in the case of *Roe*, the protection of the health and safety of the citizens, for the states that outlawed abortion considered the fetus entitled to the legal protection of other persons in the state), yet the rights the court found the litigants to have nonetheless trumped the state power. The development of this reasoning led us to the *Casey* decision, in which case the full force of the critique of the concept of substantive due process is appropriate. In that case, there is no conceivable or arguable link to procedure, the “substance” of the liberty interest is held to preclude any kind of “undue burden” on the exercise of abortion rights. This should be seen as encompassing a different, and less radical, analysis of the role of substance in determining whether or not due process has been violated.

However, even taking in the best possible light, the reasoning in this decision, particularly as it touches on natural law issues, is problematic. There are two major areas which illuminate the problematical nature of this decision: the basis described for the liberty to contract, and the conceptualization of the scope and limits of the police power.

Lochner and Liberty to Contract: Lockean Self-Ownership

Let us consider again the concept of liberty to contract articulated in , and ask, even in the moderate form of the actual *Lochner* decision, does this liberty have a place in our constitutional system? Chief Justice Peckham, you may recall, found this right in the underlying “. . . right to purchase or to sell labor. . .”, which he saw as a fundamental element of the very concept of liberty. But of course, the right to sell labor (or buy it, for that matter) rests upon the assumption that labor is a commodity. This assumption, in turn, can be traced back to the social contract theory of John Locke (it could perhaps be traced further back, but stopping at Locke provides a convenient point of contact between the world of political theory and the world of American constitutional jurisprudence).

Locke famously grounds his theory of property in the assumption that “every man has property in his own person” and thus he has, in the state of nature property in both his labor and those goods given to mankind in common that he mixes his labor with.⁹ Thus self-ownership is the fundamental source of property rights, and it is on the scaffolding of property rights that the whole

Lockean edifice of limited government and individual rights in the state of civil society is hung. (It should be pointed out that it is also the edifice on which his justification—however limited and constrained—of slavery is also hung.)

Consider what flows from Locke's conception of the origins of property rights. Because man owns his own labor, he has a right to acquire whatever he can (provided that it will not spoil uselessly in his possession—the invention of money renders that limitation meaningless). The acquisitive instinct soon leads to scarcity, which leads to conflict and insecurity. Most specifically, the “industrious and rational” soon discover that their property is difficult to protect from the “quarrelsome and contentious”, and thus come to long for some means of protection. Desiring to protect their property, which Locke famously defines as including not only goods but “lives liberties and estates”, men realize that they need to leave the freedom of the state of nature for the security of civil society; at this moment the social contract is made. Yet the Lockean social contract inherently requires that the government which results from the agreement be strictly limited in its powers, especially as those powers touch the right to interfere with private property. Since the motive for agreeing to the social contract is the protection and security of property, it would be more than reckless to allow the government—whose power would be greater than that of individuals in the state of nature to have the unlimited ability to take the citizen's property; it would be, Locke says, “to think that men are so foolish that they take care to avoid what mischiefs may be done them by pole-cats or foxes, but are content, nay think it safety, to be devoured by lions.”¹⁰

Thus the limitation of government power is the essential hallmark of legitimate government, for there is no reason other than the protection of their ability to securely hold their property why men would forsake the extensive liberty and absolute equality of the state of nature. Self-interest propels men to the state of society, and this self-interests sets their rights as sentinels over the public welfare.

However comfortably familiar this Lockean language sounds to us, however, Mary Ann Glendon reminds us that this construct of self-ownership is not a universally accepted understanding of the source of rights. Most European legal systems, for example, rest on the assumption that no one can own a human being. Furthermore, Professor Holloway has demonstrated that this understanding of the source of rights limits the public deliberation regarding the nature and extent of the relationship between rights and the common good to a cold and heartless calculus of costs and benefits: “a community . . . based on the assumption that all men are fundamentally self-interested, in which all men associate with each other only out of self-interest, has no place for the loving self-sacrifice that constitutes the culture of life.”¹¹

Certainly one can see the isolationist individualism that undergirds Lockean understandings of property rights in the *Lochner* Court's peremptory

dismissal (even in the dissent which would have upheld the law in question) of the idea that the state may have a legitimate interest in intervening in the situation of the bakers in order to attempt to balance the inequality of bargaining power between the bakers and the bakery owners; Chief Justice Peckham heaped scorn on the idea that “bakers as a class are not . . . able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action.” Because property rights have their origin in self-ownership, only the owning selves as individuals have an interest in the disposal of those rights; state regulation is inherently interference.

Self-Ownership in Catholic Thought

To put this Locke/Peckham self-ownership in perspective, it is perhaps useful to compare it and the consequent right to sell one’s labor, with the alternative concept of worker’s rights as expressed in the encyclical *Rerum Novarum*. In this encyclical, Pope Leo XIII described the origins of private property as follows:

14. The fact that God gave the whole human race the earth to use and enjoy cannot indeed in any manner serve as an objection against private possessions. For God is said to have given the earth to mankind in common, not because He intended indiscriminate ownership of it by all, but because He assigned no part to anyone in ownership, leaving the limits of private possessions to be fixed by the industry of men and the institutions of peoples. Yet, however the earth may be apportioned among private owners, it does not cease to serve the common interest of all, inasmuch as no living being is sustained except by what the fields bring forth. Those who lack resources supply labor, so that it can be truly affirmed that the entire scheme of securing a livelihood consists in the labor which a person expends either on his own land or in some working occupation, the compensation for which is drawn ultimately from no other source than from the varied products of the earth and is exchanged for them.

15. For this reason it also follows that private possessions are clearly in accord with nature. The earth indeed produces in great abundance the things to preserve and, especially, to perfect life, but of itself it could not produce them without human cultivation and care. Moreover, since man expends his mental energy and his bodily strength in procuring the goods of nature, by this very act he appropriates that part of physical nature to himself which he has cultivated. On it he leaves impressed, as it were, a kind of image of his person, so that it must be altogether just

that he should possess that part as his very own and that no one in any way should be permitted to violate his right.

In other words, the source of the right to private property is not the construct of self-ownership, but both the nature of the created world and the interdependence of human society. Private property is a matter of justice, because private property both rewards individual labor and provides for the common good. Furthermore, note that *Rerum Novarum* indicates that both individual industry and political institutions together determine the limits of private possessions. This indication recognizes that property is at once natural and conventional—natural in that one immediately recognizes the claim in justice of the relationship between labor and property, but conventional in that the terms and conditions upon which property is held are subject to legal determination, and can vary dramatically from place to place (so for example, Wisconsin has a marital property law by which assets and debts assumed by either spouse are jointly held, with virtually no exceptions, but in many other states each spouse can still hold individual title to assets acquired after marriage). Furthermore, the encyclical later addresses the interdependent nature of human communities, and describes a theory of property rights which both addresses and supports this interdependence:

26. Therefore, let it be laid down in the first place that a condition of human existence must be borne with, namely, that in civil society the lowest cannot be made equal to the highest. Socialists, of course, agitate the contrary, but all struggling against nature is vain. There are truly very great and very many natural differences among men. Neither the talents, nor the skill, nor the health, nor the capacities of all are the same, and unequal fortune follows of itself upon necessary inequality in respect to these endowments. And clearly this condition of things is adapted to benefit both individuals and the community; for to carry on its affairs community life requires varied aptitudes and diverse services, and to perform these diverse services men are impelled most by differences in individual property holdings.

Because of this interdependence, both owners and workers are joined in a system of mutual obligation. The pope identifies specific obligations of each class toward the other: workers are obliged to conscientiously and completely perform their agreed-upon work, and to avoid violence or harm to the owner's property or interests, owners are above all required to pay their workers a fair and just wage, and beyond that, to treat them with dignity and respect, and to insure that they have sufficient periods of rest to attend to their religious duties and their family obligations, and to refresh themselves from the burdens of labor. The state has a significant obligation to protect the (unequal) ownership of property, but also to give special concerns to the needs of the weaker class (the workers). In particular, the state has an obligation to concern itself with

hours and conditions of work, and with wage levels, to protect the harmonious interdependence that the existence of private property rights points to.

Note how different this conception of property rights is from that of the *Lochner* court. In this understanding, individual property rights are not necessarily a limit on state power, although in some cases they can be, as when a socialist government attempts to abolish private property or interfere with matters most appropriately in the control of families or voluntary associations; but rather these rights provide guidance for the appropriate exercise of state power in harmonizing the various interests which make up society. The police power, in this conception, is much broader than in the understanding which undergirds *Lochner*.

Obviously, we have here two radically different understandings of the natural basis of property rights, and thus two radically different conclusions regarding the legitimacy of state power in limiting or regulating the use of property. Critics of *Lochner* and decisions of its ilk could legitimately point to this situation and say “this is the problem—there are as many views of natural law as there are natural lawyers, so let’s just stick to the text.” Certainly there is some justification for this position, and given the current make up of the Supreme Court, one could certainly argue that we’d all be better off if they did just stick to the text. However, this does not necessarily dispose of the problem. To consider this issue more fully, it is helpful to discuss the relationship of the *Constitution* to judging, and to consider the relationship between constitutional and natural law.

Judging, The Constitution, and Natural Law

Most scholars agree that the *Constitution* was understood by those framing it to be related to natural law. Scholars also tend to agree that most of the framers of the *Constitution* anticipated (not all approvingly, however) that under the *Constitution* judges would exercise judicial review. What is not the subject of scholarly agreement is the question of the intersection of these two premises. That is, does the *Constitution’s* relationship to natural law, taken together with the principle of judicial review, authorize justices to go beyond the *Constitution* to use the principles of natural law to void statutes that conflict not with specific constitutional provisions, but with general principles of natural law?

To answer that question, it will be helpful to analyze more carefully the relationship between the *Constitution* and natural law. The *Constitution*, as a single written document embodying both the constitutive structural features of the government, and the basic protections for individual liberty, was a new kind of document. Insofar as the *Constitution* set up a form of government designed

to meet the great challenge of the *Declaration* to “secure these rights” while deriving its just powers from the consent of the governed, the *Constitution* was intended to reflect the principles of natural law. In other words, the design of the constitutional system was intended both to be in accord with natural law and to eliminate the need and the opportunity to appeal directly to natural law to determine the justice and appropriateness of governmental action. This is true even in those cases where the specific provisions of the *Constitution* do not seem the most effective way to achieve justice. For example, if the *Constitution* requires that all persons accused of a crime have the right to confront the witnesses against them, then even though allowing such confrontation will in many types of cases make it more difficult to convict those who are guilty of heinous crimes (and thus violate the basic maxim of justice that the guilty should be punished), nevertheless it is inappropriate to appeal beyond the *Constitution* to general principles of natural justice. The *Constitution*, in effect, bars the road to a general appeal to the natural justice of the provisions of the *Constitution* itself.

However, there is an additional aspect to the relationship between natural and constitutional law that is not captured in this general understanding. Most of the provisions of the *Constitution* are either self-explanatory (e.g., no state shall have more than two senators) or clearly related to specific and relatively uncontroversial elements of the Anglo-American legal and political tradition (no warrants shall issue except upon probable cause). In other words, most of the time textualist works. However, there are a few provisions which seem inherently—that is, both by the subjective (what was on their minds and in their arguments) and the objective (what the words were commonly understood to mean) intent of the framers—to point outside the “four corners of the constitution” to a more direct connection to natural law. The argument above suggests that a case can be made that the due process clause is one of those provisions; the privileges or immunities clause and the ninth amendment are even clearer cases. These provisions seem to require judges who would interpret them—if the judges want to be faithful to the textual intention of the *Constitution* itself—to essentially step back and examine the whole structure of the *Constitution*, including the ends for which it was intended, and the relationship between specific exercises of constitutional power and those general ends, if they are to have any chance of legitimately answering the question of what the *Constitution* itself means when it refers to the privileges or immunities of the citizens of the United States, or the rights retained by the people.¹²

To the extent that one accepts the argument that the due process clause falls in to this category (actually, perhaps, to the extent that one first accepts the argument that this category exists), the case against *Lochner* becomes weaker (or

at least the case against substantive due process becomes weaker). But that still doesn't resolve the question of how to use natural law in a way that will be a legitimate exercise of jurisprudence, rather than a cover for reading judicial predilection in to the *Constitution*.

The Culture of Death as a Consequence of Judicial Abandonment of Natural Law Jurisprudence

Before answering that question, it is appropriate to consider for a moment a related question: why have the forces of what John Paul II calls “the culture of death” made more headway in the courts than in the political arena? If Professor Holloway is correct, the impetus toward this culture of death is found in the political hedonism that underlies modern political thought, and thus is embedded in the fundamental principles upon which our regime is based. Thus it would seem that the institutions of political governance, which are more readily changeable than the law—depending as it does on precedent, which means that it is to some extent more or less insulated from changes in the theoretical understandings of politics—should be where the hedonistic impulses of modernism should break forth more clearly. Yet we see it is the courts which are hurrying us down the paths of death and destruction.

The discrepancy is explained, perhaps, by the fact that democratic politics is never free to be primarily theoretical. In other words, political elites may be enamored of certain theoretical maxims, nevertheless, the need to represent their constituents means that the common understandings of justice limit the ability of leaders to act on their theories. Insofar as America is a Christian nation (sociologically not legally), the moral precepts of Christianity provide some level of counterweight to the precepts of Hobbesianism in the political arena. However, once judging becomes seen as a form of politics, and judges are then empowered, in their minds at least, to make law, the democratic restraints which hold back the most naked forms of hedonism in political life are gone, and the principles of modernity are free to seek their own limits.

The question then becomes, is judging legitimately understood as a form of politics? If it is, the *Lochner* decision is unassailable, because the Lockean principles which support our politics are shared (although perhaps in a more extreme form) by the *Lochner* court. But judging was never intended by the Framers to be a form of politics, nor was the law understood by them to be based on the Lockean principles upon which the political institutions of government rested. Rather, as James Stoner and others have argued, the common law was understood to be the fundamental cornerstone of the American legal system, and the *Constitution* was seen to be a part of that common law system. Essential for understanding the impact of this perspective

is to understand that in the revolutionary and post-revolutionary world, the common law was not understood to be “judge-made law”; in fact, the common law was not understood to be made by anybody at all. Rather, the common law was understood to be discovered. Common law was understood to be consistent with, although not the same as, natural law. Equally importantly, the common law grew not through the discovery and applications of general principles, but through the slow accumulation of specific precedents, refined and developed over time. As Stoner explains “it is the genius of the common law judiciary to seek consistency in the law as a whole—not consistency in the manner of some modern law professors, for whom all law must flow from a one-sentence ‘theory’ or ‘principle,’ but a reasonable assimilation that accepts the diversity of human experience and the multiplicity of human endeavors.” He adds that “in the common law unlike Enlightenment theory—tradition and reason worked together, even as jury and judge.”¹³

This common law approach to judging both principled and prudential—provides a template for a natural law jurisprudence which would not be a stalking horse for judicial preferentialism run amok. Such an approach requires a disciplined immersion in the historical unfolding of legal principles, which at its best pulls judges out of the preoccupations and preconceptions of the present. It encourages a kind of glorious self-effacement, so that the law matters more than the judge in determining the outcome of a case.

Assuming a judiciary which would embrace again the disciplined, prudential, incremental, and truly common aspects of common law jurisprudence, a case can be made that our constitutional system would be more complete—that is, more fully in accord with its own nature—if the judges did appeal to the aspects of natural law revealed through common law in order to interpret those few provisions of the *Constitution* that require such interpretation. With this approach, would the decision have been different in *Lochner*?

Perhaps; perhaps not. The arid Lockean argument about individual rights would not have carried the day. However, it would have made a great deal of difference whether the state was truly exercising its power to legitimately protect vulnerable workers from the danger of exploitation at the hands of ruthless employers; or whether, as Mr. *Lochner* claimed, the state was engaged in partial, class-based legislation on behalf of the large corporate bakeries trying to drive the small bakeshops like his out of business. In either case, it is more likely that the richer and more nuanced understanding of property rights found in *Rerum Novarum* would have been called in to play, for the common law has fed from the same springs of inspiration as Pope Leo XIII.

Notes

1. *Griswold v. New York* 381 U. S. 479 (1965).
2. Carson Holloway, "Evangelium Vitae and Modernity: The Philosophical Origins of the Culture of Death," *Catholic Social Science Review*, vol 5, pp. 95-110.
3. Actually, the concept of substantive due process had come into play in earlier cases, most notably *Allgeyer v. Louisiana* (1897) but *Lochner* is commonly seen as the case that brought the concept into prominence.
4. John Hart Ely, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980), p. 18.
5. Robert Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), p. 43.
6. Bernard Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980), pp. 34-38.
7. Perhaps this is explicable because *Lochner* was originally salient to economic (pro-New Deal) liberals in the 1930's as a symbol of the power of an activist judiciary to undermine even minimally protective pro-labor legislation. Because this case was widely accepted by liberals as an example of the perils of an activist judiciary, Justice Black chose it as a particularly powerful symbol to chastise those of his brethren who shared this political outlook but nonetheless pursued the role of judicial activism in *Griswold*. Because of the decision in *Griswold* and subsequent use of *Griswold's* "reasoning" in *Roe*, *Lochner* became a symbol of the pitfalls of judicial activism to conservatives as well.
8. Federalist 84
9. John Locke, "The Second Treatise of Government" in Peter Laslett, ed., *Two Treatises of Government* (Cambridge: Cambridge University Press, 1963), Ch. 5.
10. Locke, "Second Treatise", Ch. 7.
11. Holloway, Carson, *op. cit.*, p. 99.
12. Critics of *Lochner*—for example Robert Bork—would argue that these provisions are so vague as to have no effectively discernable meaning, and therefore should never be interpreted by judges at all. On the other hand, the argument can certainly be made that it is equally a subversion of the *Constitution* to judicially eliminate a provision as it is to judicially make one up.
13. James Stoner, "Christianity, Common Law and the *Constitution*" in Gary Gregg, ed., *Vital Remnants: America's Founding and the Western Tradition* (Wilmington: Intercollegiate Studies Institute, July 1999).

COMMENT ON SHANKMAN

by Leon Holmes
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Dr. Shankman's paper is in conflict with Dr. Holloway's paper on the most important issue raised by the two of them. Dr. Holloway interprets Madison, the father of the Constitution, to teach that man is nothing more than a clever animal, and that man by reason can know only things that relate to his bodily desires and his longing for economic well-being. Dr. Shankman, on the other hand, asserts that the founders based the Constitution on natural law principles—immutable moral principles of right and wrong that can be known by the light of human reason. It appears that the reader is forced to choose between Dr. Holloway's understanding of the founding and Dr. Shankman's.

Dr. Shankman says—rightly I believe—that the *Constitution* was intended to reflect the principles of natural law, and, by doing so, to eliminate the need for an appeal to natural law. While Dr. Shankman argues that the *Constitution* was intended to eliminate the need for an appeal to natural law, she nevertheless searches the text of the *Constitution* in an effort to find in an effort to find a provision that authorizes judges to invalidate legislation that is contrary to natural law. She offers three texts as candidates for such authority—the due process clause, the privileges and immunities clause, and the ninth amendment. The most important of these is the due process clause, which has often been invoked as the authority for the courts to invalidate legislation.

Due process relates to procedure—the noun is *process*, which is modified by the adjective *due*. In its simplest expression, it means a fair trial. A state can deprive a person of his life, liberty, and property, but only if he is convicted of a crime after a fair trial. It may well be that greater procedural safeguards are due when a life is at stake than when property is at stake, but the guarantee still is one of process, not of substantive rights. The process that is “due” relates to the judicial process, not the legislative process, so the examples Dr. Shankman gives regarding the legislative process miss the mark. In short, Dr. Shankman fails to prove that the text opens the door to “substantive due process” and, hence, to natural law.

The privileges and immunities clause, likewise, gives no opening for an appeal to natural law. The privileges and immunities that are protected are the

privileges and immunities of citizens, not (as in the due process clause) of persons. Whereas the due process clause protects persons *qua* persons, the privileges and immunities clause protects citizens *qua* citizens, which means that the source of the privileges and immunities is positive law, not natural law.

The ninth amendment provides that the enumeration in the *Constitution* of certain rights shall not be construed to deny or disparage others retained by the people. This leaves open the question of what other rights are retained by the people and how shall they be enforced. Dr. Shankman offers no guidance on this question. The one natural right mentioned in the *Declaration of Independence* but not in the *Constitution* is the right of revolution; but that right, even if it is a natural right, can hardly be enforced through the judicial process. No one would argue that a court should declare unconstitutional a law prohibiting revolution, not even those who believe that the right of revolution is a natural right.

While Dr. Shankman's paper is in conflict with Dr. Holloway's on the fundamental issue of whether the founders thought human beings were capable of knowing moral truth by the light of natural reason, her paper also has something in common with his. Dr. Holloway conflates the Tenth Federalist with the philosophy of Thomas Hobbes and then argues from texts written by Hobbes that the Tenth Federalist is "starkly incompatible" with *Rerum Novarum*. Likewise, Dr. Shankman conflates the *Lochner* decision with the philosophy of John Locke and then argues from texts written by Locke that the *Lochner* decision is based on principles that are "radically different" from those of *Rerum Novarum*.

Consider the following statement:

It is surely undeniable that, when a man engages in remunerative labor, the impelling reason and motive of his work is to obtain property, and thereafter to hold it as his very own. If one man hires out to another his strength or skill, he does so for the purpose of receiving in return what is necessary for the satisfaction of his needs; he therefore expressly intends to acquire a right full and real, not only to the remuneration, but also to the disposal of such remuneration just as he pleases. Thus, if he lives sparingly, saves money, and, for greater security, invests his savings in land, the land, in such case, is only his wages under another form; and consequently, a working man's little estate thus purchased should be as completely at his disposal as are the wages he receives for his labor.

Hence, a man's labor necessarily bears two notes or characters. First of all, it is *personal*, inasmuch as the force which acts is bound up with the personality and is the exclusive *property* of him who acts and, further, was given to him for his advantage. Secondly, man's labor is *necessary*; for without the

result of labor a man cannot live, and selfpreservation is a law of nature, which it is wrong to disobey. [Underlining added, italics in the original.]

These two passages seem clearly to defend the “right to purchase and sell labor.” Both are taken from *Rerum Novarum*, the first from paragraph 5, and the second from paragraph 44.

Consider also the following quotation:

[I]f health were in danger by excessive labor . . . in such cases, there can be no question but that, within certain limits, it would be right to invoke the aid and authority of the law. The limits must be determined by the nature of the occasion which calls for the law’s interference - the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief.

This quotation is as concise a statement of the rationale of *Lochner* as can be found; it is taken from paragraph 36 of *Rerum Novarum*.

My point is not to defend *Lochner*; my point is that Dr. Shankman surely exaggerates when she says we have here “two radically different understandings of the natural basis of property rights, and thus two radically different conclusions regarding the legitimacy of state power in limiting or regulating the use of property.” Dr. Shankman’s exaggeration of the differences between *Rerum Novarum* and the *Lochner* decision is akin to, though less serious in its implications than, Dr. Holloway’s exaggeration of the differences between *Rerum Novarum* and the Tenth Federalist.

Finally, we should note that it is a mistake to equate substantive due process with natural law, which Shankman (following Justice Black’s dissent in *Griswold*) seems to do. In *Roe v. Wade* and *Planned Parenthood v. Casey*, the Court found a substantive right to abortion in the fourteenth amendment, but did so by appealing to history rather than to nature. Both *Roe* and *Casey* constitutionalize the theory of moral relativism, which is the antithesis of natural law. Hence, *Roe* begins by quoting Justice Holmes’ dissent in *Lochner*, “[The *Constitution*] is made for people of fundamentally differing views . . .” and concludes that the state may not adopt “one theory of life” so as to prohibit abortion. Likewise, Justice O’Connor’s opinion in *Casey* defines the issue as “whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter” and concludes that the State cannot do so because “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of life.” This is substantive due process, but it is not natural law; it is the rejection of natural law.

