The Common Law Right to Earn a Living

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The monopolizer engrosseth to himself what should be free to every man.

—Sir Edward Coke[1]

"At the common law," wrote William Blackstone, "every man might use what trade he pleased" ([1765] 1979, 1:415). This seemingly innocuous phrase, dropped offhandedly into a chapter on the obligations of master and servant, hints at a rich common-law tradition that has in large part been ignored, or even denied outright, in more modern scholarship. In fact, since the New Deal, the prevailing view among legal scholars has been that the right to earn an honest living as one chooses, without government interference, does not exist at all and that the "Lochner era" (1906–37), when the Supreme Court struck down numerous state laws infringing on this right, was a time of judicial usurpation during which the Court merely invented this right without precedent or legitimacy. Consider, for example, the words of one scholar quite representative of most legal scholars today:

> I do not count the Supreme Court decisions defending contract or property rights from state regulations as Bill of Rights decisions. None of these cases represents a defense of civil liberties. The Court merely used libertarian philosophy to protect the wealthy from progressive legislation. The Court eventually rejected these economic liberty decisions because they were not connected with the text of the Constitution or any philosophy with roots in the history and traditions of our nation and its democratic process. (Nowak 1992, 452)

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1. Quoted in Bowen 1957, 420.

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My research, however, reveals that this prevailing view is incorrect. In fact, the right to earn a living was protected at common law as far back as the Magna Carta (1215), and the decisions that voided economic regulations actually rested on solid historical ground. The economic substantive-due-process cases did not announce principles unknown to legal history, nor were the judges who accepted this doctrine legal interlopers going beyond reasonable readings of precedent. Instead, the New Deal's *repudiation* of protections for economic liberties was the new, ahistorical reading of the law and one that has proven itself to be fallacious and dangerous.

Before Lord Coke

Section 41 of the Magna Carta (1215) held that

> All merchants are to be safe and secure in leaving and entering England, and in staying and traveling in England . . . to buy and sell free from all maletotes by the ancient and rightful customs, except, in time of war, such as come from an enemy country [who] shall be detained without damage to their persons or goods, until we or our chief justiciar know how the merchants of our land are treated in the enemy country; and if ours are safe there, the others shall be safe in our land. (qtd. in Holt 1992, 448–73)

Of course, both before and after the Magna Carta, the king exercised an undefined sweep of power (the "prerogative") by which he could grant certain exclusive rights, or "franchises," to his subjects, allowing them the privilege to tax a particular trade or to have a monopoly on that trade within a certain area. But the foregoing passage shows that from early on the English were suspicious of royal control over economic opportunity. As far back as the reign of Edward III, common-law courts concerned themselves with protecting the subject's right to such economic freedom. In 1377, the court struck down a royal monopoly on the sale of wine in London that had been granted to a man named John Peachie. The court held this grant to violate the right of free trade (Holdsworth 1938, 4:344). Similarly, in *John Dier's Case* (2 Y.B. Henry V *26 [1415]), Chief Justice Holt ruled against a monopoly charter, holding that he would have imprisoned anyone who had claimed such a monopoly on his own authority. Thus, the king's power to control the economy was limited at common law by a right whose importance must have been obvious in an era when starvation and pestilence were common experiences. The right to support oneself by a lawful calling was central not only to the health of the state but to the lives of its subjects.

Consider the principle of economic liberty espoused in *Prior of Christchurch Canterbury v. Bendysshe,* in which the court held that "[d]amage alone is not a cause of action. Thus, [where] an innkeeper or other victualler comes and dwells next to another [innkeeper] and thereby more of the customers resort to him than the other,

it is a damage to the other, but no wrong, for he cannot compel men to buy victuals from him rather than from the other" (93 Selden Society 8 [1503?]). Protecting the right to compete not only helped to increase supply and to lower prices in the market, but also gave the poor a chance to earn a living that they would not otherwise have had.

Lord Coke

By far the most outspoken defender of the right to earn a living was Sir Edward Coke (1552–1634), attorney general for Queen Elizabeth and later Chief Justice of King's Bench under King James I. Today, Coke is best remembered for his decision in *Dr. Bonham's Case* (77 Eng. Rep 646 [1610]), in which he asserted the supremacy of the law over the king, but Coke was also the leading opponent of royal monopolies. This opposition is ironic because, as Elizabeth's attorney general, Coke had been required to argue on behalf of the plaintiff in the famous *Case of Monopolies,* or *Darcy v. Allen* (77 Eng. Rep. 1260 [1602]). Edward Darcy had a monopoly of playing cards granted by Queen Elizabeth. After Allen began to make and sell playing cards, Darcy sued (Corre 1996). Chief Justice Popham ruled for the defendant: "All trades, as well mechanical as others, which prevent idleness (the bane of the commonwealth) and exercise men and youth in labour, for the maintenance of themselves and their families, and for the increase of their substance, to serve the Queen when occasion shall require, are profitable for the commonwealth, and therefore the grant to the plaintiff to have the sole making of them is against the common law, and the benefit and liberty of the subject" (*Darcy,* 77 Eng. Rep. at 1269).

The common law did not allow merchants to sell shoddy merchandise, but it held that a regulation for consumer protection was invalid if used to keep an honest trader out of the market. As the court held in the *City of London's Case,* "the King may erect *guildam mercatoriam, i.e.,* a fraternity or society or corporation of merchants, to the end that good order and rule should be by them observed for the increase and advancement of trade and merchandise, and not for the hindrance of it" (77 Eng. Rep 658 [1610], at 663). In other words, government might regulate trade impartially, but it might not prevent the free exercise of a lawful calling (*Parry v. Berry,* 92 Eng. Rep 1066 [1718]; *Chamberlain of London's Case,* 77 Eng. Rep. 150 [1592]). As a 1727 decision put it, "The reason why particular restraints [on trade] are allowed is, because the publick is not concerned, so long as the party exercises the trade somewhere. But if it tends to prevent the exercise of [the trade] anywhere, it is not to be endured; because the publick loses the benefit of the party's labour, and the party himself is rendered an useless member of the community" (*Chesman ex ux v. Nainby,* 93 Eng. Rep. 819 [1727], at 821).

Another example is *Allen v. Tooley,* a suit against an upholsterer who had not served an apprenticeship before taking up his trade. Coke, who by this time had become Chief Justice of King's Bench, ruled that "no skill there is in this, for he may

well learn this in seven hours" (80 Eng. Rep 1055 [1614]), at1057). As unskilled labor, it was not subject to the licensing restrictions appropriate to more technical trades: "by the very common law, it was lawful for any man to use any trade thereby to maintain himself and his family; this was both lawful and very commendable, but yet by the common law, if a man will take upon him to use any trade in which he hath no skill the law provides a punishment for such offenders, and such persons were to be punished in the court leet, and by actions brought, as by the cases before" (1055).

The court cited the example of a blacksmith who injured a horse because he was not skilled in his trade. A legal redress, the court explained, was already available in the form of a suit for damages. "Unskilfulness is a sufficient punishment for him," said Lord Coke (1059). As William Holdsworth writes, the common-law "judges favored the principle [of free trade] just as they favored the principle of freedom of alienation, because they were hostile to all arbitrary restrictions on personal liberty, or rights of property, for which no legal justification could be shown" (1938, 11:477–78).

In *The Case of the Tailors,* Coke wrote again that

> at the common law, no man could be prohibited from working in any lawful trade, for the law abhors idleness, the mother of all evil . . . especially in young men, who ought in their youth, (which is their seed time) to learn lawful sciences and trades, which are profitable to the commonwealth, and whereof they might reap the fruit in their old age, for idle in youth, poor in age; and therefore the common law abhors all monopolies, which prohibit any from working in any lawful trade. (77 Eng. Rep. 1218 [1615], at 1218)

In these cases, Coke defended economic liberty to protect not the rich but the poor by striking down the legal restrictions on the freedoms that gave them a chance to work their way out of poverty. The wealthy *benefited* from monopoly practices. When James I, furious over *Dr. Bonham's Case,* finally fired him, Coke entered the House of Commons and continued his attack on monopolies, finally gaining passage of the Statute of Monopolies, which declared that all monopolies—save temporary patents, to encourage invention—"are altogether contrary to the laws of the realm, and so are and shall be utterly void and of none effect" (21 Jac. 1 c. 3). In his *Commentaries on American Law,* Chancellor James Kent referred to that statute as "magna charta for British industry." It "contained a noble principle, and secured to every subject unlimited freedom of action, provided he did no injury to others, nor violated statute law" ([1873] 1989, 339 n. c.).

Coke was not the only judge who argued that monopolies violated the common law (*Weaver of Newbury's Case,* 72 Eng. Rep. 962 [1616?]; *Les Brick-Layers & Tilers v. Les Plaisterers,* 81 Eng. Rep. 871 [1624]), but Coke's name became permanently associated with freedom of trade. After he retired from Parliament, he wrote a series of books, the *Institutes of the Common Law of England,* that became the training

books for generations of lawyers, including Thomas Jefferson, John Adams, and John Marshall. Basing his arguments on the Magna Carta, Coke wrote that "all grants of monopolies are against the ancient and fundamentall laws of this kingdome" because "[a] mans trade is accounted his life, because it maintaineth his life; and therefore the monopolist that takes away a mans trade, taketh away his life, and therefore is . . . odious." In short, "no man ought to be put from his livelihood without answer" ([1797] 1986, 3:181).

> So likewise, and for the same reason, if a graunt be made to any man, to have the sole making of cards, or the sole dealing with any other trade, that graunt is against the liberty and freedome of the subject, that before did, or lawfully might have used that trade, and consequently against this great charter. Generally all monopolies are against this great charter [Magna Carta], because they are against the liberty and freedome of the subject, and against the law of the land. ([1787] 1986, 2:47)

Coke's Legacy in America

Monopolies were anathema to the generation that grew up reading the *Institutes* (*Wade v. Ripton,* 84 Eng. Rep. 79 [1678]; *Thomas v. Sorrel,* 84 Eng. Rep. 689 [1685]; *Earl of Yarmouth v. Darrel,* 87 Eng. Rep. 48 [1687]; *Robinson v. Groscourt,* 87 Eng. Rep. 547 [1695]; *Robinson v. Watkins,* 90 Eng. Rep. 165 [1702]; *Parry v. Berry,* 92 Eng. Rep 1066 [1718]; *Bricheno v. Thorp,* 37 Eng. Rep. 864 [1821]; *Harrison v. Godman,* 97 Eng. Rep. 161 [1756]). America's founding generation believed that it was wrong for government to illegalize harmless competition—indeed, helpful competition—and to perpetuate what Burton Folsom calls "political entrepreneurialism" ([1987] 1996, 1).

It has often been noted that Thomas Jefferson's ringing phraseology in the Declaration of Independence differed from John Locke's earlier "life, liberty, and estate" or "life, liberty, and property." There seems good reason to believe that Jefferson adopted "life, liberty, and the pursuit of happiness" in order to assert the right of livelihood. Earlier in 1776, George Mason had begun the Virginia Declaration of Rights with the phrase "all men are by nature equally free and independent and have certain inherent rights . . . namely . . . *the means of acquiring* and possessing property, and *pursuing and obtaining* happiness and safety." Jefferson, who read Mason's declaration with interest while he labored in Philadelphia, was concerned with social mobility; he resented what he would later call the "artificial aristocracy" and sought instead to foster the "natural aristocracy" of "virtue and talents" (qtd. in Cappon 1959, 387–92). Government should enable the natural aristocracy to rise, and the American founders had an opportunity to create such a government. "Here every one may have land to labor for himself if he chuses; or, preferring the exercise of any other

industry, may exact for it such compensation as not only to afford a comfortable subsistence, but wherewith to provide for a cessation from labor in old age" (qtd. in Cappon 1959, 391). Elsewhere Jefferson wrote that "the first principle of association" was "the guarantee to every one of a free exercise of his industry, and the fruits acquired by it" (qtd. in Bergh 1907, 14: 466).

James Madison summed up these ideas keenly in his essay "Property":

> That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called. What must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favor his neighbour who manufactures woolen cloth; where the manufacturer and wearer of woolen cloth are again forbidden the oeconomical use of buttons of that material, in favor of the manufacturer of buttons of other materials! (Rakove 1999, 516)

The specter of legally forbidding honest people from making an honest living haunted the founding generation so much that four states, when ratifying the Constitution, included a ban on monopolies among their proposed bills of rights (Bailyn 1993, 1:944, 2: 542, 551, 571). To the Framers, the question of monopoly was not primarily a matter of economic efficiency but of *natural right*—the right to engage in the very labor that, Locke said, gave rise to all other property rights: "[E]very man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands, we may say, are properly his" ([1690] 1963, 328–29). For this reason, Chancellor Kent referred to the Statute of Monopolies as protecting "freedom of *action*."

Historian Gordon S. Wood describes the hostility with which the founding generation greeted the notion of monopolies:

> because of republican aversion to chartered monopolies, the creation of corporations [in the early United States] did not take place without strenuous opposition and heated debate. As a consequence, these corporations were radically transformed. Within a few years most of them became very different from their monarchical predecessors: they were no longer exclusive monopolies, and they were no longer public. They became private property. . . . (1992, 318)

The revolution had been fought in part to prevent the arbitrary sway over economic liberty that the throne had exercised through its grants of monopoly power. As Chancellor Kent argued, the "exclusive privileges [of royal corporations] have too fre-

quently served as monopolies, checking the free circulation of labor, and enhancing the price of the fruits of industry" ([1873] 1989, 2: 339). The grants of monopolies, Wood explains, "even when their public purpose seemed obvious . . . were repugnant to the spirit of American republicanism" (1992, 319). Instead of abolishing the power to grant corporate charters, though, the states began *to make those charters more available* to everyday businessmen: "[T]he legislatures opened up the legal privileges to all who desired them." Thus, "the traditional exclusivity of corporate charters [was] destroyed" (321).

It was in this atmosphere that the Constitution—with its several protections of economic liberty, from the contracts clause to the takings clause of the Fifth Amendment—was written and ratified. Perhaps the most important of these provisions was the "privileges and immunities" clause of Article IV.

After 1787

In the famous case *Corfield v. Coryell,* Justice Bushrod Washington wrote that Article IV protects certain "privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments." These priviliges and immunities include

> the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . . to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state. (6 F. Cas. 546 [1823], at 551–52)[2]

Between *Corfield* and the 1873 *Slaughter House Cases,* some sixty cases at both state and federal levels dealt with this common-law right. In *Sewall v. Jones,* for instance, the court held that "statutes which impose restrictions upon trade or common occupation, or which levy an excise or tax upon them, must be construed strictly" (26 Mass. 412 [1830], at 413). The 1829 case *Beall v. Beck* (2 F. Cas. 1111) concerned whether a landlord or innkeeper had the right to take possession of property—in this case, a slave—left behind by a boarder who had not paid his rent. The court said that although the landlord had a privilege to retain a nonpaying guest's property, "Wherever the privilege of the landlord would destroy a lawful trade or occupation which is useful to the public, it is restrained by law" (1114).

2. The 1602 decision *Walter v. Hanger* (72 Eng. Rep. 935) had referred to the right to earn a living by the phrase "privileges and liberties."

In one particularly intriguing case, *City of Memphis v. Winfield* (27 Tenn. 707 [1848]), Justice Turley of the Tennessee Supreme Court struck down an ordinance requiring the city police to arrest any black person found in public after 10:00 P.M. Considering that this case arose in a Southern court in the 1840s, it is remarkable that the court struck down the statute, but the court's indignant language is even more remarkable: "This new curfew law . . . is high handed and oppressive, and . . . an attempt to impair the liberty of a free person unnecessarily, to restrain him from the exercise of his lawful pursuits, and to make an innocent act a crime, and to exact a penalty therefor both by fine and imprisonment, without trial before any tribunal."

> The lot of a free negro is hard enough at the best . . . and it is both cruel and useless to add to his troubles by unnecessary and painful restraints in the use of such liberty as is allowed him. He must live, and in order to do so, he must work. Every one knows that in cities, very often, the most profitable employment is to be found in the night. . . . All these [jobs] are sources, in large cities, of much profit to the free man of color, and you necessarily deprive him of them entirely, if you compel him, like a wild beast, to hide his head in his den from ten o'clock till day-light, under the penalty of . . . being imprisoned and fined as if he had been committing a crime against society. (709–10)

The Alabama Supreme Court held in 1838 "that a citizen has the right to aspire to office, or to pursue any lawful avocation" (*In re Dorsey,* 7 Port. 293). In 1850, the Georgia Supreme Court held in *Mayor of Savannah v. Hartridge* that "statutes which impose restrictions upon trade or common occupations, and which levy an excise or tax upon them, must be construed strictly" (8 Ga. 23 [1850]), at 30).

The post–Civil War case of *Cummings v. Missouri* (71 U.S. 277 [1866]) involved a Missouri law that required citizens to take an oath of loyalty to the United States before engaging in a profession. Citizens were required to swear that they had never "been in armed hostility to the United States" or participated in the secessionist cause (316–17). Anyone refusing to take the oath was barred not just from "any office of honor, trust, or profit" under state authority but from holding any position in *any* corporation, teaching in private schools, or even "holding any real estate . . . in trust for the use of any church" (317).

In an opinion written by Justice Field, the Supreme Court struck down this ruling, holding that "[t]he oath could not . . . have been required as a means of ascertaining whether parties were qualified or not" (320). The state had argued that the law did not deprive citizens of "life liberty or property" but merely restrained them from working. Field rejected this contention. Property, he said, includes "those estates which one may acquire in professions."

> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors,

> all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined. (320)

In an era when legislatures were creating racist statutory schemes to keep individuals from pursuing happiness, the importance of protecting the right to earn a living cannot be overestimated. In *Ex Parte Garland*, which, like *Cummings,* involved a test oath, attorney Reverdy Johnson put the point starkly: "the legislature undertakes to say to [the defendant], 'You shall no longer enjoy that right, unless you will swear that you have not done the things stated in the oath which we require you to take;' and he is gravely told, 'You are not obliged to take it.' Certainly, he is not obliged to take it. No man is obliged to follow his occupation; but unless he takes it he must starve, except he have other means of living" (71 U.S. 333 [1866]), at 370). In short, as one author has noted, "long before the adoption of the Fourteenth Amendment, British and American courts protected many facets of the individual's right to pursue a gainful occupation against encroachment by the government" (McCormack 1994, 399–400).

After the Civil War, Congress passed the Civil Rights Act of 1866 and the Fourteenth Amendment to protect the former slaves from oppression by their own states. The first section of the Fourteenth Amendment declares that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Although there is much dispute in scholarly literature over the meaning of the "privileges or immunities" clause, it is generally agreed that it was meant to constitutionalize the Civil Rights Act (Bunch 2000, 332; Harrison 1992, 1389–90; Siegan 1980, 50). That act, however, mentioned *none* of what later courts would call "fundamental rights" (speech, travel, procreation, and so forth); instead, it dealt primarily with the protection of the economic rights of new black citizens. All "citizens, of every race and color," it held, "without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." It is noteworthy that the congressional framers of the Fourteenth Amendment—for example, Senators Howard and Trumbull—referred to Justice Bushrod Washington's explanation of the older "privileges or immunities" clause in *Corfield v. Coryell* when they explained this clause in the amendment (*Congressional Globe,* 39th Cong., 1st sess., 2765 [1866]; *Congressional Globe*, 42d Cong. 1st sess. 69 [1871]). Representative John Bingham, one of the authors of the privileges or immunities clause, said that it included "the liberty . . . to work in an honest calling and contribute by your own toil in some sort to the support of yourself, to the support of your fellowmen and to be secure in the enjoyment of the fruits of your toil" (*Congressional Globe,* 42d Cong. 1st sess., App. 86 [1871]). Representa-

tive Hamilton asked: "[H]as not every person a right, to carry on his own occupation, to secure the fruits of his own industry, and appropriate them as best suits himself, as long as it is a legitimate exercise of this right and not vicious in itself, or against public policy, or morally wrong, or against the natural rights of others?" (*Congressional Record,* 43rd Cong., 1st sess., App. 363 [1874]). These statements are at least plausible evidence for the claim that "it seems quite impossible that any definition of these terms [*privileges* and *immunities*] could be adopted, or even seriously proposed, so narrow as to exclude the right to labor for subsistence" (*In re Tiburcio Parrott*, 1 F. 481, 506 [1880]).

Federal protection of the right to earn a living was part of the great conflict of the Reconstruction era, when Congress attempted to create a right of federal appeal for persons—in particular, the former slaves—subjected to unequal treatment by their home states. Senator John Sherman explained that courts interpreting the privileges or immunities clause "will look first at the Constitution of the United States as the primary fountain of authority, [and] to the Declaration of American Independence, to every scrap of American history, to the history of England, to the common law of England . . . and so on back to the earliest recorded decisions of the common law. There they will find the fountain and reservoir of the rights of American as well as English citizens" (*Congresssional Globe,* 42 Cong., 2d sess., 844 [1872]).

The *Slaughter House Cases*

All of this changed with the *Slaughter House Cases* (83 U.S. 36 [1872]). *Slaughter House* involved a Louisiana law granting a twenty-five-year monopoly to a state butchery company. All cattle brought to New Orleans and surrounding counties had to be slaughtered by this company's facilities so that private slaughterhouses were effectively outlawed.

A group of butchers sued, arguing that their right to earn a living, protected by the privileges or immunities clause, was being violated. The state replied that the law was enacted to protect public health and safety. The Supreme Court, in a five to four decision, upheld the Louisiana law. Writing for the majority, Justice Miller declared that it was "difficult to see a justification for the assertion that the butchers are deprived of the right to labor in their occupation" because private butchers were free to "slaughter, to prepare, and to sell [their] own meats; but [they are] required to slaughter at a specified place and to pay a reasonable compensation for the use of the accommodations" (61). Miller saw the Louisiana statute as simply a legitimate health regulation, but he also rejected the claim that the privileges or immunities clause protected citizens against the legislatures of their own states.

In a famous dissent, Justice Field reviewed the history of monopolies: "[W]hen the Colonies separated from the mother country no privilege was more fully recog-

nized or more completely incorporated into the fundamental law of the country than that every free subject in the British empire was entitled to pursue his happiness by following any of the known established trades and occupations of the country, subject only to such restraints as equally affected all others" (105).

> This equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States. To them, everywhere, all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of the same age, sex, and condition. The State may prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society, but when once prescribed, the pursuit or calling must be free to be followed by every citizen who is within the conditions designated, and will conform to the regulations. This is the fundamental idea upon which our institutions rest; and unless adhered to in the legislation of the country our government will be a republic only in name. (109–10)

It is not possible to discuss *Slaughter House* fully here, but it is pertinent to note that the *Slaughter House* majority did not deny that the right to earn a living was, indeed, a right at common law. In fact, the majority implicitly agreed that it was, but held that the privileges or immunities clause was not meant to protect that right at a state level. The majority also held that the Louisiana statute did not actually violate that right.

Thus, *Slaughter House* did not actually hold that state monopolies could *never* violate such a right or that such a right did not exist. In fact, during the following decades the Supreme Court came increasingly to protect that right. By 1888, in *Powell v. Pennsylvania,* the Court's majority would say that "enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment" (127 U.S. 678 [1888], at 684). *Slaughter House* was an instance of the old tension between legitimate business regulations and wrongful restraints of trade.

As economic regulation became more prevalent, courts were increasingly called on to resolve this tension. Lawrence Friedman describes how "occupational licensing absolutely burgeoned during [the post–Civil War] period. . . . Some licensing regulation laws, of course, were frankly and solely designed to produce revenue. Some licensing legislation was, moreover, harsh and discriminatory, a defense mechanism of local merchants against outsiders" (1985, 454, emphasis removed). Licensing began with the learned professions, especially those concerned with health issues, such as dentistry or pharmacy, because it was easier to make the argument that public safety

required their regulation. Then architecture, midwifery, mining, and blacksmithing were included, and finally hairdressing, plumbing, and taxi driving (Friedman 1985, 456–57). In 1889, the Michigan Supreme Court commented on this phenomenon:

> It is quite common in these latter days for certain classes of citizens—those engaged in this or that business—to appeal to the government—national, state, or municipal—to aid them by legislation against another class of citizens engaged in the same business, but in some other way. This class legislation, when indulged in, seldom benefits the general public, but nearly always aids the few for whose benefit it is enacted, not only at the expense of the few against whom it is ostensibly directed, but also at the expense and to the detriment of the many, for whose benefit all legislation should be, in a republican form of government, framed and devised. This kind of legislation should receive no encouragement at the hands of the courts. (*Chaddock v. Day,* 75 Mich. 527 [1889], at 531–32)

In *Butchers' Union Co. v. Crescent City Co.,* Justice Bradley wrote that monopolies violated the common law "because they destroy the freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood, and put it in the power of the grantees to enhance the price of commodities. They are void because they interfere with the liberty of the individual to pursue a lawful trade or employment" (111 U.S. 746 [1884]). In *Dent v. West Virginia,* the Supreme Court finally and definitively declared that

> It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. (129 U.S. 114 [1889], at 121)

State courts, too, stood by this principle, holding that "[s]tatutes which impose restrictions upon trade or common occupations, or which levy an excise or tax upon them, must be strictly construed" (*Memphis v. Bing,* 94 Tenn. 644 [1895]; see also *State v. Pullman's Palace Car Company,* 64 Wis. 89 [1885], and *Washington Electric Vehicle Transportation Co. v. District of Columbia,* 19 App. D.C. 462 [1902]). In these cases, the question before the court was: Is the challenged regulation of business a legitimate exercise of the state's power to prevent public nuisances, or is that alleged exercise merely a guise for monopolistic practices? The analysis required courts to look beyond the facial explanation of a law. One of the most famous of these "economic substantive due process" cases is *Yick Wo v. Hopkins* (118 U.S. 356 [1886]).

Yick Wo involved a San Francisco regulation that required laundries to be housed in stone buildings and licensed by a board of supervisors. Although the legislature claimed that this measure protected public health and safety, the Supreme Court found that it was really part of a statutory scheme of discrimination against Chinese immigrants, whose laundries were generally built of wood. In fact, nearly all of the city's buildings were made of wood, including most of the residences. Why, then, did the regulation apply only to laundries, and were wooden laundry facilities really more dangerous than those made of stone? "We are . . . constrained, at the outset," the Supreme Court said, "to differ from the Supreme Court of California upon the real meaning of the ordinances in question" (370). The statute was not a means of protecting society; instead, it vested the board of supervisors with "a naked and arbitrary power to give or withhold" a business license (365). The statute was a sort of Jim Crow law, a disguised attempt to infringe on the rights of Chinese immigrants to earn a living freely. "[T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself" (370). *Yick Wo* was a reverse version of *Slaughter House,* except that it relied on the equal-protection clause rather than the now-eviscerated privileges or immunities clause. States followed suit. An 1891 Colorado case held that "[i]f the city council can say that certain individuals may pursue a certain vocation and that other individuals of the same class, of equal repute and citizens of that community, shall not, then the one great principle conferred upon the citizens of the United States, to wit, the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others which may increase their prosperity or develop their faculties so as to give them the highest enjoyment, is disallowed" (*May v. People,* 27 P. 1010, at 1012).

In *Allgeyer v. Louisiana,* the Supreme Court reiterated that the "the right to follow any of the ordinary callings of life is one of the privileges of a citizen of the United States" and that this right is one of the "rights which are covered by the word 'liberty' as contained in the Fourteenth Amendment" (165 U.S. 578 [1897], at 590, quoting from *Butcher's Union Co. v. Cresant City Co.*, 111 U.S. at 746, 762 [1884]). The Court again acknowledged that occupations can be subjected to legitimate licensing restrictions to protect the public—"we do not intend to hold that in no such case can the State exercise its police power" (590)—but such regulations should not be pretexts for the restriction of freedom.

Against this background, the "notorious" case *Lochner v. New York* (198 U.S. 45 [1905]) seems much less arbitrary and scandalous than it is usually described in the scholarly literature. *Lochner* involved a statute regulating the number of hours that bakers could work. This law was a protectionist measure run through the legislature by bakery companies that relied in large part on machinery and wanted to exclude competitors who relied on human labor (Meese 1999, 42–43; Siegan 1980, 210–25). The legislature, of course, claimed that the law was a health-and-

safety regulation. The Court concluded, however, that the law had "no such direct relation to and no such substantial effect upon the health of the employe, as to justify us in regarding the section as really a health law." Instead, the Court held, the law was intended only "to regulate the hours of labor between the master and his employes" (64). Because the Fourteenth Amendment did not permit such a regulation without a legitimate health-and-safety justification, the Court struck down the law.

Lochner is generally cited as the beginning of an era of laissez-faire jurisprudence, but in fact it was the continuation of a trend whose roots went back for centuries. It was followed by several high-profile cases protecting economic liberty (*Adair v. United States*, 208 U.S. 161 [1908]; *Coppage v. Kansas,* 236 U.S. 1 [1915]; *New York Life Insurance Co. v. Dodge,* 246 U.S. 357 [1918]). In *Truax v. Raich* (239 U.S. 33 [1915]), the Court struck down an Arizona law that prohibited companies from employing more than 20 percent noncitizens. In this rerun of *Yick Wo,* the Court said that "[t]he right to earn a livelihood and to continue in employment unmolested [is] entitled to protection" (38). Like the statutes in *Yick Wo* and *Lochner,* the law in *Truax* had been defended on public-safety grounds:

> It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority . . . does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. . . . [T]he right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. (41)

Economic substantive due process was a means by which the real effect of a regulation of private contracts could be analyzed to determine whether the regulation was *really* a legitimate exercise of police power or a protectionistic or monopolistic scheme. As the Court put it in *Adams v. Tanner,*

> [b]ecause abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. . . . Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible

> justification is advanced and the police power invoked. (244 U.S. 590[1917], at 594–95)

This was the backdrop for the famous New Deal cases. In *United States v. Butler* (297 U.S. 1 [1936]), for example, the Supreme Court struck down the Agricultural Adjustment Act. This statute required "processors" of crops—mill owners, for instance—to pay a tax, which funds would then be turned over to farmers. The plaintiffs claimed that the Constitution did not permit Congress to create a scheme for redistributing wealth. The government replied that the scheme was constitutional under congressional power to lay and collect taxes. The Supreme Court found the law unconstitutional. Just as in *Yick Wo* and *Truax,* the Court did not simply swallow whole the government's justification. "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted" (68). After reviewing the law, the Court concluded that "the act is one regulating agricultural production; that the tax is a mere incident of such regulation and that the respondents have standing to challenge the legality of the exaction" (61).

Criticism

It might seem odd to characterize the decisions surveyed in this article as "*economic* substantive due process," inasmuch as the judges did not consider economic concerns or use any law-and-economics methodology. But neither did the Supreme Court rely primarily on economics when striking down the New Deal statutes. Consider, for example, *Adkins v. Children's Hospital* (261 U.S. 525 [1923]), which involved a minimum-wage law that applied only to female workers. The law, of course, caused female workers to lose their jobs and be replaced by men, who became relatively cheaper to employ after women's wage rates had been raised by the law. Congress justified the law as an attempt to protect women's "safety and morals." The Supreme Court struck down the law as an infringement on a woman's right to decide what to do with her own body—in this case, to work as an elevator operator. Wrote Justice Sutherland, "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this Court and is no longer open to question" (545).

Like the statute involved in *Lochner,* the statute involved in *Adkins* was a protectionist economic measure that benefited politically favored classes by restricting the freedom of others to compete. The law was "not for the protection of persons under legal disability or for the prevention of fraud. It is simply and exclusively a price-fixing law, confined to adult women . . . who are legally as capable of contracting for themselves as men" (554). As Hadley Arkes points out,

> in none of these critical passages did Sutherland employ a brand of reasoning that could have been described in any way as "economic." There were no ventures into the theories of monetarism or fiscal policy with the manip-

> ulation of aggregate demand and "multipliers." There was not even a feint toward theories of price and the supply of labor. Sutherland was aware that these policies would produce what some people call "incentives" and "disincentives." . . . But Sutherland . . . offered no theory of "economic behavior," and it bears noting that he held back from offering any estimate about the effects of these policies. (1994, 78–79)

Instead, Sutherland was "settling the case in terms that were as purely *jural* as an opinion could be." The New Deal's infringements on the right to earn a living "offended, deeply, the principles of lawfulness" (Arkes 1994, 82). Such arrangements offended the right of the individual to use her land, her property, or her talents as she saw fit. Far from being examples of judicial activism, cases such as *Adkins, Yick Wo,* or *Lochner* were instances in which the Court restrained *legislative* activism that abridged the right to pursue a lawful occupation—a right sanctified by at least seven hundred years of traditional protection.

To justify the extreme sorts of regulation that constituted the New Deal, it was necessary to overcome that tradition or to deny its existence. In 1937, in the famous "Switch in Time That Saved Nine," the Supreme Court reversed centuries of common law. Whereas courts had formerly presumed against laws infringing on common-law rights, including the right to earn a living, in *United States v. Carolene Products* the Court held that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis" (304 U.S. 144 [1937], at 152).

By this decision, the Court divided individual rights into "fundamental" rights and "economic" rights. Yet, as earlier generations had understood, the two cannot be separated. The "economic right" to operate a business had never been based only on economic justifications; rather, it was a form taken by the fundamental right of a person to provide for himself or his family. The spurious nature of the dichotomy in *Carolene Products* has been sufficiently demonstrated elsewhere (McCloskey 1962, 34–45; Pilon 1999; Siegan 1995), but it is remarkable how, after 1937, the history of the right to earn an honest living has been confused.

With the rise of legal positivism—originated by Roscoe Pound, Oliver Wendell Holmes Jr., Louis Brandeis, and others—the very *existence* of such a right came to be directly challenged. In *McAuliffe v. New Bedford,* Holmes wrote, "The petitioner may have a constitutional right to talk politics but he has no constitutional right to be a policeman" (155 Mass. 216 [1892], at 220) This declaration is strictly correct because the common law guarantees only the right to *seek* employment, not the right to a have particular job, but Holmes's dictum, as Justice William Douglas would later write, "[had] pernicious implications" (*Barsky v. Bd. of Regents of the State of New York,* 347 U.S. 442 [1954], at 472). Roscoe Pound went further than Holmes,

though, insisting that "there never has been at common law any such freedom of contract as [cases such as *Lochner* or *Butcher's Union*] postulate." Pound argued that the individual had no right, "by contract, [to] impose substantial restraints upon his [own] liberty" because "[f]reedom to impose these restraints, in the hands of the weak and necessitous, defeats the very end of liberty" (1909, 470–72). In other words, the poor could not be trusted with the right to decide for themselves the number of hours they wished to work.

Today's scholars explicitly deny the existence of this right. Peter Irons derides the *Lochner* Court for "[h]aving *inserted* 'liberty of contract' into the Constitution" (1999, 249). John Semonche writes that Holmes, in his *Lochner* dissent, "was arguing against the use of the Fourteenth Amendment to protect *newly discovered* individual rights from control by state legislatures" (2000, 151, emphasis added), and he refers to "this *new* freedom of contract" (150, emphasis added). Paul Kens claims that the right to pursue a lawful calling was solely the brainchild of Stephen Field's *Slaughter House* dissent. "[H]e invented a new right," Kens argues. "Nowhere does the Constitution expressly guarantee a right to engage in a trade or profession" (1997, 117). But it is simply untrue that economic liberty, resting as it did on several constitutional provisions and centuries of common-law decisions, was "not connected" with the history of the United States. Like their Progressive predecessors, these scholars claim that economic liberty cases blocked government attempts to protect consumers, but neither the minority in *Slaughter House* nor the majority in *Lochner*—nor, for that matter, any decision in any case, state or federal—had ever held that freedom of contract permitted unscrupulous business practices. What these decisions held was that the courts must look behind the facial justification of the law and consider its substantive effect. Just as *Yick Wo* had looked behind the alleged health-and-safety justification for the law and seen the anti-Chinese intent, so *Lochner* found that the regulation had no relation to "the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor" (*Lochner,* 198 U.S. [1905], at 64). *Lochner* explicitly recognized the right of the state to pass legitimate health-and-safety regulations provided that they apply equally to everyone involved in a trade. The legal positivists were not trying to protect the state's right to make such regulations; they were pushing for a new canon of construction, which they got in *Carolene Products.*

Today

Even after *Carolene Products,* as the Supreme Court upheld legislation infringing on economic liberty, it did not abandon the idea of the right to pursue a lawful calling. In *Meyer v. Nebraska,* for example, the Court attempted to list some of the rights the Fourteenth Amendment protects:

> ["Liberty"] denotes not merely freedom from bodily restraint but also *the right of the individual to contract, to engage in any of the common occupations of life,* to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and *generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men*. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. (262 U.S. 390 [1939], at 399–400, emphasis added)

In *Takahashi v. Fish and Game Commission* (334 U.S. 410 [1948]), the Supreme Court considered a California law that repealed the state's previous practice of granting fishing licenses to residents regardless of citizenship. In 1943, the state began issuing these licenses only to citizens, which meant that Japanese immigrants could not legally fish because by federal law they could not become citizens. Takahashi was a fisherman who would no longer be allowed to make his living by fishing. The state claimed that its "proprietary interest in fish in the ocean waters within 3 miles of the shore . . . justified the State in barring all aliens in general and aliens ineligible to citizenship in particular from catching fish" (414). As in *Lochner,* the Court did not stop at this asserted interest, however, and as in *Yick Wo* and *Truax,* it found the law to be actually an attempt to discriminate against Japanese immigrants:

> [T]he thin veil used to conceal [the law's] purpose [is] too transparent. Under each and both, alien Japanese are denied a right to a license to catch fish on the high seas for profit, and to bring them to shore for the purpose of selling the same in a fresh state. . . . [T]his discrimination constitutes an unequal exaction and a greater burden upon the persons of the class named than that imposed upon others in the same calling and under the same conditions, and amounts to prohibition. This discrimination, patently hostile, is not based upon a reasonable ground of classification and, to that extent, the section is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. (427)

But such cases are the exception. Today, Americans still live under the regime of *Carolene Products;* since 1937, the right to earn an honest living has suffered greatly at the hands of rational-basis review. A good example of the hostility toward "economic substantive due process" is Justice Souter's concurring opinion in *Washington v. Glucksberg* (521 U.S. 702 [1997], at 752–89). Without a trace of irony, Souter claimed that those cases that explicitly protected an individual's right to work for his

own profit without interference "harbored the spirit of *Dred Scott*" (751). He wrote as powerfully in his dissent in *Seminole Tribe v. Florida:*

> It was the defining characteristic of the *Lochner* era, and its characteristic vice, that the Court treated the common-law background (in those days, common-law property rights and contractual autonomy) as paramount, while regarding congressional legislation to abrogate the common law on these economic matters as constitutionally suspect. See, e. g., *Adkins v. Children's Hospital* . . . . And yet the superseding lesson . . . [is] that action within the legislative power [should not be] subject to greater scrutiny merely because it trenches upon the case law's ordering of economic and social relationships. (517 U.S. 44 [1996], at 166)

But the cases decided on the basis of economic substantive due process were not what Souter claims. Neither *Lochner* nor *Adkins* held that legislatures could not change the common law. They simply said that laws infringing on common-law rights—rights incorporated by the Fourteenth Amendment—must have the health-and-safety effect that the legislature claims and not be mere pretexts for seizing economic advantage for rent seekers.

The overwhelming majority of legal academics agree with Souter, but the right to earn a living has proven too important for the Court to ignore completely. In a variety of cases, federal and state courts have invoked this right, and they have even struck down licensing schemes that infringe on it. One context in which this issue arose was in the anticommunist hysteria of the mid–twentieth century. *Barsky v. Bd. of Regents of the State of New York* (347 U.S. 442 [1954]) involved a doctor whose license was revoked when he refused to submit to an investigation into his alleged communist sympathies. The Court upheld this action, but the arch-liberal Justice William Douglas wrote in dissent: "The right to work I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property. . . . It does many men little good to stay alive and free and propertied, if they cannot work. To work means to eat. It also means to live. . . . [S]o the question here is not what government must give, but rather what it may not take away" (472). This declaration is *exactly* the holding of *Lochner v. New York, Adkins v. Children's Hospital,* and other now-reviled decisions: laws infringing a person's right to pursue a lawful calling should be subjected to substantive judicial scrutiny.

Today, courts continue to refer, in dicta, to the individual's right to pursue a lawful occupation (*Lebbos v. Judges of Superior Court,* 883 F.2d 810, 818 [1989]; *Chalmers v. Los Angeles,* 762 F.2d 753, 757 [1985]). As recently as 1999 the Supreme Court held that the Fourteenth Amendment protects the right to "choose one's field of private employment" (*Connecticut v. Gabbert,* 526 U.S. 286 [1999], at 292–93), although the Court upheld the regulation in that case.

In *Lowe v. SEC* (472 U.S. 181 [1985]), the Court struck down an injunction that had been issued against a group of former investment advisors. Those advisors had lost their licenses issued by the Securities and Exchange Commission (SEC) and therefore could no longer offer professional investment advice. Instead, they began to publish a newsletter expressing their opinions on stock market investments. The SEC enjoined them on the grounds that the loss of their licenses prohibited them from this profession. The investors responded that their right to publish was protected by the First Amendment. "This issue involves a collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment. . . . Regulations on entry into a profession, as a general matter, are constitutional if they 'have a rational connection with the applicant's fitness or capacity to practice' the profession" (228).

State courts also have protected this right. Texas courts have held that citizens "[have] a vested property right in making a living" (*Smith v. Decker,* 158 Tex. 416 [1958]). New York, Connecticut, and Wyoming courts have held that laws restricting or taxing occupations "are generally construed strictly" (*People v. Dr. Scholl's Foot Comfort Shops, Inc.,* 277 N.Y. 151 [1938]; *Connecticut Chiroprody Society v. Murray,* 146 Conn. 613, 617 [1959]; *State v. Capital Coal Co.,* 54 Wyo. 176, 183 [1939]). The California Supreme Court has called the right to earn a living a "fundamental" one (*Conway v. State Bar,* 47 Cal. 3d 1107, 1134 n. 7 [1989]). Like Texas, Arizona considers the right of occupation a property right (*Buehman v. Bechtel,* 57 Ariz. 363, 372 [1941]). Other courts, however—in Hawaii, for example—have declared that the right to earn a living is not a fundamental right (*Nagle v. Bd. of Ed.,* 63 Haw. 389, 393–394 [1981]).

New York courts have recognized this right, stating that "[m]onopolistic restrictions on the right to earn a living are odious devices" (*Di Carlo v. State Liquor Auth.,* 54 Misc. 2d 482 [1967], at 485). Yet recently the Supreme Court of New York stated that "[t]he right to do business has never been considered a fundamental right" (*Ricketts v. City of New York,* 181 Misc. 2d 838 [1999], at 843). Such confusion persists elsewhere, too. The Florida Supreme Court has declared that "[t]he fundamental right to earn a livelihood in pursuing some lawful occupation is protected by the Constitution, and in fact, many authorities hold that the preservation of such right is one of the inherent or inalienable rights protected by the Constitution" (*State ex rel. Hosack v. Yocum,* 136 Fla. 246, 251 [1939]; *Campos et al v. INS,* 32 F. Supp 2d 1337, 1347 [1998]). The Eleventh Circuit has likewise said that "The Fourteenth Amendment liberty guarantee includes an individual's right 'to engage in any of the common occupations of life'" (*Silverstein v. Gwinnett Hospital Authority,* 861 F.2d 1560 [1988], at 1566). Yet the Eleventh Circuit has also stated "the right to pursue a particular occupation is [not] a fundamental right, and it has not applied strict scrutiny review to classifications affecting an individual's pursuit of his or her occupation" (*Jones v. Board of Commissioners of the Alabama State Bar,* 737 F.2d 996[1984], at 1000).

Although courts often refer in dicta to the right to earn a living, they rarely protect that right from government monopolies. This abstention has a single reason: rational-relationship scrutiny. As one commentator has written, "*Slaughter House* would be a difficult case today, except that the hard questions would be hidden by the assumption, built into 'rational basis scrutiny,' that the states generally do not act for forbidden purposes" (Harrison 1992, 1469). That assumption is a blatant fiction. The Constitution was formed in part to protect the individual's right to pursue a business without wrongful interference. That right deserves protection by our courts today, just as it received protection by our courts for many centuries before the New Deal.

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