

Work as Key to the Social Question

The Great Social and Economic Transformations and the Subjective Dimension of Work



The Value of Work: A Catholic Critique of the U.S. Constitutional Norm

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Abstract

Catholic teaching has always placed great emphasis on the value of work and of workers. Particularly since Pope John Paul II published *Laborem Exercens*, the philosophical and theological foundation for work's exalted position in Catholic thought is quite clear. Work is the way that human's participate in the Divine task of creation and contribute to the common good. In doing so, the worker enhances his dignity, he becomes more fully human. Work, then, is both a right and a duty. Social policies that deter any person from contributing to the common good through his or her freely chosen avocation is suspect at best. American constitutional jurisprudence once held the right of individuals to contract freely regarding their labor to be fundamental, a liberty interest protected by the Constitution. State and federal laws that interfered with this right were scrutinized closely by the judiciary and frequently invalidated. The excessively individualistic nature of this case law brought it into disrepute when the Great Depression demanded a more communitarian vision. While this natural law strain of constitutional decision-making has been resurrected in the context of non-economic rights, such as the "right" to have an abortion or use birth control, American courts refuse to provide protection for so-called economic rights, including the right to work. The American constitutional value system is wrong and could be well informed by Catholic teaching with regard to rights that are essential to the dignity of persons.

INTRODUCTION TO CATHOLIC SOCIAL TEACHING REGARDING WORK

Work, or, more importantly, the worker, has been the principal focus of modern Catholic social thought and teaching. The "social question" of the late Nineteenth and

entire Twentieth Centuries was the “labor question.” [1] The first great modern “social” encyclical, for example, while universally known as *Rerum Novarum* (“Of new things”), is actually entitled “The Condition of Labor.” [2] In light of radical social changes prompted by the industrial revolution, its philosophical foundation, Liberalism, [3] and the ideological reaction of Socialism, Pope Leo XIII addressed his great encyclical primarily to the plight of the working class. The situation of working men and women, together with their families, has remained a primary focus of subsequent Catholic social teaching.

For ninety years following *Rerum Novarum*, the Church engaged, through its teachings, in a dialog with modern society. It critiqued both the theory and praxis of Capitalism and of Socialism as those two phenomena were developing, but the focal point of the teaching remained on the condition of the workers and their families. The moral imperatives identified in various encyclicals included a living wage, safe working conditions, appropriate limits on the labor of children and women, and the right of workers to organize. The right to own private property has consistently been recognized and defended in Catholic thought, but this right seems to be derived at least in part from the creative activities of labor. [4] Those who labor, in whatever form, have a just expectation that they will have a possessory interest in the products of their work. For most workers, that interest will be actualized in wages that may be used to purchase necessities or saved to enhance the worker’s wealth.

As business enterprises became increasingly global in their operations and influence, Catholic social thought shifted focus to the economic disparities between nations, rather than class differences within them. [5] In the era of economic expansion following World War II, the “social question ha[d] become worldwide.” [6] Development, the Church taught, was the key to justice in the emerging world order. As Pope Paul put it dramatically, “[d]evelopment is the new name for peace.” [7] In application, however, the development of a nation must be measured primarily by its capacity to provide meaningful employment to those seeking work. Expanding national wealth and enhanced efficiency do not, in themselves, establish that an underdeveloped nation is making progress towards a more just social order. The development that promotes justice and peace is very practical. It provides the education, skills, capital and infrastructure that raise the level and quality of employment, both in poorer nations and among the marginalized of rich societies.

The foregoing discussion may exaggerate somewhat the centrality of work to Catholic social thought. The hyperbole, however, is not excessive, which raises a central question of this essay. Why is work such a persistent and vital theme in Catholic social teaching? The answer, in part, is that Catholic social teaching continues the ancient prophetic call for justice; particularly that which the Church calls “social justice.” This seems to have led, continually and perhaps inevitably, to reflections on the nature and state of work. The requisites of charity or love may satisfy the fundamental human needs of impoverished individuals and nations, but social justice requires something more. It demands that individuals and institutions help build the social and economic infrastructures that support meaningful employment in the modern world.

Laborem Exercens, the first social encyclical of his Holiness, Pope John Paul II,

developed more completely than any preceding papal teaching the nature of work and its significance to the human person. Work, in the broad sense that the Holy Father uses the term, is the way that human beings, as subjects and not objects, participate in the ongoing act of creation. By willfully participating in the act of creation through work, they manifest the image of God B the *Imago Dei*. Also, men and women develop as persons – they become more fully human – through work in its many forms. In human endeavors people find and express their personalities. Ultimately, through this personal expression of self, individuals become part of community and contribute to the common good.

This teaching so eloquently developed by John Paul II places work in a most exalted position in Catholic social thought. It is dignified and dignifying. Work, to be sure, is the way that humans earn what is needed to feed, clothe and shelter themselves and their families. It may be menial and unpleasant. The Book of Genesis states, and the Holy Father reminds us, that subduing and establishing dominion over the earth will always involve toil and sweat. *Laborem Exercens*, however, teaches that work never lacks dignity, at least not when it is understood that man is the subject of work, not its object. The dignity of work is neither a function of its value in the market place nor of its social importance. Its dignity is rooted in its subject, a human person, an image of God.

Since human work serves important spiritual, personal and communal purposes, Catholic social thought holds that all persons have a right to work. Society has a corollary duty to foster conditions that are conducive to full and meaningful employment, as well as to maintain an environment in which working men and women are never reduced to the status of objects in the work force. This brief and incomplete summary of Catholic teaching about work provides the foundation for the primary objective of this essay, which is to explore the status of work under the United States' constitutional ordering of fundamental rights.

WORK IN THE AMERICAN CONSTITUTIONAL CANON

The Constitution of the United States does not expressly protect the right of citizens to work. The original document recognized the value of private property, allowing it to be taken by government only for a public purpose and upon the payment of fair compensation. [8] It also generally protected contractual expectations from frustration by government enactments. [9] The Bill of Rights added various privileges that were to be secure from federal interference. [10] The post-Civil War amendments, particularly the Fourteenth, expanded dramatically the constitutional limitations on the authority of states to regulate the behavior of their citizens. The right of an individual to employment or to practice one's profession or trade, however, has never found its way into the American enumeration of constitutional values. If the right to work was highly esteemed by the framers of the U.S. Constitution, it was at most a matter reserved to the people by the Ninth Amendment. That Amendment, however, has never been construed to sanction judicial invalidation of a federal or state law. [11] The authority of the judiciary to protect employment-based rights

would have to be granted by statute or found implicit elsewhere in the Constitution.

The following survey of relevant constitutional case law demonstrates that, although the Constitution itself is silent, the federal judiciary has interpreted several provisions of the document to include the right to work. For a time, the right to freely pursue one's calling, and to contract for one's labor, were placed very high among constitutionally protected values. This synopsis of significant cases, moreover, will show how difficult it has been for the Supreme Court to develop a consistent and defensible constitutional basis for protecting unenumerated rights, including the right to work. The path has been tortuous, particularly with regard to rights that the Court characterizes as "economic."

Early Hints of a Natural Law or Fundamental Rights Jurisprudence

The Founding Fathers of the United States clearly believed in natural law. [12] The Declaration of Independence represents a classic expression of the founders' belief in rights that precede and are superior to the positive law. Such rights, they declared, are "self evident" and "unalienable." This natural law tradition found expression, but not acceptance, in some of the earliest decisions of the Supreme Court. The critical jurisprudential issue was not whether citizens had rights that should not be abridged by statute. It was obvious that such rights existed and that they were not listed in the Constitution. The legal challenge has been to identify an appropriate role for the judicial branch in enforcing or protecting rights that were not expressly acknowledged by the Constitution. That has presented a formidable challenge to jurists, as well as political and legal scholars, throughout the history of the United States.

The most celebrated early judicial expression of a natural law jurisprudence is found in Justice Samuel Chase's dicta in the case of Calder v. Bull. [13] Chase thought that courts could invalidate certain laws even though they violated no express constitutional provision:

"I cannot subscribe to the *omnipotence* of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law of the State. . . . There are acts which the *Federal, or State, Legislature* cannot do, *without exceeding their authority*. There are certain *vital* principles in our *free Republican governments*, which will determine and over-rule an *apparent and flagrant* abuse of *legislative* power; as to authorize *manifest injustice by positive law*; or to take away that security for *personal liberty, or private property*, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the *social compact*, cannot be considered a *rightful exercise* of *legislative authority*." [14]

The Constitution, Justice Chase apparently believed, is a reflective of the "social compact." It did not establish the basic rights of citizens and could not reasonably have been intended

to annul them by silence.

Justice Iredell's response to Justice Chase in Calder reflected a positivist perspective. [15] Courts, he stated, should never set aside a law that was within the legislative authority of the enacting body based on "abstract principles of natural justice." [16] Iredell's viewpoint prevailed for several decades.

The adoption of the Fourteenth Amendment following the Civil War provided the textual basis for the ascendancy of a natural law or fundamental rights strain of constitutional jurisprudence. In relevant part, the Amendment prohibits states from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [17] The seminal and authoritative decision interpreting the post-Civil War Amendments, the Slaughter-House Cases, [18] presented the Supreme Court with a claim involving an asserted constitutional right of butchers to "exercise their trade." Louisiana had enacted legislation granting a monopoly to operate slaughter houses in New Orleans. Butchers who had been excluded sought judicial protection under the recently enacted amendments. They first claimed that the fact that they must either work for the monopolist or find another trade placed them in "involuntary servitude" in violation of the Thirteenth Amendment. The Court found that this Amendment was intended to free the slaves and could not be extended beyond a condition that was virtually identical to the institution of slavery. The exclusion of plaintiffs from the slaughter house monopoly did not amount to such a deprivation.

The plaintiffs in Slaughter-House also claimed that the state had denied them the "privileges or immunities" of citizenship by excluding them from their trade. The term "privileges and immunities" was already contained in the body of the Constitution [19] and had been interpreted to include those rights which are "fundamental; which belong, of right, to the citizens of all free governments ¼ ." [20] Surely, the plaintiffs argued, the right to practice one's profession or trade was fundamental. The majority of the Court in Slaughter-House, however, held that only those rights that were incidental to federal citizenship, such as the right to petition the federal government, were protected by the Fourteenth Amendment. The right of butchers to exercise their trade was not such a privilege and, therefore, the regulation was not barred by the Constitution.

The Court in Slaughter-House, however, was sharply divided. Four dissenting Justices believed that "Privileges and Immunities" had the same meaning in the Fourteenth Amendment as it did in Article IV. The clause did not create or define the rights of citizens. Rather, it acknowledged that there were fundamental rights that are "natural and inalienable." [21] Among these "must be placed the right to pursue a lawful employment in a lawful manner ¼ ." [22] In a separate dissenting opinion, Justice Bradley elaborated:

"[I]n my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt ¼ is one of his most valuable rights, and one which the legislature of a State cannot invade, whether restrained by its

own constitution or not.

* * * *

For the preservation, exercise, and enjoyment of these rights [of freemen] the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade as may seem to him most conducive to that end. Without this right he cannot be a freeman.

* * * *

But even if the Constitution was silent, the fundamental privileges and immunities of citizens, as such, would be no less real and no less inviolable than they are now” [23]

Although the Privileges and Immunities Clause was the natural place to posit the protection of inherent, fundamental rights, the Slaughter-House decision had foreclosed that possibility. Proponents of a natural rights jurisprudence, however, would not be deterred for too long. By the turn of the century, the Court had found that the Due Process Clause provided the avenue needed to protect fundamental, although unenumerated, individual rights. Due process it seemed embodied substantive as well as procedural guarantees.

Economic Substantive Due Process

By the end of the Nineteenth Century, the Supreme Court had established that certain unenumerated rights would be protected against state interference by the federal judiciary and that the right to contract for labor, i.e., to work, was prominent among these rights. What the Privilege and Immunities Clause could not reach after Slaughter-House, was encompassed within the “liberty” interested protected by the Due Process Clause. In Allgeyer v. Louisiana, a case involving the right to sell insurance policies in the state, the Court held that

“The 'liberty' mentioned in [the Fourteenth Amendment] means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; *to earn his livelihood by any lawful calling; to pursue any livelihood or avocation*; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.” [24]

The Court in Allgeyer, a unanimous decision, aligned itself with the reasoning

earlier advocated by Justice Bradley. The decision began an era of active judicial intervention when states sought to regulate the terms or conditions of employment.

A parallel constitutional development, which is beyond full explication in this essay, was critical to the Court's enterprise. Briefly, the Court used principles of federalism to prevent the federal government from regulating matters related to labor. The most dramatic decision of this genre is Hammer v. Dagenhart (the Child Labor Case). [25] The case involved a federal statute, the Child Labor Act, which prohibited the transportation in interstate commerce of goods produced by children. The purported source of the federal authority to enact the legislation was the Commerce Clause, [26] which grants to Congress the power to regulate interstate and foreign commerce. The Court accurately noted that the real purpose of the federal law was to regulate the conditions under which the goods were produced, even though it used the prohibition of interstate traffic as the means to achieve this end. This, the Court held, was the invalid exercise by the federal government of a power reserved to the states. [27] The rigid, categorical approach used by the Supreme Court during the first several decades of the last century effectively prevented the federal government from governing the employment relationship. That power remained in the states, but, as we shall see, the Court was to employ the Fourteenth Amendment to seriously limit state authority to regulate the conditions of labor.

The Supreme Court's decision in Lochner v. New York [28] has come to epitomize the judicial application of a fundamental rights jurisprudence that placed the relationship between employers and employees largely beyond the pale of state regulation. New York had enacted a law limiting the number of hours that bakers in the state could work. The state claimed that this promoted health and safety of both bakers and the consumers of bread. The starting point for the Court's analysis was that "the right to purchase or to sell labor is part of the liberty protected by [the Fourteenth Amendment], unless there are circumstances which exclude the right." [29] Special circumstances existed, for example, in the case of particularly dangerous fields of employment, e.g., mining, or inherently vulnerable individuals, e.g., wards of the state. Bakers, however, are not engaged in inherently dangerous work and they presumably are competent adults. The state, under these circumstances, had no authority to interfere with the contractual rights of the bakers and their employers. The right to contract for one's labor was a liberty interest protected by the Fourteenth Amendment. The Court concluded that

"the real object and purpose [of the law] were simply to regulate the hours of labor between the master and his employés (all being men, sui juris), in a private business, not dangerous in any degree to morals or, in any real and substantial degree, to the health of the employés. Under such circumstances the freedom of master and employé to contract with each other in relation to their [employment] cannot be prohibited or interfered with, without violating the Federal Constitution." [30]

Economic substantive due process became so closely associated with the Lochner decision, that the exercise of this now discredited judicial practice has come to be known as

“Lochnerizing.”

The state in Lochner had relied on its authority to protect public health, safety and morals (the so-called police powers) without avail. In subsequent cases, state governments claimed that they were merely correcting for the bargaining inequality between employers and employees. The Court remained unsympathetic. The Court’s conception of natural law as it related to employment relations was once again forcefully stated in Coppage v. Kansas. Kansas had banned the use by employers of so-called “yellow dog” contracts, i.e., contracts that prevented an employee from joining or remaining a member of a union. The state argued that such contracts reflected the grossly superior bargaining power of the employer and that they would not be freely accepted by employees. The Supreme Court invalidated the law, stating that “it is from the *nature of things* impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.” [31] Economic inequality, the Court believed, was part of the very nature of things in a free society. It was not the business of the state to “correct” the natural imbalances in bargaining positions that flow from this reality. The equality that mattered to a majority of the Supreme Court justices was the equal freedom of all parties to bargain and contract for labor, regardless of their relative strengths in the bargaining process.

Throughout the first few decades of the Twentieth Century, the federal judiciary stood as a barrier to most protective labor legislation. The terms and conditions of labor were to be left to the market place. Each individual had a protected liberty interest in determining for him or her self the conditions under which their labor would be sold. That was part of the natural order in a free society.

The Fall of Substantive Due Process

The Depression brought the beneficence of markets and the sanctity of contract into question. Markets had failed the nation badly and citizens sought relief through the political processes. The collapse of the stock market, failures of banks, extreme unemployment, and the absence of social support for the impoverished led the political branches to seek solutions that could not be reconciled with the judiciary’s liberal or libertarian philosophy. At the federal level, the President and Congress were determined to establish the “New Deal.” Government would have to play a major role in rebuilding the social and economic order, and also provide safeguards against a recurrence of the crisis then facing the nation.

The Supreme Court held firm for a while. Various legislative components of the New Deal agenda were invalidated. [32] By 1937, however, the Court reversed its earlier positions. The Supreme Court began to recognize that the nature and scope of a problem, not the character of the activities, would determine when the federal government could regulate economic matters. Congress could regulate commercial activities, including labor relations, if those activities had an effect on interstate commerce. [33] Even local conduct could be regulated by the federal government if it was part of productive activities that,

when aggregated, had an effect on interstate commerce. Wheat production for home use by a small farmer, for example, was subject to federal regulation because the *combined* impact of production by small farms throughout the nation was substantial. [34] And, naturally, labor relations was a matter for federal regulation under the new judicial regime. [35] Until very recently, there seemed to be virtually no limit to the authority of Congress to regulate activities under the Commerce Clause. [36]

At the state level, the changing judicial philosophy appeared earlier. In a 1934 decision, Nebbia v. New York, the Court adopted a noticeable shift towards a less individualistic social vision. Justice Roberts upheld a New York law regulating the price of milk. The price constraints, the plaintiff argued, interfered with private property rights and freedom of contract. The Court's reply contrasts dramatically with prior decisions: "[N]either property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom of contract to work them harm. Equally fundamental with the private right is that of the public to regulate it in the common interest." [37] This modification of the Court's previous view about the sanctity of private property and freedom of contract is consistent with Catholic social teaching. The private rights to property and contract in Nebbia were subordinated to the "common interest." In Catholic teaching, they are similarly subordinated to the "common good."

During this period, the Court also moderated its position regarding the equality of bargaining parties in labor relations. What had earlier been viewed as part of the natural order, protected from government interference, became a legitimate target of government action. In 1937, the Court upheld a minimum wage law for women, stating:

"The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a *living wage* is not only detrimental to their health and well being but casts a direct burden for their support upon the community.

* * * *

[The] community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest." [38]

Unequal bargaining strength, therefore, was no longer seen as an inevitable attribute of a free society. Private economic power could be used to deny workers meaningful freedom, imposing burdens on laborers and society as a whole. The Court now accepted the injustice that could arise from gross disparities in the economic strength of workers and employers. This injustice could be addressed by legislation without fear of a successful challenge in the courts under the Due Process Clause.

The constitutional jurisprudence of the Lochner era did share some basic principles

with the Church's social teaching. Private property was a natural right and the right to freely pursue one's avocation was valued highly. The extreme judicial commitment to these values, however, was more consistent with the economic thinking of liberalism than with the Church's more limited position. Changes that occurred in the 1930's, however, brought the American constitutional view more in line with Catholic thought. The cases of this period of judicial reform embodied themes that were critical elements of Catholic teaching, e.g., the "living wage" and the common good. The legislatures of both the federal and state governments were free to address what the Church has called the "social question" with virtually no judicial interference.

Era of Judicial Deference

The judiciary, of course, never presumed to impose on employers the duty to provide for a living wage or the other goods of the Catholic value hierarchy. Rather, in the post-Lochner years it merely left the politically responsive branches to adopt their own prescriptions for the common good. Legislative policies could be wrong or unwise, but the courts would not set them aside based on judicially determined natural law rights. The chosen judicial policy was one of deference to the political processes.

The judiciary in this time of self restraint disavowed any competence to enforce rights that could not be found explicitly in, or clearly inferred from, the text of the Constitution. The courts had reverted to a positivist legal posture. The cases decided under the theory of substantive due process, the Court implicitly acknowledged, represented a judicial usurpation of powers reserved to the legislative and executive branches of government. The formulation of public policy was a political task, not for the judges. The resulting judicial deference was embodied in the application of the "rational basis" standard. Under this standard of review, a statute is valid, barring of course a conflict with an explicit constitutional provision, if the legislature had any rational basis for its adoption. In the context of so-called economic and social rights, the courts' deference has been virtually absolute.

The Lee Optical [39] case provides a striking example of the extreme deference the Court applies in the context of a statute limiting the right to work. Oklahoma enacted legislation severely limiting the right of anyone other than a licensed optometrist or ophthalmologist from fitting eyeglasses or replacing lenses. The law had the practical effect of preventing opticians, who are artisans trained and qualified to duplicate lenses and fit eyeglasses, from freely practicing their profession. When the law was challenged, the trial court found that the exclusion of these qualified professionals was neither necessary nor reasonable. The judge invalidated the law as a violation of the Due Process Clause to the extent that it unreasonably interfered with the rights of opticians to practice their skills. The Supreme Court reversed. The challenged law survived "rational basis" scrutiny because the Court could *conceive* of reasons that may justify the statute. The decision is striking for the listing of reasons that the state legislature *might* or *may* have adopted the restriction which prevented opticians from competing freely with the members of the favored professions.

The fact that a particular class of artisans was denied the right to practice their art or profession was of little concern to the Court.

The demise of substantive due process left the protection of the right to pursue a calling or avocation largely to the Equal Protection Clause. Members of a “suspect” or “quasi-suspect” class, such as a race- or gender-based qualification, are entitled to protection by the courts, which is manifest in heightened levels of judicial scrutiny. The basic liberty interest of any person to be free of unnecessary governmental interference with his or her right to work, however, enjoys virtually no judicial protection.

Revival of Substantive Due Process

In 1965, the Supreme Court surprisingly revived substantive due process. In Griswold v. Connecticut, [40] a state law outlawing the use of birth control devices was challenged by a married couple and their doctor. There were multiple decisions in the case, but the majority of the Court agreed that a law prohibiting the use of birth control by married couples was unconstitutional. Justice Douglas’s decision for the Court attempted to reconcile the outcome with a post-Lochner positivism. This new found right, Douglas wrote, was implicit in various express provisions of the Bill of Rights. The enumerated rights emanated or had penumbras within which this asserted right could be found.

The decisions of other Justices in Griswold were more sanguine about resorting to substantive due process. Justice Harlan, in particular, based his judgment clearly on precedents resting on an interpretation of the Due Process clause that included a substantive, as well as procedural, component. Due process, he had stated in an earlier dissenting opinion involving the same law, has been the basis for the Court’s striking the balance between the citizens’ rights to individual liberty and “the demands of organized society.” [41] Lochner, and related cases, had been wrongly decided, but the natural law notions upon which they were based had not been repudiated. Other cases of that era had survived, most notably those involving the right of parents to raise and educate their children. [42]

Griswold was a very narrow decision. The right being protected was limited to married couples; to the use, and not production or distribution, of birth control devices; and seems to have been limited to activities that were not traditionally condemned as immoral in the American experience. Abortion, adultery, fornication, and sodomy, even within the confines of the marriage relationship, could still be proscribed by the state. Connecticut, however, was intruding into the most intimate aspects of a “sacred” relationship, marriage. The Court would review this statute with a heightened level of scrutiny. Strict scrutiny, rather than the rational basis standard, would be applied in this context. Connecticut had to demonstrate that the means selected – the prohibition of use by married couples – were necessary to achieve a compelling state end. [43] The state could not satisfy this standard.

The Griswold decision proved to be the foundation for a new era of substantive due process. The “fundamental right” of married couples to use contraception was shortly

extended to unmarried couples. [44] The liberty interest, it seemed, was not derived from the marital relationship, in which the sexual act is universally sanctioned, but rather it included an individual's interest in preventing conception, even in illicit sexual unions. Finally, in 1973 the Court extended the "privacy" interest of Griswold to abortion. Without clearly identifying the source of constitutional protection, the Supreme Court in Roe v. Wade [45] invalidated the anti-abortion laws of virtually every state in the Union. Carrying and bearing a child imposed serious physical, psychological and economic burdens on the mother, Justice Blackmun wrote, and, therefore, the state had to justify any interference with a decision of the mother to terminate a pregnancy through abortion. Under the Roe formula, a mother's interest decreased and the state's interest increased throughout the term of the pregnancy. Decisions following Roe made it clear that a majority of the member of the United States Supreme Court believed the right to have an abortion was among the most "fundamental" of all rights in the constitutional hierarchy of values.

Roe and its progeny have been the most controversial and divisive constitutional decisions of modern times. The Court and American society have been strongly divided over the issue of abortion and, more importantly for this analysis, over the role of the Court in deciding such critical moral and social issues. During much of the 1980s, it appeared that Roe would likely be overruled as a modern day Lochner. In Planned Parenthood of Southeastern Pennsylvania v. Casey, [46] however, the Court ended that prospect, at least for the time being. The Court in Casey opened the door to more extensive state regulation of abortions than had been permitted under Roe. However, the core of that decision – the freedom of a woman to decide whether or not to bear her child – was affirmed. Justice O'Connor's decision for the Court, moreover, clearly stated that the right of a woman to terminate her pregnancy is a "liberty" interest protected by the Due Process Clause.

Griswold, Roe and Casey have established that the natural law, fundamental rights strain of constitutional jurisprudence has survived in spite of judicial repudiation of Lochner and similar cases of the early Twentieth Century. A law burdening "non-economic" interests such as the freedom to have an abortion, use contraceptives or to marry will be subject to close or "strict" scrutiny if challenged in court. The interest in one's employment, however, remains an "economic" right in judicial reasoning and statutory enactments that interfere with such rights are subject to a mere rationality review. The result is a two-tiered system that applies heightened scrutiny to certain types of rights and minimal scrutiny to other types of individual interests, including the right to work. This essay critiques this dichotomy from the perspective of Catholic social teaching.

A CATHOLIC CRITIQUE OF THE CONSTITUTIONAL NORMS

As already suggested, the constitutional jurisprudence of the late Nineteenth and early Twentieth Century reflected a view of work that was in some respects consistent with Catholic teaching and in other respects antithetical to it. The right to freely select and pursue a line of work, and to reap the benefits of one's labor by possessing property and accumulating wealth, was valued by the American judiciary. Catholic social teaching

recognized these rights as well. The U.S. Supreme Court, however, pushed these principles to an extreme that rendered workers mere objects and left them to the mercy of the market. In the tradition of Nineteenth Century liberalism, human labor was viewed by the Court as a factor of production, and, as such, it was treated as a property interest to be exchanged through private contracts. Through the liberal exercise of the power of judicial review, the Court drastically limited the authority of government to regulate wages or other conditions of labor. Paternalistic state and federal regulations intended to protect employees, the Court found, denied workers and their employers liberty and subverted the natural forces of the market. The Supreme Court adopted a notion of natural law that embodied prevailing liberal economic thinking. Workers' interests had to be left to the market, and the market produced the evils that Pope Leo had warned against in *Rerum Novarum*.

In the late 1930s, the Court abandoned its extreme commitment to private property, including labor as a property right, and contract. In so doing, the judiciary's philosophy became more closely aligned with the social teachings of the Catholic Church. The abuses that Pope Leo had identified with the capitalistic industrial order could, the Court finally decided, be remedied through protective legislation. The judiciary lacked the authority to correct social ills of the workplace by judicial fiat, but the Court would no longer stop the legislature from responding. It recognized, as the Church had for decades, that the "freedom" of children and adult wage earners, who were more or less fungible in the market for labor, to enter into just contracts for their services was illusory. Workers, the Catholic Church had long taught, have the right to form associations – unions – to protect their interests and government has a responsibility, within limits, to ensure just working conditions. The "social question" was not committed by the Constitution to the federal judiciary for resolution. The people, through their elected executives and legislators, must establish the requisites of a just social order.

The Court rightfully abandoned an excessive interpretation of fundamental rights that had denied many workers a living wage and healthy work environments. In the process, however, it may have discounted too deeply the personal and social significance of the right to work, a right which has been so critical to Catholic thinking. Total judicial deference to legislative judgments may allow powerful special interests to exact preferred economic status at the expense of less influential competing interests. The Lee Optical case, for example, may reflect the superior political muscle of optometrists and ophthalmologists, rather than a reasoned judgment about the health and well-being of the consumers of eyeglasses. If that is so, the members of a profession are being denied by government the right to practice their art. Why should this matter? In economic analysis, consumers are being denied access to a desired good. It is, therefore, inefficient, it misallocates society's scarce resources. In Catholic teaching, such protective, special interest legislation would deny individual opticians the right to participate creatively in society in a way that promotes the common good and the individual growth of the artisan. It is unjust and, in a very real sense, an assault on the dignity of the person whose work is barred by an unreasonable and unjustifiable law.

Lee Optical, may well have been rightly decided. The opticians' competitors may have brought no untoward influence to bear on the legislature. The important point for this

analysis is that the Court appears to have been unwilling to attach any significance to the personal interest at stake in the case. Judicial scrutiny of the purpose and effect of the law was minimal to the point of being non-existent. Such extreme deference by a judiciary that continues to scrutinize state laws that interfere with some unenumerated rights is hard to reconcile with a Catholic view of the significance of the right to work.

Ironically, the modern Court has resurrected its natural law jurisprudence in the context of non-economic rights. The judicial philosophy driving the modern fundamental rights jurisprudence may be captured in the following famous quotation from Casey:

“[Our] law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. [These] matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At 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 human life.” [47]

This statement contains seductive rhetoric. It exalts the individual and personal “autonomy.” However, it minimizes the notion of community and rejects the idea of objective truth as if it were a judicially established heresy. Even dignity seems to be subsumed in this exaggerated individualism. Ultimately, the dicta raises profound philosophical and theological questions that are beyond the scope of this essay.

When critiqued from the perspective of Catholic teaching about the value and dignity of work, however, the Court’s philosophical musings in Casey may contain some useful insights. In a unintended and even perverse way, the judiciary’s individualistic philosophy should invite courts to seriously consider the Catholic view of work and its significance to the person. Individuals may in some abstract sense define themselves by developing personal notions about the “concept of existence, of meaning, of the universe, and of the mystery of human life.” In a very real, practical sense, however, human persons help to define themselves by deciding how they will contribute their skills, talents and labor to the common good. And decisions about marriage, bearing and raising children, and education are all aspects of the “work” decision. They all entail labor and the elections people make which either add to or detract from the common weal.

To summarize the current status of constitutional law, the rights to elect an abortion, use birth control devices and to procreate are now protected as fundamental. The Court will apply strict scrutiny to legislation burdening these rights. The means chosen by the state, therefore, must be *necessary* to achieve a *compelling* state end. By contrast, the right to practice one’s trade or pursue one’s calling may be denied if the means selected bear some *conceivable* relationship to a *legitimate* state end. It is hard to imagine a hierarchical system of values more inconsistent with Catholic teaching than the contemporary American constitutional ordering of rights.

CONCLUSION

Both historic and contemporary applications of the Supreme Court's fundamental rights jurisprudence suggest that the judiciary should exercise great care when setting aside legislative enactments. The Court has been rightly and vigorously condemned for imposing on the nation the preferred moral and economic policies of a shifting majority of its members. The Liberalism of Nineteenth Century Europe once dominated the judicial mind. The Court in that era stood as a barrier to many laws that recognized and protected the rights of the working class. More recently, it is the liberalism of late Twentieth Century America, with its extreme emphasis on individual autonomy, that prevails in the Court. The value of life and the need for public morality are devalued by this modern judicial trend. Both extremes are dangerous from the perspective of Catholic thought and teaching.

As long as the judiciary continues to accept a natural law or fundamental rights based interpretation of the U.S. Constitution, the right to work should be recognized as high in the hierarchy of values. The social teaching of the Catholic Church, particularly the vision of John Paul II, could well inform this area of law. Laws that deny human beings the right to contribute to the common good and to grow as persons through work should be scrutinized closely in a legal system committed to the rule of law, individual liberty and personal dignity. These principles could have application in several contexts. A couple of examples will suffice. Laws that grant monopoly to a favored special interest should be suspect, and not simply because they promote inefficiency. Those who are denied the right to practice their art or trade have suffered an indignity. Laws that deny immigrants the benefit of safe and fair employment opportunities, and their children access to the resources needed to participate as adults in a modern economy, should require some special justification. The Catholic Church does not offer ready solutions for complex social issues such as those involving business regulation or immigration policies, but its social teachings do contain a compelling message about the dignity of the person and the nature and value of human labor. A Court that claims a special competence to determine which rights are "fundamental" to citizens of a modern society would do well to seriously consider the Church's case for the right to work.

Endnotes

[1] Pope John Paul II, Encycl. *Laborem Exercens*, 2 (1981). In this encyclical, Pope John Paul II may well have brought Church teaching about work to its most comprehensive state and ushered in an era where issues regarding life and culture will dominate as the "social questions" of the next decade or century.

[2] Pope Leo XIII, Encycl. *Rerum Novarum* (1891).

[3] The "liberalism" of Nineteenth Century Europe is more closely aligned with political conservatism in contemporary American society than it is with American notions of

liberalism.

[4] *See, Rerum Novarum* 4. One of the first issues addressed by Pope Leo was the right to private property. His defense of private ownership was rooted in the expectations of workers. The worker converts his labor into wages and his wages into property. In justice, he is entitled to the property just as much as the wages used to acquire the property. *See, also, Pope John XXIII, Encycl. Mater et Magistra* 109-112 (1961).

[5] Pope Paul VI, *Encycl. Octogesima Adveniens*, 42-44 (1971).

[6] Pope Paul VI, *Encycl. Populorum Progressio* 3 (1967).

[7] *Populorum Progressio*, Part II, 4.

[8] The “takings clause” of the Fifth Amendment prohibits the federal government from taking private property without “just compensation.” U.S. CONST., amend. V. This requirement was “incorporated” by the Fourteenth Amendment and applied to the states in the late 1800s. U.S. CONST., amend. XIV, § 1.

[9] The Constitution prohibits states from enacting any law “impairing the Obligations of Contracts.” U.S. CONST., art. I, § 1.

[10] The Bill of Rights, the first ten Amendments to the Constitution, applied directly only to the federal government. *See Barron v. Baltimore*, 7 Pet. (32 U.S.) 243 (1833). Most of its provisions, however, have been applied to the states through the Fourteenth Amendment.

[11] The Ninth Amendment states “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” It has occasionally been cited by Justices, but not as the source of judicial protection for any rights. Rather, it merely establishes that there are unenumerated rights that might find protection elsewhere in the Constitution. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (Goldberg, J., concurring).

[12] This essay uses the terms “natural law” and “fundamental rights” jurisprudence interchangeably. The usage may not comport with the Catholic or any other established philosophical or religious conception of natural law. As used here, the terms both identify a judicial tradition that recognizes and protects rights that cannot reasonably be found in positive law, including the Constitution.

[13] *Calder v. Bull*, 3 Dall. (3 U.S.) 386 (1798).

[14] *Id.* at 388.

[15] Calder was decided before Chief Justice Marshall had convinced his colleagues to render decisions by the Court. It contains, typical of the times, decisions by the various

justices.

[16] *Id.* at 399.

[17] U.S. CONST., amend. XIV, § 1.

[18] 83 U.S. (16 Wall.) 36 (1873).

[19] “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. CONST, ART. IV, § 2 [1].

[20] *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823). This case was decided by Justice Bushrod Washington while sitting as a circuit court judge.

[21] 83 U.S. at 96. (Field, J., dissenting, joined by Chase, C.J., Swayne and Bradley, JJ.)

[22] 83 U.S. at 97.

[23] 83 U.S. at 113-119. (Bradley, J. , dissenting).

[24] *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (emphasis added).

[25] 247 U.S. 251 (1918).

[26] U.S. CONST. art. I, § 8, cl. 3.

[27] A related case, *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922), held that the federal government could not use its taxing power to effectively regulate employment conditions. The law at issue imposed an excise tax on the profits of firms employing child labor.

[28] 198 U.S. 45 (1905).

[29] 198 U.S. at 53.

[30] 198 U.S. at 64.

[31] *Coppage v. Kansas*, 236 U.S. 1, 17 (1915).

[32] *See, e.g.*, *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[33] *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). *Hammer v. Dagenhart* (the Child Labor Case) was explicitly overruled by the Court in *United States v Darby*, 312

U.S. 100 (1941).

[34] *Wickard v. Fulburn*, 317 U.S. 111 (1942).

[35] *See* *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937) *and* *Lincoln Fed. Labor Union v. Northwestern*, 335 U.S. 525 (1949).

[36] *See*, *U.S. v. Lopez*, 514 U.S. 549 (1995) *and* *Printz v. U.S.*, 521 U.S. 898 (1997).

[37] *Nebbia v. N.Y.*, 291 U.S. 502, 523 (1934).

[38] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400 (1937).

[39] *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

[40] 381 U.S. 479 (1965).

[41] *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[42] *E.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[43] 381 U.S. at 497 (Goldberg, J., concurring).

[44] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[45] 410 U.S. 113 (1973).

[46] 505 U.S. 833 (1992).

[47] 505 U.S. at 851.