

Review Essay: Timothy Sandefur's *The Right to Earn a Living*

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In constitutional law, the intellectual ferment is on the so-called right. Conservative and libertarian legal scholars are taking new looks at doctrines and cases on which they thought orthodoxies were settled, and discovering long-neglected angles.

Those whose initial passion for identifying the pathologies in modern constitutional law was fueled by *Roe v. Wade* (1973) focused, quite naturally, on the U.S. Supreme Court's and the academy's eagerness to weaken democratic majorities, and to make decisions not authorized by any clear text or identifiable tradition. Thus, for those conservatives, the expression "judicial restraint" took on an untouchably positive sheen, and Justice Oliver Wendell Holmes's paean in his *Lochner v. New York* (1905) dissent to "the right of the people to embody their opinions in law" sounded rather fine.

It is no surprise that author Timothy Sandefur, a litigator with the Pacific Legal Foundation, is part of the growing movement to rehabilitate *Lochner*. We all have our moments. Mine came in a constitutional history seminar at Regent Law School (where I teach) when my students had both *Lochner* and a modern substantive due process case (*Roe* or *Planned Parenthood v. Casey* [1992], I forget which) side by side: one of them pointed to *Lochner* and remarked, "At least this is law!"

We were no longer in Kansas. Sandefur never was; that is, it appears he never thought that *Lochner* was anything but a rigorous application of a constitutional jurisprudence with a long history in English and American law. Though phrased in terms of Fourteenth Amendment liberty and freedom of contract (both of which terms are subject to quibbles), the decision actually vindicates what might more concisely be called "the right to earn a living," as Sandefur has entitled his book.¹

He is ambitious. In addition to proving that the right to earn a living has an honorable spot in U.S. constitutional law, Sandefur also wishes to prove that what its commentarial tradition has come (pejoratively) to call "substantive due process" is actually neither more nor less than "due process

¹ Timothy Sandefur, *The Right to Earn a Living: Economic Freedom and the Law* (Washington, DC: Cato Institute, 2010).

of law” itself, and is perfectly respectable. I will argue that he succeeds better at the first than with the second task. Let’s start with the first.

There is no “earn a living” clause in the U.S. Constitution. But to those trying to understand the thought-world of the Framers, this fact may be bracketed while we do some historical recovery. Such recovery involves, first, removing some barnacles. We are heir to several generations of legal and social historians who were apparently unable to conceive of economic liberty as anything but a privilege of the rich, granted by the rich to themselves, for the purpose of more efficiently oppressing the poor.

Sandefur argues convincingly that economic rights do in fact, and were historically intended to, protect above all the interests of those whose economic well-being was not yet made but makeable, namely, the strivers (or as late-eighteenth-century Europeans might have seen it, Americans). Those below that level were cared for by religious institutions and extended families, both of which were stronger before the state displaced so many of their eleemosynary functions. Those whose fortunes were already made—the sole beneficiaries of economic freedom, according to progressive historians from Charles Beard to Robert McCloskey—not only had no need for (further) economic freedom, but were sometimes even inclined to view it with suspicion, as apt to present them with unwanted competitors.

This pro-striver approach found expression in the Declaration of Independence. Famously, Thomas Jefferson changed John Locke’s formula “life, liberty, and property” to “life, liberty, and the pursuit of happiness.” According to Sandefur and the authorities he assembles, this change was not made to downgrade property as such, nor to turn government into a happiness machine tasked with guaranteeing cheerful outcomes for all citizens, but as a preferential option for pursuers of property, such as builders and entrepreneurs.

Let us consider monopolies, as Sandefur does. They were understood at English Common Law as royal charters that excluded competitors, and their deleterious effects on economic freedom were recognized and condemned by Common Law courts as early as 1377 (near the beginning of the reign of Richard II, for those who keep track by William Shakespeare). For unusually risky ventures, such as the East India Company in the seventeenth century, monopoly protection may have had a rationale similar to that of patents to protect an initial investment. However, royally issued (or, in the American context, any government-issued) monopolies were obviously adverse to the interests of later entrants and the public, both of which would benefit from competition. So when English and American courts dissolved monopolies, they were protecting a right to earn a living, whether they called it that or not.

The American antebellum era was rich not only in consensus about economic freedom (except regarding slaves and women) but also in conflicts about how to apply it, illustrating that we deal here not with a dogma that predetermines a wide range of cases but with a principle that determines *some*. Sandefur provides an interesting discussion of *Charles River Bridge v. Warren Bridge* (1837), an early Roger Taney Court case that signaled a post-

John Marshall relaxation of strict interpretation of the Contracts Clause. Angry dissents were uncommon in the 1830s, but Justice Joseph Story, a Marshall loyalist, handed one in this case to his new Chief Justice. Significantly, from the point of view of the “right to earn a living,” both sides had a point. Chief Justice Taney held that the Charles River Bridge’s monopolistic charter from the state (a contract, for Contract Clause purposes) must be narrowly construed, rather than read as granting a perpetual monopoly or a guarantee of future profits, lest future enterprise be inhibited. Justice Story argued, as Marshall had often done, in favor of the sanctity of contracts, including those between the state and private parties: If these were not upheld by courts, what then of economic freedom? Sandefur does not, and we need not, pick a winner here: the fact that both majority and dissent were concerned with economic freedom makes his point.

Also on the table is early Privileges and Immunities jurisprudence. The list of rights in *Corfield v. Coryell* (1823) may be both too long and too qualified to be a case-solver, but viewed from a certain remove, it clearly points to a society that takes for granted the rights necessary to flourish economically.

In turning to substantive due process, it will be helpful to distinguish between that topic in the abstract and its agreed-upon avatar, *Lochner*. First, Sandefur mounts a bold defense of substantive due process itself. Whereas the standard attack on it focuses on the word “process” and distinguishes between that and “substance,” Sandefur seeks a less-defended gate in the castle wall and focuses on the word “law.” Is any and every legislative work-product “law”? No one from the workshop of Thomas Aquinas (such as the present writer) could affirm that. So laws that are not for the “general good” (here, I adopt Sandefur’s terminology), but instead are “arbitrary,” must not be laws at all, even if enacted by proper “processes,” right?

At this point Sandefur has, I think, pulled a bit of a switch regarding the term “process.” Its freight as a term of limitation within the phrase “due process of law” is not that of how the law got passed, but rather that of the legal processes to which the plaintiff is subjected. “Due process of law” is part of a larger clause that conditions government’s power to deprive citizens of “life, liberty, or property.” The union of these three things in one clause compels the highly traditional conclusion that what we are looking at here is a clause that conditions the government’s exercise of its powers concerning *criminal procedure*, with only limited application beyond that area. Government takes a citizen’s life, when it applies capital punishment; his liberty, when it imprisons him; his property, when it fines him. “Due process of law” clearly demands, therefore, that courts review whether the criminal justice processes applied to the defendant are the ones that comport with the traditional “law of the land,” to quote the acknowledged source of the clause in England’s Magna Carta. It is, I would urge, a leap from there to viewing the Due Process Clause (Fifth or Fourteenth Amendment) as a guarantee that all laws (and not just all criminal justice procedures) shall comport with a

Lockean political philosophy, or shall be for the “general good” and not “arbitrary”—all requirements that Sandefur sees in “due process of law.”

Furthermore, hovering over Sandefur’s or anyone’s defense of substantive due process is a judiciary to which will fall the task of distinguishing between laws made “for the general good” and laws that, in contrast, are “arbitrary.” We see every day how judges fail at the lesser task of enforcing proper criminal procedure. What leap of faith justifies entrusting them with applying the “general good”/“arbitrary” distinction to, literally, all laws? (Before the 1930s, an adequate answer might have been “precedent.” Sandefur’s own work shows that this is hopeless now.)

But even if substantive due process must remain suspect, it does not follow that every decision that has been cursed under that name must remain unredeemed and unrevisited. Take *Lochner*, for example. While Justice Rufus Peckham’s opinion for the Court in that case contains a few turns of phrase that have not stood the test of time,² nonetheless, the opinion as a whole lays out a chain of legal reasoning, taking relevant facts about the bakery world into account (contrary to Dean Roscoe Pound’s later critique of the opinion’s supposed fact-free “formalism,” as Sandefur points out), and makes clear why, against a background presumption of a “right to earn a living,” the hours limitations fail constitutional review, even while other parts of the New York Bakeshop Act were so far *within* the ambit of reasonable regulation that they were not even challenged.

One can call it a “right to earn a living” (as the Court did not), “freedom of contract” (as the Court did), “the liberty prong of the Due Process Clause” (which I do not recommend, because it invokes a certain limitlessness that the *Lochner* Court itself would probably not have endorsed), or even Privileges or Immunities (as the Court did not, because of *The Slaughterhouse Cases*, but a case based on *Corfield* could be made out for this). Under any name, the state had curbed that basic right beyond any justification that it put forward, such as the evanescent goal of “equalizing” bargaining power or providing extra “leisure time” to workers who obviously valued the freedom to trade that away for more pay.

Sandefur is especially strong in dissecting the unjustly respected Holmes dissent in *Lochner*. There is, in fact, a reasonable reply to the majority’s opinion, which was made by Justices John Harlan, Edward D. White, and William Day. It says: We upheld a nearly identical law concerning mines and miners just seven years ago in *Holden v. Hardy*. Bakeries may be safer than mines, but is that difference a judicially cognizable one? Is it not a legislative matter? We should affirm New York’s law on the basis of *Holden* (or else overrule *Holden*, though the Harlan dissenters did not urge this).

² Such as: “[A]re we therefore at the mercy of legislative majorities?” (well, majorities of the people put them there, and can get rid of them), and “mere meddling interference” (which is conclusory and petulant, not a legal argument).

But then there was Holmes. First (not so much stressed by Sandefur) he attributes the majority's opinion entirely to Social Darwinist ideology, when nothing of the sort appears in it. Holmes's academically generated prestige has led generations of scholars and students to accept this dishonest sleight of hand as an almanac fact. But Sandefur has an even more trenchant point to make. Holmes also remarks that the U.S. Constitution "was made for people of fundamentally differing views." At first—and second and third, even—this remark slips by the reader as merely affirming that people disagree about things, even important things. But if that's all it means, then it advances nothing with regard to dissenting from *Lochner*. After all, some people like the Constitution, some don't; part of the deal behind the Constitution is that it's those who like it who win. And therefore, the Constitution wins, even if some people don't like it. This follows necessarily from *Federalist # 78* and its adoption by the Court in *Marbury v. Madison* (1803). (Sandefur discusses the Progressive crowd that Holmes ran with who did not, in fact, like the Constitution.)

Sandefur calls Holmes's "fundamentally differing views" dictum "a rejection of the entire corpus of Western political philosophy up to that point" (p. 106). If that seems strong, consider that, in context, it can only mean that some Americans think that economic freedom is a good idea, some think it's a bad idea; some think it's a right that the government must protect, some think it's a grant that the government bestows and can remove—you know, "fundamentally differing." But that wasn't the deal. There may not be perfect agreement today on what the Declaration of Independence means, but it says on its face that the United States is formed around *shared* views ("We hold . . ."). Thus, if you think that human beings are natural serfs who have only the rights that government from time to time is pleased to give them, then the U.S. Constitution that was formed eleven years after the Declaration was simply *not* formed for you. Of course, you can be a citizen under it and claim its protections, but to guide constitutional interpretation based on such repudiated views is to upend the constitutional project, not to carry it out.

Inevitably, some will argue that all of this changed with the "second founding" represented by the Civil War Amendments, one of which, of course, was being applied in *Lochner*. But really, would anyone argue that the outcome of the U.S. Civil War *advanced*, rather than *defeated*, the idea that some human beings are natural serfs? In fact, the connection between "the right to earn a living" and Republican "free labor" ideology, briefly explored by Sandefur, could stand more investigation.

Let me help Sandefur's deconstruction of Holmes for him. On one constitutional issue—free speech—Holmes later moved from legislative deference to stricter judicial review. But even there, his fundamental beliefs were relativist. In an otherwise convincing dissent in *Gitlow v. New York* (1925), a criminal sedition case involving a radical socialist pamphleteer, Holmes tossed in at the end: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given

their chance and have their way.”³ Proletarian dictatorship was not, for Holmes, fundamentally off the table for the society that had adopted the Declaration, the original Constitution, and the Bill of Rights. Despite the deference he shows in *Gitlow* to the constitutional decision made by the legislative and executive branches during the Jefferson Administration in disowning the Sedition Act, Holmes’s loyalty is not to the First Amendment as such, but to an abstraction called free speech. Free speech is no more textual, really, than the right to earn a living, except that as to the latter Holmes continued to believe that popular sovereignty trumped it easily, and as to the former he no longer did. Free speech to him was less a principle than a mechanism of relativism, because it was indifferent to its own destruction.

Sandefur is also harshly critical of Judge Robert Bork. This makes it clear that Sandefur’s form of constitutional conservatism breaks with that of the one man who, above all, is identified intellectually, personally, and in terms of political scars with the revival of conservative thinking about the Constitution. I am not sure that the harsh criticism is necessary. That Sandefur disagrees with Bork will be clear to anyone who reads the former’s early chapters, while aware of the latter’s life work. Yes, we have established that the idea of constitutional restraint on government as such (not just the federal government) has respectable roots and was not made up out of whole cloth by the *Lochner* majority; but Bork was hardly the first to argue that the *Lochner* majority applied these principles with too heavy a hand, and in so doing, “legislated from the bench,” to use the hackneyed modern expression. Harlan, White, and Day thought so, too, but they shared more jurisprudential ground with the majority than Holmes did or than Bork does. And indeed, Sandefur accuses Bork of being even more positivist than Holmes, because Bork (in his *The Tempting of America*) holds that “[m]oral outrage is a sufficient ground for prohibitory legislation” (p. 113).⁴

Now, Sandefur may esoterically be arguing about gay rights issues here, because that is what Bork is doing in the passage from *Tempting* that he (Sandefur) cites, which is part of a discussion of *Bowers v. Hardwick* (1986). Bork describes the constitutional theory seminar that he used to team-teach with Alexander Bickel at Yale University in which Bork one day took the position that (to paraphrase) “it ain’t nobody’s business if you do.” Bickel countered with a hypothetical case about a man alone on an offshore island who tortures puppies for his own pleasure. No one on the mainland is affected in any way, but we want to stop him. Is moral outrage a sufficient basis? You may say that this is an issue of “animal rights,” but (Bork now says) that is no different from saying that the political community is morally outraged by maltreatment of animals. It seems to me that Bork is making the point that we

³ *Gitlow v. New York* 268 U.S. 652 (1925), accessed online at: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=268&invol=652>.

⁴ Robert Bork, *The Tempting of America* (New York: Free Press, 1990), p. 124.

not only *can* legislate morality, but that we can't legislate anything else. All of our laws—emphatically including the constitutional law protecting the right to earn a living—rest on moral foundations, foundations which Sandefur has done a cracking good job of defending earlier in his book. There are legal systems that do not recognize such rights: we call such systems *immoral*, and we are right.

In short, after making such a strong case for a sort of natural rights tradition enmeshed with U.S. constitutional law and supporting a right to earn a living free from legislative intrusion that cannot justify itself upon rational review, it seems strange to find Sandefur turning toward legal positivism and shrinking from the suggestion that morality may support or challenge legislation. In the *Charles River Bridge* case, it was at least a tenable position, from a right-to-earn-a-living point of view, that the Massachusetts legislature acted well in allowing the Warren Bridge proprietors to open a competing bridge that allowed commerce and economic opportunity to flourish. That is a *moral* judgment, and it formed the basis of legislative *action*, not inaction. Morality is not categorically ruled out as a basis for legislative action, but only when the actions sought to be prohibited are themselves protected by the Constitution. Bork and Sandefur disagree over the breadth of that protection. Bork (the mature Bork, anyway, after his schooling by Bickel) would demand to see it in the text of the Constitution; Sandefur would see it not only in texts such as the Contracts Clause, Privileges and/or Immunities, and Due Process of Law, but as pervasive in our institutions. That is fine, but morality in law, as such, is not the problem.

Sandefur is right to note (in critiquing the views of Laurence Tribe and Cass Sunstein, as formerly mouthpieced by Justice David Souter) that a background morality of freedom is implicit in “today’s civil liberties decisions” (p. 117). The citation there is to *Lawrence v. Texas* (2003), and thereby hangs a paradox—one that Sandefur need not address, for that would be a different book, but that someone should address in due course: Why has sexual liberty (the term “civil liberties” is a tad under-expressive, even euphemistic, in this context) flourished amidst a jurisprudence that in most other respects accepts the Progressivist idea that rights come from the state and are granted and withheld by it for social goals? Does a twenty-first-century Court believe in fundamental rights after all, and just *forget* them when it comes to economic rights? That seems unlikely.

But then what *is* going on? I have jokingly speculated to my students that substantive due process may be merely the way the elites of any era impose their values through constitutional law. In the late-nineteenth century, the predominant elite value was to get rich; in the twentieth century, it was to get—well, I hear a buzzer going off, but I think you follow me. Crude, but it explains the leading cases. We have not yet seriously explained why the Court has positioned itself as the bastion of individual civil liberties while forgetting utterly about the right to earn a living.

Sandefur also contributes a useful chapter on the so-called Dormant Commerce Clause. I say so-called because there’s no *clause* there. It could

more accurately be called the Dormant Commerce Doctrine, as it refers to a teaching (and a disputed one at that) on what the Court should do when Congress *could* regulate a given item of interstate commerce, but *hasn't*, and a state *tries* to. When Congress leaves its interstate-commerce regulatory potential “dormant,” does it impliedly leave the keys with the judiciary so as to lock down state laws that might (intentionally or not) “regulate commerce among the several states”? Is Article I’s assignment of the Interstate Commerce Power to Congress an implicit (and judicially enforceable) erasure of all state power in this area? Despite the Tenth Amendment?

Because of these grounds for doubt—and because of the complex and inconsistent nature of the Court’s decisions in this area—Justices Antonin Scalia and Clarence Thomas have gone on the warpath. Justice Thomas is now an outright disbeliever in the Dormant Commerce Doctrine, arguing that Article IV’s Privileges and Immunities give businessmen all of the protection against interstate discrimination the Framers mean them to have. Justice Scalia accepts the existing canon of Dormant Commerce Clause cases on *stare decisis* grounds, but will not extend them.

Not so fast, says Sandefur. The criticisms are well taken, and some Dormant Commerce Clause decisions have unreasonably interfered with states’ efforts to promote their own interests. But even so, the Framers *did* intend the United States to be an economic unity (Sandefur’s rallying of Founding-era sources on this point is impressive), and state-level trade barriers *were* high on their list of perceived evils to be rectified by the Constitution. The Court has pointed that way, too. In *Gibbons v. Ogden*, an 1824 John Marshall opinion that all Commerce Clause disputants want to claim as authority, the Court said that a state law regulating “commerce” (here construed to include navigation) “is doing the very thing which Congress is authorized to do.” Now, in *Gibbons*, Congress had not been “dormant”; it had issued a steamboat license to Thomas Gibbons, overthrowing the state-guaranteed monopoly of the cross-Hudson steamboat trade owned by Aaron Ogden. But because of the breadth of Marshall’s dictum, many observers before Sandefur (including the U.S. Supreme Court) have construed it as carrying forth the Framers’ project of favoring national economic rules, *whether or not* Congress has yet put any rule in place.

I tend to take an interest in cases where I’m pleased with the outcome but think the decision badly reasoned and would have voted the other way. One such case is *Granholm v. Heald* (2005), in which the Court prioritized the Dormant Commerce Doctrine over the Twenty-First Amendment, and struck down (silly) state restrictions on Internet ordering of out-of-state wine. My problem here is that the Dormant Commerce Doctrine is an unwritten inference, and, as such, should not prevail over the Twenty-First Amendment, which, in turn, makes states sovereign over their alcohol policies. Sandefur introduces doubt as to what *reasons* states may have for regulating alcohol under the Twenty-First Amendment. I freely admit that it is the worst-drafted amendment in the Constitution, but ambiguity about permissible state reasons for alcohol regulation is not among its vices; it does not touch the subject at

all. Sadly, it allows states to be as numbskulled as New York and Michigan were being in the *Granholm* cases.

There is even more in Sandefur's book, but enough. His main thrust, and his greatest contribution, is to establish that "the right to earn a living" must be taken more seriously by courts and scholars than it has been for more than the past eighty years. Simple demonization of *Lochner* should give way to serious consideration of its arguments ("At least this is *law!*"), including its background assumptions, which were not what Holmes said they were. The right to earn a living lacks a crystal-clear textual anchor in the Constitution. However, quite apart from the (lamentable) fact that that is scarcely a requirement for constitutional rights at the present time, textualists/originalists such as Justice Scalia often look to a combination of "text and tradition" to fill in texts that, *in situ*, are too brief to be self-interpreting or to evaluate claims made under those texts for which no clear precedent exists. Justice Thomas, for his part, is chomping at the bit to overrule *Slaughterhouse* and rediscover those right-to-earn-a-living "Privileges or Immunities" of the Fourteenth Amendment. Sandefur's book will help him in that endeavor.

