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Defining Liberty: An Empirical and Normative Analysis of the Supreme Court's Role in Democracy

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Defining Liberty: An Empirical and Normative Analysis of the Supreme Court's Role in Democracy

Abstract

The United States Supreme Court stands today as an arbitrator of political disputes and modern liberties, a “storm center” of moral and political controversy. The modern Supreme Court’s decisions regarding contraception, marriage, and abortion incite debate concerning the judiciary’s appropriate role in the United States’ democratic structure. Even after more than two hundred years since its establishment, the role of the Court remains unclear. Those who oppose the Court’s current practice argue that it has encroached upon the realm of the legislature and has ventured far from the Constitution’s intended meaning. Proponents, however, declare that certain rights, such as the right to privacy, are embedded within provisions of the Constitution itself; therefore, it is the responsibility of the Court to rule upon.

With this thesis, I attempt to answer the normative questions surrounding this debate: what is the proper role of the Supreme Court; furthermore, if it is not the role of the Supreme Court to answer such substantive questions, then to whom should this responsibility be deferred?

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DEFINING LIBERTY:
AN EMPIRICAL AND NORMATIVE ANALYSIS
OF THE SUPREME COURT'S ROLE IN DEMOCRACY

By

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Introduction

The United States Supreme Court stands today as an arbitrator of political disputes and modern liberties, a “storm center” of moral and political controversy. The modern Supreme Court’s decisions regarding contraception, marriage, and abortion incite debate concerning the judiciary’s appropriate role in the United States’ democratic structure. Even after more than two hundred years since its establishment, the role of the Court remains unclear. Those who oppose the Court’s current practice argue that it has encroached upon the realm of the legislature and has ventured far from the Constitution’s intended meaning. Proponents, however, declare that certain rights, such as the right to privacy, are embedded within provisions of the Constitution itself; therefore, it is the responsibility of the Court to rule upon.

With this thesis, I attempt to answer the normative questions surrounding this debate: what is the proper role of the Supreme Court; furthermore, if it is not the role of the Supreme Court to answer such substantive questions, then to whom should this responsibility be deferred?

It is argued that through the expansion of the Due Process Clause of the Fourteenth Amendment, the Supreme Court recreates itself as a “super-legislature.” The Court after all, establishes many of the rights that are the cause of such questions. Through the Due Process Clause, the Court rules that there was the right to privacy, the right to marry an individual of another race, and the right of a woman to choose whether to have an abortion. Yet, nowhere within the Constitution do these rights appear. Through a historical analysis of the Court’s rulings on the Due Process Clause, I show how the Court, using its own opinions, as well as the language of the Constitution, has

transformed one clause of the Fourteenth Amendment to encompass much more than a procedural right. I do not disagree with the notion that the Supreme Court has established itself as part judiciary, part legislature. However, by considering the methods of proper interpretation offered by both formalistic and non-formalistic adherents, and the questions of legitimacy each poses, I believe that the current practice of the Supreme Court is effective, and most importantly has been incorporated into the political culture of American democracy.

The Principles of the Fourteenth Amendment

Freedom is a vague word, one that does not denote any particular application, nor designate one particular meaning. Yet, within the culture of the United States, it is a highly valued belief. The freedom to practice one's religion, the freedom of speech, and the freedom to assemble as one chooses are all listed explicitly in the First Amendment of the United States Constitution. But what about the freedom to enter into contracts, or the ability to use contraceptives with one's married partner, or even the ability to engage in homosexual acts within one's own home? These rights will not be found in the Constitution, or at least in the explicit text of the document. The rights are found, through the rulings of the Supreme Court, to be encompassed within the word *liberty* in the Due Process Clause of the Fourteenth Amendment. The Amendment reads in part:

No State shall make or enforce 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.

“It is surprising but true that many of the principles of constitutional liberty most prized by Americans were created, not by the founders, but by the Supreme Court during this century. At the very least, the understandings that have given those principles their current life are very recent creations” (Sunstein, 1993, p. 97). The concept that the word “liberty” within the Fourteenth Amendment encompasses rights not written directly into the Constitution is known as substantive due process. The idea surrounds the belief that there are fundamental rights, rights that are so central to an individual’s life that there is no process fair enough, or due enough, to take them away. The Due Process Clause therefore, protects individuals against governmental infringement upon these rights. There is no guideline or provision that establishes the Due Process Clause involves a substantive meaning. It has, however, become standard practice to view the clause in this light through the rulings of the Supreme Court.

“Since the late 1880’s the Supreme Court has flirted with substantive due process, sometimes affirming, at other times rejecting, the due process clauses as a restraint on the exercise of legislative power” (Keynes, 1996, p. x). Initially, the Due Process Clause of the Fourteenth Amendment was only accepted as a right of procedure. The notion suggests that the government, or more specifically in terms of the Fourteenth Amendment’s application, the State, cannot deprive individuals of their “rights without going through an established judicial procedure- that is prior to the forfeiture of these rights” (Keynes, 1996, p. 36).

The Due Process Clause of the Fifth Amendment is interpreted by the Court as a grant of procedural rights, as described above. The interpretations of the same clause within the Fourteenth Amendment, however, venture far from this standard. The

argument for the Fourteenth Amendment's substantive interpretation is partly based upon the difference in language and content of the two amendments (Keynes, 1996). Provisions issuing instructions for jury indictments, double jeopardy, and self-incrimination are all found within the Fifth Amendment. Therefore, at its base the Amendment is primarily concerned with the establishment of procedural rights. The Fourteenth Amendment however contains no such provisions. At its core is the protection from state interference in the personal rights of individuals. One of the most significant differences between the amendments that provides substantive interpretation is the specific addition of the "privileges and immunities" clause. This guarantee is seen by some as a purposeful movement away from procedure and towards the protection of actual freedoms granted to individuals.

Defining Liberty

The intended nature of the judiciary is that of interpreter—a distinct difference from the legislative, or the "law-making" body. When reading Articles I, II, and III of the Constitution, it is apparent that the drafters of the Constitution provided little substance to define the methods of the judiciary system. Article III, which establishes the judiciary, vests judicial authority over all cases that arise through constitutional issues as well as the laws of the country. In comparison to Article I, which establishes the legislature, the guidelines for the judiciary branch are sparse and general.

The difference in the substance defining each branch is indicative of the initial fear that the true power laid within the executive and legislative branches. Those branches that were more promising of increasing their power were given more direct

guidelines to prevent such excess. In fact, initially the judiciary was seen as the “least dangerous” of the branches. In Federalist 78, Alexander Hamilton outlined the intentions of the proper role of the Court:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution. (The Avalon Project)

This is because, as stated by Hamilton, the judiciary is dependent upon the other two branches—the Courts have no power of the purse, nor does it have the ability to control the army. Rather, the judiciary’s decisions are conditional upon the laws the other branches create and enforce.

It is important to note, however, that Hamilton also understood the potential power that lay within the judiciary. The Courts were designed, according to Hamilton, to “be an intermediate body between the people and the legislature” in order to control the legislature from creating authority not designated by the Constitution (The Avalon Project). The result is ultimately the protection of citizens’ liberty. However, Hamilton added a warning within Federalist 78 that is not often mentioned: “liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments” (The Avalon Project). He also warned that if the Courts “be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body” (The Avalon Project). The proper role of the judiciary, according to Hamilton, is that of a distinct

body, “For I agree, that ‘there is no liberty, if the power of judging be not separated from the legislative and executive power’” (The Avalon Project).

Today, the judiciary has established itself as a powerful, if not the most powerful, branch of government. A democratic society is one that involves “the people,” deliberating and ultimately deciding how they should be governed. Instead, the American people of today rally upon the steps of the Supreme Court awaiting their answer to political questions.

Through its written opinions, the Supreme Court has essentially given meaning to the words life and liberty found within the Due Process Clause of the Fifth and Fourteenth Amendments. A historical analysis of the evolution of due process shows the role that the Court has carved for itself within the democratic process. These intended interpreters have instead created liberty rights. The Court has, through a case-by-case basis, begun to define liberty, and ultimately taken this process out of the hands of the people. The lines separating the legislature from the judiciary have begun to blur.

A Historical Look at Substantive Due Process

There is no question of the expansive role the Supreme Court now plays in the protection of fundamental rights. The Court is consistently considered to be the venue that answers questions regarding the liberties of citizens within the United States, a role that has been greatly expanded through a case-by-case basis. It is a role the Court creates for itself through its own interpretations.

Early in its interpretations the Supreme Court limited the reach of the Fourteenth Amendment. *Butcher's Benevolent Association v. Crescent City Livestock Landing & Slaughter House Company*, 83 U.S. 36 (1873), known as *The Slaughterhouse Cases*, forced the Court to rule upon the construction of the Fourteenth Amendment's due process and equal protection clauses. The industrial revolution transformed the lives of millions of individuals and the cities they resided within, however, there were many negative side effects as well. "For example, the Louisiana state legislature claimed that the Mississippi River had become polluted because New Orleans butchers dumped garbage into it" (Epstein & Walker, 2004, p. 580). In order to rectify the situation, the state created a state-based slaughterhouse, the Crescent City Livestock Landing & Slaughter House Company. In effect, the state had created a monopoly over the industry, forcing all butchers to pay state-set prices in order to use the state facility. The butchers collectively sued the organization on several levels, arguing that it was involuntary servitude as outlined in the Thirteenth Amendment, that the act also violated the Fourteenth Amendment, by depriving the butchers of the privileges and immunities of citizens of the United States and the equal protection of the law. They argued that the Fourteenth Amendment's language was broad enough to encompass all citizens (Epstein & Walker, 2004, p. 580). However, the Supreme Court addressed the question in another manner.

By analyzing the context under which the amendments were passed, the Court ruled in a 5-4 decision that the state's actions did not violate either amendment. Justice Miller, writing the opinion of the Court, regarded the "pervading spirit" of the articles.

He writes:

...on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race...It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievance of that race, and designed to remedy them as the fifteenth.

(Slaughterhouse, 83 U.S. 36)

Furthermore, the Court established limitations upon the application of the Due Process Clause. The opinion held that the Fourteenth Amendment's Due Process Clause simply imposes the same restrictions upon the states as the clause imposes upon the federal government within the Fifth Amendment, that is, restricting infringement upon citizens' procedurally-based rights.

In dissent, Justice Stephen J. Field notes, "liberty to contract one's labor or services was but a means to ensure every person's fundamental right to develop his full human potential" (*Slaughterhouse, 83 U.S. 36*). Justice Field continued to write that the United States' free government is one "under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws" (*Slaughterhouse, 83 U.S. 36*).

The Court initially took a hard-lined stance against the idea of a substantive element to due process, as evidenced in *The Slaughterhouse Cases* opinion. But, why did

Justice Miller and the majority of the Court reject the substantive view of due process. It has been stated that, “In large measure, he did so because he did not want to see the Court become a “super-legislature,” a censor on what states could and could not do” (Epstein & Walker, 2004, p. 584). This characterization could not be more indicative of future opinions of the Supreme Court.

The Creation of Economic Substantive Due Process

Four years after its decision in the *Slaughterhouse Cases*, a series of cases were brought forth by railroad, warehouse, and public-utility companies pushing the Court to declare state interaction in private business unconstitutional. The first of these cases was *Munn v. Illinois*, 94 U.S. 113 (1877). The question in *Munn* revolves around Illinois’ legislation that fixed the maximum rates grain elevators could charge. Because the grain elevators were owned by private industry, the owners questioned whether the law violated their due process rights. Although the Court upheld the state’s actions, the actual opinion did encourage the idea of substantive due process. In the opinion, Justice Waite writes that the Fourteenth Amendment did not prohibit state interference in private property “when such regulation is necessary for the public good.” Use by the public deemed a business open to public regulation, however the state could only interfere for a reasonable purpose. The actual ruling opened the ideas of liberty and property to real value: private is therefore protected and impervious to regulation.

Once again, Justice Field expressed his notions of individual liberty in the dissent, stating that “liberty” as written in the Fourteenth Amendment has greater meaning. He writes:

...something more is meant than mere freedom from physical restraint or the bound of a prison. It means freedom to go where one may choose, and to act in such manner not inconsistent with the equal right of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment. The same liberal construction which is required for the protection of n all particulars in which life and liberty are of any value, should be applied to the protection of private property.” (*Munn*, 94 U.S. 113)

It wasn't until twenty-years later when Justice Field's dissenting opinions were echoed as the Court's majority opinion.

The Court gradually expanded its review of economic rights beginning with the case *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). In *Allgeyer*, the Court was forced to answer whether liberty, as written in the Fourteenth Amendment, included the freedom of contract. Allgeyer & Company was accused of violating a Louisiana statute when it purchased insurance from a firm in New York. The statute prohibited out-of-state insurance companies from conducting business in Louisiana if the company did not maintain at least one place of business within the State. Allgeyer's attorney argued that “the term *liberty* included the right to use and enjoy all “endowments” without constraint,

and the term *property* included the right to acquire it and engage in business” (Epstein & Walker, 2004, p. 592).

In its holding, the Court reviewed past attempts to give meaning to the word “liberty” and called upon an argument very similar to that of Justice Fields’ twenty-years earlier. According to the Court, *liberty* means the freedom to pursue one’s livelihood:

The act done within the limits of the state under the circumstance of this case...we hold a proper act, one which the defendant were at liberty to perform and which the state legislature had no right to prevent, at least with reference to the Federal Constitution. (*Allgeyer*, 165 U.S. 578)

The court agreed that that Due Process Clause in the Fourteenth Amendment protected against state interference in an individual’s right to contract “by reading the term liberty to mean economic liberty” (Epstein & Walker, 2004, p. 594).

At this point in the Supreme Court’s history, there is a clear shift in the Court’s approach to due process—no longer would the Court only apply the procedural interpretation to the Due Process Clause. In thirty-two years, since its *Slaughterhouse Cases* decision, the Court gradually transitioned from a judiciary, to a “superlegislature,” using the standards from *Munn* to decide upon whether state legislation was “reasonable” and therefore constitutional. Nowhere in the Constitution is the right to contract stated, however the Court held that it existed, and that it was indeed protected through the Due Process Clause. This reasoning affirmed one of the most controversial economic substantive due process cases: *Lochner v. New York*, 198 U.S. 45 (1905).

The ruling in *Lochner*, created a new standard for the Court. It began what is known today as the Lochner Era, a period lasting roughly 30 years where the Court invalidated close to 200 pieces of legislation “using a laissez-fair approach towards economics” (Phillips, 2001, p.11).

In *Lochner*, the Court invalidated a New York law that prohibited bakery employees from working more than ten hours per day or sixty hours per week. The State of New York had initiated the legislation through the use of its police powers, as a protection of the health of workers and consumers. The owner of a New York bakery, Joseph Lochner, challenged these assertions on the basis that the legislation deprived him of his freedom of contract and of his property rights protected by the Fourteenth Amendment. Issuing the opinion of a 5-4 Court, Justice Peckham reaffirms that the freedom of contract is a liberty protected by the Due Process Clause:

The mandate of the statute, that ‘no employee shall be required or permitted to work,’ is the substantial equivalent of an enactment that ‘no employee shall contract or agree to work’...The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution...The right to purchase or to sell labor is part of the liberty protected by this amendment.

(*Lochner*, 198 U.S. 45)

The state law had taken away the ability of the employer and employee to contract upon their own terms. The Court ruled that the state law created a contract with the bakery employees, leaving the owner out of the process.

The Court held that a state does have the ability to exercise its police powers, but only if it is a reasonable exercise of this power. In other words, the Court is the sole institution that is able to question and judge the “reasonableness” of state actions, creating a larger role for itself. What may be even more significant to note is the exact language of the majority opinion. Continually throughout the opinion, Justice Peckham writes such statements as, “we think” and “in our judgment,” conveying that the justices have based their conclusions upon personal opinions, rather than sound legal principles.

Breaking Away from Lochner Economics: The Nationalization of the Bill of Rights

Facing the Great Depression in 1929, the American people began to turn toward their government to restore order to the broken economy. “The Court continued to vindicate economic autonomy, while state legislatures attempted to promote collective action. The Supreme Court’s laissez-faire constitutionalism was beginning to collide with the policies of the emerging welfare state” (Keynes, 1996, p. 121). The justice’s defense of an individual’s economic liberty and property tended to directly conflict with President Franklin Roosevelt’s New Deal policies, which called for a large amount of governmental interaction. After facing confrontations with President Roosevelt regarding the implementation of the New Deal policies, “a new majority virtually abdicated the protection of economic liberty and property rights to Congress and the state legislatures” (Keynes, 1996, p. 130). In *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), the Court

abandoned its reasoning in *Lochner*, ruling that minimum wage laws did in fact violate an individual's liberty of contract as found in the Fifth Amendment and applied to the states through the Fourteenth Amendment.

From this case forward, the Court adopted a "double standard of judicial review," establishing a route that would enable the expansion of liberty to include many of the fundamental rights we enjoy today. "The Supreme Court abandoned the protection of economic rights to legislative will, but it continued to employ the substantive due process reasoning of *Lochner* in articulating such unenumerated rights as family, marital, and reproductive privacy" (Keynes, 1996, p. 131). In a little more than a year after the ruling in *Parrish*, footnote number four of Justice Stone's opinion in *U.S. v. Carolene Products, Co.*, 304 U.S. 144 (1938), foreshadowed "that prejudice directed against discrete and insular minorities may call for 'more searching judicial inquiry.'" Provisions within the First and Fourteenth Amendment that guarantee equal access and "legal equality to discrete racial and ethnic minorities, Stone argued, are indispensable to ordered liberty" (Keynes, 1996, p. 134).

This opinion is evidence of a significant shift in substantive due process reasoning. "Unlike earlier substantive due process reasoning, Stone's double standard would insulate new, unenumerated personal freedoms from governmental intrusion" (Keynes, 1996, p. 135). It is important to note as well that this would only be made possible if the rights and liberties protected by the Bill of Rights were applicable to the states through the Fourteenth Amendment. Until this point, the Bill of Rights only applied to the federal government, as a protection from the legislative and executive branches; the states were not obligated to follow the provisions. As Justice Stone wrote

footnote number four, he was well aware of the current movement of the Court towards such a stance.

At first almost casually, then with greater theoretical acuity and awareness, the Supreme Court inaugurated a line of decisions that would eventually make the guarantees of virtually the entire Bill of Rights effective against the states through the due-process clause of the Fourteenth Amendment. (Kelly, Harbison, & Belz, 1991, p. 516)

It took the first initial step in this process with its opinion in *Gitlow v. New York*, 268 U.S. 652 (1925). In *Gitlow*, the Supreme Court asserts:

For the present purposes, we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgement by Congress—are among the fundamental personal rights and ‘liberties’ protected by the Due Process Clause of the Fourteenth Amendment from impairment by the states. (268 U.S. 652; Kelly et al., 1991, p. 517)

The trend continued seven years later in *Powell v. Alabama*, 287 U.S. 45 (1932), when the Supreme Court first included criminal procedure guarantees of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment. The Court held that the state of Alabama violated the Due Process Clause when the defendants in a rape trial were not given the opportunity to secure counsel in their defense (Kelly et al., 1991). The right to council for a defense is found within the Sixth Amendment.

Justice Cardozo's opinion for the Supreme Court in *Palko v. Connecticut*, 302 U.S. 319 (1937), provided the necessary framework for the nationalization of the Bill of Rights (Kelly et al., 1991). The opinion indicated that some of the provisions of the Bill of Rights, through a "process of absorption," become part of the due process of law of the Fourteenth Amendment. Justice Cardozo creates a hierarchical structure of rights. According to the opinion, some rights were more important than others: "they were the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (*Palko*, 302 U.S. 319). These rights, Cardozo continued, existed on a "different plane of social and moral values" (*Palko*, 302 U.S. 319).

At the forefront of this movement was Justice Black, who in many dissenting opinions expressed his theory of the total incorporation doctrine. According to Justice Black, the framers of the Fourteenth Amendment had incorporated the entire Bill of Rights into the Due Process Clause of the Fourteenth Amendment. The protections of the Bill of Rights would not only apply to the federal level of government, rather, the provisions would also apply to the state governments as well. He expresses this theory most fully in *Adamson v. California*, 332 U.S. 46 (1947):

I cannot consider the Bill of Rights to be an outworn 18th Century 'strait jacket' ... In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes... To hold that this Court can determine what, if any, provisions of the Bill of Rights

will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.

Justice Black's asserted that liberties protected by the Due Process Clause were not stagnant. In his dissent he explains that the process of interpretation involved the possibility of the "contraction or extension of the original purpose of a constitutional provision thereby affecting policy" (*Adamson*, 332 U.S. 46). This definitive break from the "original purpose" of a constitutional provision affords the Court the ability to guard rights through substantive due process. It is evident in Justice Cardozo's opinion in *Palko* that the Supreme Court declares the importance of some rights over others. It selectively chooses what is a liberty right, and what is not.

A Turning Point: The Court's Ability to Legislate Liberty

The Supreme Court's opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965) establishes the right to privacy. Until the Supreme Court issued its decision in 1965, this right had never been declared to exist by the Court. *Griswold* involved "the Court's review of a nineteenth-century relic—an 1879 state law that made the use of artificial birth control illegal in Connecticut" (Johnson, 2006, p.235). Under the law, those who counseled or provided artificial contraceptives to others were also conducting criminal behavior. The law was actually rarely enforced, and individuals and couples were able to purchase over-the-counter contraceptives. "The most pronounced effect of the law was that it outlawed birth control clinics and, therefore, discouraged the practice of birth control by the state's poorest women" (Johnson, 2006, p. 235). The events leading up to

the *Griswold* case were actually prompted by the Court's decision in another case four years earlier. The case, *Poe v. Ullman*, 367 U.S. 497 (1961), questioned the very same Connecticut law the Court ruled on in *Griswold*.

The Justices dismissed the potential challenge to the Connecticut law in *Poe* on the basis that the case only involved its "threatened and not actual application" (The Oyez Project). Because those bringing the case had not actually been charged with violation of the law, the Court found there was no sense of "immediacy which is an indispensable condition of constitutional adjudication" (*Poe*, 381 U.S. 479).

The *Poe* decision was "not a complete loss for the advocates of birth control. Within the decision itself lay seeds that would generate its destruction" (Bartee, 2006, p. 196). In dissent, Justice John Marshall Harlan II lays the groundwork affording the creation of a right to privacy. Justice Harlan's dissent, thirty-three pages in length, "attacked the plurality's argument on two major grounds: justiciability and constitutionality" (Barteen, 2006, p. 197). To Justice Harlan, the state of Connecticut was "intruding upon the most intimate details of the marital relation with the full power of criminal law...In sum, the statute allows the states to enquire into, prove, and punish married people for the private use of their marital intimacy" (*Poe*, 381 U.S. 479). He called for a truly substantive view of the Due Process Clause. Justice Harlan argues that the actual liberties guaranteed to the people were not limited to those written in the text of the Constitution:

The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked

out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.

This broad application of liberty would serve as the foundation in the argument for privacy rights.

The *Poe* decision failed because the law had not actually been enforced. Five months after the Court released the *Poe* decision, however, the rule was enforced. This action and the incidents immediately prior directly led to *Griswold* (Bartee, 2006). Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut and C. Lee Buxton, a Yale University physician, opened a birth control clinic in New Haven, Connecticut in 1961 (Johnson, 2006). As both expected, the authorities closed the clinic after only one day of operation. Griswold and Buxton were convicted and fined \$100 each. Appealing to the Supreme Court, their attorneys argued that the law “violated the privacy of the two defendants and unnamed married couples who sought contraceptive services from the clinic” (Johnson, 2006, p. 235). Unlike *Poe*, the law was finally invoked.

In its 7-2 decision, the Supreme Court ruled that although the Constitution does not directly name a right to privacy, “the various guarantees within the Bill of Rights create penumbras, or zones, that establish a right to privacy. Together, the First, Third, Fourth, and Ninth Amendments create a new constitutional right, the right to privacy in marital relations” (*Griswold*, 381 U.S. 479).

Justice Douglas, in his majority opinion of the Court, used precedent set by the Court during the Lochner Era to reaffirm the expansion of liberty. For example, in *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court held invalid a Nebraska statute that prohibited teaching of modern foreign languages to elementary school children. The majority opinion, written by Justice Reynolds, states “the liberty guaranteed by the Fourteenth Amendment... included the right to bring up one’s children according to the dictates of individual conscience.” Following this same argument, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court also invalidated an Oregon law that required children between the ages of eight and sixteen to attend public school. “The statute, said Justice McReynolds, destroyed property right in private schools and violated the right of parent to educate their children as they saw fit” (Kelly et al., 2001, p. 516). To Justice Douglas in *Griswold*, this means, “the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge” (381 U.S. 479). The right to privacy established through the “penumbras” of the Constitution is “sufficiently broad” to provide a constitutional right to engage in sexual acts with contraceptives.

Justices Black and Stewart, who both wrote dissenting opinions, were vehement in their argument that the Court had overstepped its Constitutional authority. Both agreed that even though the law itself was “a silly law,” it was not the place of the Court to decree that such state action went against provisions of the Constitution.

Justice Black writes:

I get nowhere in this case by talk about a constitutional “right of privacy” as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. (*Griswold*, 381 U.S. 479).

Justice Stewart’s separate dissent echoes that of Justice Black’s. It is also remarkably similar to the warning left by Hamilton in Federalist 78. In his dissent, Justice Stewart states that the majority opinion has inserted its own will instead of solely judging the constitutionality of the state’s actions:

I think this is an uncommonly silly law....But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

(*Griswold*, 381 U.S. 479).

It is important to note the contradictory nature of a section within the majority opinion. In an attempt to preempt attacks of its authority to define liberty rights, similar to the remarks of Justice Stewart, the Court quickly dismisses the expansion of its role in the governmental structure. Justice Douglas wrote, “We do not sit as super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs, or social conditions” (*Griswold*, 381 U.S. 479). In effect, however, this is exactly what the Supreme Court has become. In *Griswold*, the Supreme Court deemed

essential a right that was not enumerated by the Constitution to the federal or state governments or to the people. By holding the Connecticut law unconstitutional, the Supreme Court itself was dictating what state actions were prohibited. The Supreme Court, not only the legislature, has the ability to create law. *Griswold*, though controversial, instituted the framework for future civil liberties.

Modern Substantive Due Process

Only two years after *Griswold* was decided, the Supreme Court was faced with defining whether a person's liberty involved the ability to marry someone of another race. *Loving v. Virginia*, 388 U.S. 1 (1967) questions the constitutionality of a state law that criminalized interracial marriages.

Antimiscegenation laws were part of the "legal legacies of slavery" and "lasted well into the twentieth century in many parts of the country" (Mauro, 2000, p. 98). The antimiscegenation law in the state of Virginia made it illegal for individuals of different races to marry. The law went as far as preventing any resident of Virginia from marrying in another state and then returning to reside together in the Virginia. In 1958, Richard Loving, who was white, and Mildred Jeter, who was part black and part American Indian, drove to near-by Washington, D.C. and had a formal wedding ceremony. No laws against interracial marriages existed within this part of the country. Five weeks after their return to the state of Virginia the couple was arrested. Knowing they were in clear violation of the law, the couple accepted a plea bargain forcing them into exile from the state for a period of twenty-five years (Wallenstein & Mooney, 2006).

In its arguments to the Supreme Court, the state argued “that the laws did not violate “equal protection” because they punished blacks and whites equally for the crime of intermarriage” (Mauro, 2000, p. 98). The Court’s ultimate decision however disagrees. In their unanimous decision, the Justices rule that the state of Virginia’s anti-miscegenation law is a clear violation of the Equal Protection Clause. The Court further established that this law was also a violation of the Due Process Clause of the Fourteenth Amendment; the couple had been deprived their liberty rights. In the opinion, the Court holds that marriage is a fundamental right, essential to a person’s existence:

To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law...Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual, and cannot be infringed by the State.

(*Loving*, 388 U.S. 1)

The Court’s new role was carved. In *Loving*, the nine justices call upon the all-encompassing nature of the word liberty to define extremely personal issues, those involving sexual acts and marriage. The established precedent set forth in *Griswold* creates a right to privacy in a very general sense. At this point in the Court’s history, it has not established what the right encompasses or the extent privacy prohibits governmental interference. One of the most controversial modern liberty decisions of the Court was its opinion in *Roe v. Wade*, 410 U.S. 113 (1973). In this case, the Court takes

steps to determine the limitations to the right to privacy. The Court ultimately holds in *Roe* that, “A woman’s right to an abortion is part of her constitutionally protected right of privacy under the Fourteenth Amendment, although the right is not absolute” (Mauro, 2000, p. 166). The ruling ultimately invalidated statutes within 46 different states (The Oyez Project).

In his opinion for the Court, Justice Blackmun determined the point when governmental interference in a woman’s privacy right is constitutional by defining allowable state interactions during the trimesters of a woman’s pregnancy. During the first trimester, a woman has “total autonomy over the pregnancy” (The Oyez Project). During the second trimester, regulation of abortion is allowed to protect the woman’s health, but during the final stages of a pregnancy, a state can outlaw abortions.

Rather than ending conflict over privacy rights and abortion, the Court’s decision had the opposite effect. The *Roe* decision has been condemned on moral, religious, and legal grounds. Much of the criticism questions whether a right to privacy exists, and also whether this decision should have been left to the states to decide. Similar arguments are brought forward by Justice William Rehnquist in his dissent:

The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one...partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

Four years after its decision in *Roe*, the Court again affirmed its ability to prohibit state interference in its own definition of liberty. In *Moore v. East Cleveland*, 431 U.S. 494 (1977), the Court answered whether a housing ordinance, which restricted the occupancy of a dwelling to a strict definition of “family,” violated the Due Process Clause. The ordinance prevented those who were not immediate members of a family from living within the same home. The Court ultimately struck down the law, stating that it was an “intrusive regulation of the family” without accruing some tangible state interest (*Moore*, 431 U.S. 494).

Because the right to privacy was established by the Supreme Court, the Justices have the ability to tailor the extent that privacy rights may apply. With their ruling, a door was opened to endless possibilities—what could and could not be protected within a person’s liberty rights? Justice Blackmun attempted to draw a line regarding abortion in his *Roe* decision: the right is not absolute. The Court attempted to further limit the application of privacy rights in abortion cases when it partially affirmed *Roe* twenty-years later in the case *Planned Parenthood v. Casey* 505 U.S. 833 (1992). In *Casey*, the Court created a new standard when reviewing state regulation in abortion. The state of Pennsylvania had amended its abortion control law to contain provisions that required the woman to obtain informed consent, or if a minor receive parental approval, and then wait twenty-four hours before the abortion procedure could occur. In its 5-4 decision, the Court upheld most of the Pennsylvania provisions through its new “undue burden” standard. This standard “asks whether a state abortion regulation has the purpose or

effect of imposing an "undue burden," which is defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" (The Oyez Project).

The established precedent thus far in the Supreme Court's history holds that a person has a right to privacy, and therefore a right to have access to contraceptives, and decide such private matters as whether to have an abortion. Next, the Court addresses whether sexual acts within the closed door of an individual's own home are protected from state interference as well. Are homosexual acts also private acts, and therefore protected through one's liberty rights? The Court attempts to answer this question in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the Court determines the constitutionality of a Georgian law criminalizing acts of sodomy.

In 1982, an Atlanta police officer arrived at the home of Michael Hardwick, a gay man. The officer had a warrant for Hardwick's arrest after he had not attended his scheduled court appearance to answer to charges of drinking in public. Hardwick's roommate allowed the officer into the house and directed him to Hardwick's bedroom. The officer found the bedroom door partially open, exposing Hardwick and his male partner engaging in oral sex. The two were immediately arrested and charged with violating the state's sodomy law (Bartee, 2006).

In oral arguments before the Supreme Court, Hardwick's attorney related the right of homosexuals to engage in sodomy to "the fundamental rights of family intimacy that the Court had declared in other contexts" (Mauro, 2000, p. 15). In a 5-4 opinion, however, the Court upheld the Georgia law.

In his opinion for the Court, Justice White argues that the right to commit acts of sodomy did not fall within established standards previously granted privacy rights adhered to. Per the decision in *Griswold*, protected rights are “deeply rooted in the Nation’s history and tradition” (478 U.S. 186). The Court previously established in *Palko v. Connecticut* that rights not identified within the Constitution are protected only if the right was “implicit in the concept of ordered liberty” (478 U.S. 186). Justice White and the Court found that neither applied to *Bowers*.

Instead, the Court drew a line in its own power, stating that it would not be pressured to create a new right. Justice White writes:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or not cognizable roots in the language or design of the Constitution... There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. (*Bowers*, 478 U.S. 186)

It is apparent that the Court believed it would be venturing far into the realm of the legislature if it were to afford privacy rights to homosexual acts of sodomy. The opinion states that this action would have created a new right. Yet, hadn’t the Court established such a process was possible through its opinion in *Griswold* and affirming privacy rights in *Roe*? Justice White’s reasoning seems quite inconsistent with the actual practices of the Court itself. Thus far the nine justices have defined liberty as containing

a right to access contraception for private sexual acts. There is a postscript added to that freedom by the Court: the right to privacy in sexual acts only pertains to those who are heterosexual.

Seventeen years later, the Court would again address the constitutionality of sodomy laws. The end result, however, would be quite different. The *Bowers* decision was ultimately overturned when the Supreme Court issued its opinion in the case *Lawrence and Gordon v. Texas*, 539 U.S. 558 (2003). The Texas statute in question in *Lawrence* banned oral and anal sex for same-sex couples. In a 6-3 opinion, the Justices hold that liberty rights include the right of homosexual persons to choose whether to engage in sexual acts with someone of the same-sex.

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests...When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons. (*Lawrence*, 539 U.S. 558)

In his opinion for the Court, Justice Anthony Kennedy warns of the “far-reaching consequences” restrictions such as the Texas law have upon the “the most private human conduct, sexual behavior, and in the most private of places, the home.” He writes:

The Nation's laws and traditions in the past half century are most relevant here. They show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. (539 U.S. 598)

Analysis of the Court's Decisions

When the Court ultimately held that a right to privacy existed in 1965, it opened the door to countless personal issues. The same standards have been used to push for the legality of same-sex marriages, as well as the establishment of a person's "right-to-die." It would seem that the day has passed when the United States Supreme Court could be considered the "least dangerous" of the branches of government as once stated by Alexander Hamilton. As evidenced through its history, the Court's only boundaries are the limitations that it dictates for itself in its own opinions.

As shown, substantive due process licenses the Justices of the Supreme Court to decide what rights are fundamental in the United States. Initially, the Court set a boundary to the interpretations of the Due Process Clause (*The Slaughterhouse Cases*). As the United States grew, the Supreme Court altered this view to include economic substantive due process (*Munn, Allgeyer, Lochner, West Coast*). Then, the Court incorporated part of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment (*Carolene Products, Gitlow, Powell, Palko, Adamson*). The incorporation doctrine was also a gradual shift towards a reading the Due Process Clause to include substantive elements.

The Court has not returned to any of its previous views of procedural or economic due process. In fact in one opinion alone, the Justices declared that it would no longer decide economic cases. In *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955), the Court states:

The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. We emphasize again what Chief Justice Waite said in *Munn v. Illinois*, ‘For protection against abuses by legislatures the people must resort to the polls, not to the courts.’

Although the Court has abandoned economic due process, it has simply taken another route to protect against “abuses by legislatures”—substantive due process. The history of substantive due process shows the Courts ability to selectively decide what rights are fundamental, and therefore protected. Substantive interpretation has also led to the creation of privacy rights (*Griswold, Loving, Roe, Moore, Lawrence*).

If the Court has rooted these decisions within the Due Process Clause itself, then how can the Court be compared to a “superlegislature”? Such a comparison is made because of the finality of the Supreme Court’s decisions. For example, as previously stated, the right to privacy is not written into the actual Constitution. Once the Court held the right to privacy exists (*Griswold*), the elected branches of government may not change the scope the right applies. The only available option is to override the Court through constitutional amendment—a highly impracticable option as constitutional

amendments must receive two-thirds approval from both houses of Congress and ratified by at least three-fourths of the states. If the people of the United States disagree with the Supreme Court, there are few options they may take to override the Justices' decisions. *"Through substantive due process, the court can directly legislate rights"* (Goldstein, 1995, p. 279). The Supreme Court has greatly increased its power within the governmental system because it alone has the ability to expand substantive due process to encompass what the Justices deem as fundamental.

In majority opinions, the Justices have been insistent that its legitimacy as a judiciary is immediately in question when a Justice inserts his or her will for that of constitutional provisions. Even so, the Court has increased its authority and taken the ability to decide out of the hands of the citizens—the Court has bypassed the democratic process so central to the United States' governmental structure.

Emerging Practice: The Unwritten Constitution

The United States Constitution is ultimately the supreme law of the land; there is no other law able to supersede its authority. Today this understanding is a "potentially powerful challenge" to the Court's legitimacy (Fallon, 2001, p. 111). Each time the Court reaffirms its own definition of liberty, it is unavoidably prevailing over the rights asserted within the written Constitution. How then is the Court able to disregard its obligation to the Constitution?

Perhaps the dilemma can be best explained through the work of Richard Fallon, who has developed the concept that “the United States has an unwritten as well as a written constitution” (2001, p. 111). In his book, *Implementing the Constitution* (2001), Fallon argues that there are sources outside of the written Constitution that share constitutional authority. Fallon writes:

trying to imagine American constitutionalism without the written Constitution is like trying to imagine *Hamlet* without the prince. It would be equally misguided, however, to think that we could understand American constitutionalism by reference to the written Constitution alone. (2001, pp. 125-126)

Outside sources recognized by the unwritten constitution include: the authority of judicial precedent, historical practices, and adjudicative norms. As Fallon asserts, judicial precedent and historical practices “may sometimes dictate different results to constitutional cases than would be reached under what otherwise would be the best interpretation of the written Constitution” (2001, p. 111). It is the unwritten constitution that also provides the norms structuring judicial decision-making.

In his writing, Fallon differentiates the two types of constitutions through the use of capital and lowercase letters. The U.S. Constitution is ultimately deferred to in all questions arising law and state constitutions, therefore Fallon shows the prominence of the written Constitution, by using a capital “C” at the beginning of the word “constitution.” To indicate that other sources must defer to the U.S. Constitution, Fallon represents the unwritten constitution’s inferiority by referring to it as the “small-c” constitution. “I should emphasize that the unwritten constitution, in both of its aspects,

supplements or mediates the written Constitution, rather than displaces it” (Fallon, 2001, p. 111). Opinions based upon the unwritten constitution can, “at least be reconciled with the language of the written Constitution, even if reconciliation sometimes depends on tenuous or even specialized interpretations (as in the case of “substantive due process” adjudication)” (Fallon, 2001, p. 111-112). The unwritten constitution requires the Supreme Court to make “practical, predictive, and sometimes tactical judgments” that complement the Constitution and its authority (Fallon, 2001, p. 111). Words like *liberty* and *due process* found in the Constitution are broad and do not denote one specific meaning; therefore, such words ultimately demand interpretation by the Court.

The belief that another, albeit unwritten, constitution exists gives credence to the Court’s ability to interpret, or rather as Fallon describes, “implement,” liberty. As stated, the unwritten constitution draws its authority, in part, through the judicial precedent set by the Court. In the rule of *stare decisis* the judiciary will uphold the opinions of previous cases, as well as previous Courts. The Supreme Court has mostly adhered to *stare decisis* in modern substantive due process—the Court established that there are substantive elements to Due Process, and it continues to follow this line of thinking. To Fallon, the authority of precedent cannot be distinguished from the authority of the Court itself. “The Supreme Court’s authority to endow its precedents with power to trump what otherwise would be the best interpretation of the written Constitution cannot be derived from the written Constitution alone” (Fallon, 2001, p. 115-116). Fallon therefore associates practices of the Court to a higher level of influence—what could be considered practice is now seen as constitutional authority.

The strong relationship between precedent and the Court's practice in Fallon's arguments, however, illustrates a major flaw within the legitimacy of the Court. Fallon argues that the unwritten constitution is merely a supplement to the written Constitution. He also argues that the unwritten constitution grants constitutional authority to these outside sources. In effect then, his argument is inconsistent. If constitutional authority is granted to other sources, then the supremacy of the Constitution is weakened. When other sources are given constitutional authority, they no longer need to be reconciled with the written Constitution. For example, according to Fallon, precedent is one of the outside sources granted constitutional authority by the unwritten constitution. As previously reviewed, *stare decisis* requires the Court to uphold prior judicial rulings. When this practice is continually followed the Court is actually deferring to prior holdings, and not the actual Constitution. It can be argued that the original precedent itself is based upon the Constitution, and therefore later precedent follows as such. This of course does not explain situations when the Court uses the precedent to expound upon an originally granted right. In these cases, the Court followed judicial precedent. If this line of thinking continues, we may come to a point when we must ask ourselves whether the holdings of the Court are still rooted in the actual written Constitution. What is really guiding the Justice's decisions—the supreme law of the land, or prior judicial holdings? If it is prior holdings, then the supremacy of the Constitution is in question; further, the legitimacy of the Court itself can also be questioned because it is granted authority within the written Constitution.

Fallon's model may be closer to the actual practice of the Supreme Court than one may think. This flaw is actually represented within the holdings of the Court today. As I

demonstrate above, many of the freedoms we enjoy today are not listed within the Fourteenth Amendment. Instead, many liberty rights come about through precedent the Court has established. The Court's decision in *Griswold* establishes the right to privacy. As described, the Court found that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance" (*Griswold*, 381 U.S. 479). However, before the Court could rule privacy exists, it first found in a series of cases that specific areas of the Bill of Rights are protected through the Fourteenth Amendment, and therefore enforced at the state level. If the Court had not established precedent nationalizing the Bill of Rights, then protection against state infringement of a person's privacy could not be "rationalized" in the manner that it is. The Court also follows the rule of *stare decisis* in cases after the *Griswold* decision. Modern substantive due process cases not only affirm a right to privacy exists, but also expound upon the specific guarantees found to be encompassed within this right. When the Court builds upon established precedent as it has done in privacy rights—to include contraception, abortion, homosexual acts—has the Court actually concluded these rights exist through provisions of the Constitution? The Court essentially establishes an "unwritten" Constitution. Being unwritten, it is therefore subject to adaptation, to context, and judicial interpretation.

Although Fallon's concept rings true to the actual practice of the Court today, it also brings a greater issue to the forefront: Is this how the Constitution should be interpreted? Furthermore, if it is not the role of the Supreme Court to answer such questions, then whose responsibility is it?

Methods of Interpretation

The fact that the Court has departed from the actual text of the Constitution has fueled the debate regarding the Supreme Court's proper role in American democracy. Should the Court act as a true independent judiciary, or does the American system of government require the Court to behave politically as it has in substantive due process decisions? Scholars are divided among three classifications of thought; each proposes what the Court's proper methods of interpretation should involve, and the role the Court should play. These classifications are: objective, realist, and subjective.

Those residing within the objective realm of judicial theory believe a justice should remove him or herself from the interpretation. I describe below the originalist perspective, which describes how objective interpretations should be applied. Realists, however, call for judicial restraint in constitutional matters, deferring much responsibility to the elected branches. Subjective interpretations are quite different from the two other classifications of judicial thought. Those who view the Court subjectively, believe the Justices should act as policy makers, interpreting the Constitution to adapt to the modern world in which we live.

Objective Interpretations: The Originalist Perspective

The act of being objective is an attempt to refrain from influencing, and being influenced by, personal feelings, prejudice, or other interpretations. Objective judicial interpretation follows this same approach. Originalism is a purposeful movement to detach the Court from inserting the Justice's will into their interpretations of the Constitution. "In a sentence, originalism holds that the Supreme Court should interpret

the Constitution to reflect the “original understanding” of those who wrote and ratified relevant language” (Fallon, 2001, p. 13). Those of originalist thought believe, when the Constitution was adopted, the framing generation bound themselves and future generations to the meanings, values, and principles that they believed the words of the Constitution embodied.

The major tenants of originalist thought are often best exemplified through the writings and opinions of former judge, and Supreme Court nominee, Robert H. Bork. Within his book, *The Tempting of America* (1990), Bork argues to an extent that the Constitution itself is law. It is the role of the judge to only reinforce the original understanding, not to incorporate new, present-day principles into the text. Bork writes, “The ratifiers of the Constitution put in place the walls, roofs, and beams; judges preserve the major architectural features, adding only filigree” (2001, p. 5). Originalist justices construe constitutional truths by deciphering the intended meaning behind the words of the Constitution (Epstein & Walker, 2004).

To an originalist, the current interpretation of the Due Process Clause is unfounded. According to Bork, there is no original understanding that lends to an understanding that the Due Process Clause contains substantive elements. Instead, the Court established through initial due process cases, such as *The Slaughterhouse Cases*, that the clause was only a grant of procedural rights. “Thus, a judge who insists upon giving the due process clause such content must make it up. That is why substantive due process, wherever it appears, is never more than a pretense that the judge’s views are in the Constitution” (Bork, 1990. p. 43).

Proponents of originalist interpretation believe that justices must hold true to the intended meanings of the Constitution because of their designed role as “guardians” of the people’s liberties. To Bork, the federal courts were designed to preserve the Constitution and the authority of the people. Unlike legislators, Supreme Court justices cannot be held accountable through elections and the democratic process because of their life-tenured positions. If the Court were to be accountable to the people through elections, the people could choose to deny basic rights to individuals at their whim. The only method to ensure that the people are “guarded from our guardians” is for justices to set aside their own views and only follow what is written within the Constitution and what the Framers intended (Bork, 1990, p. 5). Justices must be “bound by the only thing that can be called law, the principles of the text, whether Constitution or statute, as generally understood at the enactment” (Bork, 1990, p. 5).

For Bork, the fact that the Supreme Court ventures away from this method of interpretation in substantive due process opinions, only brings the Court deeper into the realm of politics. Bork calls this the “American orthodoxy”—that is, people widely expect the Supreme Court to create new or destroy old standards of liberty, therefore the Court continues this behavior. In doing so, the Court assumes a legislative power that is superior to any other branch within the government. The problem lies within the superiority of the Constitution and the finality of the Court itself. It is the Court’s role to interpret the meaning of the Constitution and apply it to decisions. Therefore, whenever the Court issues an opinion, “the democratic process is at an end,” for there is no other structure of the government that has been granted the power to state what is within the supreme law of the land (Bork, 1990, p. 3).

To Bork and other originalists, there is no question that issues such as abortion are morality questions that should not be decided by judges. Because the protection of the right to privacy and the protection of a woman's right to have an abortion were not written into the text of the Constitution, then such matters should not be attempted by the Court. Bork addressed this issue in a dissenting opinion he wrote while sitting as a federal judge, he included the passage in his book: "[W]e administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law" (Bork, 1990, p. 6).

The intention of the Framers was a tripartite system of government, each with differing responsibilities. The reliance upon the judiciary branch, and not those elected by the people, is a clear step away from the intentions of those who wrote and ratified the Constitution. Justice Peckham, in his opinion in *Lochner*, "defended liberty from what he considered to be 'a mere meddlesome interference,' asked rhetorically, '[A]re we all...at the mercy of legislative majorities?'"(Bork, 1990, p. 49). According to Bork, the answer to this question is a resounding yes. There must always be deference to the original understanding of the Constitution, and therefore each of the three branches of government. The legislative majorities are synonymous with that of the basic outline of the American structure, and the intent of our representative democracy (Bork, 1990).

Criticism of Original Intent: The Intent and Beliefs of a Past World

In modern practice the Supreme Court has answered Justice Peckham's rhetorical question quite differently than Robert Bork. While the notion of following the original Framers' intent may ensure a strict limit on the judiciary's power, it also leads to questions of how the actual application of such views can be implemented in the modern world. When the U.S. Constitution was adopted in 1789, the world was a different place than the one in which we live today. The document itself was crafted by an exclusive group of land-owning white males, who lived in an agrarian society that upheld the belief that human beings were property. Specific groups, such as women, African Americans, and other minorities, were purposefully excluded from the words of the Constitution by its authors. The Founding generation regarded Great Britain as the largest power in the world; they had no need for things such as Medicare; and they would never hear the words global warming. The entire premise of originalism is based upon the intent and beliefs of a past world. The fact is the Founder's could never have even imagined many of the specific issues that challenge the political process today. Possibly even more unimaginable, is the prospect that one can actually determine what the Framers' intentions were. Justice Brennan, one of the more prominent activist Supreme Court Justices, "It is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth, it is little more than arrogance cloaked as humility" ("Contemporary Ratification," 1985).

Originalist perspective is intended to remove the Justice from inserting his or her views into interpretations of the Constitution. However, this view fails to recognize that Justices still have much interpretative latitude in using this approach. It must be

remembered that the Founders themselves were not a coherent collective, speaking in only one voice. The drafters of the Constitution disagreed on many matters when planning the American system of government. If intentionalism is followed as directed, then the Justice inserts their influence over which Framers' intentions get priority over others.

The "consequences" of following an originalist perspective "are not obscure" (Sunstein, 1993, p. 97). Liberty could not receive substantive protection and any discrimination would only receive rational basis review, essentially ensuring its validation (Sunstein, 1993). The originalist perspective cannot conform to the actual practice of the Court today. "A great deal of existing constitutional doctrine—including much that we are likely to think most important—cannot be justified on originalist principles" (Fallon, 2001, p. 15).

Originalism is a theory that cannot conform to today's practices in full. "A return to a narrowly described 'original understanding' would result in the elimination, in one bold stroke, of many constitutional safeguards" and principles (Sunstein, 1993, p. 98). Instead, it is a theory that proposes how the Court should behave, offering the Court's "appropriate" role (Fallon, 2001, p. 16). In the face of substantive due process, which thus far has proven to have no end in sight for the Court, the originalist theory does draw a line and limits the Court's power.

Realist Interpretations: Judicial Restraint

Realists use a pragmatic approach to explain how the judiciary branch and the Supreme Court should behave. Realists derive their concept of judicial interpretation from the basic outline of the tripartite system of American government. To realist, the judiciary should defer to the other branches of government—in other words, use judicial restraint— so that the intended separations between the three distinct branches do not disappear. Judicial restraint is a theory of judicial interpretation that maintains the Court should create limitations in its own power. This means the Supreme Court should refrain from striking down laws unless they are obviously in conflict with the Constitution. If a constitutional decision must be made, it should be as narrowly tailored as possible.

The approach increases the prominence of the old political question doctrine, “According to this doctrine, matters of political discretion (that is, policy choices), are left to the (legislative and executive) branches elected by the people, or to the people themselves in their constitution-writing mode” (Goldstein, 1995, p. 276). The concept argues for government by consent of the governed. Judicial interpretations, therefore, do not answer political matters, rather legal questions.

Such an approach is offered by Leslie Friedman Goldstein in her “Consent-Oriented Constitutional Theory I” (1995). Goldstein’s core argument for judicial restraint is derived from the political question doctrine. She points to the three branches of government—two elected, one not—to distinguish whether the Court has the ability to rule on substantive elements of the Constitution. To Goldstein, “If the Court were to be free to announce new rights as it went along, there would be no reason for not treating it as a third house of the legislature” (p. 286). The distinct difference of the electoral

process differentiates the judiciary from the legislative branch. The true power of the Court does not derive from the Constitution itself, rather from the people of the United States as a whole. According to Goldstein, the people consent to the Constitution at two different levels. The higher level is “that of constitution formation through the original ratification and the amending process” of Article V (1995, p. 284). The idea is that when the formal Constitution was adopted, the people, and their successive generations, retain the power to create rights and change the Constitution through formal processes. The lower level is the people’s consent to the elected majorities and legislative policies. According to Goldstein, the people express their will through elected representatives whom they choose to enact laws on their behalf. Therefore, when law is enacted, the people themselves are consenting and expressing their will—it should “count as the voice of the people themselves” (Goldstein, 1995, p. 284).

Goldstein then points to three different levels of authority in the American system of government. At the top is the formally adopted Constitution, “the voice of people at its firmest. It is to be honored even at the cost of frustrating—the bottom level—particular legislative majorities” (Goldstein, 1995, p. 285). Between these two levels “is the amorphous, fluid world of constitutional politics—the ongoing dialogue between the people and the Supreme Court about the meaning of their constitutional law” (Goldstein, 1995, p. 285). To Goldstein and other realists, the people consent to a written constitution so that others will know what it is they have agreed to. That is why the Constitution is to be treated as the highest law and upheld—not altered—by the Supreme Court. The Court must simply enforce the will of the people by “exercising text-based judicial review” (Goldstein, 1995, p. 284).

The realist approach defers much authority to the elected officials of the people. There are clauses within the Constitution, however, that demand interpretation—the word liberty, for instance, could be all inclusive of many aspects of life. If the Court were to defer to the legislature on all of these matters, is the Court fulfilling its responsibility to interpret the Constitution? Goldstein answers that there are certain instances within the Constitution that require active judiciary interpretations. However, because the American system is a government by the people, “it makes sense to “adopt judicial-power-constraining readings of those infinitely expandable clauses” (Goldstein, 1995, p. 286). The Supreme Court should interpret these aspects of the Constitution in such a way that the “channel rather than unleash judicial power, limiting the judiciary to implementing some expression of the will of the sovereign people.” (Goldstein, 1995, p. 286).

According to this approach then, substantive due process is a gross appropriation of the judiciary’s power. “So-called substantive due process turns the justices from interpreters of a legal text (albeit an opaque, amorphous, malleable one) into grand prohibitors of legislation who may prohibit any law that strikes them as a bad one on the grounds that the particular freedom invaded by this law is fundamental in American society” (Goldstein, 1995, p. 279). Referring specifically to the Court’s decision in *Griswold* and *Roe*, Goldstein argues that substantive due process allows the Court to abandon the Constitution and its role as interpreters.

And it was doing so in its grand prohibitor mode, with no apparent embarrassment at the idea that it needed no referent in the constitutional text for its assertion that there is a fundamental right to choose to have an abortion. The justices were obviously doing something other than merely *interpreting* law, and

they were doing it in ways that had tremendous impact on society. (Goldstein, 1995, p. 279)

A realist Justice would most likely have answered such “moral” questions in a quite different manner, instead deferring to the state and allowing the people to electorally choose. This of course, similar to originalism, raises questions as to implementing such an approach in today’s world. If realist thought points to the legislature as the policy maker, then could this approach not also lead to the elimination of rights we the people hold as fundamental? According to Goldstein and the political question doctrine, moral issues, such as abortion and homosexuality, should be left to legislators to decide because they are the direct representatives of the people. These representatives however are the elected officials of the majority, and not the citizenry as a whole. To this extent, proper Congressional legislation reflects the majority, the closest reflection to our democratic republic system. Issues of morality, however, “involve questions of value on which reasonable people differ” (Sunstein, 1993, p. 101).

While judicial restraint may very well ensure the upholding of the democratic majority process, it must be noted that it is primarily the majority who is most likely to take away the rights of the minority in order to maintain the status quo. Therefore, there is the possibility that rights would be taken away. Attempts by the Supreme Court may instead represent the minority’s sentiment, and prevent the majority from eliminating the rights from the minority of the population. Another question I also posed by the application of the realist perspective: Does an election truly represent a majority of the

people? Further analysis of this question is contained within the section titled “Deference to the Majority.”

Subjective Interpretations: The Judicial Statesperson

The subjective classification of judicial interpretation theories is quite distinct in its approach than the other two classifications. Those who do not adhere to an originalist or judicial restraint perspective are often referred to, in a very general sense, as activists. Subjective approaches, unlike originalists and realists, believe that proper interpretations of the Constitution require a justice to consider beyond the “narrowly understood” original understanding of the document (Sunstein, 1993, p. 98)—a justice cannot strictly adhere to the written law of the land. “Text has no meaning apart from the principles held by those who interpret it, and those principles cannot be found in the text itself” (Sunstein, 1993, p. 101). Instead, “Meaning is created, rather than found, and hence a function of one’s perspectives” (Sunstein, 1993, p. 114). The justices will always insert their own views into the Constitution.

Many proponents of subjective, or activist, interpretation also believe that the Supreme Court itself cannot escape its political nature, that it is a political institution. This approach emphasizes the human nature of the justices of the Court—justices, just as any other person, are swayed by the changes within the wider political system and the culture of the country (Kahn, 1994). To those within this realm of interpretation, it is unfounded that one document, written over 200 years ago, could contain provisions outlining all subsequent privileges and rights in an ever-evolving world. As stated by Justice Brennan (“Contemporary Ratification,” 1985), “For the genius of the Constitution

rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.” Instead, the justices must base their holdings upon the principles the document itself embodies, not only what is written.

There are several main theories that have emerged involving a subjective perspective. Perhaps the strongest rival to originalism has been brought forth by the legal philosopher Ronald Dworkin. Dworkin characterizes the Supreme Court as a “forum of principle” (Fallon, 2001, p. 3). Similar to originalists, Dworkin argues that the Court’s role should involve determining the Constitution’s true meaning. Dworkin goes further, however, to argue that the Court “should equate constitutional meaning with norms, values, or principles that the Constitution embodies” (Fallon, 2001, p. 4). The role of the justice has been expanded through Dworkin to find the true understanding of the broad principles within the Constitution—to act as judicial statespersons, making policy from the provisions of the Constitution.

The core of this theory equates interpretation by the Court with an obligation to enforce the fundamental rights of the people. “To the idea of the fundamentality of rights, Dworkin conjoins the notion that ours is a Constitution of principle, the full meaning of which cannot be derived directly from the intent of the framers or even from a narrow parsing of the text” (Fallon, 2001, p. 27). Dworkin argues that the Constitution contains principles, or moral directives, designed to guide the nation. Additionally, he maintains that these principles can be found in other sources beyond the written Constitution. “Rather, a principle counts as a constitutional principle if it would appear in the philosophically best explanation of the written Constitution and of surrounding

practice and judicial precedent” (Fallon, 2001, p. 27). The act of interpreting these principles leads to truth, the truth of all citizens’ fundamental rights.

The “Forum of Principle” theory circumvents one of the main arguments brought forth against originalism—the Founders could never have accounted for every specific issue that would face future generations. This theory grants the justices true interpretive powers. Instead of adhering to only a strict notion of the specific rights granted, the Constitution can be adapted to conform to problems of the current generation. The adaptation of a document into a fluid idea is not unlike the Supreme Court’s modern interpretations of the Due Process Clause. The justices hold that liberty is all-encompassing of many fundamental rights. As stated by Justice Peckham in the *Allgeyer* opinion:

The liberty mentioned in that 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. (165 U.S. 578)

Increasing industry within the country forced the justices to recognize in *Allgeyer* that the concept of due process had to change with the needs of the times, not to remain stagnant. This is the stance of subjective interpretations—the Justices must be flexible in his or her interpretations of the Constitution to fulfill their role as arbitrators of justice.

Criticism of the “Forum of Principle” Theory

Dworkin’s concept itself is promising as an explanation of why the Court is able to adapt the Constitution to the modern times. The theory itself, however, has many

flaws in practice. Dworkin's theory defers much faith into the nine Justices of the Supreme Court who are mere mortals and, by no such means, any more apt to adhere to a moral certitude than another being.

The argument is one based upon philosophy, not of legal reasoning. If the Supreme Court were a "Forum of Principle," then the Court could arbitrarily define any liberty right without adhering to constitutional principles or legal concepts (Fallon, 2001). Some argue that the Court has already done so in terms of its due process decisions. Yet, each opinion thus far called upon provisions within the Constitution or adhered to established precedent in some sense. Because of the strong reliance upon philosophy, Dworkin's theory raises serious questions as to this interpretation's effect upon the supremacy of the Constitution. In this particular viewpoint, the Court's rulings should embody the true meaning of the Constitution. Through Dworkin's theory however, the Court is able to side-step the Constitution. If the Court is able to create law without referring to the Constitution, then isn't the Court essentially stripping the Constitution of any authority over law? Even more perplexing then, is the legitimacy of the Supreme Court itself, which is granted its authority within Article III of the Constitution. These questions are quite similar to those that have been raised in regards to the objective classification, or the originalist perspective.

The Court's Appropriate Role

It is apparent that any question of appropriateness in terms of the Supreme Court's use, or in some opinions, their abuse, of power is hinged upon its legitimacy. But

what is this term, and why is it so important? According to Justice William J. Brennan, Jr., at the center of the legitimacy debate is:

...what the late Yale Law School professor Alexander Bickel labeled, “the counter-majoritarian difficulty.” Our commitment to self-governance in a representative democracy must be reconciled with vesting in electorally unaccountable Justices the power to invalidate the expressed desires of representative bodies on the ground of inconsistency with higher law. Because judicial power resides in the authority to give meaning to the Constitution, the debate is really a debate about how to read the text, about constraints on what is legitimate interpretation. (“Contemporary Ratification,” 1985)

The legitimacy claim is used often, but rarely defined in the context of these arguments.

For the most part, legitimacy argument refers to concerns about, and ultimately assert or imply answers to, a compound question such as: ‘By what moral right does the government, or an institution of the government such as the Supreme Court, hold the power that it holds, and by what moral right does it then exercise those powers in a particular way?’ (Fallon, 2001, p. 118)

Ultimately, how does the Supreme Court have the power to decide these moral issues if they are not implicit within the written text of the Constitution? In other words, what enables the Court to create, and then follow, the unwritten constitution referred to by Fallon.

The Legitimacy of the Unwritten Constitution

The answer to questions of the Supreme Court's legitimacy is not clear. As I demonstrate above, substantive due process has taken the Court far away from the provisions of the written Constitution. Each time it choose to expand liberty rights, an "unwritten" constitution is followed. If this is so, then the Supreme Court has overstepped its power and the people are under no obligation to adhere to its rulings. Today, although the people may disagree with the Court, the people do not agree that its decisions must not be followed; the Court's decisions are adhered to. Perhaps, then the questions of legitimacy can be answered through an analysis of the unwritten constitution that the Court follows. Can the legitimacy of the unwritten constitution be argued?

Nearly everyone assumes the legitimacy of the written Constitution, and "everyone also accepts the legitimacy of exercise of power that can be shown to be directly authorized by the written Constitution" (Fallon, 2001, p. 119). The unwritten constitution however is questioned, for it is not a formal document and its scope is immeasurable. The principles the unwritten constitution reflects though are also accepted. The Justices themselves argue that there are certain principles embodied within many of the written clauses of the Constitution. I believe the existence of the unwritten Constitution is most evident through the Court's ability to nationalize the Bill of Rights. The Supreme Court justified the incorporation of the Bill of Rights through a long, case-by-case process. After most of the provisions of the Bill of Rights were found to apply to the state-level of government, the Court finds that the pervading spirit of several of the Amendments created penumbras, or zones, of unwritten protections. The zones, I

believe, are reflections of the unwritten Constitution. The Court could not displace the written Constitution; rather it used the “zones” as its supplement, to reflect widely accepted values.

The fact remains that a constitution is an outline of the basic structure of government; it cannot provide for every possibility. In fact such a document, as argued by Chief Justice John Marshall in *McCulloch v. Maryland*, 17 U.S. 316 (1819), would be beyond the comprehension of the human mind:

A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important object designated, and the minor ingredients that compose those objects, be deduced from the nature of the objects themselves.

It is within the realm of the Court to interpret this written Constitution. In so doing, it will base its decisions upon standards and principles the Constitution reflects, though may not be expressly written. If the Court and the government were unable to proceed through this manner—conforming the Constitution to today’s world—then society itself could not evolve. The unwritten constitution allows the United States to adapt and evolve as a society, to face modern problems with modern theories. The unwritten constitution can be argued as legitimate because of its relationship with the actual Constitution itself. For example, the nationalization of the Bill of Rights was possible because the provisions of the written Constitution, specifically the word *liberty*,

encompassed many of the fundamental rights found in these first ten amendments. The process didn't directly conflict with the provisions of the Constitution. Rather, the unwritten constitution supplemented the written one—it expounded upon principles found within the Constitution. Because the unwritten constitution reflects the values of the written document, is it not also legitimate? The values that the unwritten constitution reflects are widely accepted within society and the American culture. Acceptance can be seen as a form of legitimacy. Though this is true of practice today, should the Supreme Court proceed in such a manner?

Deference to the Majority

It is apparent that many of these rights the Court establishes through the unwritten constitution epitomize the spirit of America today. This begs the question: what has given the Court the right to decide these emotionally charged issues? Those within the realist classification of judicial interpretation, as established earlier, believe that the Court has abused its grant of interpretive power; these matters should be deferred to the legislators. The American democratic structure creates a government of and by the people. Therefore, these decisions should be left to the people or their representatives whom they freely elect. This majoritarian process directs that the Court restrains from acting as an appropriator of liberties—it should act solely as a guarantee that the process of government functions within the scope of the Constitution, rather than interpret substantive meaning into the text. The democratic process would leave the majority of the people to define the word liberty.

In today's society, however, the democratic process has actually resulted in a disconnect between the American people and their government. It is argued that the legislative process today remains unaware of the majority of the people's wishes. The governmental structure of modern America is confusing to the average American, while a large majority of the population remains apathetic to the actions that the government takes. For example, in today's society, voter turn out numbers remain stagnant at close to half of the voting population. According to the Federal Election Commission, 56.7 percent of the voting age population cast a vote in the 2004 presidential election, a slight increase from the 51.21 percent turnout in the previous presidential election. Voter turnout is even lower for non-presidential elections. Compiled statistics by the United States Election Assistance Commission show that only 37 percent of the voting age population voted in the 2002 Congressional election. There seems to be no guarantee that the true majority is speaking out upon an issue. Those who are reflected within the majority vote seem to be far out-of-center with the population simply because they are politically involved. Can a majority vote today truly reflect the majority of the population?

The role of the Court today may contribute to the apathetic attitude the people have towards the government. Because the Court takes it upon itself to address these moral issues, the responsibility no longer requires action from the legislators. The legislator is then able to avoid such matters, never having to make a decision. If the legislators were instead forced to take clear stances upon these moral matters, would the apathetic nature of the population transform to a highly involved America? The reason why many citizens are not involved in the process may be a direct result from the lack of

any vested interest the citizen has in the electoral process. If citizens knew that their elected officials were forced to make hard-lined stances on issues, the population would then have a vested interest to become more involved in the process.

Conclusions

The Democratic theory stresses that our structure of government is a government of the people, and therefore, “substantive value choices should by and large be left to them” (Brennan). Deference to the people would render judicial review appropriate only as a guarantee that the democratic process functions. Ultimately, it would restrain the Court from expanding its power. In other words, as Justice Brennan describes, “we would protect freedom of speech merely to ensure that the people are heard by their representatives, rather than as a separate, substantive value.” Justice Brennan argues that the process of the majority will not ultimately uphold the values inherent in the Constitution, an argument with which I do not disagree.

The democratic theory, although promising of a re-birth of the people’s involvement, does not properly reflect the actual protection of all citizen’s liberty rights. It is the inherent instinct of the majority to use its power in any method that ensures its ability to hold its position of authority. This often leads to the exploitation of the minority. The concept is not dissimilar from that of Social Darwinism. Charles Darwin proposed theory of natural selection in biology “contributed the notion that in the evolution of species the stronger beings survive and the weaker beings perish, so that the species acquire traits that permit it to survive and thrive” (Ducat, 1996, p. 513). This

theory was also advanced in early economic substantive due process questions. The Justices employed this theory as a condition for prohibiting governmental interference in business; the idea was to “better the human race through unrestricted competition” (Ducat, 1996, p. 513). The actual results were torrid working conditions and low pay. As demonstrated in *Lochner*, the health of the worker—having to work long hours and an unsanitary environment—was compromised for the monetary success of business. Justice Brennan states, “Unabashed enshrinement of majority will would permit the imposition of a social caste system or wholesale confiscation of property so long as a majority of the authorized legislative body, fairly elected, approved.” It is within the history of American society that dictates this could happen again, as exemplified in the racial clashes of the South in the 1950s and 1960s. The Constitution does define a democratic system, one that defers to the majority. However, the Constitution also outlines certain rights and restrictions upon that majority. These are evident within the Bill of Rights and the Due Process Clause. “It is the very purpose of a Constitution...to declare certain values transcendent, beyond the reach of temporary political majorities” (Brennan). To defer to the majority process would require the people to “rectify claims of right” of the minority inflicted through the “outcomes of that very majoritarian process” (Brennan). One must have faith in the democratic process, however that faith cannot be blinded to the rights of certain citizens within the population. The Declaration of Independence, the Constitution, and the Bill of Rights, which shed light upon the democratic structure of government, have each “committed” the United States as a country of equality, where the rights of all individuals as equals are dignified before the authority of law (Brennan).

The majoritarian process cannot guarantee the dignity nor the equality of the human spirit. The question then begs: Why cannot the Supreme Court be the authority upon this matter? The judicial ruling need not defer to the majority, rather it is a check upon the majority so that the spirit of the Constitution is not set aside. Through my research, I have read philosophical theories, the opinions of the Justice's themselves, and the historical nature of its practices, all in the hopes of answering whether the Supreme Court should define liberty for all of the country. It is conclusive within my readings that the process that exists today has ultimately been incorporated into the political structure of American democracy. It is a system that the people have grown to understand. Therefore, should we not let the process lie as it is?

It is the responsibility of the judiciary to interpret the Constitution and apply it to the world we live today. "Justices can only read and interpret a document through their own understanding, that of a" Twenty-first Century American (Brennan). The only other option is to defer to the democratic process, which in America may not reflect a true majority. This of course is not to say that the nine Justices of the Supreme Court hold the ultimate knowledge on all understanding of the Founding generation or the spirit of the Constitution itself. Yet, we as a country defer to the Justices this responsibility. We view them as having a greater understanding of the principles of the country because of the position that they hold. It is the inherent nature of the people to question their legislators, whom they vote into office. It is evident that the Congress is fallible because the judiciary structure was created pass judgment upon their laws. "The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"

(Article III, Section 2, The United States Constitution). The nature of the Supreme Court contributes to its acceptance—the Court is the final step of the democratic process.

Justice Robert H. Jackson aptly stated in the Court’s opinion of *Brown v. Allen*, (344 U.S. 443 (1953), “We know that we are infallible only because we are final.”

Through a historical analysis of the Court’s interpretations of the Fourteenth Amendment’s Due Process Clause, it is clear that the Court has departed from the actual structures placed within the written Constitution. Originalist interpretations, such as those offered in the writings of Robert Bork, hold that any decision that is not based upon the Founder’s intent or the actual written expressions of the Constitution are inherently illegitimate. In reality however, the practical applications of originalist thought are flawed. It is impossible for one document to reflect every possible shift in the nature of the country, nor provide great detail in how the document itself should be interpreted. “Typically, all that can be gleaned is that the Framers themselves did not agree about the application or meaning of particular constitutional provisions, and hid their differences in cloaks of generality” (Brennan). Even when a determination can be made, it is clear that the Founders themselves did not value the rights that have become a part of the culture of the people within the United States. They did not provide for the equality of women, nor African Americans, nor other minorities, large segments of the population that share a vested interest in the practices of the government today.

Therefore, it is the power of the Judiciary to interpret the Constitution and apply it to the culture of today. However, their interpretations cannot venture so far that they rely upon the Justices own personal philosophies, as offered through Ronald Dworkin’s

theory of the Court as a “Forum of Principle.” There must be a strong legal basis to the Court’s decisions or it will feign to hold the authority that it does.

Activism is a balancing act; it is the weighing of the authority of the Constitution as supreme, with the Court’s ability to interpret for an ever-changing society in which we live. “To put this another way, the possibilities for collision between government activity and individual rights will increase as the power and authority of government itself expands, and this growth, in turn, heightens the need for constant vigilance at the collision points” (Brennan).

With the growing power of corporations and the threat of modern day problems, the rights of the individual must be preserved. Through substantive due process, the Court has affirmed that there are certain rights so intrinsic to the very nature of an individual that there is no process “due enough” to take them away. The practice of the Supreme Court has upheld the minority’s rights as equal to that of the majority. The modern practice of the Supreme Court is effective, and most importantly, incorporated into the nature of our political system.

Reference of Cases

Adamson v. California, 332 U.S. 46 (1947)

Allgeyer v. Louisiana, 165 U.S. 578 (1897)

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)*

Barron v. Baltimore, 32 U.S. 243 (1833)*

Board of Education v. Barnette, 319 U.S. 624 (1943)

Bowers v. Hardwick, 478 U.S. 186 (1986)

Gitlow v. New York, 268 U.S. 652 (1925)

Griswold v. Connecticut, 381 U.S. 479 (1965)

Lawrence and Gordon v. Texas, 539 U.S. 558 (2003)

Lochner v. New York, 198 U.S. 45 (1905)

Loving v. Virginia, 388 U.S. 1 (1967)

Meyer v. Nebraska, 262 U.S. 390 (1923)

Moore v. East Cleveland, 431 U.S. 494 (1977)

Munn v. Illinois, 94 U.S. 113 (1877)

Palko v. Connecticut, 302 U.S. 319 (1937)

Pierce v. Society of Sisters, 268 U.S. 510 (1925)

Planned Parenthood v. Casey, 505 U.S. 833 (1992)

Poe v. Ullman, 367 U.S. 497 (1961)

Powell v. Alabama, 287 U.S. 45 (1932)

Roe v. Wade, 410 U.S. 113 (1973)

Skinner v. Oklahoma, 316 U.S. 535 (1942)*

The Slaughterhouse Cases, 16 WALL. (83 U.S.) 36 (1873)

United States v. Carolene Products, Co., 304 U.S. 144 (1938)

West Coast Hotel v. Parrish, 300 U.S. 379 (1937)

Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955)*

Zablock v. Redhail, 434 U.S. 374 (1978)*

*denotes cases not cited within the paper, but referenced during research

Selected References

- Bartee, A. (2006). *Privacy Rights: Cases lost and causes won before the Supreme Court*. Lanham, Maryland: Rowman & Littlefield Publishers, Inc.
- Bork, R. (1990). *The Tempting of America: The political seduction of the law*. New York: The Free Press, A Division of Macmillan, Inc.
- Brennan, W. (1985, October 5). *Contemporary Ratification*. (speech)
Found within: "Justices on Role of Supreme Court." CQ Electronic Library, CQ Historic Documents Series Online Edition. Originally published in *Historic Documents of 1985* (Washington: CQ Press, 1986). Retrieved from Eastern Michigan University database: <http://library.cqpress.com/historicdocuments/hsdc85-0001141117> (accessed October, 2006).
- Ducat, C. (1996). *Constitutional Interpretation* (6th ed.). St. Paul, MN: West Publishing, Co.
- Epstein, L., & Walker, T. (2004). *Constitutional Law for a Changing America: Institutional powers and constraints* (5th ed.). Washington, D.C.: CQ Press.
- Fallon, R. (2001). *Implementing the Constitution*. Cambridge, MA: Harvard University Press.
- "Federal Elections: 2002." The Federal Election Commission. Retrieved December 2006, from the World Wide Web: <http://www.fed.gov/pubrec/fe2002/federalelections2002.shtml>

- “Federal Election: 2004.” The Federal Election Commission. Retrieved December 2006, from the World Wide Web: <http://www.fed.gov/pubrec/fe2004/federalelections2004.shtml>
- The Federalist Papers. “No. 78. “The Judiciary Department.” The Avalon Project at Yale Law School. Retrieved October 2006, from the World Wide Web: <http://www.yale.edu/lawweb/avalon/federal/fed78.htm>
- Johnson, J. (2006). Griswold v. Connecticut. In M. Urofsky (Ed.), *The Public Debate over Controversial Supreme Court Decisions* (pp. 235-244). Washington, D.C.: CQ Press.
- Kahn, R. (1994). *The Supreme Court and Constitutional Theory, 1953-1993*. Lawrence, KS: University Press of Kansas.
- Kelly, A., & Harbison, W., & Belz, H. (1991). *The American Constitution: Its origins and development* (7th ed., Vol. 2). New York: W.W. Norton & Company, Inc..
- Keynes, E. (1996). *Liberty, Property, and Privacy: Toward a jurisprudence of substantive due process*. University Park, PA: The Pennsylvania State University Press.
- Mauro. T. (2000). *Illustrated Great Decisions of the Supreme Court*. Washington, D.C.: CQ Press.
- National and State Voter Registration and Turnout in the Congressional Election: 2002. United States Election Assistance Commission. Retrieved from the World Wide Web: http://www.gov/election_resources.asp
- O’Brien, D. (2005). *Storm Center: The Supreme Court in American Politics* (7th ed.). New York: W.W. Norton & Company.

- Phillips, M. (2001). *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s*. Westport, CT: Praeger Publishers.
- Renstrom, P. (2006). Lawrence v. Texas. In M. Urofsky (Ed.), *The Public Debate over Controversial Supreme Court Decisions* (pp. 367-376). Washington, D.C.: CQ Press.
- Schwartz, J. (2006). Roe v. Wade. In M. Urofsky (Ed.), *The Public Debate over Controversial Supreme Court Decisions* (pp. 299-308). Washington, D.C.: CQ Press.
- Sunstein, C. (1993). *The Partial Constitution*. Cambridge, MA: Harvard University Press.
- Wallenstein, P., & Mooney, E. (2006). Loving v. Virginia. In M. Urofsky (Ed.), *The Public Debate over Controversial Supreme Court Decisions* (pp. 252-261). Washington, D.C.: CQ Press.