2011

Supreme Court Decisions: The Power of Substantive Due Process

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Supreme Court Decisions: The Power of Substantive Due Process

Abstract
One of the fundamental elements of our government system is the broad concept of a right to fair treatment -- that even those accused or guilty of violating the law have due to them the right to a fair process. However, we regard a citizen's right to life, liberty, and property to be so significant or substantive that there is no due process fair enough to cover infringement of certain freedoms. This has come to be known as substantive due process. Through an analysis of judicial theory and Supreme Court decisions, I compare the use of substantive due process on economic protections and relate the Court's decision-making methods to modern civil liberties jurisprudence and decide whether the Court is acting within its power to actively create constitutional rights. Although substantive due process is by and large no longer used in an economic standpoint today, the Supreme Court continues to utilize its guarantees to protect the invasion of people's privacy.

Degree Type
Open Access Senior Honors Thesis

Department
Political Science

First Advisor
Barry W. Pyle

Subject Categories
Law

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SUPREME COURT DECISIONS:
THE POWER OF SUBSTANTIVE DUE PROCESS

By

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A Senior Thesis Submitted to the
Eastern Michigan University
Honors College
in Partial Fulfillment of the Requirements for Graduation
with Honors in Political Science

Approved at Ypsilanti, Michigan on this date June 15, 2011

Supervising Instructor (Print Name and have signed)

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Table of Contents

I. Abstract 3

II. Introduction 4

III. Part I
   A. The Significance of Substantive Due Process 7
   B. Interpretation: Formalism 8
   C. Interpretation: Political Policy-Making 11

IV. Part II
   A. The Rise of Due Process 13
   B. Initial Use: Procedural Interpretation 14
   C. Substantive Interpretation: Right to Contract 21
   D. End of Substantive Interpretation 28
   E. Return of Substantive Interpretation: Right to Privacy 29

V. Part III
   A. The Inconsistency of Substantive Due Process 37
   B. Discussion 42

VI. References of Cases 46

VII. References 47
Abstract

One of the fundamental elements of our government system is the broad concept of a right to fair treatment – that even those accused or guilty of violating the law have *due* to them the right to a fair *process*. However, we regard a citizen’s right to life, liberty, and property to be so significant or *substantive* that there is no due process fair enough to cover infringement of certain freedoms. This has come to be known as substantive due process. Through an analysis of judicial theory and Supreme Court decisions, I compare the use of substantive due process on economic protections and relate the Court’s decision-making methods to modern civil liberties jurisprudence and decide whether the Court is acting within its power to actively create constitutional rights. Although substantive due process is by and large no longer used in an economic standpoint today, the Supreme Court continues to utilize its guarantees to protect the invasion of people’s privacy.
Introduction

The Constitution of the United States is the binding document that acts as a foundation for our system of government. Within this document are procedures and regulations that both limit government as well as control its citizens. Yet, as with any system created and run by man, the process is not entirely perfect. When implementing constitutional law, the problem lies not only on the framers original intentions, but also in the methods of interpretation and definition. Judicial activism allows the personal views of the judges based on the time and needs of the nation guide their decisions. As the area of possible interpretations increase, the possibility for judicial activism also increases. My study focuses on the text of the Fourteenth Amendment’s due process clause that states 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.

When activism crosses the notion of liberty and of due process, the Court places itself in the problematic position to define what the word “liberty” encompasses. Allowing the Court to define liberty so liberally allows for its interpretation to produce any freedom, opening a wide array of rights for the American people. For instance, one may interpret liberty as an individual’s right to speed, smoke indoors, hire child labor, and so forth.
The expansion of the due process clause over the years has opened rights and liberties not originally expressed in the Fourteenth Amendment. Through analysis of Court decisions and extra-legal influences over the course of history, I find where the Court establishes both procedural and substantive interpretations in the due process clause answering the empirical question: *How does the Court interpret the Fourteenth Amendment and apply Due Process to economic and civil liberties?*

Alexander Hamilton in Federalist 78 believes that the Court is the “least dangerous branch” having little power over the other political branches stating:

> The judiciary... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment.... If they [the courts] should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. (Hamilton, Federalist #78)

Hamilton acknowledges the need for a judiciary that is separate from the legislature. The Court’s role should not be feared of abuse since their role is only to interpret the law, not create it. But what are the dangers of a judiciary that exercises WILL instead of JUDGMENT? Many political theorists attempt to define correctly the Court’s power, some stating that the Court is venturing too far from the original textual meanings of the Constitution while others believe that modern interpretations are essential for a growing and expanding world. Although Hamilton believes that the
Court’s role is not to be politically influenced, I analyze due process cases where the Court has not only overpowered the other political branches, but has done so with personal and political intentions. Through the analysis of Court decisions, I attempt to convey a sense of the proper role of the Court by answering the normative question: 

*should the Supreme Court be out front essentially creating legislation?*

The purpose and significance of this analysis can be summed up in the following quotation from Justice Oliver Wendell Holmes, who states:

> The rational study of law is still to a large extent the study of history. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. (Holmes 457)

According to Holmes, in order to understand fully the strength of an idea or concept, one must examine it from all possible angles. To accomplish this, my study is organized into three parts: *Part I* identifies the significance of both substantive due process and judicial interpretation theories; *Part II* answers the empirical question by exploring the history behind substantive due process and its application in various Supreme Court cases; I finally attempt to justify the Court’s role in *Part III* answering the normative question by utilizing the contexts from the first two parts of analysis. Only by exposing how the Court utilizes substantive due process to the “light of day” will its power be truly understood.
PART I

The Significance of Due Process

Before analyzing the Court’s behavior on this subject over the past hundred years, one must first understand why due process is so significant. The due process clause states that no State shall deprive any person of life, liberty, or property, without due process of law. The most common association of due process is in criminal procedure—to protect an individual’s right to fair procedures that even those guilty of a crime have due to them a right to a fair trial. For instance, a man caught on video committing a crime is still given his right to a trial regardless of the amount of evidence found against him that proves his guilt. This interpretation, commonly referred to as procedural due process, guarantees that all citizens be fairly treated equally under the law. Yet the due process clause also has a second interpretation where certain rights and liberties are regarded to be so significant that no procedure is fair enough to cover such intrusion. With this interpretation, the Court deems no process is fair enough to cover such disturbance of a citizen’s right to life, liberty, and property. Known as substantive due process, this interpretation allows the Court to essentially create law at their whim. Under substantive due process, the Court establishes constitutional rights that did not previously exist, clearly or overtly, within the text of the Constitution. This allows the Court to act as a superlegislature, a body of government that acts with the authority of lawmaking, where the Court’s interpretation of the law is the same as creating the law. Over time substantive due process develops into an essential source for the people’s protection of self-governance that has slowly grown in acceptance as part of the Court’s methods of judicial interpretation and application. While this concept may seem logical
and appropriate in many cases, it carries with it a level of inconsistency that challenges the very structure of the Constitution’s rules and procedures. Despite the existence of these inconsistent and contradictory characteristics, the Court continues to use and apply substantive due process today. As such, many of today’s controversial and significant Supreme Court decisions derive from substantive due process’ attempts to define the scope of liberty (e.g. abortion, gay rights, assisted suicide, etc.). Over the course of time, the Court’s use of due process challenges the state’s power to regulate. The use of due process as a method to restrict the legislature contradicts what Hamilton envisioned for the Court in Federalist #78. Again, Hamilton was well aware of the dangers of a Court that overextends its power over the other branches. Essentially, due process becomes potentially dangerous when the Court’s use it as a method to create law.

**Interpretation: Formalism**

In the decision making process, judges function as constitutional interpreters. This suggests that the connection between text and doctrine is fundamentally significant which must be explored in order to justify the appropriateness of the Court’s role. I have separated their interpretation methods into two framed theories: *formalism* and *political policy-making*.

Under formalism, the law is objective. The interpreter is removed from the interpretation; thus, eliminating the possibility of imposing personal beliefs and other extra-legal influences into their decision making process. This objectivity restrains the interpreter from the influences of personal will, feelings, and biases. Justice Antonin
Scalia, known for his strong formalist position in constitutional interpretation, defends formalism stating:

Of all the criticisms leveled against textualism, the most mindless is that it is formalist. The answer to that is, of course it's formalistic! The rule of law is about form . . . A murderer has been caught with blood on his hands, bending over the body of his victim; a neighbor with a video camera has filmed the crime and the murderer has confessed in writing and on videotape. We nonetheless insist that before the state can punish this miscreant, it must conduct a full-dress criminal trial that results in a verdict of guilty. Is that not formalism? Long live formalism! It is what makes us a government of laws and not of men. (Scalia 25)

According to formalism, law is a matter of legal principle and procedure; what is written is what must be followed. The meaning of law is not a product of the interpreter's intent, but rather the intent of the original creator of the law. Original intent binds the interpreter to the values and principles of the framer, reflecting the original understanding of a text to only those who wrote the text. Under formalism, the Court reinforces the original intent of the law and does not incorporate new and unintended principles into its language.

Unlike the lawmaking body of the legislature, the Court is not held accountable to political processes, such as elections, due to their lifelong tenures. This becomes a problem when judges, positions not elected by the people, strike down laws created by those in elected positions – legislators and elected representatives. Because of their life
tenures, in order for people to be protected from an “over-powerful” Court, the Court must remove itself from its decision-making process and bind itself within the laws of the Constitution. If the Court assumes the role of a superlegislature, then it becomes superior to any other governmental branch crossing the line between law interpretation and law creation. With such authority, the Court must act as its own “check and balance.”

While formalism has its strengths, there are also many weaknesses. While formalism may restrain judiciary power and activism, the theory tends to create problems in the modern application and implementation of the law. For instance, the original intent of an outdated law attempts to apply morals and principles of a time long gone to modern issues which did not previously exist at the time of ratification.

A second weakness of formalism involves the certain areas of the Constitution which cannot be penetrated by simple legal definition. These areas, regardless of the effort to limit textual possibilities, will always produce indeterminacies. Whittington in Constitutional Interpretation provides this example:

If given the text, “buy a dog,” the interpreter can draw the boundaries of meaning embodied in the text. You must buy a dog; you may not buy a cat, horse, or elephant. But the choice of what dog to buy is a non-interpretive choice. Though there may be reasons supporting the choice, and though the text may be suggestive as to those reasons, a pure interpreter could have no decisive justification for purchasing any particular dog, while all texts may not do so, this one necessarily calls for something beyond interpretation in order to develop fully its meaning. (Whittington 7)
By analysis, defining liberty is much like purchasing the dog in the example. It may be simple to eliminate what liberty is not, but there remain countless possibilities of what liberty is, as there are a countless number of combinations of breeds, colors, and ages of dogs one could purchase. Formalistic interpretation may not be suitable in every situation.

**Interpretation: Political Policy-Making**

The interpretive measures of political policy-making, on the other hand, allows for interpretive creativity, is subjective, and derives from the interpretation of what may not necessarily be written, but rather, what the law implies. While formalists believe the law is a product of how the law should or ought to be, realists contradict this approach by simply determining what the law is, more so concerning itself with its modern application. Subjectivity allows justices the ability to act as policy-makers, making it easier to adapt the Constitution to fit modern day issues and allow the Court to be a political institution. This theory accepts that personal views and principles will always affect interpretation, inescapable of law’s political nature and extra-legal influences. Justice William Brennan in *Contemporary Ratification* defends this theory stating “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.”

Under this process, justices base their interpretations on simply more than what is written. This allows for interpretations to adapt and conform to modern problems. It is
with this flexibility that allows the Court to interpret due process and liberty rather liberally.

Political policy-making does have its share of criticism. It relies much on the moral philosophies of the nine justices of the Court who are, by and large, appointed into a position by no control of the American people. Court Justices are nominated by the President and appointed by Senate confirmation. Their appointment is void of any democratic process on part of the American people and; thus, abuse of their decision making powers essentially circumvents the democratic process. Again, a problem arises when the uncited Court is given the authority to strike down regulations created by elected representatives – not so much by finding the created law to be unconstitutional by formalistic terms, but more so when this is done with political influences. When the Court has the power to create law outside of the original scope of the laws found in the Constitution, then the Court is essentially stripping the Constitution of its supremacy and replacing its own preferences as the “true” meaning of the Constitution.

So how can the Constitution be both fixed and flexible simultaneously? Where are the limits of such constitutional flexibility? Is the Court capable in determining the legal thresholds of what is and what is not protected under the law? To amplify the significance of extra-legal influence, one simply needs to turn to the Court’s inconsistent interpretation of the due process clause. In the case of attempting to define broad words such as liberty, there is no one correct interpretation which any formalist can define and which realists can agree upon in meaning. This is where the Court risks crossing the line that separates the interpretation of law and the creation of law.
PART II

The Rise of Due Process

The expression due process is a deviation from the Magna Carta’s “according to the law of the land” which limits the English government’s enforcement measures; however, the notion behind substantive due process is a product of the judicial theoretic stemming from the Federalist-Antifederalist debates over the best method in which to protect individual natural rights and liberties. On one side of the debate, one limits governmental powers to a number of predetermined responsibilities, while the other extreme authorizes government’s general powers limited to a number of predetermined exceptions. Fearful of the Federalist’s formation of a centralized government with unrestricted powers, the Antifederalists demanded a list of specific rights to act as a safeguard for the protection of individual’s vested rights and liberties. This led to the creation of what is now the Bill of Rights.

The debate between vested rights and a written Constitution as supreme law has long been a part of understanding Constitutional law. Opponents of vested rights argue that judicial review can only reference the written law, further advocating the state’s “police power” right to regulate the holding of property in the public interest, subject only to restraints listed in the Constitution. However, in support of the unwritten law of natural rights, Edward Corwin characterizes the basic doctrine of American constitutional law by stating:

We are now prepared to consider the underlying doctrine of American Constitutional Law, a doctrine without which indeed it is inconceivable that there
would have been any Constitutional Law. This is the Doctrine of Vested Rights, which-to state it in its most rigorous form-setting out with the assumption that the property right is fundamental, treats any law impairing vested rights, whatever its intention, as a bill of pains and penalties, and so, void. (Corwin 250)

Corwin’s characterization includes a broad rule which the legislature cannot take away an individual’s vested rights of property. The Court decisions prior to the Civil War limit this characterization. During this time, the Court’s pit the concepts of individual rights against the public’s general welfare; many of whom believe that the government cannot interfere with people’s property or liberty unless such intrusion is necessary to advance the public’s general welfare. Over time, the debate over the word *due* becomes significant. Will the legislature determine what is *due* or will this be a role for the Court? The Court’s interpretation of the due process clause will challenge the states’ power to regulate.

**Initial Use of the Due Process Clause: Procedural Interpretation**

The *Dred Scott v. Sandford* 60 U.S. 393 (1857) decision is an early example of the struggle to grasp the correct application of the due process concept. Chief Justice Roger Taney’s opinion in *Dred Scott* delivers an initial application of substantive due process stating:

> [A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular
Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law. (*Dred Scott*, 60 U.S 393)

Taney’s opinion explains that the Missouri Compromise’s slavery ban deprives slave holders of their property (referring to slaves) without the due process of law. This marks an early understanding of due process as a *procedural* concept.

The Court first attempts to utilize and expand the meaning of the Fourteenth Amendment in 1873. *Butcher's Benevolent Association v. Crescent City Livestock Landing &Slaughter House Company*, 83 U.S. 36 (1873), known as *The Slaughterhouse Cases*, draw out interpretations of the newly constructed Fourteenth Amendment’s privileges and immunities, equal protection, and due process clauses. In the *Slaughterhouse Cases*, the state of Louisiana created a state-run slaughterhouse in response to claims that butchers in New Orleans had polluted the Mississippi River with waste. Over four hundred members of the Butchers’ Benevolent Association denounced the state’s actions as not only creating a monopoly but deprived butchers the right to pursue their trade, claiming that right as a basic guarantee granted by the privileges and immunities clause. The butchers use the Fourteenth Amendment’s broad language for their defense stating that its privileges and immunities and equal protection clauses encompassed all citizens rather than the sole protection of African-Americans, the driving force behind the amendment’s ratification.

The Court does not believe the state’s actions violate either clause found in the Fourteenth Amendment. In a five-four decision, Justice Samuel Miller narrowly
interprets the Fourteenth amendment based solely on its intended purpose at ratification—utilizing a formalist approach. The privileges and immunities clause was to only be applied to the rights of national citizenship rather than state citizenship completely throwing out the use of this clause for years to come. Justice Miller states:

...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.

(Slauderhouse, 83 U.S. 36)

During this time, equal protection was primarily intended to protect the discrimination against African-Americans and so Miller afforded no violation. The Court also limits the use of the due process clause claiming that it is only restricting interference of the procedurally-based rights of the citizens. Here, the Court’s application of the due process clause from the procedural point-of-view provides the state ample power to regulate as necessary. Miller’s binding position prevents the Court’s ability to act as a superlegislature.

In dissent, Justice Stephen Field views Miller’s interpretation of the Fourteenth Amendment as a “vain and idle enactment” stating:
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...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)*

It is here in Field's dissenting opinion that grants substance to the term *liberty*, as its meaning is much deeper than its vague, face value. Along with Field is Justice Joseph Bradley's dissent that states:

A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property” *(Slaughterhouse, 83 U.S. 36)*.

Bradley recognizes the significance of liberty and property inherent with the people, such that the state has no authority to seize absolute control over. However, in this case, the Court's majority holds its interpretation of the due process clause in a procedural point-of-view, taking a hard-lined stance against the idea of substantive due process. Again, Justice Miller prevents the Court from taking on the role of a superlegislature, an authoritative censor with the power to determine what the states can or cannot do.
Four years after the *Slaughterhouse Cases*, Illinois establishes grain warehouse and elevator rates declaring that businesses used for public good be regulated by the government. The elevator owners claim that this is a violation of their due process rights. The argument comes to the Court in *Munn v. Illinois*, 94 U.S. 113 (1877). The Court once again holds in favor of the state, however, the Court’s opinion suggests opening up to the notion of substantive due process. The Court in a seven-two decision states that the imposed rates were not violations of the Fourteenth Amendment’s equal protection and due process clauses. Chief Justice Morrison Waite argues that the government may regulate the use of business interests or private property when such utilities and regulations serve the public good. In respect to the business-affected-with-a-public-interest (BAPI) doctrine, Waite states “We find that when private property is ‘affected with a public interest it ceases to be [of private right] only’” (*Munn v. Illinois*, 94 U.S. 113). Again, the Court’s majority applies *procedural* due process; however, ironically it is Waite’s opinion that opens the door for substantive due process. If private businesses affect public utility were open to regulation then logically, private businesses with *no* affect to the public utility could *not* be regulated by the state. In dissent, Justice Field states:

…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 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)

Again, similar to his Slaughterhouse opinion, Field’s dissent states the significance of liberty, that the Fourteenth Amendment protects citizens from the interference of the state.

After nearly a quarter-century of Court decisions supporting the governmental interest in public welfare and procedural due process, the notion of substantive due process begins to surface with Allgeyer v. Louisiana, 165 U.S. 578 (1897). In Allgeyer, Louisiana passes a statute which prohibits out-of-state marine insurance companies from conducting business in the state without an appointed agent within the state. As an extension of the state’s police powers, the statute’s purpose is to prevent fraud and protect the citizens of Louisiana from deceitful insurance companies. E. Allgeyer & Company violates the law when they purchase marine insurance from the Atlantic Mutual Insurance Company based in New York to cover an international shipment of cotton. Allgeyer asserts that the Louisiana statute violates the equal protection and due process clause of the Fourteenth Amendment that protects Allgeyer’s liberty to enter contracts with businesses of its choice, including out-of-state businesses.

In a unanimous decision, the Court sides with Allgeyer finding that the Louisiana law violates the Fourteenth Amendment and deprives Allgeyer its liberty without due process. Justice Rufus Peckham, delivering the Court’s majority opinion, defines liberty drawing upon Bradley’s dissents from Slaughterhouse and Munn stating:
The ‘liberty’ mentioned in [the Fourteenth] amendment means *not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned*. (Emphasis added) (Allgeyer, 165 U.S. 578)

Here, the Court finds meaning in the term *liberty* referencing Field’s interpretation of the word twenty-years earlier. The Court follows suit to Field’s interpretation stating that liberty does in fact allow the citizen’s freedom to pursue one’s livelihood and that the due process clause does protect private citizen’s right to contract from state interference. Not only did Peckham’s opinion develop a clear link between economic liberty and the due process clause, it encompassed the “right to contract” establishing an early case that supports substantive due process. The Court would soon begin to act as a superlegislature, the very position Miller tried to prevent in *Slaughterhouse*.

One year later, the Court in *Holden v. Hardy*, 169 U.S. 366 (1898) upholds a Utah statute that limits the number of working hours for miners. The Court finds that the Utah law is a legitimate and *reasonable* exercise of police power supported by facts that
distinguish the relationship between dangerous work conditions and the number of work hours. However, the precedent set by Allgeyer will influence the use of substantive due process in the infamous Lochner case of 1905.

**Substantive Interpretation: Right to Contract**

For over twenty years before Allgeyer, due process sustained procedural interpretations. One may note that the shift in the decisions between Slaughterhouse and Allgeyer coincide with the transition between the justices presiding on the bench. By 1890, both Miller and Waite, justices strongly in opposition of substantive interpretations, stepped off the bench, while Field and Bradley remained on board to rule and advocate for substantive due process.

This transition marks the first shift in the Court’s interpretation of the due process clause, opening the Court to take on a superlegislature role. *Lochner v. New York*, 198 U.S. 45 (1905) solidifies substantive due process as an interpretation tool for the Court. In *Lochner*, New York enacts the Bakeshop Act which prohibits bakers from working more than ten hours per day or sixty hours per week. Joseph Lochner of Lochner’s Home Bakery was indicted for violating the Act. Lochner appeal to the Supreme Court claiming that the state violated his liberty protected by due process clause of the Fourteenth Amendment and argued that the “right to free contract” was a right encompassed by substantive due process.

The Court decides five-to-four in favor of Lochner invalidating the New York statute. Justice Peckham, again in support of economic substantive due process, states that the Bakershop Act interfered with the “right to free contract” and that the regulation
of the bakers’ work hours did not constitute a legitimate exercise of the state’s police powers. Justice Peckham states:

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)

Peckham raises the following question in respect to the character of legislation and constitutional protection:

Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Or course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

(Lochner, 198 U.S. 45)
According to the Court’s majority, the state interferes with the employer’s ability to contract with their employees upon their own terms; thus, the state violates the citizen’s right to contract under the due process clause. The Court claims that the state can only exercise its police powers only if it is a reasonable exercise of power. Thus, the Court set itself as the final determinant in what is and what is not reasonable state action, or rather, a superlegislature with the authority to censor state actions.

When compared to Holden just 7 years earlier, one questions the difference in reasonable state actions. While the Court upholds the Utah law regulating the working hours of miners, the Court strikes down the New York law regulating baker’s working hours. The Court utilizes a “legislative analysis” of the health of professions where the Court, not the states, determines which professions are protected under the right to contract. Between these two cases, the Court decides that bakers are at no risk of excessive working hours, while the hours of miners must be regulated.

Justice Holmes’ Lochner dissent advocates strongly against the Court’s activism and justification for “Social Darwinism” or “survival of the fittest” that emphasizes the hypercompetition between people in laissez-faire economics. Considering the political and economic influences of that time period, Holmes’ opinion invalidates the influences of extra-legal factors at work and the popular preferences for the laissez-faire and Progressive ideology of the time in an effort to maintain consistency of constitutional principles. It is not within the Court’s power or jurisdiction to act as a legislative body, nor interfere with the political process in which the laws are created. If the Court is to regard liberty as a substantive right of the people, where are its limits?
Despite Holmes’ opposition in *Lochner*, the freedom of contract and liberty continues to outweigh the governmental interest in public welfare inconsistently for the next three decades until the New Deal Era in the 1930’s and finally ending with the *West Coast Hotel Co. v. Parrish* (1937) decision. This growth in power allows the Court to apply personal theory rather than legal principle in their decisions. Throughout this time period, the ability for the legislature to exercise any control of the national economy becomes nearly impossible as the Court continues to invalidate legislation via substantive due process.

In *Muller v. Oregon*, 208 U.S. 412 (1908), three years after the *Lochner* decision, the Court upholds an Oregon law that limits the working hours of women. Justice David Brewer writes the unanimous opinion establishing a difference between sexes with the support of a massive amount of statistical data, therefore not overruling the decision made in *Lochner*. At that time in history, society considers women unequal and inferior to men. For the Court, women’s physical and social differences warrant different rules in respect to contract rights. Similar to the decision of *Holden*, the Court is able to favor legislative statutes when the rational basis has concrete research and supporting facts available. However, despite these rulings, the freedom of contract continues to outweigh the governmental interest in public welfare until the New Deal era in the 1930’s.

In 1918, Congress enacts a law which set minimum wages for women and children in the District of Columbia leading to *Adkins v. Children’s Hospital*, 261 U.S. 525 (1923). In a five-three decision, Justice George Sutherland delivers the Court opinion finding that the statute violates the freedom of contract upholding and reinforcing the decision in *Allgeyer* and *Lochner*. Sutherland reiterates that the *Muller* decision is not an
overruling of *Lochner*, but a decision based on the facts found on gender differences. However, a few major changes occur in between the time of *Muller* and *Adkins*, specifically the passage of the Nineteenth Amendment granting women’s suffrage. Sutherland, recognizing these societal changes, states:

> [in] view of the great – not to say revolutionary – changes which have taken place since *[Muller]*, in the contractual, political, and civil status of women, culminating in the Nineteenth Amendment, it is not unreasonable to say that these differences have now come almost, if not quite, to the vanishing point. (*Adkins*, 261 U.S. 525)

However, he admits that the freedom of contract is not to be absolute and that limitation may be justified in “exceptional circumstances” allowing the Court to decide its definition ad-hoc. Justice Holmes’ dissent basically claims that this is not the role of the Court.

At the onset of the Great Depression, the majority of American citizens demand government intervention in order to restore the broken economy. The Court, however, continues to deny state interference in individual’s economic liberty rights; thus, conflicting with many of President Franklin Roosevelt’s New Deal programs. In *Nebbia v. New York*, 921 U.S. 502(1934), New York enacts a Milk Control Law regulating the minimum retail price of milk in an effort to combat the farming price decline after World War I and the Great Depression. Leo Nebbia, a grocery store owner convicted of violating the statute, claims that the law was a violation of equal protection and the due process clause. In a five-four decision, Justice Owen Roberts states that the New York
law did not violate due process based on the fact that the price controls were neither arbitrary nor discriminatory to the legislative policy in order to promote the general welfare of its citizens. He further states that “neither property rights nor contract rights are absolute” a reinforcement of Justice Sutherland’s view on contracts in Adkins. Justice Roberts leads the shift from substantive due process back to procedural due process with his decision in West Coast Hotel.

After the Court invalidated numerous New Deal statutes, Roosevelt proposes his plan authorizing the appointment of several new justices who would favor his programs. While Congress eventually defeated his court-packing plan, Roosevelt’s influence over the Court succeeded to sway Roberts towards his position. Over the next four years, Roosevelt would appoint seven new justices severely altering the ideology of the Court. This shift apparently marks the beginning of the end to substantive interpretation.

The End of Substantive Interpretation

The Court discards its substantive due process interpretation in the case of West Coast Hotel v. Parrish, 300 U.S. 379 (1937). In West Coast, Elsie Parrish brought suit against her employer the West Coast Hotel Company to recover differences between her sub-minimum wages paid to her and the minimum wage established by state law. The Court, in a five-four decision, holds that the enactment of minimum wages for women was not a violation of the Constitution overruling the Adkins decision. Roberts’ shift back to procedural due process, a move infamously referred to as “the switch in time that saved nine,” suggests the Court adopt the need for rational justification through the use of a “rational basis test,” the minimum level of scrutiny in judicial review.
Justice Sutherland's dissent much like his majority opinion in *Adkins*, advocates for the necessary protection for substantive rights. Accusing the majority for subjecting itself to the necessities of time, Sutherland's opinion is subject to its own irony. The influences of laissez-faire, progressiveness, the perception of women's inferiority, to the women's rights movement, change of political parties, and the Great Depression were all extra-legal factors in the Court's decision making process for the previous thirty years. The change in socioeconomic perspective helps to develop this inconsistency of decisions regarding substantive due process. In his dissent, Sutherland admonishes the majority for its abuse of judicial activism, but it is with great ignorance to believe that substantive due process is not a construct of judicial activism as well.

*Williamson v. Lee Optical Company*, 348 U.S. 483 (1955) reconfirms the *West Coast* decision marking the end of substantive due process and the introduction to "rational basis scrutiny." Justice William Douglas 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. (*Williamson*, 348 U.S. 483)

Although the Court officially marks an end to substantive due process in these last few cases, only ten years pass until it is used again by the Court.
The Return of Substantive Interpretation: Right to Privacy

While liberty in respect to due process is no longer an issue of economic rights, *Griswold v. Connecticut*, 381 U.S. 479 (1965) first establishes the interpretation of liberty as a right to privacy. Before *Griswold* was *Poe v. Ullman*, 367 U.S. 497 (1961) which challenges Connecticut’s nineteenth-century statute prohibiting the use of contraceptives, outlawing birth control clinics, discouraging birth control practices. In dissent, Justice John Marshall Harlan states that 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). Harlan further supports the use of substantive due process in *Poe* stating:

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 restraint. (*Poe*, 381 U.S. 479)

In his dissent, Harlan points out that the Court consistently rejects attempts to limit the Fourteenth Amendment’s due process clause to guarantee procedural fairness.
Harlan’s interpretation of liberty would continue to serve as the foundation for an individual’s right to privacy.

In the case of *Griswold*, physician Estelle Griswold opens a birth control clinic violating the Connecticut statute which she takes to the Court arguing that the law is a violation of privacy between married couples. In a 7-2 decision, Justice Douglas states:

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 utilizes precedent set by the substantive-minded Lochner Era Court to support the expanded definition of liberty. It is ironic that that Douglas’ opinion from *Williamson* marking the death of substantive due process contradicts his opinion in *Griswold*. Just ten years earlier, Douglas in *Williamson* refuses to use substantive due process to strike down laws that may be “unwise, improvident, or out of harmony with a particular school of thought” yet utilizes substantive due process in *Griswold* to strike down Connecticut’s ban on contraceptives. Again, the Court’s role sways towards judicial legislation. In dissent, both Justice Black and Justice Potter Stewart argue the Court oversteps its authority claiming that the Court’s majority is utilizing personal theories rather than legal principles. Justice Stewart states:
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)

Justice Black’s dissent makes it even more evident that, although he did not completely agree with Connecticut’s contraceptive ban, he could not find any constitutional restriction against the statute. He believes that the Court does not have the power to strike down the state’s legislation and that the Court is utilizing substantive due process, not in an economic sense, but in a social sense to protect a “constitutional right to privacy.” Black believes the Court is heavily diluted the idea of “constitutional right to privacy” by expanding on it far beyond what it was originally intended to protect. On the word “privacy,” Black states:

Broad, abstract and ambiguous concept...which can be easily interpreted as a constitutional ban against many things... 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)

He believes that the Court was reviving the Lochner ideology essentially telling the Court that their reasoning in this case paralleled the decisions during the Lochner
era's use of substantive due process which struck down numerous economic statutes and was abandoned in the 1937 West Coast case. He states:

Arbitrary and capricious or shocking to the conscious formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation.... that formula is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I thought we had laid that formula, as a means of striking down state legislation, to rest. (Emphasis added) (Griswold, 381 U.S. 479)

Black continues to argue against the Court using substantive due process to authoritatively veto legislative lawmaker decisions stating that the Court was not created to act "as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern." Although Black was aware that the Constitution must be a flexible document that stays in "tune with the time" he tells the Court that changes must be driven by the political process; definitive rights of privacy such as the result of Griswold must come through by amendment. However, Justice Douglas in his majority opinion claims that the Court was not acting as a superlegislature; it is in fact what the Court has become today. Griswold establishes the Court's ability to choose what rights to cover under the term liberty. The Court essentially grants itself the authority to dictate state actions.
Roe v. Wade, 410 U.S. 113 (1973) attempts to determine the limitations on a citizen’s right to privacy. Justice Harold Blackmun establishes when the state can interfere in a woman’s right to privacy in the realm of abortions, defining the trimesters of pregnancy. The Court claims that the state cannot interfere with a woman’s right to privacy during the first trimester of pregnancy. Regulation of abortion can occur during the second trimester in order to protect the woman’s health, while states can completely ban abortions during the third and final trimester. In dissent, Justice William Rehnquist states:

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

Rehnquist admits that the Court’s decision is a product of judicial lawmaking. White, a frequent critic of substantive due process and dissenter of Roe, suggests that the end result of Roe was “an exercise in raw judicial power” criticizing the decision for “interposing a constitutional barrier to state efforts to protect human life.” White, a proponent of stare decisis, consistently opposes the basis of Roe throughout his tenure. White expresses his view on the legitimacy of substantive due process in his dissent in Moore v. City of East Cleveland, 431 U.S. 494 (1977) stating:
The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers, and that much of the underpinning for the broad, substantive application of the Clause disappeared in the conflict between the Executive and the Judiciary in 1930s and 1940s, the Court should be extremely reluctant to breathe still further substantive content into the Due Process clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority. (Moore, 431 U.S. 494)

White confirms his views on substantive due process and commitment to judicial restraint in Bowers v. Hardwick, 478 U.S. 186 (1986). Bowers upholds Georgia’s anti-sodomy law. White’s majority opinion states:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.... There should be, therefore, great resistance to ... 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)
White’s opinion in *Bowers* is eventually overturned in *Lawrence*, one year after his death, where substantive due process is used as a tool for judicial lawmaking once again. In 2003, a Texas law prohibiting oral and anal sex for same-sex couples is tested in the case of *Lawrence and Garner v. Texas*, 539 U.S. 558 (2003). Houston police officers catch and arrest John Lawrence and Tyron Garner for violating the Texas statute.

The Court decides six-to-three, that the crime for same-sex couples engaging in intimate sexual conduct is a violation of the due process clause. The Court’s rationality considers both Lawrence and Garner to be free as adults to engage in private conduct as a liberty protected by the due process clause. Justice Anthony Kennedy writes the majority opinion stating:

Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the government.... The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual. (*Lawrence*, 539 U.S. 558)

The majority finds that “liberty” and “right to privacy” protects same-sex couples engaging in sexual acts with each other. Justice O’Connor’s concurrence supports the striking of the Texas sodomy law, however, disagrees with the use of substantive due process as the rationale. O’Connor believes that the equal protection argument has the same power to find the Texas statute unconstitutional and in turn, would avoid the Court defining sexuality as a protected liberty.
In 1990, Dr. Ira Gore, Jr. bought a new BMW sports sedan from an Alabama dealership. Nine months later he discovers that his new car was repainted prior to his purchase and files suit against BMW for committing fraud by failing to disclose that his new car had been repainted. The Alabama Circuit Court favors Gore, awarding him $4,000 in compensatory damages and $4 million in punitive damages, which the Alabama Supreme Court later reduces to $2 million due to a jury calculation error. BMW maintains that the award was grossly excessive and a violation of the due process clause leading to the Court case BMW of North America v. Gore, 517 U.S. 559 (1996).

The Court in a five-four decision states that the due process clause prohibits states from imposing excessively high punitive damages. Justice John Paul Stevens delivers the majority opinion determining three specific factors in his judgment: the degree of reprehensibility, ratio, and sanctions for comparable misconduct. Under degree of reprehensibility of the defendant’s conduct, Stevens points out that the harm BMW inflicted on Gore was not particularly reprehensible, as to say no reckless disregard for safety or health and was simply economic in nature. Under his second factor, Stevens states that the ratio to the compensatory damages awarded was excessively high in nature and is indicated by the $2 million punitive damage awarded to Gore amounting to a 500 to 1 ratio when compared to Gore’s actual harm. Finally, Stevens makes a comparison of the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct stating that the maximum civil penalty for violating Alabama’s Deceptive Trade Practices Act was $2,000 (compared to other states with penalties ranging from $5,000-$10,000), thus indicating the $2 million penalty imposed on BMW as excessively high in nature. Justice Breyer concurs stating that although there is a
degree of difficulty in assessing a reasonable punitive award, the "gross excessiveness" of the damages found in the case is clearly a violation of the due process clause.

The Court's majority uses substantive due process to find gross excessive punitive damages claims to be a violation of the Constitution. Justice Scalia and Ruth Bader Ginsburg's dissent claims that this case was by all means outside the Court's jurisdiction that surpasses the limits of substantive due process interpretations, raising the question: Where in the due process clause, Fourteenth Amendment, or Bill of Rights does one read about an "excessive damages clause?"
Part III

The Inconsistencies of Substantive Due Process

In the scope of substantive due process, constitutional rights were not originally conceptualized in this fashion. As established by the Federalist-Antifederalist debates, the general powers of government had been delegated into the Constitution, but limited to a number of predetermined exceptions and responsibilities guarding the individual’s vested rights and liberties. In the early part of the twentieth century, the Court could no longer maintain limiting government to such exceptions due to the socioeconomic transformations catalyzed by the Progressive Era. Despite shifts in ideology during the Great Depression, the Court seems convinced that substantive due process could approach civil liberties in the same fashion as it had on economic protections. This has been the fixture in modern civil liberty jurisprudence ever since. However, there is no justification yet that this practice is appropriate for the Court.

The biggest objection to substantive due process is the blatant gap between doctrine and text or process and substance, specifically the missing connection to the procedure referred to in the due process clause. In support of the due process clause, Justice Brandeis states “despite arguments to the contrary which had seemed to me persuasive, it is settled that the Due Process Clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure” (Whitney, 274 U.S.).

Sixty years later Justice White admits that the gaps still exist stating:
It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken; the cases are legion in which those Clauses have been interpreted to have substantive content. (*Bowers, 478 U.S. 186*)

Of course, the Court has attempted to fill the gap between doctrine and text. Justice Harlan’s opinion in *Poe* further establishes a connection between substantive due process and constitutional text. According to Harlan, the Court refuses to limit procedure for the following reason:

Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty, or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. Compare, *e.g.*, *Selective Draft Law Cases*, 245 U.S.366; *Butler v. Perry*, 240 U.S. 328; *Korematsu v. United States*, 323 U.S. 214. Thus the guaranties of due process, though having their roots in Magna Carta’s “*per legem terrae*” and considered as procedural safeguards “against executive usurpation and tyranny,” have in this country “become bulwarks also against arbitrary legislation.” (*Poe*, 381 U.S. 479)

In other words, the *process* of the clause cannot govern solely on procedure because it may lead to unfortunate consequences if it did. Regardless of the uncertainties
which remain, the Court is compelled or bounded by *stare decisis*. So not only is it important for the Court to understand constitutional text, but they must also acknowledge what the Court has done with it and how it has been approached. Rule based on precedent, regardless of incorrect decisions, allows for modern interpretations to continue principles despite their errors. One may easily question why this is the correct application of law. To answer this, I believe that it is the importance of *stability*. In law, a consistent answer holds more weight than the proper answer. Inconsistency affects legitimacy and the people’s perception of a body of government which knows the correct application of the law. It is the people’s acceptance that stare decisis is able to exist, bearing a faith that a course, if carried on long enough, is the correct course regardless of how it came about initially.

This significance is the reason why *Roe* has not been completely overturned. O’Conner in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) expresses her refusal to overturn *Roe* even though the Court finds the trimester framework of the case to be unworkable. O’Conner in defense of stare decisis states “The Constitution serves human values, and while the effect of reliance on Roe cannot be exactly measured, neither can the certain cost of overruling Roe for people who have ordered their thinking and living around that case be dismissed” (*Planned, 112 S. Ct. 2791*).

If the goal is to maintain stability, substantive due process has not performed to the standard of stare decisis. For instance, abortion rights have yet to find stability since its inception in the *Roe* decision. This can be seen in *Casey*:
There was no majority for the trimester framework employed in that case; whether there was still a majority for the strict scrutiny approach is a dicey question. The plurality maintained that it was preserving the essential holding of Roe, but it did not leave the law unchanged. *(Planned, 112 S. Ct. 2791)*

Due to the inconsistent, opaque, and broad characteristics of substantive due process, the Court cannot simply draw out previous applications for support. According to Whittington in *Constitutional Interpretation*:

The judiciary should not prop up old constructions that are no longer politically authoritative, and it should avoid stifling the development of new constructions by placing the judicial imprimatur on the old and contributing to its hegemonic status. Constructions claim the fidelity of political actors through their continuing political authority, not through judicial enforcement. *(Whittington 11)*

The use and definition of substantive due process in *Dred Scott* is wildly different from its use and definition in *Lochner* which is different again in *Roe*. We see that the Court initially held its restraint in interpretation in *The Slaughterhouse Cases*. A gauntlet of issues has arisen since the Court expanded the interpretation of the Fourteenth Amendment to include an individual’s right to privacy in 1965. Such change in application and definition does little to support the need for stability in law. Again, stability is essential for legitimacy and legitimacy is necessary for the acceptance of Court decisions. The lack of an articulate and consistent definition acts as a missing
puzzle piece to substantive due process. Without it, the Court assumes to be unpredictable in its decisions on the subject matter. If the Court changes interpretation and/or fails to clearly articulate a proper definition, then substantive due process simply multiplies in confusion with each Court decision. It is the role of the Court to make the law clear and not the opposite.

The Second Industrial Revolution coincided with the Court's decision in *Lochner*. The economic timing was the key factor in the Court's decisions to strike down laws that restricted market freedom. The justices were so heavily influenced by laissez-faire theories that they essentially abused their own powers masking their misuse of activism behind the due process clause. It was their “invention” of economic rights, substantive interpretations, and right of contract that bled over into privacy issues. And although the Court in *West Coast Hotel* attempted to end the substantive interpretation of due process, the power of substantive due process still remains. What's so distressing is that the Court acknowledges its mistakes in *West Coast*, yet continues to find appropriateness in substantive interpretation. If the application of substantive due process was wrong when applying right of contract, then how can it be right when applied to as a right of privacy? Why is the Court continuing a tradition which was initially created by an abuse of power? When the Court utilized activism in *Bush v. Gore*, it made clear that its decision not be used as precedent. Economic substantive due process must be looked at in the same light. Economic rights protected by due process no longer exist, they cannot set precedent for privacy rights and future rights deemed to be substantive by the Courts. The Court’s cannot use substantive due process so much that the law is no longer recognizable. Thus, the Constitution must not be so malleable that it loses its legitimacy.
Discussion

The Court's liberal use of substantive due process affects the convention of democracy. What they are doing is removing the democratic process out of lawmaking and making the decisions on their own. This is not their role as constitutional interpreters. It is not a question regarding whether legislative policies are right or wrong, but rather whether the Court can make such decisions instead of the people through the political process. Hamilton in Federalist #78 forewarns the implications of a judiciary that imposes WILL over JUDGMENT stating:

"It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as 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. (Hamilton, Federalist #78)"

Hamilton states that the judiciary is the weakest branch, one that the people shall not fear, as long as their role remains separate of the other branches. However, once the Court uses WILL to influence their decision-making powers they essentially destroy the entire notion of separate powers. Once this occurs, the people should have everything to fear when the Court becomes the law makers instead of law interpreters."
The *Lochner* era represents a period of where the Court’s activism exceeds the boundaries of authority, motivated by their own preference of policy and influenced by laissez-faire ideologies and social Darwinism. Their actions ultimately lead to the interference of a long standing political process. Based on the historical context of previous Court decisions and the intent of the Fourteenth Amendment, I argue that the Court wrongly interprets the due process clause as a guarantee of a right of contract and eventually as a right to privacy. The Court acting as judicial legislation overpowers the actions of the nation’s legislation. The Court has immense powers verified by their given life tenures. The Court must be separate from political influence and not allow politics or personal preferences affect their decisions. This is why judicial legislation is wrong. The Court cannot be a political actor. The Court acting as a superlegislature simply violates the notion of having three separate and distinct branches of government. When the Court uses the power of substantive due process to act as judicial lawmakers, they are imposing its power over the authority of the legislative branch, an exercise of power that is not authorized by the Constitution.

If the criticisms of *Lochner* and the acknowledgement of substantive due process as an improper interpretation are determined in *West Coast* and in *Williamson*, then why continue its use in cases like *Griswold* and *Roe*? As archaic and impractical as the Connecticut contraceptive ban was, the authority to strike down the statute should have come from the legislature, the representatives of the people of Connecticut, and not the Court. Although conventional wisdom and common sense supports the Court’s decision in cases like *Griswold*, the Court’s power must be bounded by the Constitution even if their final decision is not aligned with wisdom and common sense. The Constitution
does not always equal wisdom. Such wisdom must come about through the political process. The people should have that authority to either support or vote against their state legislation, not the Court. The Court’s actions and use of substantive due process is beyond the scope of their authority. Justice Black’s dissent in Griswold spoke of the dangers of the Court using its interpretive powers to act as judicial lawmakers. The Roe decision prohibits any state legislative restrictions on abortion. How can we simply allow the Court make such a decision such as that of Roe on behalf of the people?

Regardless, the appropriate role of the Court will always be a matter of debate. The Court of today is well into a new age of jurisprudence, paralleling much of its characteristics from the legislative branch of government. Through substantive due process, the fixture behind modern right to privacy cases, the Court has abridged the authority of the government to enact judicial lawmaking. In my opinion, the Court is essentially undermining the efforts of the legislative branch of government, throwing off the balance built into the separation of powers doctrine. And while the values of the Constitution are not necessarily static in nature, judicial interpretation of due process cannot suggest values which are no longer relevant to its original meaning and intention. Balancing liberty and the traditional conception of the general welfare is a delicate, complex task; however, the demands of the social, political, and economic environment make no excuse to create law outside of authority and jurisdiction.

If the Court continues to act in this fashion, then they are simply usurping democracy and voiding the long-standing political process which originally built this nation’s governance of laws. Their actions essentially make them an additional house of Congress that is more powerful than the other two houses combined. The people accept
and justify legislative decisions because they are created by elected representatives; with fixed terms and who can be removed from office if they no longer represent the people’s best interest. The Court is not a body that is elected nor are they in a position in which they can be easily removed. Yet, with the power of substantive due process, they are making legislative decisions and outlining the boundaries of liberty. In the end, the power of democracy must lie in the hands of the people and not at the whim of the Court.
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