Freedom from Arbitrary Restraint: Establishing a Clearer Legal Framework for Substantive Due Process

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Introduction

The doctrine of substantive due process has the potential to curb some of the worst abuses of governmental power, but in its current form it invites criticism through its unprincipled application and unpredictable results. The concept of "due process of law" has evolved over eight centuries of Anglo-American law,[1] and has been held to encompass a broad array of procedural and substantive rights. The ambiguity of the phrase, and its historical antecedent, "the law of the land", has allowed generations of judges and scholars to inject it with their own meaning. Typically, it has been employed to protect individual liberty wherever more explicit constitutional protections have failed.

The Supreme Court has established the need and authority for recognizing rights other than those enumerated in the Bill of Rights. It has done so by reading a substantive component into the Due Process Clause of the Fifth and Fourteenth Amendments.[2] Essentially, the Court has held certain liberties to be so fundamental that their abrogation would violate the Due Process Clause regardless of the procedural protections available. In practice, the Court's decision to apply the doctrine in striking down a law has turned more upon whether the government has a legitimate interest at stake than it has on the abstract importance of the proposed right. The exact contours of the doctrine have remained distressingly vague, as the justices have proved unable to reach a consensus on

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[1] The concept first appeared in the Magna Carta of 1215, Clause 39. "No free man shall be taken or imprisoned or disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."

[2] "No person shall be ... deprived of life, liberty, or property, without due process of law" U.S. Const. amend. V. "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

how to distill it into a practical judicial test. The text of the Due Process Clause itself provides no meaningful guidance.[3]

Critics of the doctrine of substantive due process argue that the Due Process Clause only provides procedural protections before a citizen may be deprived of life, liberty, or property. They quip that the very term "substantive due process" is a contradiction in terms, like "green pastel redness."[4] However, if a citizen may be deprived life, liberty, or property without cause, procedural protections are of little practical value. For instance, if a citizen may be detained based solely upon his ancestry, as the Supreme Court permitted in *Korematsu v. U.S.*,[5] notice and a chance to be heard[6] will prove unavailing to those detained without cause. The text of the Constitution clearly indicates that its enumerated protections were not intended to serve as an exhaustive list.[7] The decisive question is how the courts are to determine what unenumerated rights the Constitution does embrace.

The major precedents are divided between two competing theories of substantive due process which straddle a broad ideological divide - the "historical traditions" approach, which has been favored by the Supreme Court's conservative justices, and the "reasoned judgment" approach, which has been embraced by the Court's more liberal members.[8] The "historical traditions" approach protects only those freedoms "deeply rooted in this Nation's history and tradition" or those so fundamental as to be deemed

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[3] *Id.*
[4] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980)
[5] 323 U.S. 214 (1944) (upholding the legality of detaining 100,000 Japanese Americans in internment camps during World War II)
[6] the protections allowed under procedural due process
[7] *See* U.S. Const. Amend. IX
[8] These labels are borrowed from Daniel Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. Rev. 63 (2006). (analyzing the reasoned judgment and historical traditions approach, and advocating a modification of the latter)

"implicit in the concept of ordered liberty".[9] When the Supreme Court has invoked this theory in a majority opinion, it has almost always found the proposed liberty interest to be unprotected. This theory is relatively straightforward to apply, but it results in the underprotection of rights and gives continuing vitality to historical prejudices.[10]

The second approach to substantive due process has been labeled, perhaps pejoratively, as the theory of "reasoned judgment".[11] [12] This is a more flexible approach which attempts to adapt constitutional protections to our evolving notions of the proper relation between the individual and the state. This theory flows from a basic "right to be let alone", and "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[13] The proponents of this theory accept that "substantive due process has not been reduced to any formula" and that courts must use their reasoned judgment in adjudicating claims.[14] The critics of this theory argue that it transfers largely unrestrained discretion to judges to impose their own normative preferences in place of those of the country's democratically elected leaders.

Between these two opposing theories there is some meaningful common ground, and it would be highly desirable for the Court to unite around a common theory to lend coherence and predictability to the results of the doctrine's application. The proponents of the "historical traditions" approach have grudgingly recognized the need to protect certain unenumerated rights which are "implicit in the concept of ordered liberty."[15]

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[9] Bowers v. Hardwick, 478 U.S. 186, 191 (1986)

[10] This is because racial minorities, women, homosexuals, and other groups have been persecuted throughout much of our nation's history.

[11] *See* Justice Scalia's dissent in Planned Parenthood v. Casey, 505 U.S. 833, 983

[12] *See also* Conkle *supra*, note 7 at 98.

[13] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[14] Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992)

[15] *See Bowers* at 191

Likewise, proponents of the "reasoned judgment" approach have recognized some need to impose limitations on their unbridled discretion.[16] There are certain threads which have run through all legitimate applications of substantive due process. If incorporated directly into the theory, they could constrain it within reasonable bounds while allowing sufficient room to invalidate arbitrary laws.

This Article will propose a simple framework for the application of the doctrine that promises to bridge this ideological divide and address the failures of the two existing approaches. Unlike the prevailing methodology, it would apply a consistent level of scrutiny to all restrictions of individual liberty. The current approaches both turn on whether a proposed right is deemed "fundamental". Rights that succeed in garnering this appellation are strictly protected, while others receive virtually no protection at all. This all or nothing approach inhibits the Court from extending protection to new areas of law and can lead to logically inconsistent results.[17]

A better approach is to apply some meaningful scrutiny to any legislation that restricts individual liberty, but only strike down laws that fail to advance a proper legislative purpose. Let us refer to this as the *West Coast* approach, as it derives from language in the Supreme Court's majority opinion in *West Coast Hotel Co. v. Parish.*[18] Under this approach, legislative acts should be given the force of law only if they, "have

[16] *See Casey* at 849, "Its boundaries are not susceptible of expression as a simple rule. That does not mean we are free to invalidate state policy choices with which we disagree; yet neither does it permit us to shrink from the duties of our office."
[17] For instance, a terminally ill patient has a constitutional right to refuse medical treatment, but no right to seek active medical assistance in ending his suffering.
[18] 300 U.S. 379 (1936) (upholding a Washington minimum wage law)

a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory."[19] Laws failing to achieve this modest objective would be invalidated.

Laws infringing upon what the Court has already identified as fundamental rights could continue to be analyzed under strict scrutiny. However, new assertions of protected liberty interests would be analyzed under a heightened form of rational basis review.[20] The government would be required to demonstrate that a challenged law promotes a proper legislative purpose, thus the presumption of constitutionality from *Ogden v. Saunders*[21] would be abandoned. Instead, the government would have to overcome a burden of production by presenting some evidence that a challenged law effectuates a proper legislative purpose.[22]

This test would be applied in two stages. First, the government would be required to show a proper legislative purpose[23] motivating the law. Unlike rational basis review under the Equal Protection Clause, post-hoc rationalizations would not suffice. Next, the government would need to demonstrate that the challenged law contributes to its intended purpose in practice.[24] Legislation would only be subject to invalidation if it is demonstrably arbitrary; that is, if it fails to advance any proper legislative purpose. This

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[19] *Id*. at 398

[20] This is in contrast to rational basis review under the Equal Protection Clause, where the Court will assume the existence of "any state of facts that can reasonably be conceived and which will support a classification." Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). This would instead mirror the "rational basis with bite" endorsed by many commentators.

[21] 25 U.S. 213 (1810) (requiring that, when a law's constitutionality is challenged, the Court must "presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.")

[22] For obvious reasons, the quantum of evidence required to support a law should not be great, particularly where there is limited data on the law's impact available. If the government can proffer some evidence of the law's utility, this should be sufficient to shift the burden to the party challenging the law.

[23] I.e., promoting the "health, safety, or welfare" of the population. Laws justified solely by vague notions of morality or tradition could not stand.

[24] The law's benefits need not exceed it costs, but it must yield some benefit to justify its abrogation of individual liberty.

would provide a simpler and more consistent framework for reviewing legislation under the Due Process Clause.

In effect, this would recognize a limitation on the police power of the states, which has ostensibly included the almost plenary authority to promote the "health, morals, safety, and general welfare" of society.[25] The evolving view, and the view more consistent with modern precedents under the Due Process Clause, is that although the "health, safety, and welfare" of society are legitimate objects of government regulation, it is not the role of the government to enforce private morality.[26] [27] [28] This principle is implicit in many of the Supreme Court's rulings on substantive due process, but rarely has this been candidly admitted by the Court.[29]

With the growing influence of strict constructionist constitutional interpretation, there is a significant danger that the doctrine of substantive due process will be relegated to a position of near-irrelevance. This would undermine the purpose of the Ninth Amendment and vitiate one of our greatest protections against arbitrary abuses of governmental power. Although reasonable legislative judgments should not be second guessed, truly arbitrary restraints of liberty should not carry the force of law. In order to prevent this result, substantive due process must be reformed and the legitimate concerns of its detractors must be addressed.

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[25] Village of Euclid v. Ambler Realty, 272 U.S. 365, 383 (1926)

[26] "The assertion that 'traditional Judeo-Christian values proscribe' the conduct involved, Brief for Petitioner 20, cannot provide an adequate justification for [the challenged law]" *Bowers* at 211, Justice Blackmun dissenting.

[27] "The fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." *Bowers* at 216, Justice Stevens dissenting.

[28] "Our obligation is to define the liberty of all, not to mandate our own moral code." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)

[29] The most notable exception is Lawrence v. Texas

In Part I, this Article will make the case for the continuing vitality of the substantive due process doctrine. Evidence of the founder's intent regarding unenumerated rights will be discussed, and the practical benefits of judicially created rights will be asserted. In Part II, the most significant cases in the evolution of the doctrine will be reviewed, with commentary on how the *West Coast* approach would comport with existing precedent. In Part III, the failings of the two existing approaches to the doctrine will be analyzed, and the requirements of a potential compromise theory will be discussed. In Part IV, this Article will examine the scope of the police power. The argument will be made that although the promotion of morality has traditionally been advanced as a proper legislative purpose, there is no practical way to determine whether a law promotes morality if it fails to advance the public welfare. In Part V, the presumption of constitutionality will be examined and a structural argument will be made that the Constitution instead endorses a presumption of liberty.

I. The Case for Substantive Due Process

In recent years there has been a growing political backlash against "judicial activism", a phrase which has grown in ignominy since it was first coined. The view of the Constitution as a living document, as it was perceived during the time of the Warren Court,[30] has steadily eroded under conservative rebukes that the Court "comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no

[30] Although the theory is closely associated with the Warren Court, it can be traced back at least as far as Justice Holmes statement that the constitution "called into life...an organism," "the development of which could not have been foreseen completely by the most gifted of its begetters." in Missouri v. Holland, 252 U.S. 416 (1920). Chief Justice Marshall made this same point in McCullouch v. Maryland, 5 U.S. 137 (1803), stating, "We must never forget that it is a Constituion we are expounding."

cognizable roots" in the text of the Constitution.[31] This criticism is well taken in light of the haphazard and seemingly arbitrary manner in which the doctrine of substantive due process has been applied, but if followed to its logical conclusion it would result in an abdication by the Court of its role in protecting some of our most basic human rights. The level of deference that the judiciary should extend to legislative judgments is a subject of considerable controversy. The issue turns on whether one believes the Constitution envisions an active role for the judiciary, and whether the judgments of an active judiciary are more likely to result in good than harm. These questions must be analyzed in turn before the proper limits of judicial review can be intelligently discussed.

A. The Founders' Intent

Much light can be shed on this issue by a consideration of the debates leading up to the Constitution's adoption. In order to achieve ratification by a sufficient number of states, the drafters found it necessary to include a bill of rights strictly limiting the federal government's power.[32] Some Federalists argued that inserting a bill of rights could actually prove counterproductive, as the constitution already limited the federal government to a handful of enumerated powers.[33] A catalogue of express proscriptions could give the impression that anything not proscribed was allowed.[34] The people

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[31] Bowers v. Hardwick, 478 U.S. 186, 194 (1986)

[32] *See* United States Archives *at* http://www.archives.gov/exhibits/charters/bill_of_rights.html

[33] *See* U.S. Const. Art. I Sec. 8, Clauses 1-18

[34] Kadlec, Joseph F., *Employing the Ninth Amendment to Supplement Substantive Due Process: Arguing for Explicit Recognition of Both Fundamental and Non-Fundamental Unenumerated Rights*, 48 Boston College L. Rev. 387, 398

endowed the federal government with only these enumerated powers, leaving much broader, but still limited, police powers to the states.[35]

Proponents of the Bill of Rights argued that it was better to protect some rights strongly and others weakly than not to provide direct protection to any.[36] Thomas Jefferson wrote a letter to Madison to that effect,[37] ultimately persuading Madison to introduce the first ten amendments at the First Congress. To alleviate concerns that the Bill of Rights might be interpreted as a limitation on recognized rights, Madison included the Ninth Amendment as a caveat that the rights enumerated were not intended to serve as an exclusive list.[38]

The text of the Ninth Amendment is clear on its face. It provides express authorization for the recognition of unenumerated rights. It states that, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[39]

The framers of the Constitution simply did not believe that democracy alone was a sufficient protection of individual liberty. This is evident from the structure of the constitution - from its elaborate set of checks and balances, from its creation of an independent judiciary, from its limitation of the federal government to enumerated powers, and from the perceived need for a bill of rights. The election of senators by state legislatures and the election of the president through an electoral college provide

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[35] *See Id*. at 397; U.S. Const., Amendment X
[36] *See* Kadlec, *supra*. at 415
[37] Letter from Thomas Jefferson to James Madison (Mar. 15, 1788), *reprinted in* Rakove, *supra* note 10, at 165-66
[38] "If courts are to give meaning to every clause of the Constitution, as *Marbury v. Madison* requires, they should not let the Ninth Amendment--one of the last stumbling blocks for final approval of the Constitution and a reason why Madison relented on the addition of a bill of rights at all--to continue to be ignored and disparaged." Kadlec, *supra,* note 30 at 421
[39] U.S. Const. amend. IX.

additional evidence of the founders' intent to temper pure democracy. Prior to the American democratic experiment, no democracy had long survived before descending into autocracy.[40] The framers were jealous of individual liberty, and wished to preserve it from encroachments even by democratically elected legislatures.[41]

B. The Need for an Active Judiciary

Critics of substantive due process argue that it is undemocratic; if we are unhappy with the judgments of our democratically elected leaders, we should simply elect new ones.[42] This advice is of little consolation to an individual in a nation of three hundred million, particularly if that individual is a member of a political minority and the political majority has no legitimate interest at stake. Under the social compact theory upon which our government was founded, we sacrifice our individual liberty only to the extent necessary to safeguard the legitimate interests of our fellow citizens.

An appeal to democratic values is appropriate wherever the government must weigh the competing legitimate interests of multiple parties,[43] but does not always justify the majority's imposition of its will on the politically weak. History is replete with examples of atrocities committed by democratically elected governments.[44] We must

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[40] Ancient Greece and the Roman Republic provide the two most prominent examples.
[41] See Madison's Speech to the 1st Congress, "the great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode. They point these exceptions sometimes against the abuse of the executive power, sometimes against the legislative, and, in some cases, against the community itself; or, in other words, against the majority in favor of the minority."
[42] *See Casey* at 532 (Justice Scalia dissenting), "The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."
[43] Which was arguably the case in *Casey*, .
[44] Slavery, the Holocaust, internment camps, segregation, and religious persecutions are just a few examples.

recognize that while democracy is one of the greatest achievements of our civilization, it is prone to certain excesses which can and should be mitigated.

The term "democracy" has not always evoked uncritical adulation. Modern pundits denounce "populism" and "sound bite" politics, but rarely concede that democracy has inherent flaws. Political philosophers, however, have always recognized its weaknesses. Aristotle differentiated democracies from republics, deriding the former as a form of mob rule in which politicians appeal to the basest instincts of the public.[45] [46] He considered the latter to be the ideal form of government, a form in which the desires of the public are constrained by the rule of law, as interpreted by independent magistrates. In our system of government, this role is played by independent political appointees such as Supreme Court justices[47] and Federal Reserve Board governors.[48] Montesquieu developed this idea further in *The Spirit of the Laws,* noting that if unconstrained, democratic governments have the potential to erode political liberty.[49] Without certain counter-majoritarian features, the apparatus of government can be co-opted to oppress political minorities. Thus a constitutional democracy must place some limits on the majority in the same way a constitutional monarchy places limits on the monarch.

Our Constitution expressly provides a republican form of government for the states,[50] and nowhere in its text is the term "democracy" employed. Madison considered

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[45] *See* Aristotle, *The Politics*, Book IV, Part IV
[46] For an example from classical Greek history, see Thucydides depiction of Alcibiades' speech to the Athenian Senate in *The Peloponnesian Wars*, advocating the invasion of Sicily which led to the downfall of the Athenian republic.
[47] who are protected with life tenure
[48] who serve under staggered 14 year terms
[49] *See* Montesquieu, *The Spirit of the Laws*, Book VIII, Sec. 2 (1748)
[50] U.S. Const. Art. IV, Sec. 4

one inherent flaw of democracy in what is probably the best known of his Federalist papers,[51] warning against its dangerous tendency towards factionalism. The dangers of factionalism, according to Madison, are twofold. First, small special interest groups with interests contrary to the general public may exercise a disproportionate influence on policymaking because of their greater vested interests.[52] Second, and perhaps more pernicious, is the danger that a faction of the majority would impose its will on a defenseless minority, even when the majority had no legitimate interest in regulating the conduct of the minority. This concern is well expressed in a quote often attributed to Benjamin Franklin, stating that "democracy is two wolves and a sheep debating on what's for dinner."[53]

This danger of majoritarian overreaching has been a persistent problem throughout American history, and it is when the Court has guarded against this danger that it has done the most to enhance its prestige. African-Americans, immigrants, women, minors, homosexuals, and religious minorities have all sorely felt the consequences of their political powerlessness. When the Court has failed to protect these groups, as in *Korematsu v. United States*[54] and *Dred Scott v. Sandford*,[55] it has exposed itself to the derision of generations. This concern is not solely applicable to identifiable minority groups, but to any situation in which the legislature restricts individual liberty without reference to the legitimate interests of the State.

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[51] See Madison, *Federalist Papers* #10

[52] For a detailed analysis of the dangers posed by special interest groups, see Friedrich von Hayek, *Law, Legislation and Liberty* (1973)

[53] This attribution has been endlessly repeated but never verified.

[54] 323 U.S. 214 (1944)

[55] 60 U.S. 393 (1856)

The drafters created an independent judiciary to guard against these dangers and provide a necessary counterweight to the democratically elected branches of government. They envisioned a government composed of three co-equal branches, and gave the justices life tenure to insulate them from the political pressures to which the other branches were exposed.[56] Though some are unsettled by this lack of political accountability, it is precisely what has allowed the Court to pull society forward when the other braches could not.[57] Ironically, despite its unelected status, the Supreme Court consistently maintains a higher approval rating then either of the elected branches.[58]

Alexander Hamilton famously assured the people of New York that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them."[59] As "the weakest of the three departments of power," it possesses "neither FORCE nor WILL, but merely judgment."[60] This passage is often quoted but rarely appreciated. The framers recognized that those in power tend to aggregate ever more power to themselves and that governments of limited powers rarely remain that way. In the short history of our own country, we have seen the power of the federal government expand by an order of magnitude beyond its original, limited role. Hamilton stressed the importance of the judiciary's role in restraining the legislature in Federalist #78.[61]

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[56] U.S. Const., Art. III
[57] *E.g.* Brown v. Board of Education, 347 U.S. 483 (1954)
[58] See Gallup Report dated Sep. 29, 2006, *Supreme Court Approval Rating Best in Four Years* (showing consistently higher approval rating for the Supreme Court than for Congress or the president)
[59] *Federalist Papers* #78
[60] *Id.*
[61] Alexander Hamilton, *Federalist Papers* #78, "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."

The judiciary is less dangerous than the other branches because it has no capacity to enact positive law, but only to negate exercises of power by the other two branches. Federal judges cannot "legislate from the bench" as they are accused of doing; the power of judicial review is more akin to a veto power. The Supreme Court can regulate the conduct of governments and government actors, but it cannot regulate the conduct of individuals.

As federal and state legislation expands to encompass almost every aspect of modern life, having a body with the power only to strike down laws serves a vital function. Some scholars have argued that even if the Court were to intervene in the legislative process in an arbitrary and unprincipled manner, it would still result in a net gain to the overall quality of legislation.[62] The chief benefit of our tripartite form of government is that it requires the cooperation of all three branches to regulate individual conduct. If the Supreme Court habitually defers to legislative judgments, we lose one of the chief protections of our constitutional plan.

II. A Brief History of Substantive Due Process

Perhaps no area of constitutional law is more muddled than the doctrine of substantive due process. Once applying solely to economic legislation,[63] it drew criticism for imposing the laissez-faire economic preferences of the sitting justices on a population that was increasingly desirous of economic intervention. When President Roosevelt threatened to pack the Court in response to its invalidation of many of his New Deal

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[62] James Rogers and Georg Vanberg, *Resurrecting Lochner: A Defense of Unprincipled Judicial Activism*, 23 J.L. Econ. & Org. 442

[63] *See Dred Scott* and *Lochner*

economic programs, the Court backed away from the doctrine and it entered an extended period of disuse.[64] Since the doctrine's revival decades later, it has been applied exclusively to social legislation.[65] When used to strike down a law, the Court has typically failed to provide meaningful guidance on how the doctrine is to be applied and under what circumstances its application is appropriate. In cases where the Court has refused requests to expand the doctrine, it has cited a "historical traditions" limitation which, if applied consistently, would virtually halt the expansion of the doctrine. The cases have typically splintered into a proliferation of concurring and dissenting opinions, as the members of the Court have found themselves unable to unite around a common principle. In order to divine the factors that determine when it will or will not be applied in practice, it is necessary to survey the history of the doctrine in some depth.

A. *Dred Scott v. Sanford*

Arguably the first application of substantive due process, and almost certainly its most ignominious application, occurred in *Dred Scott v. Sanford*.[66] Scott, having lived in both a state and a territory designated as free of slavery in their constitutions, sued the wife of his deceased former owner in federal court for his freedom. The Supreme Court found that he had no standing to sue, but rather than end its analysis there, it went on to rule the Missouri Compromise invalid on the ground that a man cannot lose title to his property simply by crossing state lines. Although the court did not use the term "substantive due process", it cited the Fifth Amendment's protection of life, liberty, and

[64] *See West Coast Hotel*
[65] *See Griswold*
[66] 60 U.S. 393 (1856)

property, and appealed to the fundamental nature of Sanford's property right rather than any failure of notice or procedural defects.[67]

It is debated whether this case should be treated a substantive due process case, although Justice Scalia argues that it served as the first appearance of the doctrine.[68] Whether or not the case involved substantive due process, it represents a danger of abuse that must be addressed. Ironically, this application might have survived under Scalia's preferred "historical traditions" test, as slavery had been broadly protected by the federal government since the founding of the nation. However, it clearly would not comport with the doctrine as it is understood today.

The unfortunate outcome of this case resulted from the Court's characterization of Sanford's property right as fundamental. By giving paramount importance to this one factor and ignoring the numerous moral and practical reasons to recognize Scott's freedom, the Court invalidated a delicate political compromise and plunged the country into civil war. The Due Process Clause protects "life, liberty and property" in that order. To ignore the life and liberty interests of Scott in an effort to preserve the property interest of Sanford was absurd. Scott was deprived of life and liberty without due process of law, and the Fifth Amendment should have been construed as barring the government from assisting in the detention of a person not accused of any crime. Congress had a legitimate interest in banning slavery in federal territories, and this case illustrates the danger of allowing the Court to strike down non-arbitrary laws. It also demonstrates the failure of the "historical traditions" approach to guide the theory's application in a morally defensible way.

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[67] *Id.* at 450

[68] *See* Planned Parenthood v. Casey, 505 U.S. 833, 998

B. *The Slaughterhouse Cases*

Fortunately, *Dred Scott* is no longer good law. It was reversed with the adoption of the Thirteenth and Fourteenth Amendments, which made due process applicable against the states and greatly expanded the Supreme Court's authority to invalidate state laws. The first test of the Fourteenth Amendment occurred in *The Slaughterhouse Cases*,[69] which effectively liquidated the Privileges and Immunities Clause[70] and provided a significant setback for the discovery of unenumerated rights. These cases involved a public corporation set up by the City of New Orleans which would have a legal monopoly on the slaughter of livestock in the city. The city argued that this was a necessary exercise of the police power to protect the public from health hazards. The butchers challenging the creation of the corporation argued that it violated their fundamental right to freely pursue their livelihood "in an honest and necessary business".[71] They argued that they were deprived of liberty and the use of their property without due process of law.

The Court conceded that the states' police powers are not unlimited,[72] but held that the Privileges and Immunities Clause of the Fourteenth Amendment did not create privileges or immunities besides those implicit in United States citizenship. Instead, it merely requires that a state extend any privileges it grants to its own citizens to the

[69] 83 U.S. 36 (1873)
[70] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. Amend. XIV, Sec. 1, Clause 2
[71] *Id*. at 55
[72] *Id*. at 56, "the subject of sanitary laws belong to the exercise of the power set up; but it does not follow there is no restraint on State power of legislation in police matters."

citizens of the several states.[73] The majority opinion summarily dismissed the plaintiffs' argument that they were deprived of property without due process of the law.[74] Although the health of the city's citizens was undoubtedly a proper governmental purpose, there was no evidence presented that the challenged law did anything but provide patronage to a few favored butchers.

The dissenting opinion of Justice Fields envisioned a much broader role for the Due Process Clause, which would prove influential in future economic applications of substantive due process. In a prelude to the subsequent cases, he quoted Adam Smith on the fundamental nature of one's own labor as a property right.[75]

Many modern scholars have criticized this narrow reading of the Privileges and Immunities Clause, which some view as a preferable basis for the discovery of unenumerated rights as compared to the Due Process Clause.[76] Although this narrow reading of the Fourteenth Amendment conflicts with modern jurisprudence, these cases would have been similarly decided under modern law, as they were primarily concerned with economic rights. As long as the City could put forth evidence that this scheme reduced health hazards, it should have been entitled to deference. However, if in practice the law's only function was to provide political patronage, it should not have been allowed to stand.

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[73] *Id*. at 77, "Nor did it profess to control the power of the State governments over the rights of its own citizens."
[74] *Id*. at 81
[75] *Id*. at Footnote 39, "The property which every man has in his own labor,' says Adam Smith, 'as it is the original foundation of all other property, so it is the most sacred and inviolable."
[76] *See* Justice Black's dissent in Adamson v. California, 332 U.S. 46 (1947) and Justice Thomas' dissent in Saenz v. Roe, 526 U.S. 489, 521

C. *Lochner v. New York & West Coast Hotels v. Parrish*

There are few cases that have been as widely criticized in the academic literature as *Lochner v. New York*.[77] Although a reasonable case can be made for its methodology,[78] it represents an era in the doctrine's history that has long passed. The case involved a New York statute limiting the work week of bakers to no more than 60 hours per week, which the Court found to be an "unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract."[79]

The legislation involved did not make it a crime for an employee to work more than 60 hours per week. It stated instead that "no employee shall be required or permitted to work" more than 60 hours per week by his employer.[80] As it regulated the conduct of the employer with respect to the employee, it cannot properly be characterized as a victimless crime. The statute did not rest on the paternalistic assumption that employees did not know thier best interests, but on the ralistic assumption that they lacked the bargaining power to protect those interests. The Supreme Court had already recognized the states' interest in protecting employees from harmful working conditions in *Holden v. Hardy*,[81] upholding a law which limited the work hours of miners and smelters.

The *Lochner* decision has been criticized on the grounds that it replaced the economic policy preferences of a democratically elected body with the policy preferences of unelected justices.[82] It paved the way for a number of similar decisions throughout the

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[77] 198 U.S. 45 (1905)
[78] *See generally* James Rogers and George Vanberg, *Resurrecting Lochner: A Defense of Unprincipled Judicial Activism*, 23 J.L. Econ. & Org. 442
[79] *Id*. at 56
[80] *Lochner* at 45
[81] 169 U.S. 366
[82] Justice Oliver Wendell Holmes began his dissent: "This case is decided upon an economic theory which a large part of the country does not entertain." *Id*. at 75

"Lochner era" in which restraints on trade were repeatedly invalidated.[83] This culminated in a showdown during the Roosevelt administration, in which the president threated to pack the Court with additional left-leaning justices to prevent further invalidation of his New Deal legislation. The Court responded in *West Coast Hotels v. Parrish*[84] by drastically curtailing the application of substantive due process in cases involving freedom of contract.[85]

Although the Supreme Court's substantive due process jurisprudence during the *Lochner* era was not indefensible, the Court had clearly overstepped its role. Had the Court limited application of the doctrine to economic policies that were objectively arbitrary, those that no trained economist could defend, it might have found support. For instance, under the Agricultural Adjustment Act,[86] the Roosevelt administration oversaw the destruction of millions of acres of crops and the slaughtering of millions of livestock at a time when many Americans were on the brink of starvation.[87] Insulating farmers from a precipitous collapse in farm prices may have been a proper legislative purpose, but destroying valuable property was not a reasonable way of achieving that goal. Many of the regulations enacted during the Great Depression are now recognized by economists to have extended it unnecessarily.[88] [89]

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[83] *E.g.* Adkins v. Children's Hospital, 261 U.S. 525 (1923) (striking down minimum wage law); Hammer v. Dagenhart, 247 U.S. 251 (1918) (striking down law prohibitng sale of products made with child labor);

[84] 300 U.S. 379 (1937)

[85] "That both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself." Id. at 394

[86] Pub.L. 73-10, *enacted* May 12, 1933

[87] Brinkley, Alan. *American History: A Survey* (1999)

[88] See Jakob Madsen, "Trade Barriers and the Collapse of World Trade during the Great Depression" *Southern Economic Journal* Volume: 67. Issue: 4. 2001 (analyzing the impact of the Smoot-Hawley tariffs)

[89] *See also* Ben Bernanke, *Essays on the Great Depression* (2000), (analyzing the impact of the NIRA on preventing wages from adjusting to deflationary pressures on the money supply).

The overwhelming majority of economic legislation, however, can be evaluated only in light of subjective value judgments. Such judgments are properly left to the democratic branches of government. It is for this reason that the Court moved away from its hard-line stance on liberty of contract in *West Coast Hotels*.[90] In *West Coast*, the Supreme Court upheld a minimum wage law for female hotel workers, reversing its former position on minimum wage laws from *Adkins v. Children's Hospital*.[91] The Court wrote that if laws have "a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied." It borrowed this language from *Nebbia v. New York*[92] and it has been repeated in various other opinions as well.

This language provides a logical framework for the application of substantive due process, but neither *West Coast* nor *Nebbia* apply this framework in an ideal manner. Both opinions make a substantial inquiry into the relation between the government's interest and the challenged law, but neither required the government to produce any evidence in support of its naked assertions.[93] Both cases make reference to the promotion of morality as a proper legislative purpose, but neither explores what this might mean operationally. The handful of cases applying rational basis review forcefully under the Equal Protection Clause might provide a better example of how this language should be applied in practice.[94] [95] The Court in *West Coast* rightly recognized that it should not

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[90] 300 U.S. 379 (1937)
[91] 261 U.S. 525 (1923)
[92] 291 U.S. 502, 525 (1934)
[93] "While in the instant case no factual brief has been presented, there is no reason to doubt that the state of Washington has encountered the same social problem that is present elsewhere." *West Coast* at 399
[94] *E.g.* Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) and Romer v. Evans, 517 U.S. 620 (1996)
[95] Another strong example of more searching rational basis review can be found in Goodridge v. Dept. of Public Health, 798 N.E.2d 941 (Mass. 2003) (Holding that the state's failure to extend marriage or civil

undermine legislative judgments unless they are arbitrary, but it failed to undertake a sufficient factual inquiry to determine whether the challenged law met that standard.[96]

D. *Poe v. Ulman & Griswold v. Connecticut*

Following *West Coast Hotels*, the doctrine of substantive due process laid virtually dormant for two decades before its resurrection as a vehicle for striking down social legislation. This occurred through two Supreme Court cases involving a Connecticut statute barring the use of contraceptives. The first case, *Poe v. Ullman*,[97] involved a challenge to the statute by a married couple whose previous pregnancies had resulted in children with serious congenital abnormalities.[98] The majority opinion refused to address the merits of the plaintiffs' claim due to a lack of standing, stating that the law had not yet been enforced. The dissenting opinion, authored by Justice Harlan, addressed the merits of the claim and laid the groundwork for future applications of substantive due process. He wrote that the liberty interest protected by the Fourteenth Amendment includes the "freedom from all substantial arbitrary impositions and purposeless restraints."[99] Though this alone might have provided a basis for future decisions, Justice Harlan went on to limit the doctrine to historically protected liberties. He explicitly accepted the validity of regulation for the purposes of morality and in particular the

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union protections to same sex couples advances no legitimate public purpose and violates the Equal Protection Clause of the Massachusetts Constitution)

[96] Whether minimum wage laws benefit workers in practice is still a matter of debate amongst economists and turns in part on the elasticity of the supply and demand curves for labor in a given market. The existence of this controversy, however, is sufficient to establish that minimum wage laws are not demonstrably arbitrary.

[97] 367 U.S. 497 (1961)

[98] *Id.* at 498

[99] *Id.* at 543

validity of laws regarding homosexuality, fornication, and adultery.[100] Justice Douglas' dissent endorsed a less restrictive theory of substantive due process, one not limited by history and traditions.[101]

Four years later, the same statute came up for review again in *Griswold v. Connecticut*[102] and was struck down. The majority opinion struck down the statute on the basis that it violated a married couple's right to privacy, largely mirroring the concerns that Justice Harlan addressed in *Poe.*[103] Although this right of privacy was not expressly mentioned in the Constitution, the Court held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[104] More specifically, the Court held that the right to privacy had roots in the First, Third, Fourth and Fifth Amendments. It cited the Ninth Amendment in support of the discovery of unenumerated rights by this method.

This protection of reproductive freedom marked a new beginning for substantive due process. The discovery of unenumerated rights based on the penumbras and emanations of enumerated rights provided a viable starting point, but the exact boundaries of those penumbras cannot be predicted except as incrementally clarified by precedent. Some applications of this right to privacy would prove highly controversial,[105]

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[100] *Id.* at 546

[101] "The Due Process Clause is said to exact from the states all that is 'implicit in the concept of ordered liberty.' It is further said that the concept is a living one, that it guarantees basic rights, not because they have become petrified as of any one time, but because due process follows the advancing standards of a free society as to what is deemed reasonable and right." *Id*. at 518

[102] 381 U.S. 479 (1965)

[103] "A statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life." *Poe* at 539

[104] *Id.* at 484

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

while other reasonable invocations of the right to privacy would prove unavailing.[106] There are numerous valid state laws which curtail the right to privacy, but this statute was unique in that it failed to advance any proper legislative purpose. It did not protect the health, safety, or welfare of Connecticut citizens, yet it restricted their liberty in a highly arbitrary and offensive way. The statute was motivated by the religious injunction against the use of contraceptives, and the legislature had no more right to give force to this religious injunction than it would to mandate the wearing of head scarves or the universal observance of kosher laws.

E. *Roe v. Wade & Planned Parenthood v. Casey*

Roe v. Wade[107] provides one of the most famous and controversial opinions of the twentieth century. It lies at the heart of the debate over substantive due process. The feelings of the individual justices towards abortion have played a major role in their attitudes towards the doctrine in general. Conservative justices have argued vociferously that *Roe* and *Casey* represent the unsanctioned imposition of the Court's political preferences on the American polity.[108] Liberal justices regard these cases as essential bulwarks of women's reproductive freedom and privacy rights. Recently these cases have played a central role in the confirmation hearings of Supreme Court appointees, with the

[106] Washington v. Glucksberg, 521 U.S. 702 (1997)
107 410 U.S. 113 (1973)
[108] *See* Justice Thomas' dissent in Stenberg v. Carhart, 530 U.S. 914 (2000), "the Casey joint opinion was constructed by its authors out of whole cloth. . . . The standard is a product of its authors' own philosophical views about abortion, and it should go without saying that it has no origins in or relationship to the Constitution and is, consequently, as illegitimate as the standard it purported to replace."

newest members of the Court harboring some discomfort with their premise,[109] but accepting their importance as established precedent.[110]

Roe was premised on the same privacy rights as the decision in *Griswold*.[111] The Court did not adopt the Griswold opinion's discussion of emanations and penumbras, but relied directly on a fundamental right to privacy found to be implicit in the Due Process Clause. The Court established that a woman's right to choose whether to terminate a pregnancy is a part of this privacy right, and that laws curtailing it are subject to strict scrutiny.[112] However, the Court held that certain exceptions to this fundamental right exist, such that "a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."[113] The point at which the state's interests become sufficiently compelling to survive strict scrutiny was set at the point of fetal viability. Justice Blackmun noted in the majority opinion that if a fetus were regarded as a person within the meaning of the Fourteenth Amendment, it would have an independent right to life under the Due Process Clause.[114] The Court ruled, however, that as used in the Fourteenth Amendment, the term was not intended to include the unborn.[115]

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[109] *See* Charles Babington and Amy Goldstein. "Senate Panel Endorses Roberts" The Washington Post, Sept. 21, 2005, citing a memo authored by Justice Roberts referring skeptically to the "so-called right to privacy." Roberts disavowed this viewpoint in day 2 of his Senate confirmation hearings.

[110] Also in day 2 of his Senate confirmation hearings, Justice Roberts said of the *Roe* and *Casey* decisions: "there's nothing in my personal views based on faith or other sources that would prevent me from applying the precedents of the court faithfully under principles of stare decisis."

[111] "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe* at 152

[112] Roe at 153

[113] *Id*. at 154

[114] *Id*. at 156, "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument."

[115] *Roe* at 158

The Supreme Court's decision in Roe was reaffirmed by a plurality in *Planned Parenthood v. Casey*,[116] although subject to a slightly greater allowance for governmental regulation. The plurality opinion rested in large part on stare decisis, but also included some expansive language about the scope of the Fourteenth Amendment.[117] The plurality opinion strongly reaffirmed the importance of unenumerated rights as components of the Fourteenth Amendment.[118] Despite some references to our nation's history and traditions, the opinion fell squarely within the "reasoned judgment" camp of substantive due process jurisprudence.[119]

These cases would undoubtedly provide the greatest difficulty in uniting the Court around a common theory of substantive due process. For a theory of the doctrine to be endorsed by a majority of the Court, it would need sufficient flexibility for the justices to reach differing conclusions on this issue. Unlike the other instance in which the Court has struck down statutes under substantive due process,[120] the statutes involved in *Roe* and *Casey* are not objectively arbitrary. They seek to protect the rights of a third party, but one whose rights are not deemed legally cognizable until the point of viability.

Conservative justices could endorse a theory of substantive due process based on

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[116] 505 U.S. 833 (1992)

[117] *See Casey* at 851, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

[118] *Id*. at 847, "It is tempting, as a means of curbing the discretion of federal judges, to suppose that liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight Amendments to the Constitution. But of course this Court has never accepted that view."

[119] "Neither the Bill of Rights nor the specific practices of States at the time of the Fourteenth Amendment's adoption marks the outer limits of the substantive sphere of such "liberty." Rather, the adjudication of substantive due process claims may require this Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society." *Id.* at 834

[120] excluding cases which have been reversed such as *Lochner* and *Dred Scott*

arbitrariness[121] while attacking these precedents on the grounds that they fail that test. They could argue that the Fourteenth Amendment's express protection of life outweighs its implicit protection of privacy,[122] and that abortion restrictions further a legitimate governmental interest. This would comport better with other applications of the doctrine while avoiding the moral ambiguity of the "history and traditions" approach. Liberal justices could continue to endorse strict scrutiny in cases involving rights already established as "fundamental",[123] while accepting an arbitrariness test when extending the doctrine to new areas of law. This would allow lower courts greater freedom to strike down arbitrary legislation without having to determine whether a right is fundamental. The reasonable fear on the part of the Supreme Court and lower courts of the sweeping implications of applying strict scrutiny to new areas of law has prevented the expansion of the doctrine into areas where it could do much good.[124] Both the commentators and the Court[125] have shown increasing awareness of the impropriety of allowing the level of scrutiny to play such a determinative role in the outcome of individual cases.

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[121] As endorsed in *West Coast* at 398, "if such laws 'have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied.' "
[122] As considered in *Roe* at 156
[123] *Casey* at 851, "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."
[124] *See* Cruzan v. Director, MDH, 497 U.S. 261 (1990) (refusing to expand the right to refuse medical treatment to encompass a more general right to death with dignity)
[125] *See* Conkle, *supra* note 7, discussing *Cruzan*, "the Court conspicuously rejected the "right of privacy" nomenclature and with it the strict scrutiny that would follow. Instead, the Court found only that the interest in refusing medical treatment was a specially protected "liberty interest" under the Due Process Clause, an interest that triggered serious judicial review but not the strong presumptive invalidity of strict scrutiny."

F. *Bowers v. Hardwick* & *Lawrence v. Texas*

Bowers v. Hardwick[126] and *Lawrence v. Texas*[127] addressed the validity of state laws regulating consensual sex between same-sex couples in the privacy of their homes. State sodomy laws invade exactly the sort of privacy right the Court protected in *Griswold* and *Roe*. In fact, they provide a stronger case for judicial intervention, since they are motivated out of prejudice towards a politically unpopular group.[128] These laws effectuate no legitimate state interest[129] and invite arbitrary enforcement.[130]

Surprisingly, the Court refused to recognize a protected liberty interest on the first challenge to these statutes. The majority in *Bowers* characterized the proposed right narrowly as "a fundamental right to engage in homosexual sodomy", and found that such a right is not "deeply rooted in this Nation's history and traditions."[131] This, in conjunction with *Dred Scott*, demonstrates the propensity of the "history and traditions" approach to perpetuate historical prejudices.

Under widespread criticism,[132] the Court reevaluated this position in *Lawrence v. Texas* and reached the opposite result.[133] The statute challenged was virtually identical, but the Court's approach was different. Instead of narrowly interpreting the proposed right, the Court defined the issue presented as "whether petitioners were free as adults to engage in private conduct in the exercise of their liberty under the Due Process

[126] 478 U.S. 186 (1986)
[127] 539 U.S. 558 (2003)
[128] failing both the "arbitrary" and "discriminatory" prongs of the *West Coast* test
[129] The majority argued in *Bowers* that promoting morality is a legitimate state interest, but this position was reversed in *Lawrence.*
[130] Although these laws ostensibly apply with equal force to heterosexual couples, prosecution of heterosexual couples is exceedingly rare.
[131] *Bowers* at 191
[132] "In the United States, criticism of *Bowers* has been substantial and continuing" *Lawrence* at 560
[133] Stating only 16 years later, "*Bowers* was not correct when it was decided, is not correct today, and is hereby overruled." *Id*. at 560

Clause."[134] Instead of deferring to history and traditions, it noted "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[135] It ultimately concluded that "The Texas statute furthers no legitimate state interest which can justify its intrusion into the individual's personal and private life."[136]

The opinion's broad language seemed to herald a new era for substantive due process. Justice Kennedy leveraged his swing vote to endorse a broad conception of liberty under the Fourteenth Amendment, writing, "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."[137] The broad language and reasoning employed by the Court seems to threaten a wide variety of laws restricting individual liberty without furthering any legitimate state objectives. Hopes of such a renaissance may prove premature, however, as lower courts have continued to apply the more restrictive methodology of *Washington v. Glucksberg*[138] while ignoring the implications of *Lawrence*.[139] If the Supreme Court wishes to expand substantive freedoms under the Fourteenth Amendment, it may find it necessary to explicitly overturn the *Glucksberg* holding.[140] Hover, the importance of

[134] *Id.* at 558
[135] *Id*. at 559
[136] *Id*. at 560
[137] *Id*. at 558
[138] 521 U.S. 702 (1997)
[139] "My survey of 102 cases applying Glucksberg since the day the Supreme Court decided Lawrence (the "Glucksberg Survey") indicates that the Glucksberg Doctrine has not only survived Lawrence, but has flourished. (8) Most cases from the Glucksberg Survey ignore Lawrence completely; of the few cases that acknowledge Lawrence and its expansive view of constitutional rights, all but one eventually fall back on the Glucksberg Doctrine's restricted approach." Brian Hawkins, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 Mich. L. Rev 409, 410
[140] A step this Article strongly endorses, as the state has no legitimate interest in requiring those with terminal diseases to die slow and painful deaths.

Lawrence should not be understated. The Court could easily have decided the case on more narrow equal protection grounds, but instead chose to eviscerate the reasoning on which *Bowers* stood.[141] Whether the Court will continue on this path or revert back to its prior deferential stance is unclear at this point.

V. The Way Forward

The *Lawrence* opinion suggests that the Supreme Court now endorses at least two, and possibly three, inconsistent theories of substantive due process.[142] With lower courts unable to draw inferences from these decisions, they have been unwilling to expand substantive protections without clear guidance on the status of a proposed right. The Supreme Court has created a confusing array of logically inconsistent precedents, resulting in higher levels of litigation, inadequate protection of substantive rights, and reduction in the perceived legitimacy of the Supreme Court.

What strands of commonality can be drawn from the existing precedents? First and foremost, with the exception of *Roe* and *Casey*, every law struck down under substantive due process has been an arbitrary restraint on liberty which failed to advance the legitimate governmental interest.[143] There are, however, a significant number of cases where the Court has failed to strike down such laws.[144] Second, the Court has been

[141] Conkle, *supra* note 7, at footnote 78
[142] *See generally* Conkle, *supra* note 7
[143] *E.g. Griswold* (laws restricting access to contraceptives); Loving v. Virginia 338 U.S. 1 (1967) (laws prohibiting interracial marriage); *Lawrence* (laws prohibiting certain consensual sex acts); Chicago v. Morales, 527 U.S. 41 (1999) (laws against loitering); Meyer v. Nebraska, 262 U.S. 390 (1923) (laws prohibiting the teaching of foreign languages). This excludes decisions such as *Lochner* which have been reversed.
[144] *E.g. Korematsu* (upholding legality of interning Japanese Americans based solely on ancestry); McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday laws), Wickard v. Filburn, 317 U.S. at 125 (upholding law prohibiting farmers from growing more than a certain amount of wheat)

especially vigilant in dealing with laws imposing unreasonably upon minorities. Finally, cases involving the right to privacy have received the strictest and most searching scrutiny. The Court's invocation of "reasoned judgment" or "history and traditions" provides little in the way of predictive value, as the Court simply applies the former when it wishes to recognize a right and the latter when it doesn't.

A workable theory of substantive due process would have to be built upon the most secure possible footing, upon a principle sufficiently pragmatic and self-evident that both conservative and liberal justices could accept its basic validity. It would have to provide meaningful predictive value, such that lower courts could consistently apply it. Finally, it would have to be sufficiently well defined and deferential that the great majority of legitimate legislation would be immune from attack.

Such criteria are best satisfied by a simple arbitrariness standard, as the Court endorsed in *West Coast Hotels*. Unlike later cases invoking "emanations" and "penumbras", "history and traditions", and "transcendental dimensions", the Court in *West Coast Hotels* put it succinctly and clearly: "Liberty implies the absence of arbitrary restraint."[145] This principle is sufficiently clear that it should be unassailable, and it can be formulated easily into a practical test. For laws to survive challenge under the Due Process Clause of the Fifth or Fourteenth Amendments, the government should be required to make an affirmative showing that such laws "have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory."[146]

[145] *West Coast* at 392
[146] *West Coast* at 398

This language is remarkably similar to the rational basis test under the Equal Protection Clause,[147] and whether the test is applied under the Equal Protection Clause or the Due Process Clause makes little difference. What is essential is that it be applied with meaningful force, and not signal uncritical deference to even the most spurious of legislative fact-finding. When applied under the Equal Protection Clause, rational basis analysis has commanded judicial deference even to painfully contrived post-hoc rationalizations for legislative classifications: "When the classification [is] called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911) Clearly arbitrary laws are routinely validated under this standard.[148]

For an arbitrariness test to have any meaningful force, it must place the burden upon the government to show "a proper legislative purpose" and "a reasonable relation" to that legislative purpose. A proper legislative purpose should be found only if a law is designed to protect the health, safety, or welfare of the general public. If such a purpose is found, the government should be required to make a showing that the law advances that purpose in practice. This does not mean that the challenged law's benefits must outweigh its costs, only that it must yield *some* demonstrable benefit to justify its restraint of individual liberty.[149]

[147] typically formulated as requiring laws to be "rationally related to a legitimate governmental purpose."
[148] See Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 (1947) (upholding riverboat pilot licensure scheme granting licenses only to friends and family members of incumbent riverboat pilots)
[149] This does not mean that the government may rely on anecdotal evidence. A statistically significant improvement in some observable metric should be required.

IV. Scope of the Police Power

When the Supreme Court has directly addressed the scope of the states' police power, it has taken a highly deferential stance and has often given the impression that the police power is virtually plenary. The formulation typically espoused is that states have the right to enact legislation for the benefit of the "health, morals, safety, and general welfare of the community."[150] The Supreme Court has acknowledged that the police power is not unlimited,[151] but generally it has failed to clearly articulate the limitations on that power. When the Court strikes down state legislation, it does so based upon a violation of specific provisions in the constitution, not upon a generalized transgression of the limits of the police power. However, to the extent that the Court can and has struck down state legislation based on unenumerated rights, it has implicitly recognized that the state police power is not without limit. When a state law is struck down for violating unenumerated rights, it is almost always based upon an express or implied finding that the law is arbitrary or unreasonable.[152]

Few would argue that the states lack a legitimate interest in promoting the health, safety, and welfare of their populations. Legislation aimed solely at the enforcement of morality is more problematic. It is almost always this category of legislation that has been found to violate unenumerated rights.[153] The crux of the problem is that there is no system of morality which is shared by a majority of the population or a majority of the

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[150] Village of Euclid v. Ambler Realty, 272 U.S. 365, 392 (1926)

[151] See *Id.* at 392, "With the growth and development of the state the police power necessarily develops, within reasonable bounds, to meet the changing conditions."

[152] *See Id.* at 395, "it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

[153] *See Lawrence* at 577, "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."

Court. Most moral legislation, such as Sunday laws and sodomy laws, have simply sought to give legal force to religious mandates, a goal prohibited by the Establishment Clause.[154]

The Court has wisely avoided any attempt to arrive at a legal definition of morality, but it is impossible to say whether a law promotes morality when this crucial term is undefined. Ostensibly, any law which is promulgated pursuant to a majoritarian political system can be said to advance what the public deems moral. If this is so, then the Court's definition of the police power is rendered meaningless. Any objective system of morality not grounded upon the strictures of a specific religion would have to be derived from considerations of the public welfare, rendering a separate power to promote morality superfluous.

Nowhere in the Constitution is the power of the states to promote morality recognized. To the contrary, a bias in favor of individual liberty is omnipresent in the document.[155] The sole protection of the states' rights found in the Constitution lies in the Tenth Amendment, which reserves power not delegated to the United States "to the States respectively, or to the people."[156] The latter clause provides evidence of the founders' intent that the states' police powers be subject to some limitation.

V. The Presumption of Liberty

The Court has come a long way from the vision of our founders with respect to the role of government. The founders, influenced heavily by the political theorists of the

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[154] "Congress shall make no law respecting the establishment of religion…" U.S. Const. amend. I

[155] *See generally* U.S. Const. amend I – VIII, *see also* U.S. Const. Art. I, Sec. 9

[156] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X

enlightenment and natural law, believed that government was the product of a social compact resting on the consent of the governed. This social compact theory, articulated most forcefully in the writings of John Locke, posited that the natural rights of man are not bestowed on him by the beneficence of his government, but that men "are endowed by their Creator with certain unalienable Rights."[157] In the state of nature, each man is restricted only by the dictates of his conscience. He gives up this state of perfect freedom only to secure his rights against encroachment by his fellow man.[158] In doing so, however, he does not surrender all his natural rights, but only subjects himself to the police power to the extent necessary to preserve his life, liberty, and property.

If ever a nation was founded on the principle of liberty it was our own. Under the governance of the English, the American colonies enjoyed tremendous prosperity, low taxes, and expansive freedoms. The founding generation imperiled life and limb to cast off that government because, despite their high standard of living, they were subject to the arbitrary exercise of governmental power.[159] This is an anomaly in history, as virtually all other revolutions have been precipitated by economic hardship. This is a testament to the tremendous force and support for Locke's ideals, and in particular his belief that the arbitrary exercise of power robs a government of its legitimacy.

Early Supreme Court justices recognized the limited nature of state power and the inviolability of fundamental rights whether enumerated or not. These justices viewed the Constitution as a guarantor of fundamental rights stemming from the nature of the social

[157] the Declaration of Independence
[158] "If man in the state of nature be so free, as has been said; if he be absolute lord of his own person and possessions, equal to the greatest, and subject to no body, why will he part with his freedom? Why will he give up this empire, and subject himself to the dominion and control of any other power? To which it is obvious to answer, that though in the state of nature he hath such a right, yet the enjoyment of it is very uncertain, and constantly exposed to the invasion of others." John Locke, *Second Treatise on Govt.,* § 123
[159] *See* the enumerations of errors against the King George III in the Declaration of Independence

compact rather than the Constitution itself.[160] A prime example is Justice Chase's opinion from 1798 in *Calder v. Bull*[161]:

> I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State… An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of the legislative authority.

These sentiments were echoed nearly a century later by Justice Miller in *Loan Association v. Topeka*[162]:

> [T]here are...rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism.
>
> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.

These opinions are grounded in the social compact theory's central tenet that the surrender of individual liberty by members of a free society is not absolute, that they retain certain natural, fundamental, and unalienable rights which derive from the Creator and can be determined through Reason. Reason, put into a form of a judicial test, is rational basis review, and any legislative act that fails to advance a proper governmental purpose should not carry the force of Law.

Randy Barnett, in his 2003 treatise, *Restoring the Lost Constitution: The Presumption of Liberty*,[163] argued that the structural logic of the constitution embodies a

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[160] See Corwin, *The 'Higher Law' Background of the American Constitutional Law*, 42 Harv. L. Rev. 149, 365.
[161] 3 U.S. 386 (1798)
[162] 87 U.S. 655 (1874)

"presumption of liberty" which legislation must overcome to achieve legitimacy. Rather than accepting the assumption that every act passed by a democratic legislature is legitimate, it operates on the assumption that the primary role of government is to safeguard the rights and liberties of its citizens, and any legislation that sacrifices those rights must be premised on a finding that such a sacrifice is necessary to preserve the rights of others. The very purpose of a Constitution, he argues, is to restrain the government from acting in ways detrimental to the liberties it was established to preserve.[164] The Supreme Court moved dramatically toward this broader conception of liberty in *Lawrence v. Texas*.

The primary impediment to a more meaningful role for the Court in scrutinizing the legitimacy of legislation arose in *U.S. v. Carolene Products*.[165] In response to President Roosevelt's court-packing threat, the Supreme Court recognized a "presumption of constitutionality" that would preserve all but the most flagrant abuses of power.[166] Prior to this, the Court would inquire into the factual basis of a challenged law to determine whether it advanced the interest it was purported to serve. In *Lochner*, the Court placed this burden of production on the government and found it failed to establish the necessity of that law. The problem with *Lochner* was not that it placed the burden of production on the government, but that it required the government to show the *necessity* rather than the *rationality* of the law. By treating liberty of contract as fundamental and

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[163] Princeton University Press (2003)
[164] "The Constitution is a law designed to restrict the lawmakers." *Id*. at 103
[165] 304 U.S. 144 (1938)
[166] A potential exception was carved out in Footnote 4, which theorized that greater scrutiny might be required for laws affecting "discreet and insular minorities."

subject to strict scrutiny, it threatened an endless variety of economic legislation, the *necessity* of which would be almost impossible to prove.

The majority opinion in *Carolene Products* stated that the law could be supported entirely by this presumption of constitutionality, but went on to list a number of factual findings that could have sustained the law under rational basis review.[167] This threw the proverbial baby out with the bathwater. Although a lower level of scrutiny may be appropriate for ordinary commercial legislation than for laws threatening fundamental rights, allowing the government to rest on a "presumption of constitutionality" reduces judicial review to a formality. Judges will naturally be reticent to establish new fundamental rights with the presumptive inviolability that strict scrutiny affords them, but to allow all other laws to rest on a presumption of constitutionality virtually guarantees that individual liberty will be restricted for arbitrary purposes.

VII. Conclusion

Substantive due process has been fairly criticized for its unpredictable results and the difficulty inherent in its application. However, it serves an essential function, and that function is integral to the founder's vision of constitutional government. The Court's failure to articulate the boundaries of the police power and its reliance on strict scrutiny rather than rational basis review for striking down laws has yielded a jurisprudence that is both confused and confusing. If the doctrine is to retain its vitality and legitimacy, the Court must unite around a single judicial test and apply it consistently.

[167] *Id*. at 148

Rather than placing all emphasis on the categorization of a right as fundamental or non-fundamental, the court should subject all legislation to meaningful rational basis scrutiny. Legislation which restricts individual liberty without providing a corresponding benefit to the public should not be allowed to stand. To sustain legislation on the sole basis that it promotes morality creates a jurisprudential quagmire, because no court has the legitimacy to establish an authoritative definition of morality. Without such a definition, the statement that a law "promotes morality" is rendered meaningless.

Legislation that has a legitimate purpose, i.e. the promotion of the health, safety, or welfare of the community, should be subjected to an analysis of whether it contributes to its purpose in practice.[168] This would require the government to show that restrictions on liberty protect against harm to the public, and this should be done through empirical evidence rather than conclusory statements in the preambles of acts.[169] [170] In particular, victimless crimes legislation would be subject to more rigorous review, but such laws would only be struck down if they fail to protect the public as intended.[171] [172] [173] This occurs most frequently with laws criminalizing widespread and socially-tolerated conduct, and these are precisely the laws which tend to be applied inconsistently and

[168] The courts need not determine that a law's benefits exceed its costs, only that such benefits exist.
[169] Challenges to laws for which there is not yet empirical data would be dismissed under the ripeness doctrine.
[170] Legal commentators with science and economics backgrounds have often lamented the ambivalence of the courts to empirical research. The system of common law is based on the same inductive principles as the scientific method, but the only major federal case to recognize the importance of good science is *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993).
[171] This often happens when the proscribed conduct is simply driven underground, increasing its harmfulness without reducing its frequency.
[172] *Eg.*, Deaths due to alcohol consumption actually increased during alcohol prohibition. See Clark Warburton, The Economic Results of Prohibition (New York: Columbia University Press, 1932) at page 90
[173] *E.g.*, laws against prostitution are intended to protect women from violence and prevent the spread of sexually transmitted disease, but data from Nevada indicates they often achieve the opposite. *See* Lawrence Altman, *U.S. Examines Prostitutes and AIDS Virus,* NY Times, March 27, 1987

undermine respect for the rule of law.[174] Some such laws have clearly been successful in protecting the public,[175] and for others the data are ambiguous. In such cases, the courts should properly defer to the political branches. However, such deference is only appropriate when legislative judgments are supported by substantial evidence.[176]

Justice Oliver Wendell Holmes was famously quoted as stating, "If my fellow citizens want to go to Hell, I will help them. It's my job."[177] If there's one lesson to be drawn from constitutional scholarship, it is that this is emphatically *not* the role of the Supreme Court. The most sacred role of a Supreme Court justice is the preservation of liberty. The Constitution is but a collection of safeguards of individual liberty, and the Supreme Court is the lynchpin of that plan. Without diligent enforcement by the Supreme Court, all the protections of liberty enshrined in the Constitution are merely precatory. It is laudable for the Court to refrain from arbitrarily imposing its will upon the legislative process, but it is the Court's duty to prevent the legislature from arbitrarily imposing upon the people. As members of a free and ordered society we sacrifice many of our freedoms for the common good, but our freedoms should not be sacrificed in vain. Perhaps with the benefit of a clearer legal framework, the men in whose hands our liberty rests will feel more confident performing their constitutional function.

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[174] This is the source of contempt for the law and law enforcement officers so prevalent in youth culture and impoverished communities. It creates an antagonistic relationship between police officers and those policed which often frustrates the investigation of serious crimes.
[175] E.g. seatbelt laws
[176] This is similar to the standard applied to administrative judgments under the "substantial evidence" test and expanded to constitutional litigation in *Turner Broadcas. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 666 (1994)
[177] *See* Albert Alschuler, *Law Without Values: The Life, Work and Legacy of Oliver Wendell Holmes* at 63, also quoting Holmes as stating, "I loathed most of the things I decided in favor of," and "the crowd, if it knew more, wouldn't want what it does – but that's immaterial." *Id*.