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Substantive Due Process: The Trojan Horse of Judicial Legislation, 51 J. Marshall L. Rev. 261 (2018)

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SUBSTANTIVE DUE PROCESS: THE TROJAN HORSE OF JUDICIAL LEGISLATION

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I. INTRODUCTION

The Due Process Clause of the Fifth Amendment to the United States Constitution provides in part, “No person shall . . . be denied life, liberty or property without due process of law.”¹ Likewise, the Fourteenth Amendment commands, “nor shall any state deny any person life, liberty, or property, without due process of law”² The theoretical question raised upon examining the plain text of the above clauses is: just what kind of process is due before the government may take away these hallowed rights? Nonetheless, the United States Supreme Court has far too often used a clause that indisputably invokes procedure to justify imposing substantive limits on what the government can do.³ Whatever one thinks about the outcomes of these “substantive” due process cases, the questions raised in each do not suffer for want of controversy. Politically charged issues such as labor relations, birth control, and private consensual sexual conduct between adults, amongst a host of others, have seen the ferocious democratic debate that surrounds them resolved by nine unelected and unaccountable judges in the

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1. U.S. Const. amend. V.

2. U.S. Const. amend. XIV.

3. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003).

Nation's capital.⁴ To be sure, the elasticity of constitutional standards and principles can be maddening for the traditional law student taught to memorize clear cut rules and legal practitioners seeking to use them on behalf of their clients; but substantive due process theory goes much further. Unlike most constitutional doctrines, it has no cognizable ties to a clause about *process*, and this paper submits it is nothing more than a thinly veiled pretext for the most odious form of judicial legislation. Substantive Due Process should be discarded as having no legitimate role in American constitutional jurisprudence.

II. DAVID BERNSTEIN'S CASE IN FAVOR OF SUBSTANTIVE DUE PROCESS

In *Lochner v. New York*,⁵ the Supreme Court held that a state law limiting bakers to a sixty-hour work week was unconstitutional as a violation of the "liberty of contract" that the Court maintained was implicit in the Due Process Clause of the Fourteenth Amendment.⁶ Since that decision, Professor David Bernstein⁷ argues that *Lochner* has become the most infamous case in constitutional theory and "shorthand for all manner of constitutional evils."⁸ He asserts that while the critics of the *Lochner* decision maintain that it crafted a substantive due process standard out of whole cloth, many state courts had been relying on the doctrine to strike down legislation that unduly encroached on economic liberties since the 1850s.⁹ Bernstein also maintains that state courts borrowed from the dissent in the *Slaughter-House Cases*¹⁰ to hold that individuals had a constitutionally protected liberty interest in pursuing the profession or vocation of their choice without undue interference by the state.¹¹ Bernstein contends that the principles of freedom of contract were so deeply rooted in constitutional theory that decisions invoking these substantive restrictions on legislation via the Due Process Clause became

4. U.S. Const. art. 3, § 1.

5. *Lochner*, 195 U.S. at 64-65.

6. *Id.* at 64.

7. David E. Bernstein is the George Mason University Foundation Professor at the George Mason University School of Law in Arlington, Virginia, where he has been teaching since 1995. He has been a visiting professor at Brooklyn Law School, Georgetown Law Center, University of Michigan Law School, and William and Mary Law School. Professor Bernstein teaches Constitutional Law I and II, Evidence, Expert and Scientific Evidence, and Products Liability. He is a contributor to the popular Volokh Conspiracy blog.

8. DAVID BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 1 (Univ. of Chicago Press 2012).

9. *Id.* at 10-11.

10. 83 U.S. 36 (1872).

11. *Id.* at 17.

commonplace as early as the 1870s.¹² As such, Bernstein asserts, “[w]hat history can tell us is that the standard account of the rise, fall, and influence of the liberty of contract doctrine is inaccurate, unfair, and anachronistic.”¹³ Bernstein goes on to discuss the countervailing school of thought of the era, Progressive Sociological Jurisprudence, which he claims “often masked a political agenda that favored a significant increase in government involvement in American economic and social life.”¹⁴ Bernstein maintains that jurists such as Justice Oliver Wendell Holmes subscribed to this legal theory, and cared little for the individual rights that liberty of contract substantive due process jurisprudence valued, favoring majoritarian decision making instead.¹⁵

III. JUSTICE OLIVER WENDELL HOLMES’ CRITIQUE OF *LOCHNER*

The most powerful critique of Professor Bernstein’s approach is the short shrift that it gives to democratic decision making. An ideology that views the Constitution as a document that constrains the state from sensibly and reasonably responding to the public will allow the courts to sit as philosopher kings, cloaking their political dispositions under the guise of legal analysis. Justice Holmes sufficiently responded to his critics in the first page of his classic work, *The Common Law*: “The life of the law has not been logic; it has been experience . . . The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”¹⁶ In his *Lochner* dissent, Holmes appropriately began by stressing his careful reluctance to have the Court step in to block democratic will:

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory I should desire to study it further and long before making up my mind. *But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of the majority to embody their opinions in law.*¹⁷

Holmes then directly confronts the fallacy that the Due Process Clause has barred serious encroachments on liberty of contract, noting that Sunday laws and usury laws had long been upheld by the Court.¹⁸ Two years before *Lochner*, Holmes noted that the Court

12. *Id.* at 18-19.

13. *Id.* at 6; see also Scott D. Gerber, *Reason Papers*, Vol. 33, at 212 (reviewing Bernstein’s critique in *Rehabilitating Lochner*).

14. BERNSTEIN, *supra* note 7, at 41; *id.* at 213.

15. Gerber, *supra* note 13, at 213.

16. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1st ed. 1881).

17. *Lochner*, 195 U.S. at 75 (emphasis added).

18. *Id.*

upheld a law that also deeply infringed upon liberty of contract: an *outright bar* on the sales of stock on the margins or for future delivery in California's state constitution.¹⁹ Holmes also discussed several other cases upholding laws interfering with liberty of contract, including the Court's contemporaneous validation of a statute prohibiting minors from working more than eight hours in any given day.²⁰ Holmes' citation of these cases also supports the proposition that the liberty of contract doctrine, that its supporters claim is grounded in principles of substantive due process, is a malleable concept that makes it easy for judges to impose their political ideology on the rest of the country. If the doctrine was as firm as its proponents assert, these cases should have been decided differently.

Holmes also pens a passage in his *Lochner* dissent that has become a classic in American constitutional law:

*The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics . . . Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.*²¹

Holmes maintained that the concept of liberty embodied in the Fourteenth Amendment is distorted if used as a tool to weaken democratic action "unless it can be said that *a rational and fair man necessarily would admit* that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."²² Unlike the assertions of his protractors, this would not necessitate spineless judicial review. However, its greater significance seems to be a vision of American constitutionalism that allows for inclusive politics, one which embraces a kaleidoscope of viewpoints in responding to national problems and is properly reluctant to disturb legislation under the guide of a substantive due process doctrine that is imprecise at best. Professor Bernstein does not seem to have a persuasive reply to the thrust of Justice Holmes' dissent. He correctly notes that some state courts and the U.S. Supreme Court have used substantive due process principles of liberty of contract to strike down legislation. Still, Justice Holmes' *Lochner* dissent makes it clear that, at the very least, the doctrine has not been uniform in theory or

19. *Id.* (citing *Otis v. Parker*, 187 U.S. 606 (1903)).

20. *Lochner*, 195 U.S. at 75 (citing *Holden v. Hardy*, 169 U.S. 366 (1897)).

21. *Lochner*, 195 U.S. at 75-76 (emphasis added).

22. *Id.* at 76 (emphasis added).

application. This kind of concept allows judges, perhaps by design, to run wild in a field of law already filled with vague precepts that are hard to apply in individual cases. Unlike most constitutional doctrines, however, substantive due process has no ties to the procedural clause of the constitutional text it invokes. Those two problems alone mitigate against using substantive due process as a method of striking down legislation. In a vigorous national debate where reasonable citizens and jurists who seek to remain faithful to constitutional principles may disagree, the Supreme Court ought to be reluctant to invoke a dubious doctrine to resolve the debate. Substantive due process jurisprudence that allows and, by its ambiguity, even encourages the Court to do precisely that should be scrapped. In a free society, constitutional constraints on democratic action ought not to be imposed in such a fashion.

IV. RICHARD EPSTEIN'S AHISTORICAL APPROACH TO SUBSTANTIVE DUE PROCESS

Professor Richard Epstein likewise argues that up until the late 1930s, liberty of contract was strongly protected via the Due Process Clause.²³ For support, he first cites a famous passage penned by Justice Peckham in *Allgeyer v. Louisiana*:

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

Epstein says that this broad reading of liberty of contract set the *Lochner* decision on solid ground nearly a decade before it was decided.²⁵ To buttress his position, Epstein contends that Justice Peckham treated the New York measure at issue as a labor statute that was outside the scope of the state government's police power to regulate safety and health.²⁶ Epstein maintains that the hour restrictions in the New York law applied only to bakers who were in direct competition with union bakers, "not those in other lines that might be subject to the same health and safety risks."²⁷

This argument misses the mark. First, Epstein's position that

23. RICHARD EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 339 (Harvard Univ. Press 2017).

24. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

25. See EPSTEIN, *supra* note 23, at 339.

26. *Id.* at 339-340.

27. *Id.*

liberty of contract was strongly protected is historically inaccurate. He is certainly right that there were *some* cases that held steadfast to the doctrine, but he offers no credible distinction between these cases and the cases Justice Holmes mentions in his *Lochner* dissent in which the Court upheld far greater encroachments on liberty of contract. Instead, he lambasts Justice Holmes' opinion as masking "an economic blunder by ignoring the simple point that mutual benefits arise from voluntary exchanges no matter how great the initial wealth differentials may be."²⁸ The truth or invalidity of Epstein's assertion here is entirely irrelevant. As Justice Holmes emphasized, the proper question is whether this political ideology must be constitutionalized if the rule of law is to be upheld. Epstein's apparent disdain for labor seems to blind him to the reality that the legislature does not have to address a whole problem by passing a single statute. Epstein notes that the statute at issue in *Lochner* would only apply to those who were in direct competition with unionized bakers, instead of everyone in the industry that could be subjected to similar risks. What difference does that make? At best, this argument sounds in equal protection.²⁹ The Due Process Clause should not be interpreted to bar lawmakers from proceeding piecemeal if they deem fit. This statute is at the very least a reasonable response to a potential health hazard. The larger point, aside from the merits of Epstein's or Holmes' approach to substantive due process, bears repeating: the doctrine has been wildly erratic and hopelessly unpredictable in its application. Epstein does nothing to rebut that premise.

V. JACK BALKIN'S ACCOUNT OF SUBSTANTIVE DUE PROCESS

Professor Jack Balkin's account of substantive due process starts out with a broad outline of its historical origins, including the rise and eventual fall of the *Lochner* era.³⁰ Balkin then pivots to a discussion that notes the Supreme Court's use in the post-New Deal era of the Due Process Clause of the Fourteenth Amendment to begin applying parts of the Bill of Rights against the states.³¹ Balkin maintains that the Supreme Court incorporated substantive rights, such as freedom of speech, against the states by arguing that these rights are part of the "liberty" protected by the Due Process Clause.³² At first the Court did so with precepts that were already enumerated in the Bill of Rights to the Constitution.³³ However,

28. *Id.* at 340.

29. Where surely it would survive judicial review as it does not involve a suspect classification, but that is outside the scope of this discussion.

30. JACK M. BALKIN, *LIVING ORIGINALISM* 245 (Harvard Univ. Press 2014).

31. *Id.*

32. *Id.*

33. *Id.*

Balkin notes that the Court then employed substantive due process reasoning to protect unremunerated rights such as “a fundamental right to marital privacy, and, still later, general rights of contraceptive use, the right to abortion, and homosexual rights.”³⁴ Balkin proceeds to review and critique what he sees as the two prevailing positions of the due process clause: one asserting it guarantees mere procedural fairness and the other maintaining it protects substantive liberties.³⁵

Balkin then asserts that although the ideal of due process states a principle of procedural fairness, its conception during the Founding Father’s era “included some guarantees that we would now consider substantive. The reason for this, however, is that people connected procedural fairness with the separation of legislative and judicial powers and not that the due process principle was a general guarantee of liberty.”³⁶ Balkin then draws on historical evidence going as far back as the Magna Carta to conclude that the concept of due process protected “vested” rights, such as property, from being extinguished by the state or involuntarily transferred from one private party to another. Further, it required that particularized laws aimed at particular people or groups were the province of courts, not legislators.³⁷ With respect to the latter, due process was said to mandate “legislatures to create laws of general scope, which did not single out groups of persons for special favor or disfavor.”³⁸ After this laudable attempt to explain some of the cobbled jurisprudence behind substantive due process, Balkin rightly points out:

Even so, the due process clause is not a general guarantee of substantive liberty, and therefore is not the appropriate vehicle for most implied fundamental rights. To the extent that the Constitution guarantees these fundamental rights, they are protected by the privileges or immunities clause of the Fourteenth Amendment in conjunction with the Ninth Amendment.³⁹

The problem with conceiving of the Due Process Clause as a protection against substantive legislation is two-fold. First, such an approach, as Balkin concedes, seems to be unwise: it is a tortured reading of the Due Process Clause to interpret its mandate as a substantive guarantee. More to the point, however, such a reading is plainly unnecessary: several other constitutional provisions can and do operate to stop some of the harsh results that might otherwise flow from an outright reversal of cases establishing constitutional rights that many, if not most, Americans now take

34. *Id.*

35. *Id.* at 246.

36. *Id.*

37. *Id.* at 246-47.

38. *Id.* at 247.

39. *Id.*

for granted. Balkin sensibly points to the Privileges or Immunities Clause of the Fourteenth Amendment. By its own terms, that clause applies directly to the states; no abstract legal theory is necessary. Perhaps the question would then become which Amendments in the Bill of Rights have become so fundamental as to be part and parcel of national citizenship. Using a provision that guarantees certain substantive rights as a mechanism to determine what those rights are would seem to have some circularity to it. However, Balkin suggests reading it in conjunction with the Ninth Amendment, which explicitly states that the enumeration of certain rights in the text is not to be taken as a denial of other rights retained by the people. A jurist could then carefully examine case law, history, and context when deciding whether the proposed right is expressly or by implication enshrined in the Constitution.

This approach surely invites the courts to impute their own politics in rendering monumental decisions of which substantive rights deserve constitutional protection, and which ones do not. Such is the life of constitutional law. Still, jurisprudentially, it is by far a more coherent and intellectually honest approach. It is at least preferable to disjointed reasoning that sifts through a procedural clause in search of substantive rights. This approach would have the capacity of producing a more consistent and predictable body of case law than having judges hiding behind the epistemological maze of “substantive due process.” When the question is one of substance, it is a more faithful reading of the constitutional text to turn to its substantive provisions to begin searching for the answer.

In his explanation of the history behind substantive due process, Professor Balkin provides further support, intentionally or otherwise, to the proposition that “substantive due process” is an imprecise and unpredictable doctrine. If anything, Balkin’s analysis implicitly adds insult to injury: in addition to these problems, substantive due process is conceptually flawed from the outset.

Critics may assert that a retreat from substantive due process would extinguish hard fought victories stemming from the women’s and gay rights movements. In reality, these landmark cases could be more sensibly and securely maintained on other legal grounds. In any event, these victories were largely a result of the kind of democratic action that substantive due process has often been used to block. Those who advocate letting democratic debate and collective decision making drive national policy should not seek to wrap their victories in the hollow cloth of substantive due process.

VI. THE CONSTITUTION IN EXILE?

Judge Douglas Ginsberg of the United States Court of Appeals for the District of Columbia Circuit has lamented that the Constitution’s commitments to economic liberty and limited federal power were abandoned in the late 1930s when the Supreme Court

started to uphold much of President Franklin D. Roosevelt's New Deal legislation against constitutional attack.⁴⁰ Ginsberg asserts that by doing this, the Court casted the "Constitution into Exile," its true meaning only "kept alive by a few scholars who labor in the hope of a restoration, a second coming of the Constitution of Liberty."⁴¹ Judge Ginsberg cites substantive due process as one of the doctrines that have been "exiled" and asserts that until a resurrection occurs, economic and property rights that the Constitution once held sacred will only be further eroded.⁴² Justice Clarence Thomas and, indeed, Professor Richard Epstein have also expressed support for this view.⁴³

The Constitution in Exile theory deals with substantive due process along with a host of other doctrines that the Court began to read differently in the late 1930s, particularly the Commerce Clause, to sustain New Deal legislation.⁴⁴ The wisdom of the Court's more expansive reading of the Commerce Clause is beyond the scope of this discussion, and its merits and flaws have been thoroughly debated by jurists and scholars across the ideological spectrum. Still, it is critical to note that the debate that surrounds the Commerce Clause (as well as the Necessary and Proper Clause and the Takings Clause that proponents of the Constitution in Exile theory discuss) deals with the meaning of another substantive provision of the Constitution: what does the power to regulate commerce "among the several states . . ." mean in practice?⁴⁵ This school of thought does not appear to have anything persuasive to say about using a clause that expressly mentions procedure as a pretext to block substantive legislation. This seems particularly problematic since Justice Thomas and other proponents of the theory are avowed Originalists who ordinarily claim a commitment to strict construction of the constitutional text.⁴⁶ How can a jurist profess that he or she seeks to apply the plain meaning of the text and yet, in the same breath, assert that the due *process* clause is to be read to embody substantive restrictions? At least those professing a commitment to a living Constitution acknowledge at the beginning of their analysis that the Constitution must be read flexibly to adapt to the demands of a modern society. For an

40. William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001).

41. *Id.* (citing Douglas H. Ginsberg, *Delegation Running Riot*, REGULATION NO 1 at 83-84 (1995)).

42. Douglas H. Ginsberg, *Delegation Running Riot*, REGULATION NO 1 at 83-84.

43. Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES (Apr. 17, 2005), www.nytimes.com/2005/04/17/magazine/the-unregulated-offensive.html.

44. Ginsberg, *supra* note 42, at 83-84.

45. U.S. CONST. art. 1, § 8, cl. 3.

46. Nancie G. Marzulla, *The Textualism of Clarence Thomas: Anchoring the Supreme Court's Property Rights Jurisprudence to the Constitution*, 10 JOURNAL OF GENDER, SOCIAL POLICY, AND THE LAW 351, 360 (2002).

Originalist like Justice Thomas to go down the same road stretches the comprehension of a reasonable person to the breaking point. The intellectual dishonesty of such an approach is as blatant as it is breathtaking.

VII. THE JUDICIAL CONDEMNATION CUTTING ACROSS USUAL LINES

Substantive Due Process has no shortage of critics across historical and ideological lines. Justice Holmes' fears turned out to be well founded:

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, *I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions . . .* we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.⁴⁷

The conservative jurist may bristle at this source; but perhaps Justice Antonin Scalia would command more respect. In *City of Chicago v. Morales*,⁴⁸ the President Ronald Reagan appointee chastised the doctrine in dissent: "The entire practice of using the Due Process Clause to *add judicially favored rights to the limitations upon democracy* set forth in the Bill of Rights (usually under the rubric of so-called 'substantive due process') is in my view judicial usurpation."⁴⁹ With this critique, the Originalist minded Scalia joins with the more flexible Holmes in recognizing the incoherence of the doctrine. Still more jurists have lined up against substantive due process. Justice Bryon White was appointed by one of the most iconic liberal figures of the 20th Century: President John F. Kennedy. Still, his adamant dissent in many of the Warren Court's landmark decisions, particularly *Roe v. Wade*, surely earned him favor among many conservatives. In his dissent in *Moore v. East Cleveland*,⁵⁰ Justice White chided substantive due process:

[T]he Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down

47. *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J. dissenting) (emphasis added).

48. *City of Chicago v. Morales*, 527 U.S. 41 (1999).

49. *Id.* at 85.

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

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.*⁵¹

With the addition of the moderate Bryon White, substantive due process theory achieves the rare feat of uniting highly respected Justices across the ideological and historical spectrum in a common cause to discredit it. Other judicial critiques of this doctrine are legion. This discussion exposes substantive due process for exactly what it is and has been for over a century: the Trojan horse of judicial legislation.

VIII. ACADEMIC CRITIQUE OF SUBSTANTIVE DUE PROCESS

Some in the legal academy have been no less forceful than Justices Holmes, Scalia, and White in their criticism of the doctrine. Professor John Hart Ely famously declared that substantive due process could be seen as “a contradiction in terms- sort of like ‘green pastel redness.’”⁵² Professor Daniel Conkle reminds his audience that an appeal to custom and habit is not enough. “That substantive due process continues to flourish is hardly enough to justify the doctrine’s constitutional legitimacy. The Court’s decisions, from *Lochner* to *Lawrence*, have little or no support in the constitutional text.”⁵³ Conkle has no shortage of respect for the concept of liberty, but notes that “only its deprivation ‘*without due process of law*’ violates the text of the Fourteenth Amendment.”⁵⁴ Professor Conkle further elaborates:

Nor is there any persuasive evidence that the framers and ratifiers of the Due Process Clause, despite their chosen language, nonetheless intended to protect the substantive liberties that the Court has elected to privilege. Likewise, and perhaps *more to the point*, *there is no persuasive evidence that these liberties were embraced by the original meaning of the Fourteenth Amendment.* Instead the Court is protecting values that emerge from a process of nonoriginalist judicial decision making. *Needless to say, the identification and protection of unenumerated, nonoriginalist constitutional rights by an unelected Supreme Court – with the Court nullifying legislative judgments on fundamental questions of political morality – is a highly controversial practice.*⁵⁵

Professor Conkle later goes on, perhaps somewhat begrudgingly, to concede that substantive due process has enough

51. *Id.* at 544.

52. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 69 (2006) (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980)).

53. *Id.*

54. *Id.* (emphasis added).

55. *Id.* at 77-78 (emphasis added).

support on the Court and amongst some members of the public that it is likely here to stay.⁵⁶ Nonetheless, his critique in this passage is a thorough one that largely echoes and supplements the views of Justices Holmes, White and Scalia. Cronkle adds an outside perspective that urges the Court to be wary of nullifying decisions of the politically accountable branches of government on major controversies of the day by appealing to a nebulous doctrine that is not grounded in the constitutional text. Professor Cronkle's analysis makes it clear that there is little, if anything, in substantive due process jurisprudence that stops the Supreme Court from imposing its political predilections on the American public.

IX. SUSTAINED ON OTHER GROUNDS

It is undeniably true that some of the most important victories for women's and gay rights advocates have come under the legal banner of substantive due process. What is to be done with these progressive triumphs if substantive due process fades into the annals of the more shameful parts of American legal history? A discussion of two of these landmark cases, *Griswold v. Connecticut*⁵⁷ and *Lawrence v. Texas*,⁵⁸ should assure the reader that no national emergency would ensue. Both decisions could be readily sustained on more solid legal grounds. While the outcome of both cases is surely the correct one, there is no need to cloak important social advances for women and the gay community in the ruse of substantive due process.

In *Griswold v. Connecticut*,⁵⁹ the statutes at issue proscribed the use of contraception and prohibited any person from aiding or abetting such use by others.⁶⁰ The Court struck down both statutes on substantive due process grounds.⁶¹ Curiously, Justice Douglas at first seemed to suggest the Court was making a move away from substantive due process, avowing that the Court did not "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."⁶² This time, Justice Douglas assures us, things are different: "This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."⁶³ Why this distinction matters for legal, as opposed to political, reasons is anyone's guess. In any event, the restoration of substantive due process to a place of prominence in constitutional

56. *Id.* at 79.

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

58. *Lawrence*, 539 U.S. at 558.

59. *Griswold*, 381 U.S. at 479.

60. *Id.* at 480.

61. *Id.* at 482.

62. *Id.*

63. *Id.*

law after its collapse in the post *Lochner* era was plainly unnecessary to achieve the Court's purpose.

The Court could have instead held that Connecticut's statute violated the Eighth Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".⁶⁴ The Supreme Court, in *Atkins v. Virginia*,⁶⁵ nullified a sentence of death against an intellectually disabled man who had been convicted of murder, and noted that a national consensus had been reached: people with the petitioner's disability were categorically less culpable than the average criminal.⁶⁶ The Court noted that the steady and considerable shift in public opinion, combined with its own considered judgment, required prohibiting the execution of a intellectually disabled person.⁶⁷ The Court did so pursuant to a constitutional clause that the majority asserted provides for a substantive standard which contemplates a consideration of the tide of public opinion in the legal analysis of what is cruel and unusual punishment within the meaning of the Eighth Amendment.⁶⁸

This approach would have been far more coherent than the one the Court used in *Griswold*. The statute at issue there provided a *criminal sanction* for the use of contraceptives in the mid 1960s. Surely the "evolving standards of society" in the mid 1960s would not have tolerated such a harsh result, even if legislators were not as quick as one might hope in responding to public opinion. The Eighth Amendment's text plainly contemplates concern over excessive criminal penalties. Had the Court applied an analysis similar to *Atkins* when it decided *Griswold*, the case could have been decided the same way without doing violence to the constitutional text. That line of reasoning also expressly authorizes and indeed encourages the Court to look to public opinion in fleshing out the provisions of a substantive standard. Such a result allows the American public to influence, without dictating, the interpretation of some provisions of the Constitution. It should lead to more public support for the document as an acceptable framework for governance.

Contrast this potential rationale for sustaining *Griswold* with the language from the Court's opinion. Writing for the majority, Justice Douglas proclaimed that past precedent suggested "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and substance."⁶⁹ Here, the Court boldly (or foolishly) goes where no other Court seems to have gone before: legal reasoning based on

64. U.S. CONST. amend. VIII.

65. *Atkins v. Virginia*, 536 U.S. 304 (2002).

66. *Id.* at 306.

67. *Id.* at 322.

68. *Id.* at 307, 322.

69. *See Griswold*, 381 U.S. at 484.

radiation. Justice Douglas then sets up a straw man in an apparent attempt to scare his audience: “[w]ould we allow the police to search the sacred precincts of the marital bedrooms for telltale signs of contraceptives?”⁷⁰ Without going into a discourse on constitutional criminal procedure, it is clear that the Fourth Amendment would put considerable restrictions on the government’s ability to barge into a married couple’s bedroom. Under current law, ordinarily, the police would need to secure an arrest warrant from a judge to even enter the home under these circumstances.⁷¹ Without an arrest warrant, or an exception to the warrant requirement, the police could not enter a private residence.⁷² Since policy is what gets funded, the wide swath of conduct prohibited by modern criminal codes cannot always be detected by law enforcement. It seems highly unlikely either in the 1960s (concededly before *Payton* was decided) or today that the police would bring such a request before a judge.⁷³ Political realities and well settled legal doctrine makes this doomsday scenario exceedingly unlikely.

Contrast this with the observations of Justice John Marshall Harlan II’s concurring opinion. “While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations.”⁷⁴ Harlan is quite correct to reject any reference to this kind of nonsense in a Supreme Court decision, especially one of such tremendous magnitude. Justice Harlan also voiced his support for a healthy judicial restraint as an “. . . indispensable ingredient of sound constitutional adjudication”⁷⁵ Harlan is unwilling to casually use the Constitution as a vehicle to blunt democratic will in general; this is precisely what substantive due process does in an egregious fashion.

In dissent, Justice Hugo Black also warns the Court of injecting personal politics into constitutional reasoning:

I agree with my Brother STEWART’S dissenting opinion. *And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on the belief that the law is wise or that its policy is a good one.* In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is *every bit as offensive to me* as it is to my Brethren of the majority and my Brothers HARLEN, WHITE and GOLDBERG who, reciting reason why it is offensive to them, hold it unconstitutional. *There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court’s opinion or by those of my*

70. *Id.*

71. *Payton v. New York*, 445 U.S. 573, 602-603 (1980).

72. *Id.*

73. Even if the police somehow spied on the couple and saw the contraceptives from outside the residence, thereby developing probable cause to seek an arrest warrant.

74. *See Griswold*, 381 U.S. at 500 (Harlan, J. concurring).

75. *Id.* at 501.

*concurring Brethren to which I cannot subscribe – except their conclusion that the evil qualities they saw in the law make it unconstitutional.*⁷⁶

The argument for judicial restraint in constitutional adjudication reaches its zenith when the constitutional doctrine that the Court relies upon to strike down legislation is one of the most perplexing and contradictory ones American constitutional law has ever known. However offended one might be by the Connecticut law at issue in *Griswold*, applying this doctrine is no answer. As discussed above, the Eighth Amendment is a far more coherent means of striking down this statute.

In *Lawrence v. Texas*,⁷⁷ the Supreme Court used the substantive due process doctrine to strike down a Texas law that proscribed homosexual sodomy.⁷⁸ Justice Anthony Kennedy boldly declares that:

Freedom extends beyond spatial bounds. 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.⁷⁹

Perhaps all of these things are true; perhaps they are not. In any event, these concepts of liberty, not constrained by a link to a specific substantive constitutional clause, are too easy to manipulate to reach the outcome a particular majority of the Court deems politically desirable.

Justice Sandra Day O'Connor's concurrence invoking the Equal Protection Clause is a more precise and constrained method for striking down the statute. "The Equal Protection Clause of the Fourteenth Amendment 'is essentially a direction that all persons similarly situated should be treated alike.'"⁸⁰ O'Connor believed that the statute at issue here should be reviewed under a deferential rational basis standard, but noted that when a law is enacted with a bare desire to harm a politically disfavored class of persons, the Court has applied a "more searching form of rational basis review."⁸¹ Such a desire is not a legitimate state interest.⁸² O'Connor noted that the Court had been willing to apply a more rigorous rational basis review to laws that encroach upon personal relationships.⁸³ Here, the Texas statute only barred sodomy

76. *Id.* at 508 (Black, J. dissenting).

77. *Lawrence*, 539 U.S. at 558.

78. *Id.* at 579.

79. *Id.* at 562.

80. *Id.* at 579 (quoting *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982))).

81. *See Griswold*, 381 U.S. at 580.

82. *Id.* (citing *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

83. *See Griswold*, 381 U.S. at 580.

between persons of the same sex.⁸⁴ O'Connor observed the harsh results that would occur if the convictions were upheld such as bars to licensing and employment in certain areas of professional life and registration of the individual convicted under the statute as a sex offender if they had thereafter moved to any of four states: Mississippi, Idaho, South Carolina, and Louisiana.⁸⁵ She concluded that "[t]he Texas statute makes homosexuals unequal in the eyes of the law by making particular conduct—and only that conduct—subject to criminal sanction."⁸⁶ The Texas statute at issue in *Lawrence* was a blatant violation of the Equal Protection Clause. While zealously protecting gay people from this invidious discrimination, O'Connor properly noted that *ordinarily* our Constitution presumes that even deeply misguided legislation will be corrected by democratic will, not judicial fiat.⁸⁷ Justice O'Connor's opinion should have controlled a majority of the Court in *Lawrence*. Inexplicably, the Court chose to rely on the substantive due process doctrine instead.

X. CONCLUSION

The Supreme Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁸⁸ declared: "Liberty finds no refuge in a jurisprudence of doubt."⁸⁹ Of all the admittedly malleable standards and principles of American constitutional law, none has been as poorly articulated and randomly applied as the oxymoronic "substantive due process". Principles of *stare decisis* should not be religiously upheld in the name of preserving a legal theory that is so disjointed. Most, if not all, of the Court's decisions that the public has come to rely on as enumerating their "substantive due process" rights can readily be sustained on other grounds.

In the *highly unlikely* event that the proponent of one of these decisions cannot articulate a superior constitutional doctrine to uphold it, the case should be overruled and the controversy left to the democratic process. This discussion has not advocated for timid judicial review: the courts play a vital role in our society. However, a judge's role is not simply to strike down legislation that offends his or her political preferences. The President has the sword, Congress has the purse, and the Supreme Court has, if anything, the legitimacy that comes with interpreting and applying our

84. *Id.* at 581.

85. *Id.*

86. *Id.*

87. *Id.* (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985)).

88. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

89. *Id.* at 844.

Constitution in a way that is enlightened, practical, and just. The Court should not impede that venerable role by clinging tightly to a doctrine that confuses procedure and substance. Substantive Due Process should have no further role in the development of American Constitutional Law.

