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# Substantive Due Process and the Politicization of the Supreme Court

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Claremont McKenna College

Substantive Due Process and the Politicization of the  
Supreme Court

Submitted to  
Professor Ralph Rossum

By  
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for  
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## Abstract

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Substantive due process is one of the most cherished and elusive doctrines in American constitutional jurisprudence. The understanding that the Constitution of the United States protects not only specifically enumerated rights, but also broad concepts such as “liberty,” “property,” and “privacy,” forms the foundation for some of the Supreme Court’s most impactful—and controversial—decisions.

This thesis explores the constitutional merits and politicizing history of natural rights jurisprudence from its application in *Dred Scott v. Sandford* to its recent evocation in *Obergefell v. Hodges*. Indeed, from slavery to same-sex marriage, substantive due process has played a pivotal role in shaping our nation’s laws and destiny: But was it ever intended to?

This paper first examines the legal arguments in favor of substantive due process to determine whether the judiciary was designed to be the “bulwark” of natural as well as clearly scribed law. Then, employing a novel framework to measuring judicial politicization, the thesis tracks the doctrine’s application throughout its most prominent case studies. Often arriving at nuanced conclusions, we observe that the truth is more often painted in some gradation of grey than in black or white.

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## Section One: Introduction

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### Initial Remarks

The notion that the Supreme Court—and the judiciary generally—is (or should be) apolitical is grounded in the institution’s historical origins and has long been widely viewed as critical to its legitimacy. In Federalist No. 78, Alexander Hamilton made the duty of the federal court system clear:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, **as a fundamental law**. It therefore belongs to them **to ascertain its meaning**, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.<sup>1</sup>

Furthermore, Hamilton wrote that courts “are to be considered as the bulwarks of a limited Constitution against legislative encroachments” and that the “independent spirit” of judges is “essential to the faithful performance of so arduous a duty.”<sup>2</sup> Due to justices’ manner of appointment and confirmation, lifetime tenure, and other factors, the judiciary is deliberately designed to be insulated from the swings of public opinion, whims of the masses, and pressure of legislators.

It is important for the Supreme Court to be viewed as politically agnostic in large part because of its power of judicial review: Since it is the Supreme Court that has the power to define the scope of legislative and executive power under the Constitution, it is

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<sup>1</sup> Alexander Hamilton, “The Federalist Papers: No. 78,” *The Avalon Project: Federalist No 78*, Accessed January 19, 2018, [http://avalon.law.yale.edu/18th\\_century/fed78.asp](http://avalon.law.yale.edu/18th_century/fed78.asp).

<sup>2</sup> Ibid.



critical that the Court be perceived as a neutral arbiter. An ultimate tribunal that is closely tied to a political party or cause is an umpire drawn from the ranks of the home team—little time is likely to elapse before the boo's start, the game erupts in chaos, and the final score is dismissed as illegitimate.

As a deliberately unrepresentative body, the Supreme Court's legitimacy, unlike that of Congress and the executive branch, does not depend on success at the ballot box. Insofar as the American form of government rests upon the principle that ultimate power is to be earned through democratic processes, the Supreme Court has no clear and credible purpose other than as an ostensibly impartial arbiter of the law. For this reason, politicization of the Supreme Court has long been decried as antithetical to its role within our governmental scheme.

History, too, provides strong support to the notion that excessive association with a political or partisan cause has the potential to undermine the legitimacy of the Court. A string of judicial decisions striking down parts of the New Deal did, in fact, precipitate President Franklin Roosevelt's "court-packing" plan,<sup>3</sup> which, if implemented, had the potential to seriously undermine the independence of the Court. President Roosevelt's arguments in favor of the plan suggest the inherent dangers for the Court when it blurs the lines (or is perceived to blur the lines) between judicial interpretation and public policy making. In defending the court-packing plan, Roosevelt stated:

The Courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions. . . . The Court has been acting not as a judicial body, but as a policy-making body. . . . We have, therefore, reached the point as a nation

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<sup>3</sup> The History Channel, "Roosevelt Announces "court-packing" Plan," History.com, <https://www.history.com/this-day-in-history/roosevelt-announces-court-packing-plan>.

where we must take action to save the Constitution from the Court and the Court from itself. We must find a way to take an appeal from the Supreme Court to the Constitution itself.<sup>4</sup>

Roosevelt's assertion that he, alongside Congress, needed to "save the Court from itself" lost favor with the American public and, luckily, his plan was never implemented. However, hindsight affords us the opportunity to clearly see the slippery slope such a road could have paved.

Politicization of the Supreme Court not only undermines its institutional legitimacy—it also often accords the Court a public policymaking role that it is uniquely unsuited to perform. Courts have no easily accessible mechanism for tapping wide-ranging outside expertise, incorporating the diverse spectrum of views held by the American public, or regularly "tweaking" policy in order to address the multitude of minute dilemmas that might arise following implementation. Furthermore, members of the Court are appointed for life, and its composition is refreshed with "young blood" only periodically (although, to be fair, Congressional seats cannot be said to have high turnover, either). The judicial review process is time-consuming, shielded from public opinion (at least in theory), and highly bureaucratic. As such, courts are well-suited for the independent adjudication of particular laws or disputes and especially poor at crafting public policy.

While the Constitution ultimately rejects a model that provides the Supreme Court a political role, even the most cursory analysis suggests that the institution—from its

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<sup>4</sup> Franklin Delano Roosevelt, "Fireside Chat on Reorganization of the Judiciary," FDR: Fireside Chat on Judicial Reorganization, Accessed January 19, 2018, [http://xroads.virginia.edu/~ma02/volpe/newdeal/court\\_fireside\\_text.html](http://xroads.virginia.edu/~ma02/volpe/newdeal/court_fireside_text.html).

earliest incarnation through to its most recent rulings—has both helped form and been shaped by the partisan politics of its times. Indeed, political controversy surrounding our nation’s highest court is no modern phenomenon. This is perhaps most easily illustrated by considering one of the earliest and most important Supreme Court decisions: *Marbury vs. Madison* (1803).

*Marbury*, most famous for establishing the principle of judicial review, also illustrates the abiding power of politics to insert itself into judicial decision-making. The case arose from a “court packing” exercise not dissimilar in its objective (albeit on a much smaller scale) from that contemplated by President Roosevelt. The Judiciary Act of 1801 created a substantial number of new judgeships that President Adams proceeded to fill with Federalists in an effort to preserve his party’s control of the judiciary.<sup>5</sup> William Marbury, among the last to be appointed, did not receive his commission before the opposition party, led by Thomas Jefferson, took over the Presidency.<sup>6</sup> When the new Secretary of State, James Madison, refused to honor the appointment at the direction of the newly elected Anti-Federalist President, Marbury requested the Court to issue a writ of mandamus to force the new administration to deliver his commission.<sup>7</sup> In 1803 as well as today, Americans have always been willing to put up a vigorous fight when it comes to their paychecks.

Indeed, from *Marbury* on, the Supreme Court has rightfully ruled on hundreds of fundamental questions that strike to the very heart of the nation’s most pressing public

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<sup>5</sup> History.com staff, “*Marbury v. Madison*,” History.com, Published in 2009 and accessed November 20, 2017, <https://www.history.com/topics/marbury-v-madison>.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

policy debates. This is the heavy duty and responsibility of the federal judiciary. That Supreme Court decisions have political repercussions is inevitable: The very power of judicial review presupposes judicial intervention in—and, as necessary, over-ruling of—political decisions. The Court has rightfully played a pivotal role in a wide range of the country's most important and controversial policy issues including (but not limited to) slavery, desegregation, the death penalty, affirmative action, pornography, gun rights, and voting rights. It has done so in the course of interpreting a multitude of constitutional provisions, including those related to its own jurisdiction (as in *Marbury vs. Madison*), the Commerce Clause (as in any number of decisions invalidating various New Deal programs), and each of the amendments in the Bill of Rights. However, because there is little textual or historical basis for the concept of substantive due process, the doctrine occupies a special place in the politicization of the Supreme Court.

Thus, this paper explores the role of substantive due process in the politicization of the Supreme Court throughout American constitutional history. The first job in so ambitious an exercise is to define what is meant by politicization, explore its nature, and provide some criteria by which its prominence in an institution such as the Supreme Court (and the judiciary more generally) can be measured. This, alongside application of the developed methodology to the present day, is the focus of Section One of this thesis.

The second critical task is to explore the origins and constitutional merits of substantive due process as well as its relationship to more general approaches to legal interpretation (Section Two). In addition, I shall also trace the history of the doctrine's application through the decisions of the Court (Section Three), especially as those decisions are, or were perceived to be, fundamentally political.

Finally, after providing a holistic view of substantive due process in American jurisprudence, Section Four will return us to the present day. In doing so, it expounds how the currently politicized state of the Supreme Court (especially with respect to the doctrine) may be addressed moving forward. First, however, it is worth examining how to measure judicial polarization and apply that metric to the contemporary landscape of the federal judiciary generally and the Supreme Court in particular.

### Politicization of the Supreme Court: A 2018 Status Check

Defining what, precisely, is meant by the “politicization” of the Supreme Court is a more difficult task than it might initially seem. At first glance, one is tempted to employ an approach similar to that of Justice Potter Stewart’s test for recognizing obscenity in the Supreme Court’s 1964 case, *Jacobellis v. Ohio*: “I know it when I see it.”<sup>8</sup>

Unfortunately, a bit more specificity is needed for the purposes of this paper. While more formal statistical modes of measurement will be addressed, the working definition used in this thesis assesses the degree of politicization of the Supreme Court using five interrelated factors:

- The degree to which the Court makes controversial decisions that are important to the public and inconsistent with the strongly held views of a not insubstantial sector of the public, based on a rationale that is obscure.
- The extent to which the Supreme Court deviates (or appears to deviate) from established precedent or modes of judicial interpretation to reach a particular result in cases that have broad political implications.
- The extent to which Supreme Court composition is the focus of political processes, including election rhetoric and voting priorities.
- The extent to which Supreme Court nomination and confirmation is subject to a political litmus test, especially at the expense of judicial qualifications and expertise.

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<sup>8</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964)

- The degree to which Supreme Court justices are polarized along the legal spectrum.

By these measures, the Supreme Court of 2018 is extraordinarily politicized. While the first and second factors will be addressed at length throughout the historical analysis section, this chapter examines the following three in depth.

As an introduction, however, the first two factors are described at length in the context of cases involving abortion, homosexuality, and other social hot button issues. In these decisions, substantive due process in particular has been a primary (and largely unjustifiable) mechanism for the Court to insert itself into the resolution of issues that are often fundamentally nonjusticiable, resulting in the alienation of a significant sector of social conservatives.

From the standpoint of liberals, however, perhaps the best illustration of the Supreme Court reversing established modes was demonstrated by the majority decision in *Bush v. Gore* (2000). This case held that there was an Equal Protection Clause violation in using different standards of counting presidential votes for different Florida counties.<sup>9</sup> As a result, many Democrats railed the conservative block for alleged hypocrisy at best and outright judicial activism at worst in employing a stringent reading of a clause that is typically relished by liberals to “give” the Republican candidate, George W. Bush, the election.<sup>10</sup> As such, it can hardly be said that only the conservative

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<sup>9</sup> Elspeth Reeve, "Just How Bad Was *Bush v. Gore*?" *The Atlantic*, November 29, 2010, accessed December 20, 2018, <https://www.theatlantic.com/politics/archive/2010/11/just-how-bad-was-bush-v-gore/343247/>.

<sup>10</sup> *Ibid.*

camp openly criticizes the Court's decisions as political. Of course, this will also be demonstrated historically, especially with respect to the *Lochner* era.

However, in line with the third factor outlined, the degree to which the contemporary federal judiciary has been politicized is perhaps best illustrated by the 2016 presidential election (and its subsequent aftermath). In a *Sacramento Bee* article titled "It's the Nukes, Not the Supreme Court," lifelong Republican and Roy P. Crocker Professor of American Politics at Claremont McKenna College John J. Pitney describes the difficulty of his decision not to vote along party lines for the first time in 35 years:

To anybody who says that the argument stops with the words, "Supreme Court," I offer two other words: "nuclear weapons." The power to nominate justices is important, but the power to wipe out all life on earth is even more important. Maybe he doesn't pine for Armageddon, but his [Mr. Trump's] big mouth could start a crisis that spins out of control.<sup>11</sup>

Pitney continues to list the many reasons why the soon-to-be President-elect is unfit for office. However, what is relevant to this thesis is not the fact that an unpolished, former reality TV star became the 45th President of the United States: it is the degree to which voters weighed the importance of the Supreme Court at the ballot box.

During the 2016 presidential campaign, People for the American Way, a left-wing advocacy group, stated that "for the future of the Supreme Court, and for the rights of all Americans, November 8, 2016, is truly judgment day."<sup>12</sup> The group compiled a comprehensive report outlining the major areas in which the courts recently had—and

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<sup>11</sup> John J. Pitney Jr, "It's the Nukes, Not the Supreme Court," *The Sacramento Bee*, August 11, 2016, Accessed March 19, 2018, <http://www.sacbee.com/opinion/op-ed/article94872637.html>.

<sup>12</sup> People For the American Way, "Judgment Day 2016: The Future of the Supreme Court as a Critical Issue in the 2016 Presidential Election," People For the American Way, September 2015, Accessed February 19, 2018, <http://www.pfaw.org/report/judgment-day-2016-the-future-of-the-supreme-court-as-a-critical-issue-in-the-2016-presidential-election/>.

would continue to have—a tremendous role in determining public policy, namely: money and politics; civil and voting rights; LGBT rights; as well as reproductive freedom and women’s rights.<sup>13</sup> While jurisprudence concerning these areas rests on a variety of federal laws and constitutional provisions, several cases have undoubtedly been decided on a conception of “natural rights” allegedly grounded in the Fourteenth and other Amendments.

The Democratic presidential candidate herself reinforced strong rhetoric surrounding the Supreme Court. In the third presidential debate, Hillary Clinton made her stance clear:

We need a Supreme Court that will stand up on behalf of women's rights, on behalf of the rights of the LGBT community, that will stand up and say “no” to Citizens United, a decision that has undermined the election system in our country because of the way it permits dark, unaccountable money to come into our electoral system.<sup>14</sup>

In addition, during an interview on the Tom Joyner Morning Show, Clinton pledged to “look broadly and widely for people who represent the diversity of our country.”<sup>15</sup> As such, while it is surely not an exclusively 21st century phenomenon, it is clear candidates want their judicial nominations (particularly those to the Supreme Court) to reflect their own political and social views.

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<sup>13</sup> Ibid.

<sup>14</sup> Veronica Stracqualursi, “What Hillary Clinton Wants in a Supreme Court Justice,” *ABC News*, October 24, 2016, Accessed October 14, 2017, <http://abcnews.go.com/Politics/hillary-clinton-supreme-court-justice/story?id=43014620>.

<sup>15</sup> Ibid.



On the other hand, then-candidate Trump promised to appoint judges who would “protect the Second Amendment”<sup>16</sup> and largely follow in Justice Scalia’s footsteps.<sup>17</sup> And while it is no secret that presidents have long nominated justices who are likely to rule in their favor, it is rather shocking to examine how many prominent party leaders, conservative organizations, and registered Republicans supported Trump solely over the issue of the federal judiciary.

For example, former Republican primary candidate and Senator Ted Cruz (R-TX), who once called Mr. Trump a “pathological liar,”<sup>18</sup> eventually supported the Republican nominee largely due to the perceived threat Hillary Clinton’s nominees would pose to the conservative agenda.<sup>19</sup>

For anyone concerned about the Bill of Rights—free speech, religious liberty, the Second Amendment—the Court hangs in the balance. We are only one justice away from losing our most basic rights, and the next president will appoint as many as four new justices. We know, without a doubt, that every Clinton appointee would be a left-wing ideologue.<sup>20</sup>

Former Speaker of the House John Boehner (R-OH) had a similar stance on why he would be supporting Mr. Trump. In his mind, the decision was “pretty simple.”<sup>21</sup>

The legislative process, the political process, is at a standstill and will be regardless of who wins. **The only thing that really matters over the next four**

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<sup>16</sup> Politico Staff, “Full Transcript: Third 2016 Presidential Debate,” *Politico*, October 20, 2016, Accessed November 20, 2018, <https://www.politico.com/story/2016/10/full-transcript-third-2016-presidential-debate-230063>.

<sup>17</sup> Meet the Press, “Trump on Picking a Scalia Replacement,” *NBCNews.com*, February 14, 2016, Accessed January 20, 2018, <https://www.nbcnews.com/meet-the-press/video/trump-on-picking-a-scalia-replacement-622796355543>.

<sup>18</sup> Timothy P. Carney, “The ‘but Judges!’ Argument for Trump, and Why It Fails,” *Washington Examiner*, September 27, 2016, Accessed November 19, 2017, <http://www.washingtonexaminer.com/the-but-judges-argument-for-trump-and-why-it-fails/article/2603011>.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> Russell Berman, “Why the Supreme Court Matters More to Republicans than Trump,” *The Atlantic*, October 14, 2016, Accessed October 19, 2017, <https://www.theatlantic.com/politics/archive/2016/10/why-the-supreme-court-matters-more-to-republicans-than-trump/504038/>.

**years or eight years is who is going to appoint the next Supreme Court nominees.... The biggest impact any president can have on American society and on the American economy is who is on that court.**<sup>22</sup>

While unfortunate, the classic establishment Republican who, in any other election year, would have no business voting for Donald Trump, was precisely correct. With the legislative arena gridlocked to the teeth, the judicial branch presented the next best avenue to accomplish a political agenda. Mr. Trump recognized the Court's importance and, just four months before the election, articulated it loud and clear (in typical fashion, speaking in third person) at a campaign stop in Cedar Rapids:

If you really like Donald Trump, that's great, but if you don't, **you have to vote for me** anyway. **You know why? Supreme Court judges,** Supreme Court judges. Have no choice, sorry, sorry, sorry. You have no choice.<sup>23</sup>

It is undoubtedly clear that interest groups, the party establishment, and, most importantly, the American public were listening.

According to exit polls, 21% of voters considered the Supreme Court to be the "most important factor" when deciding how to cast their votes in the presidential election.<sup>24</sup> Of this group, 56% supported Mr. Trump.<sup>25</sup> Another 48% of voters considered the factor to be "important."<sup>26</sup> In an election where the President-elect lost the popular vote, it is possible that those who felt that they were voting (albeit indirectly) for a more conservative Supreme Court may have made the difference.

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<sup>22</sup> Ibid., Emphasis added in bold.

<sup>23</sup> David Frum, "The Supreme Court Isn't a Sufficient Reason to Vote for Trump," *The Atlantic*, August 04, 2016, Accessed November 5, 2017, <https://www.theatlantic.com/politics/archive/2016/08/scotus-not-a-good-reason-to-vote-trump/494630/>. Emphasis added in bold.

<sup>24</sup> CNN, "Exit Polls," CNN Politics, November 23, 2016, Accessed January 14, 2018, <https://www.cnn.com/election/2016/results/exit-polls>.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

It should be noted that some legal scholars regard the prominence of the composition of the Supreme Court as an election issue as appropriate and positive. For example, when I asked CNN senior legal analyst Jeffrey Toobin at Claremont McKenna College in January 2018 about election rhetoric surrounding the judiciary, the frequent television commentator spoke at length about how Americans should, in fact, be voting for representatives who they believe will protect their rights. For this reason, consideration of representatives' views regarding Supreme Court justices is appropriate.

While a compelling case at first glance, this assertion presupposes that individuals take the time to seriously consider whether their most cherished "rights" are, in fact, constitutionally mandated. At best, Toobin's picture is a rosy one. Americans are using the democratic process to help protect the rule of law, rights of minorities, and other constitutional provisions. At worst, the public—and their representatives—undermine the sovereignty and integrity of the judicial branch in order to enact public policy under the guise of legitimate legal interpretation.

Regardless of whether the composition of the Supreme Court should or should not play so prominent a role in election politics, it is clear that the degree of attention focused on this issue in the 2016 presidential election is atypical and indicative of the public's strong sense that the Supreme Court has failed to keep itself above the political fray. As William G. Ross of the Samford University's Cumberland School of Law noted in an academic commentary published in October 2012,<sup>27</sup> the Supreme Court had been an important election issue only four times in the past 100 years. According to Ross, the

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<sup>27</sup> William G. Ross, "The Supreme Court Should Be a Key Election Issue," JURIST - Forum, October 31, 2012, Accessed October 21, 2017, <http://www.jurist.org/forum/2012/10/william-ross-scotus-election.php>.

judiciary “has emerged as an important campaign issue only when the Court has alienated a distinct bloc of voters with a broad range of issues.”<sup>28</sup> In 1912 and 1924, the public backlashed in response to the Court's nullification of progressive economic policies.<sup>29</sup> In 1964 and 1968, the Warren Court's "liberal" decisions regarding the rights of criminal defendants, racial desegregation, school-sponsored prayer, and voting district populations became major election issues.<sup>30</sup> In these elections, the Republican nominees (Barry Goldwater and Richard Nixon, respectively) pledged to appoint justices who would exercise judicial restraint.<sup>31</sup> And, while this thesis argues that today's importance of the Supreme Court as an election issue is in large part due to the institution's expanded use of substantive due process over the last several decades, the point nonetheless holds that it is particularly prevalent compared to historical standards.

The third factor in assessing politicization relates to the degree to which the appointment and confirmation of justices is subject to political manipulation that is transparent to the public, as well as the extent to which political “litmus tests” are used in vetting Supreme Court nominees. Following Justice Antonin Scalia's death on February 13, 2016, Democrats were appalled when the majority Republican Senate refused to hold hearings on President Obama's nominee, Chief Judge of the U.S. Court of Appeals for the District of Columbia Justice Merrick Garland.

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<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

A study conducted by Professors Bradley Kar and Jason Mazzone deemed the “snub” unprecedented in the nation’s constitutional history.<sup>32</sup> According to the study, in all 103 cases where an elected president faced a Supreme Court vacancy before his successor’s election, he successfully nominated and appointed a replacement Justice.<sup>33</sup> To add gas to the flame, Senate Minority Leader Harry Reid (D-NV) said that his Republican counterpart, Senate Majority Leader Mitch McConnell (R-KY), refused to hold a hearing on Garland due to pressure from the billionaire Koch brothers.<sup>34</sup> And while there is some debate whether the Republican action was truly as categorically novel as the Kar and Mazzone report argues,<sup>35</sup> the politicization of the judicial appointment was clear. According to a poll by NBC News and the Wall Street Journal,<sup>36</sup> more than half of registered voters disapproved of the Republican action, while Senator Elizabeth Warren denounced the act as an “insult to the Constitution” and one that morphed a solemn Senatorial duty into a “crazy political process.”<sup>37</sup> If nothing else, this failed appointment provides ample evidence that the Supreme Court—along with the rest of the federal judiciary—is now viewed by Congress not as a third and equal arm of government, but as an effective tool for creating, maintaining, and overruling public policy.

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<sup>32</sup> Robin Bradley Kar and Jason Mazzone, “The Garland Affair: What History and the Constitution Really Say About President Obama’s Powers to Appoint a Replacement for Justice Scalia,” *SSRN Electronic Journal*, May 2016, 53-62, Accessed December 7, 2017, doi:10.2139/ssrn.2752287.

<sup>33</sup> *Ibid.*, 53.

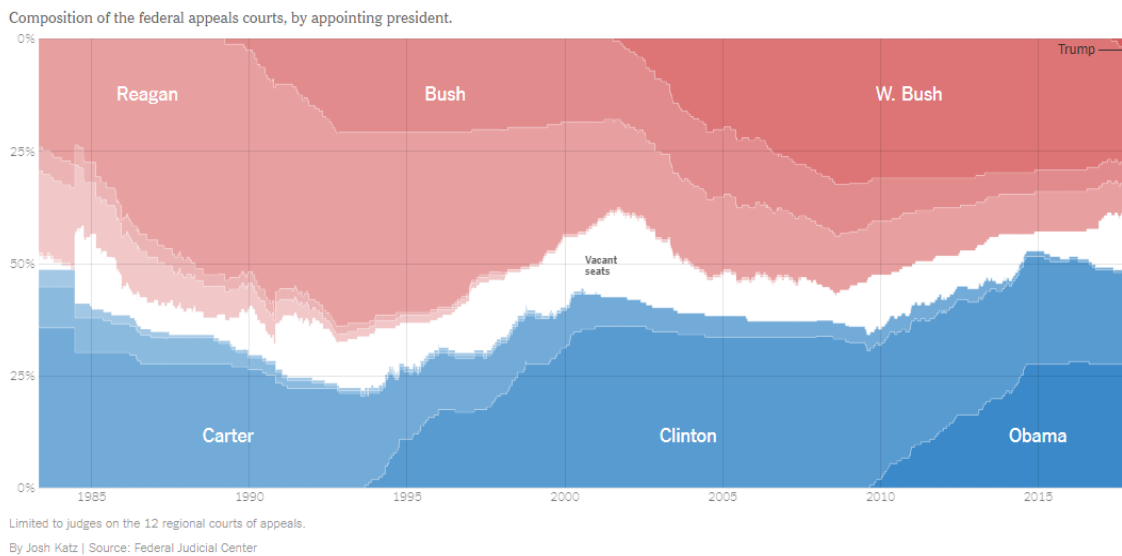
<sup>34</sup> Louis Nelson, “Harry Reid Won’t Rule out Hardball Tactics in Merrick Garland Fight,” *Politico*, August 11, 2016, Accessed October 15, 2018, <https://www.politico.com/story/2016/08/harry-reid-merrick-garland-226919>.

<sup>35</sup> Adam Liptak, “Study Calls Snub of Obama’s Supreme Court Pick Unprecedented,” *The New York Times*, June 13, 2016, Accessed October 17, 2017, <https://www.nytimes.com/2016/06/14/us/politics/obama-supreme-court-merrick-garland.html>.

<sup>36</sup> Reena Flores, “Elizabeth Warren: GOP Obstruction on SCOTUS Pick an ‘insult,’” *CBS News*, March 17, 2016, Accessed October 18, 2017, <https://www.cbsnews.com/news/elizabeth-warren-obama-supreme-court-nominee-election-2016/>.

<sup>37</sup> *Ibid.*

Some political pundits argue that President Trump's most lasting legacy in the policy arena will not be his southern border wall, tax reform, or repeal of the Affordable Care Act's individual mandate, but the degree to which he has shaped (and will continue to shape) the composition of the federal courts. After winning election, Trump nominated more federal appeals judges to the bench in his first twelve months in office than any other President (and four times as many as Barack Obama in his first year).<sup>38</sup> Upon reaching the historic mark, Faith and Freedom Coalition Executive Director Tim Head declared that, due to the President and Senate Republicans' efforts, the "federal judiciary is being reshaped for an entire generation."<sup>39</sup> Especially in light of the following chart,<sup>40</sup> the impact these lifetime appointments will have on the judiciary's composition should not be understated.



<sup>38</sup> Tessa Berenson, "Donald Trump Set a Record for Confirming Federal Judges," *Time*, December 15, 2017, Accessed October 18, 2018, <http://time.com/5066679/donald-trump-federal-judges-record/>.

<sup>39</sup> *Ibid.*

<sup>40</sup> Charlie Savage, "Trump Is Rapidly Reshaping the Judiciary. Here's How," *The New York Times*, November 11, 2017, Accessed January 26, 2018, <https://www.nytimes.com/2017/11/11/us/politics/trump-judiciary-appeals-courts-conservatives.html>.

As of January 19, 2018, the Senate had confirmed 23 of the President's Article III nominees, including Neil Gorsuch, a conservative, textualist, 50 year old former Circuit Court of Appeals Judge for the 10th Circuit.<sup>41</sup> At the time of his confirmation, Mr. Gorsuch was the youngest successful nominee since Clarence Thomas.<sup>42</sup> Following Senate Democrats' filibuster of Mr. Gorsuch's nomination, Sen. McConnell employed the so-called "nuclear option" in order to confirm the Justice. This action, which cut the votes necessary to confirm the Supreme Court Justice from 60 to a simple majority, was the first time the process had been used to push a judge through to the highest federal court.<sup>43</sup>

Overall, the practice of appointing judges and justices that share the President's political orientation is not a new one: As discussed above, the practice dates from the time of *Marbury vs. Madison*. The extent to which the number of judicial nominees put in place by President Trump is troubling depends largely on one's political orientation. What is of note in the context of the present analysis is the degree nominations appear to be subject to a political litmus test and without regard to judicial qualification. Four of President Trump's nominees for judicial positions in his first year in office were rated as "not qualified" by the American Bar Association.<sup>44</sup> One of these, Brett J. Talley, a

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<sup>41</sup> Kyle Kim, "Trump Appointing Judges at Rapid pace," *Los Angeles Times*, January 19, 2018, Accessed April 20, 2018, <http://www.latimes.com/projects/la-na-pol-trump-federal-judiciary/>.

<sup>42</sup> Aaron Blake, "The One Big Reason Republicans REALLY Love Neil Gorsuch," *The Washington Post*, February 01, 2017, [https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/why-neil-gorsuchs-age-is-a-big-deal-for-republicans-and-the-supreme-court/?utm\\_term=.f9bb15e294f6](https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/why-neil-gorsuchs-age-is-a-big-deal-for-republicans-and-the-supreme-court/?utm_term=.f9bb15e294f6).

<sup>43</sup> Ali Rogin, "Senate Approves 'nuclear Option,' Clears Path for Neil Gorsuch Supreme Court Nomination Vote," *ABC News*, April 06, 2017, Accessed November 23, 2018, <http://abcnews.go.com/Politics/senate-approves-nuclear-option-fight-gorsuch-supreme-court/story?id=46608672>.

<sup>44</sup> Philip Bump, "Analysis | How Unusual Are Trump's 'not Qualified' Judicial Nominations?," *The Washington Post*, December 15, 2017, Accessed January 19, 2018, [https://www.washingtonpost.com/news/politics/wp/2017/11/10/how-unusual-are-trumps-not-qualified-judicial-nominations/?noredirect=on&utm\\_term=.38c31f2a4f23](https://www.washingtonpost.com/news/politics/wp/2017/11/10/how-unusual-are-trumps-not-qualified-judicial-nominations/?noredirect=on&utm_term=.38c31f2a4f23).

nominee for a federal judgeship in Alabama, eventually withdrew his name after it was revealed that he had never tried a case, was unanimously rated “not qualified” by the American Bar Association's judicial rating committee, had practiced law for only three years, and had posted highly partisan posts on the internet.<sup>45</sup> Another nominee, Matthew Spencer Petersen (who had never tried a jury or civil case), went viral on the internet after he struggled to answer basic legal questions posed to him by Republican Senator Neely Kennedy (R-LA).<sup>46</sup> Charges have been raised by scholars such as Russell Wheeler from the Brookings Institution that Trump nominees are more consistently conservative due to the extensive vetting responsibility given to the Federalist Society,<sup>47</sup> which holds strong financial ties to conservative donors such as the Koch Brothers.<sup>48</sup>

The fifth factor to be considered in determining the degree of Supreme Court politicization relates to the extent of polarization among members of the bench itself. According to research conducted by Atlantic writer David Paul Kuhn, less than 2% of Supreme Court rulings were decided by single vote margins from 1804-1940.<sup>49</sup> In 2012,

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<sup>45</sup> David Savage, "Embattled Trump Judicial Nominee Brett Talley Withdraws," *Los Angeles Times*, December 13, 2017, Accessed January 19, 2018, <http://www.latimes.com/politics/washington/la-na-pol-essential-washington-updates-embattled-trump-judge-nominee-withdraws-1513192192-htmlstory.html>.

<sup>46</sup> Aaron Blake, "Analysis | That Painful Exchange between a Trump Judicial Pick and a GOP Senator, Annotated," *The Washington Post*, December 15, 2017, Accessed January 19, 2018, [https://www.washingtonpost.com/news/the-fix/wp/2017/12/15/that-painful-exchange-between-a-trump-judicial-pick-and-a-gop-senator-annotated/?utm\\_term=.467e38bf21a0](https://www.washingtonpost.com/news/the-fix/wp/2017/12/15/that-painful-exchange-between-a-trump-judicial-pick-and-a-gop-senator-annotated/?utm_term=.467e38bf21a0).

<sup>47</sup> Nina Totenberg, "3 Trump Judicial Nominees Withdraw, Raising Some Questions About Vetting," *NPR*, December 20, 2017, Accessed January 19, 2018, <https://www.npr.org/2017/12/19/572046189/three-trump-judicial-nominees-withdraw-raising-some-questions-about-vetting>.

<sup>48</sup> Jeffrey Toobin, "The Conservative Pipeline to the Supreme Court," *The New Yorker*, June 19, 2017, Accessed January 19, 2018, [https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court?mbid=nl\\_170410\\_Daily&CNDID=49221241&spMailingID=10793995&spUserID=MTg0OTkxNzg0Nzg3S0&spJobID=1140767167&spReportId=MTE0MDc2NzE2NwS2](https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court?mbid=nl_170410_Daily&CNDID=49221241&spMailingID=10793995&spUserID=MTg0OTkxNzg0Nzg3S0&spJobID=1140767167&spReportId=MTE0MDc2NzE2NwS2).

<sup>49</sup> David Paul Kuhn, "The Incredible Polarization and Politicization of the Supreme Court," *The Atlantic*, June 29, 2012, Accessed January 19, 2018, <https://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/>.



the statistic was 20%.<sup>50</sup> Thus there is at least some quantitative evidence that the Supreme Court is increasingly polarized.

Many academics and researchers have attempted to put numbers to the phenomenon of increased polarization among the American public. According to the “DW-NOMINATE” metric developed by Professors Keith Poole and Howard Rosenthal, Congress is more polarized today than any time since reconstruction.<sup>51</sup> Nor is Congress unrepresentative in this regard. As demonstrated by a 2014 study conducted by the Pew Research Center,<sup>52</sup> Americans were more ideologically divided then than in several decades. Perhaps even more concerning, in recent years, each party is increasingly viewing the other as a “threat to the nation’s well-being.”<sup>53</sup> While there is significant debate as to whether the ideological divide that characterizes the public today caused the polarization of the political parties in Congress—or vice versa—it appears clear that both the people and their representatives are moving away from the prospect of compromise.

It certainly makes sense that as members of Congress and the public have become more polarized, the judiciary might follow suit. However, while it is difficult to quantify politicization in the legislative arena, it is perhaps even more so in the judicial realm. The most well-known standard for assessing judicial ideology is the Martin-Quinn score, developed by Professors Andrew Martin and Kevin Quinn. Using their statistical algorithm, the two graphed each Supreme Court Justice’s ideological position on a scale

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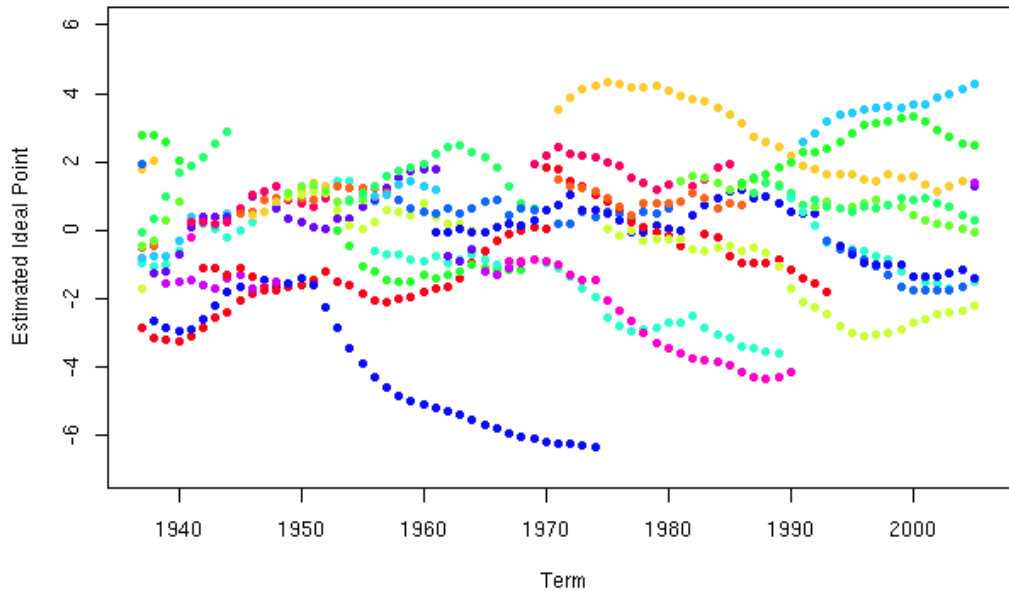
<sup>50</sup> Ibid.

<sup>51</sup> Drew DeSilver, “The Polarized Congress of Today Has Its Roots in the 1970s,” Pew Research Center, June 12, 2014, Accessed November 20, 2017, <http://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/>.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

of -8 (most liberal) to 8 (most conservative).<sup>54</sup> Indeed, as demonstrated by the following chart,<sup>55</sup> it appears that the “gap” between justices, as well as the standard deviations, has grown since roughly the mid-1960s, when substantive due process was revived in “personal liberty” cases.



In conclusion, based on the working definition of politicization proposed, it appears that today’s Supreme Court is broadly viewed as highly politicized. This paper does not argue that the substantive due process is the sole or even necessarily the primary cause of our highly politicized and polarized court. It does, however, assert that the doctrine is the primary means by which the Court justifies incorrect decisions that are constitutionally designed to remain in the legislative arena, thereby courting the kind of politicization described above.

<sup>54</sup> Andrew D. Martin and Kevin M. Quinn, "Project Description," Martin-Quinn Scores: Description, Accessed December 20, 2017, <http://mqscores.lsa.umich.edu/index.php>.

<sup>55</sup> Ibid.

## Section Two: Exploring the Constitutional Merits of Substantive Due Process

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### Initial Remarks

This section of the thesis focuses on providing an overview of substantive due process or “natural rights” jurisprudence. In doing so, it addresses the following questions:

- What is substantive due process?
- How is the doctrine’s legitimacy tied to modes of constitutional interpretation?
- Is the doctrine supported by the Constitution—either by the Fifth or Fourteenth Amendment Due Process Clauses or by references to unenumerated rights within the Ninth Amendment?
- Do contemporary sources suggest that some notion of substantive due process may reasonably be “read into” the Constitution?

### What is Substantive Due Process?

In examining the legitimacy of substantive due process, it is first necessary to develop a working definition of the term. Interestingly, as argued by Professor John Harrison at the University of Virginia, “the textual pedigree of substantive due process has no definitive judicial articulation—there is no *Marbury*, no *McCulloch*, for substantive due process.”<sup>56</sup> In the absence of an authoritative description, the doctrine is often defined in juxtaposition to procedural due process, which is explicitly protected by the Fifth and Fourteenth Amendments. Specifically, the Fifth Amendment Due Process Clause prohibits the federal government from depriving any person of “life, liberty, or property,

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<sup>56</sup> John Harrison, “Substantive Due Process and The Constitutional Text,” *Virginia Law Review* 83, no. 3 (April 1997): 495, Accessed January 14, 2018, doi:10.18411/a-2017-023. [http://www.law.virginia.edu/pdf/faculty/hein/harrison/83va\\_1\\_rev493\\_1997.pdf](http://www.law.virginia.edu/pdf/faculty/hein/harrison/83va_1_rev493_1997.pdf).

without due process of law.”<sup>57</sup> The Fourteenth Amendment extends that prohibition to the states.

Director of the William E. and Carol G. Simon Center on Religion and the Constitution at the Witherspoon Institute, Professor Matthew Franck, articulates the distinction between procedural and substantive due process as follows:

A procedural right is one that requires the government to enforce its policies—it matters not what they are—in such a way and by such processes that we are treated fairly under the rules laid down. A substantive right is a right against the imposition of certain kinds of policies on us under any circumstances—in this instance it mattering a great deal what the policies are, therefore, and there being no “right way,” no rules laid down, that can render the policy itself legitimate.<sup>58</sup>

Thus, procedural due process merely asks whether the government has followed proper legal channels before taking a punitive measure. Justice Scalia put his explanation simply:

Now, what does this guarantee? Does it guarantee life, liberty or property? No, indeed! All three can be taken away. You can be fined, you can be incarcerated, you can even be executed, but not without due process of law. It’s a procedural guarantee.<sup>59</sup>

Indeed, from a grammatical standpoint, the clause’s language is clear. To use an analogy, suppose instead that it read, “No employer shall terminate an employee, reduce hours, or change insurance plans without first submitting a two week, advance notice to the Department of Labor.” This does not mean a department manager at Amazon is prohibited from firing the consistently late delivery truck driver, moving shifts around, or

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<sup>57</sup> U.S. Const. Amend V.

<sup>58</sup> Matthew J. Franck, “What Happened to the Due Process Clause in the Dred Scott Case? The Continuing Confusion over “Substance” versus “Process,”” *American Political Thought* 4, no. 1 (Winter 2015), 122, Accessed February 13, 2018, doi:10.1086/679325.

<sup>59</sup> Antonin Scalia, “Constitutional Interpretation the Old Fashioned Way,” March 14, 2005, Accessed January 17, 2018, [https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia 2010-2011/Constitutional\\_Interpretation\\_Scalia.pdf](https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf).

re-evaluating its contract with Blue Cross. Furthermore, such a clause would certainly not grant the delivery driver paid paternity leave, 2x overtime pay, or a 401(k) match.

Nonetheless, this is precisely the kind of interpretation the Supreme Court has read into the Constitution through its use of substantive due process. In general, the doctrine asks “whether” or “what” instead of “how.” It asks, as Professor Erwin Chemerinsky put it in a 1999 speech at Duke University, “whether the government’s deprivation of a person’s life, liberty or property is justified by a sufficient purpose... a good enough reason for such a deprivation.”<sup>60</sup> Since the doctrine is only employed when laws are purportedly adverse to notions of “ordered liberty” or “natural rights,” this paper uses the terms substantive due process and natural rights jurisprudence interchangeably.

In undertaking a substantive due process analysis, then, the courts first determine whether a right is fundamental and, if it is, requires a compelling, narrowly tailored interest to be curtailed.<sup>61</sup> By contrast, there only has to be rational basis for legislation to infringe upon non-fundamental rights, including, for example, economic rights.<sup>62</sup> In this manner, courts take on the responsibility of “weighing” the interests of the state and the individual whose substantive due process rights are at issue, giving more or less latitude to the state, depending on whether the “right” is fundamental. Of course, this kind of interest “weighing” is precisely what legislatures do—explicitly or implicitly—when they enact public policy. Nonetheless, the doctrine is likely an attractive one to justices confronted by laws that, on their face, appear to be unjust or repugnant, since the concept

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<sup>60</sup> Erwin Chemerinsky, *Substantive Due Process*, 15 *Touro Law Review* 1501 (1999), Available at: [https://scholarship.law.duke.edu/faculty\\_scholarship/718](https://scholarship.law.duke.edu/faculty_scholarship/718). The source is an article written by Sydney M. Irmas, Professor of Law and Political Science at the University of Southern California Law School based on a transcript of Professor Chemerinsky’s speech.

<sup>61</sup> *Ibid.*, 1501-1534.

<sup>62</sup> *Ibid.*, 1501-1534.

gives them the authority to find the law inconsistent with fundamental notions of liberty and to invalidate it on those grounds.

However, in the words of Justice Scalia, “the judge who always likes the results he reaches is a bad judge.”<sup>63</sup> Substantive due process provides judges with wide-ranging authority to do what may very well be morally or ethically preferable. But at what expense in terms of the Court’s credibility? The words used in both the Due Process Clauses are readily understandable: On their faces, they do not suggest or imply anything further than the requirement that the government use properly constructed, followed, and fair processes before depriving a person of life, liberty, or property. Reading a meaning that so substantially expands the power of the judiciary comes at a great cost in terms of the court’s legitimacy in the eyes of the public. Before fully expounding the politicizing effects natural rights jurisprudence has on the court, however, this paper first examines the doctrine’s constitutional legitimacy.

### Substantive Due Process and Constitutional Interpretation

Because the concept of substantive due process has no support in the literal language of the Fifth or Fourteenth Amendments, but rather finds its foundation in natural rights jurisprudence, any discussion of the doctrine must first commence by determining whether a textualist, originalist, or “living Constitution” mode of legal interpretation is most appropriate. This thesis employs a textualist approach to reading the law, reflecting the view that, while imperfect, this is the best means of discovering the “true” meaning of a given statute. Under this form of analysis, the judicial branch (and all

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<sup>63</sup> Nolan D. McCaskill, “The 11 Most Memorable Scalia Quotes,” *Politico*, February 14, 2016, Accessed February 20, 2018, <https://www.politico.com/story/2016/02/best-antonin-scalia-quotes-219274>.

others, for that matter) should first and foremost prioritize the letter and structure of the text when wrangling with its implications. Only when the language itself is vague or unclear are other supplemental historical sources permissible in order to discover what the law means.

Why? Because while particular framers' intents, regional and temporal circumstances, or the understanding of the "public" might change, the letter of the law remains unless and until it is amended. As such, the words themselves are "dead" rather than living—or, as the late Justice Scalia preferred, "enduring."<sup>64</sup> In contrast to various modes of originalism, a textualist first and foremost prioritizes the words of the law themselves rather than the intent of its ratifiers, the public, or any other body involved in the statute's passage. As such, it is "law that governs, not the intent of the lawgiver."<sup>65</sup>

However, a heightened sense of respect for the language of the text itself need not confine judges to overly simplistic, at-times silly interpretations of the law. Take, for example, the Free Exercise Clause within the First Amendment, which states: "Congress shall make no law... prohibiting the free exercise thereof [religion]."<sup>66</sup> If a religious organization mandated murder of infidels as a requisite for admission to the church, a "strict constructionist" might be compelled to interpret the First Amendment in such a manner that disobeys Congress from prohibiting a capital offense. I, along with other textualists, would defend no such reading. Rather, the words themselves should neither be blanketly interpreted broadly or narrowly, but reasonably.<sup>67</sup>

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<sup>64</sup> Ushma Patel, "Scalia Favors 'enduring,' Not Living, Constitution," Princeton University, December 11, 2012, Accessed February 20, 2018. <https://www.princeton.edu/news/2012/12/11/scalia-favors-enduring-not-living-constitution>.

<sup>65</sup> Antonin Scalia, *A Matter of Interpretation* (Princeton, NJ: Princeton University Press, 1997), 17.

<sup>66</sup> U.S. Const. Amend. I.

<sup>67</sup> Antonin Scalia, *A Matter of Interpretation* (Princeton, NJ: Princeton University Press, 1997), 67.

With respect to substantive due process, Justice Scalia argued at a CSPAN-televised presentation at the Woodrow Wilson Center that, with the doctrine, “the Court has essentially liberated itself from the text of the Constitution, from the text and even from the traditions of the American people.”<sup>68</sup> Indeed, one need not be an originalist—one who strictly interprets the constitutional clauses in line with how their adopters would have understood them—to refute substantive due process under the Fifth or Fourteenth Amendments. Instead, one simply must demand solid textual backing from the founding document.

Nonetheless, natural rights jurisprudence and “living Constitution” theory are integrally related, and they are both well regarded by a great many justices and scholars in the legal community. Rather than employing historical or textual arguments, proponents of a “fluid” or “evolving” Constitution often emphasize three primary arguments in its favor in relation to alternatives: 1) It is more practical or prudent given our modern political environment, 2) The Constitution itself does not outline a singular, proper mode of interpretation, and there is little historical evidence to suggest that the Framers expected future generations to employ a strictly originalist framework, and 3) In addition to rules and procedures, the Constitution elucidates various underlying “principles,” which, similarly to our governing system, were meant to endure over time. Each of these is addressed below.

According to David Strauss, Gerald Ratner Distinguished Service Professor of Law at the University of Chicago, given the difficulty of the amendment process, it is

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<sup>68</sup> Antonin Scalia, “Constitutional Interpretation the Old Fashioned Way,” March 14, 2005, Accessed January 17, 2018, [https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia 2010-2011/Constitutional\\_Interpretation\\_Scalia.pdf](https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf).



unreasonable to expect the Constitution to “keep up” with modern advancements in technology, social norms, economic transformation, and international globalization.<sup>69</sup> Indeed, the Framers could hardly have anticipated 21st century issues related to internet surveillance and due process, the extraordinary capability of today’s guns and individual rights to bear them, as well as a multitude of other constitutional dilemmas born out of social evolution and technological innovation.

For this reason, one of the central arguments in favor of incorporating modern society’s views when evaluating the constitutionality of a given law is that doing so provides “flexibility.” In this manner, the Constitution remains “workable” in the 21st century. When Justices Breyer and Scalia testified during a Senate Judiciary hearing in 2011, the liberal defender of a living Constitution asserted that the danger of originalism “is interpreting those words in a way that they will no longer work for a country of 308 million Americans who are living in the 21st century—work in the way those framers would have wanted them to work had they been able to understand our society.”<sup>70</sup> By employing his framework, Justice Breyer contends the Court maintains legitimacy in the eyes of the American public.

Notably, this argument underemphasizes the mechanisms explicitly included by the Founders for ensuring that the Constitution remains sufficiently flexible to accommodate changing times: the framework for a limited federal government and the amendment process itself. Indeed, while the text of the Constitution might very well be

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<sup>69</sup> David A. Strauss, “The Living Constitution,” The University of Chicago Law School, Accessed January 20, 2018, <https://www.law.uchicago.edu/news/living-constitution>.

<sup>70</sup> Andrea Seabrook, “Justices Get Candid About The Constitution,” NPR, October 09, 2011, Accessed February 20, 2018, <https://www.npr.org/2011/10/09/141188564/a-matter-of-interpretation-justices-open-up>.

inconvenient for the ultimate settlement of public policy issues, the suggestion that it cannot “work for the people of today” is unfounded due to the document’s amendability. The original Constitution of 1776 was one of the most democratic of its time, and its subsequent amendments (most notably the Seventeenth, Nineteenth, Twenty Fourth, and Twenty Sixth) have made it even more so without the help of judicial intervention.

And, while it is fair to say that the process for amending the Constitution is relatively difficult, it is by no means impossible. Since the ratification of the Bill of Rights in 1791, the Constitution has been modified by 17 different times. Thus, since then, there has been roughly one amendment passed every 13 years (albeit none since the passage of the 27th Amendment in 1992). For this reason, although constitutional amendments often come in waves, as they did during Reconstruction and from 1910-1933, the process is certainly surmountable.

Furthermore, negation of substantive due process does not necessarily prohibit a more expansive reading of other constitutional provisions. The powers delegated to the federal government have grown enormously since the Great Depression and World War II. Without the New Deal, Social Security, and other federal programs that were previously deemed outside the scope of congressional authority, it is quite likely that the country would not have moved forward the way it did. However, while programs may have been struck down under a strictly *originalist* reading of the Constitution, they did have solid *textual* backing under either the Interstate Commerce or Necessary and Proper Clauses. As the final section argues, a more open-ended reading of other constitutional provisions readily addresses many of the practical issues proponents of substantive due process allege.

Moreover, rather than enhancing the credibility of the Court, as proponents of the “living Constitution” approach argue, judicial distortion of the plain meaning of the text as well as far-ranging contemporary interpretation of various fundamental “principles” has done enormous damage to the institution's image. Various examples of this phenomenon will be examined in the historical analysis.

Second, proponents of living Constitution theory also rightly point out that the Constitution itself does not specify any particular interpretative scheme justices must (or should) abide. Indeed, Article III is extremely vague in its articulation of the judicial branch: “The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”<sup>71</sup> What precisely is meant by the “judicial power”—as well as its limits—is far from clear. For example, the classic debate over judicial supremacy versus departmentalism is one instance in which scholars often turn to other sections of the Constitution, as well as legislative history, in order to form opinions.

Along these lines, the Framers were well aware (or, at the very least, hopeful) that the government they were setting the foundations for would last long after they were no longer around to explain the founding document’s meaning. In ratifying the Constitution, did they truly expect judges to make their attempts at “time traveling” into the minds of men who lived centuries earlier? It would seem that Jefferson, as demonstrated in a letter to Samuel Kercheval, fully expected—and in fact believed it beneficial—for times and institutions to progress alongside society itself:

I am certainly not an advocate for frequent and untried changes in laws and constitutions. **I think moderate imperfections had better be borne with;**

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<sup>71</sup> U.S. Const. Art. III, § 1

**because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects.** But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, **institutions must advance also, and keep pace with the times.** We might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors.<sup>72</sup>

Supporters of an evolving Constitution often emphasize the final three sentences of this passage, which is on Panel 4 of the Jefferson Memorial.<sup>73</sup> However, the reference to changing “laws and constitutions” would seem to imply that there must be a deliberate, systematic process by which these changes take hold. So yes, in addition to Justice John Marshall, the Framers were well aware that they were expounding a Constitution to last for centuries. However, this does not mean its meaning was somehow malleable without a formal amendment process.

With respect to the final argument proposed, it is readily admitted that the Constitution elucidates various principles in addition to rules and procedures for a new system of government. Checks and balances, republicanism, and federalism are all institutional principles that are reasonably inferred from the words of the document as well as those of the Founders. For more individual or “personal” principles, one need not look further than the First Amendment: It is indeed difficult to argue that Congress’s prohibition on infringement of the freedom of the press, speech, or peaceful assembly are rules in the same sense as “make your bed before school.” Instead, the First Amendment

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<sup>72</sup> Thomas Jefferson Encyclopedia. "Quotations on the Jefferson Memorial." Thomas Jefferson's Monticello, Accessed February 20, 2018. [https://www.monticello.org/site/jefferson/quotations-jefferson-memorial#Panel\\_Four](https://www.monticello.org/site/jefferson/quotations-jefferson-memorial#Panel_Four). Emphasis added in bold.

<sup>73</sup> Ibid.

outlines various broadly articulated individual rights against the federal government that require reasonable interpretation to properly understand. Why should the allusion to other concepts such as unenumerated rights in the Ninth Amendment, the “ends” articulated in the preamble, or others be so different?

The answer to this question is that when the Court is given license to adjudicate immensely broad concepts such as “liberty,” it begins to look far more like a legislature than a tribunal. Nonetheless, under a textualist framework, the remainder of this section recognizes the possibility that the Ninth Amendment lends natural rights jurisprudence some credibility. However, when viewed in relation to the politicization that the understanding causes (fully articulated in the third section), this paper argues that such an interpretation affords the Constitution a serious flaw.

### Substantive Due Process and the Bill of Rights

The notion of “natural rights” has long historical roots within American constitutional history. Indeed, the concept was foundational to such early influencers as Locke, Voltaire, and Rousseau. These thinkers had extraordinary impacts on several Framers, including Thomas Jefferson. Perhaps our early nation’s greatest writer, Jefferson made these ideals clear in the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator **with certain unalienable rights**, that among these are life, **liberty** and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.<sup>74</sup>

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<sup>74</sup> Thomas Jefferson, “The Declaration of Independence,” *Historic American Documents*, Lit2Go Edition, (1776), Accessed April 20, 2018, <http://etc.usf.edu/lit2go/133/historic-american-documents/4957/the-declaration-of-independence/>. Emphasis added in bold.

It might seem odd, then, that our nation's preeminent legal document would disregard the protection of these natural rights in light of the Framers' high regard for them. Especially from this excerpt, it appears clear that our forefathers envisioned a society where "liberty" would serve as the foundation of good government. According to Edward Erler, senior fellow at the Claremont Institute:

Madison also wrote that the purpose of the Constitution was grounded in "the transcendent law of nature and nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed." Everyone, of course, recognizes this statement as a paraphrase of the *Declaration of Independence*. Madison clearly says here and other places in *The Federalist* that the principles of the *Declaration* supply the ends or purposes of the Constitution and that institutions—structures—are subordinate to the ends. There can be little doubt that this was the understanding of the Founding generation.<sup>75</sup>

Indeed, Federalist No. 51 stated that "justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."<sup>76</sup> Thus, Professor Erler may, in fact, be correct in asserting that the Framers viewed the Constitution as a means to achieve the ends articulated in the Declaration of Independence. Insofar as this end is "justice," one could contend that the courts have a role to play in the defense of so-called natural rights.

Furthermore, it is true that by 1798—not long after ratification of the Constitution—the Supreme Court was considering questions related to natural law that,

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<sup>75</sup> Edward J. Erler, "Natural Rights and the Limited Government Model of the Constitution: A Response to Patrick Garry," *Law & Liberty*, January 05, 2014, Accessed February 20, 2018, <http://www.libertylawsite.org/liberty-forum/natural-rights-and-the-limited-government-model-of-the-constitution-a-response-to-patrick-garry/>.

<sup>76</sup> James Madison or Alexander Hamilton, "Federalist No. 5: The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments," *The Avalon Project : Federalist No 51*, Accessed April 20, 2018, [http://avalon.law.yale.edu/18th\\_century/fed51.asp](http://avalon.law.yale.edu/18th_century/fed51.asp).

today, would likely be framed in terms of substantive due process. While the decision makes no reference to the Fifth Amendment or its Due Process Clause (in fact, the case was ultimately decided on the interpretation of Article I's ex-post facto clause), the notion that legislatures simply cannot take certain actions regardless of whether they are expressly prohibited by the Constitution was famously expounded in Justice Samuel Chase's *Calder v. Bull* (1798) decision:

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. The people of the United States erected their Constitutions, or forms of government, **to establish justice**, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence... **The nature, and ends of legislative power will limit the exercise of it.** There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof of the government was established. **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 legislative authority.**<sup>77</sup>

Although he concurred in the decision, Justice James Iredell vehemently rebutted the view articulated by his colleague:

The ideas of natural justice are regulated **by no fixed standard**: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.<sup>78</sup>

While the doctrine may not have had the same, formal title it does today, it is clear that the fundamental question whether the federal judiciary should be the bulwarks of

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<sup>77</sup> *Calder v. Bull*, 3 Dall. 386, 387-388 (1798). Emphasis added in bold.

<sup>78</sup> *Id.*, 399. (Justice James Iredell, dissenting). Emphasis added in bold.

natural—as well as man-made—law is reflected in the earliest days of the Court’s history. It is equally clear that, even so shortly after ratification of the Constitution, there was no consensus among jurists that the Bill of Rights provided protection for rights not specifically enumerated in the Constitution.

### Substantive Due Process under the Fifth Amendment

It should be emphasized up front that the meaning of “substantive” due process has changed over time. Furthermore, what is regarded as a procedural question to a particular scholar may very well be deemed more substantive in nature to another, depending on how strictly one interprets “process.” Sharswood Fellow and Professor of Law at the University of Pennsylvania Ryan Williams contends that the phrase “due process” originated out of developments in the English Magna Carta in 1215.<sup>79</sup> Originally, the text read that no freeman would be deprived of rights except, “by the judgement of his peers and by the law of the land.”<sup>80</sup> Later, “law of the land” was superseded by “due process of law.”<sup>81</sup> At this stage, Lord Edward Coke, who would later become Chief Justice of England and Wales, regarded the two phrases to be synonymous and wrote that: “the power and jurisdiction of the parliament, for making of laws” was “so transcendent and absolute” as to be boundless.”<sup>82</sup> As we will see, various contemporary scholars have argued that the Due Process Clauses of the Fifth and Fourteenth Amendments have very different meanings today (and from each other).

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<sup>79</sup> Ryan Williams, "Substantive Due Process in Historical Context," *Cato Unbound*, February 10, 2012, Accessed February 14, 2018, <https://www.cato-unbound.org/2012/02/10/ryan-williams/substantive-due-process-historical-context>.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*



Regardless of its historical origins, it is indisputable that the plain language of the Fifth (or Fourteenth) Amendment does not vest the Due Process Clauses with substantive meaning. Furthermore, there is no solid body of evidence suggesting that the Fifth Amendment was intended to impose substantive, in addition to a procedural, limitations on the Federal Government's exercise of power. In its entirety, the Amendment states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.<sup>83</sup>

The majority of the text outlines various rules and procedures for indictment. As such, it is entirely sensible for the Amendment to conclude with a prohibition against punishment without "due process" of law. In this manner, the Fifth Amendment encapsulates the protection of other processes that the Congress or, perhaps, the judiciary, may deem necessary to protect. Indeed, at the time of the framing, the Constitution was not seen as having judiciable limitations with respect to "due process of law."<sup>84</sup> This was also the stance taken by influencers such as William Blackstone, Justice Joseph, Story, and Chancellor James Kent.<sup>85</sup>

Others, such as Timothy Sandefur, Lincoln Fellow at the Claremont Institute, read the Fifth Amendment differently. According to him, the word "law" implies something

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<sup>83</sup> U.S. Const. Amend V. Emphasis added in bold.

<sup>84</sup> Ryan Williams, "Substantive Due Process in Historical Context," Cato Unbound, February 10, 2012, Accessed February 14, 2018, <https://www.cato-unbound.org/2012/02/10/ryan-williams/substantive-due-process-historical-context>.

<sup>85</sup> Lawrence Rosenthal, "Not So Fast, Mr. Sandefur," Cato Unbound, February 8, 2012, Accessed May 20, 2018, <https://www.cato-unbound.org/2012/02/08/lawrence-rosenthal/not-so-fast-mr-sandefur>.

more than merely a provision or policy properly passed in accordance with relevant procedures. Instead, the word itself has a substantive element: “Law is the use of government power in the service of a rational, general, public principle.”<sup>86</sup> As such, arbitrary, malicious, or otherwise irrational public policies, regardless of how dutifully they followed the proper procedures for passage, are not truly “law” (as we will see, this is what Justice Taney meant in his *Dred Scott* decision).

This argument is not particularly compelling because virtually every court and legislature throughout American history has recognized the existence of bad, unjust, or poorly executed laws. Indeed, an even greater majority of the public would recognize this to be the case, as well. Furthermore, as noted by Professor Rosenthal at Chapman University, the Constitution itself recognizes in Article I that if a bill is passed by both Houses of Congress and signed by the Chief Executive (or if the President’s veto is overridden by the Senate), “it shall become Law” regardless of its nature.<sup>87</sup> Thus, while perhaps the high-browed perspective of a minority of legal scholars, for all intents and purposes, a bill becomes a law once it meets the procedural requirements to do so. In other words, its substance is irrelevant. As one might suspect, this was the case in 1791 as it is today. For this reason, unless one is willing to indulge in extraordinary linguistic manipulation, the Fifth Amendment provides neither a textual nor historical basis for substantive due process.

### Natural Rights under the Ninth and Tenth Amendments

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<sup>86</sup>Timothy Sandefur, "Why Substantive Due Process Makes Sense," Cato Unbound, February 6, 2012, Accessed March 20, 2018, <https://www.cato-unbound.org/2012/02/06/timothy-sandefur/why-substantive-due-process-makes-sense>.

<sup>87</sup> Lawrence Rosenthal, "Not So Fast, Mr. Sandefur," Cato Unbound, February 8, 2012, Accessed May 20, 2018, <https://www.cato-unbound.org/2012/02/08/lawrence-rosenthal/not-so-fast-mr-sandefur>.

While many scholars disagree about the proper interpretation of the Ninth (and, to a lesser extent, Tenth) Amendment, its history is relatively clear. In response to concerns about the enlarging scope of federal power under the new Constitution, Anti-Federalists sought to enshrine within it a formal Bill of Rights.<sup>88</sup> One of the nation's most resolute patriots and vehement opponents of the federal constitution, Patrick Henry, believed that in addition to grossly expanding the scope of the federal government, the Constitution did not protect fundamental liberties:

Will the abandonment of your most sacred rights tend the security of your liberty? Liberty, the greatest of all earthly blessings—give us that precious jewel and you may take everything else. But I fear I have lived long enough to become an old-fashioned fellow. Perhaps an invincible attachment to the dearest rights of man may, in these refined, enlightened days, be deemed old-fashioned: if so, I am contented to be so.<sup>89</sup>

Henry's deep concern for the liberties that he feared the Constitution might disenfranchise stems from a valid historical argument: "that all nations have adopted this construction—that all rights not expressly and unequivocally reserved to the people are impliedly and incidentally relinquished to rulers, as necessarily inseparable from the delegated powers."<sup>90</sup> By failing to include a Bill of Rights (as well as an amendment explaining that their description was not meant to be exhaustive), Anti-Federalists feared the consequences of the new framing document.

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<sup>88</sup> Thomas B. McAfee, "The Original Meaning of the Ninth Amendment," *Columbia Law Review* 90, no. 5 (1990): 1227-1245, doi:10.2307/1122877.

<sup>89</sup> From Revolution to Reconstruction, "Speech of Patrick Henry (June 5, 1788)," American History: From Revolution to Reconstruction and Beyond, Accessed February 20, 2018, [http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/speech-of-patrick-henry-\(june-5-1788\).php](http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/speech-of-patrick-henry-(june-5-1788).php).

<sup>90</sup> Thomas B. McAfee, "The Original Meaning of the Ninth Amendment," *Columbia Law Review* 90, no. 5 (1990): 1229, doi:10.2307/1122877.

Meanwhile, Federalists viewed the Constitution from a very different perspective. As they saw it, the narrowly tailored document was necessary in order for the federal government to accomplish specific goals. Thus, in contrast to the Anti-Federalists understanding of state constitutions that "invested their representatives with every right and authority which they [the people] did not in explicit terms reserve,"<sup>91</sup> the framing of the federal government implied precisely the opposite. It would mean, as James Wilson put it, that "everything that is not given, is reserved." As such, a Bill of Rights was either redundant or superfluous.<sup>92</sup>

Federalists further argued the enumeration of various rights might be used to expand the scope of federal power by implication in the future. For example, Alexander Hamilton famously remarked that the amendments were "not only unnecessary in the proposed constitution, but would even be dangerous."<sup>93</sup> At the 1788 Virginia Convention, James Madison articulated that by "enumerating particular exceptions to the grant of power... it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government."<sup>94</sup> As such, the Ninth Amendment was intended to protect the "great residuum of rights" not delegated to that newly formed government. In a similar fashion, the Tenth Amendment reinforces the notion that the great residuum of *powers* shall be left to the states.

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<sup>91</sup> Thomas B. McAfee, "The Original Meaning of the Ninth Amendment," *Columbia Law Review* 90, no. 5 (1990): 1230, doi:10.2307/1122877.

<sup>92</sup> Ibid.

<sup>93</sup> Alexander Hamilton, "The Federalist Papers: No. 84; Certain General and Miscellaneous Objections to the Constitution Considered and Answered," The Avalon Project: Documents in Law, History and Diplomacy, Accessed February 20, 2018, [http://avalon.law.yale.edu/18th\\_century/fed84.asp](http://avalon.law.yale.edu/18th_century/fed84.asp).

<sup>94</sup> Thomas B. McAfee, "The Original Meaning of the Ninth Amendment," *Columbia Law Review* 90, no. 5 (1990): 1285, doi:10.2307/1122877.

It is due in large part to the Ninth and Tenth Amendments' historical context that many scholars regard their inclusion to the Bill of Rights as largely symbolic, rather than substantive. As put by Professor McAfee, a leading scholar on the subject, the Ninth Amendment "is the unique product of the struggle to ratify the Constitution and, more specifically, the ratification-period debate over the omission of a bill of rights from the Constitution drafted by the Philadelphia convention."<sup>95</sup> Indeed, if its addition merely served to ensure that the federal government would not go off-the-walls in doing things not explicitly prohibited (but also not expressly granted by Article I), originalists can make a strong argument that "natural rights" had little relevance to its passage at all. Rather, the final two amendments exclusively sought to maintain a firm system of federalism in response to the monarchical form of rule from which the new nation recently achieved autonomy. The "old orthodoxy," as put by McAfee, concerning the Ninth Amendment, then, is the proper reading: "The unenumerated rights... are the rights of the people reserved by the device of listing granted powers."<sup>96</sup> In other words, the Ninth Amendment serves a two-fold purpose: 1) To ensure that the federal government does not imply that the enumeration of various rights may be used to extend its own authority passed the powers granted by Article I, and 2) To protect the legitimate addition of those rights that future generations may feel were not protected by the original constitutional text.

As noted previously, however, the Ninth Amendment provides more ample textual evidence for the assertion that, as part of the "judicial power," the federal courts

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<sup>95</sup> Ibid., 1227.

<sup>96</sup> Thomas B. McAfee, "The Original Meaning of the Ninth Amendment," *Columbia Law Review* 90, no. 5 (1990): 1218, doi:10.2307/1122877

must protect natural rights (or, at the very least, various unenumerated rights) in addition to those that are explicitly spelled out. The text states:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.<sup>97</sup>

As mentioned, many scholars contend that this is largely an instruction regarding how the new federal government should be understood: as one with exclusively enumerated and limited powers. However, as the following historical analysis section will show, several liberal justices have interpreted a robust, substantive meaning to the Ninth Amendment, including Justice Arthur Goldberg in his concurring *Griswold v. Connecticut* (1965) opinion:

the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, **is surely relevant in showing the existence of other fundamental personal rights**, now protected from state, as well as federal, infringement.<sup>98</sup>

Absent this interpretation, the Ninth Amendment indeed serves largely a repetitive, affirmatory purpose. This is especially true in light of the following Tenth Amendment, which states: “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.”<sup>99</sup>

Indeed, the most solid grounds for those who support judicial protection of alleged natural rights such as those of property, liberty of contract, privacy, dignity, or otherwise is within an amendment that never mentions the phrase “due process.” The most compelling textual foundation, in fact, is to be found within the Ninth Amendment. The argument is clear and simple: 1) The Constitution affirms not only the existence, but

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<sup>97</sup> U.S. Const. Amend. IX.

<sup>98</sup> *Griswold v. Connecticut*, 381 U. S. 479, 493 (1965). Emphasis added in bold.

<sup>99</sup> U.S. Const. Amend. X.

the peoples' *retention* of unenumerated rights 2) Insofar as these rights exist, regardless of how difficult it may be to discern precisely what they are, the courts have a responsibility to protect them against legislative or executive encroachments. Based exclusively on the grammar and structure of the Ninth Amendment, this is, in fact, a solid textualist argument.

A slightly different but nonetheless related argument is put forth by Randy Barnett, a self-proclaimed originalist and Professor of Law at Georgetown University. In his article published in the *Texas Law Review* titled "The Ninth Amendment: It Means What It Says," Barnett employs historical sources to assert that "the purpose of the Ninth Amendment was to ensure the equal protection of unenumerated individual natural rights on a par with those individual natural rights that came to be listed 'for greater caution' in the Bill of Rights."<sup>100</sup> Indeed, the Framers' writings are filled with allusions to government's solemn duty to protect inalienable rights. As such, depending on how directly sources are connected, there is an abundance of evidence to draw from to support the assertion that natural rights were intended to be protected under the Ninth Amendment. This is, of course, readily contested by various scholars, including McAfee:

Indeed, in the midst of the ratification-era debate over the advantages and disadvantages of express and implied reservations and enumerated powers and enumerated rights, there was virtually no discussion of the force of natural rights standing alone. This is, no doubt, because the crux of the debate was how best to secure these rights in positive law... Indeed, **the ratification materials seem to**

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<sup>100</sup> Randy E. Barnett, "The Ninth Amendment: It Means What It Says," *Texas Law Review*, 82nd ser., 85, no. 1 (November 2006): 2, <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1850&context=facpub>.

**cut against the view that at the time of the founding there was a clear consensus in favor of the concept of enforceable unwritten limitations.**<sup>101</sup>

Of course, the language has also been read other ways. Rather than placing the emphasis on the *possibility* of other rights retained by the people, one can prioritize the phraseology concerning “deny and disparage.” According to Justice Scalia, the Ninth Amendment’s prohibition on denying or disparaging other rights “is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges’ list against laws duly enacted by the people.”<sup>102</sup> This argument, however, is unconvincing. Insofar as justices refuse to accept or protect a “right”—natural or municipal—they are, in fact, *denying* it.

Another understanding put forth by Robert Bork during his Senate confirmation hearings was that the Ninth Amendment served to ensure that the enumeration of federal rights would not be used to disparage those protected by states under their respective constitutions.<sup>103</sup> To be sure, this would parlay well into the Ninth Amendment’s history. In response to rising federal authority, states would want to ensure that their ability to protect additional rights would be protected.

Given the plethora of divided theories, it is difficult to discern a single, clearly defined “meaning” of the Ninth Amendment. At the very least, then, from both a textualist and originalist standpoint, the waters are rather murky. Furthermore, they are

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<sup>101</sup> Thomas B. McAfee, “The Original Meaning of the Ninth Amendment,” *Columbia Law Review* 90, no. 5 (1990): 1275, 1318, 1319. doi:10.2307/1122877.

<http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1536&context=facpub>. Emphasis added in bold.

<sup>102</sup> *Troxel v. Granville*, 530 U.S. 57, 91 (2000)

<sup>103</sup> Ramesh Ponnuru, “Judge Bork’s Ink Blot,” *National Review*, December 20, 2012, Accessed January 20, 2018, <https://www.nationalreview.com/2012/12/judge-borks-ink-blot-ramesh-ponnuru/>.



increasingly so depending on which sources are prioritized as well as what mode of originalism (framers intent, public understanding, etc.) is employed.

And, while the constitutional merits of natural rights jurisprudence are hazy, deciphering what, precisely is protected under such a doctrine is even more so. Perhaps the most illustrative metaphor for this difficulty was exemplified by Judge Robert Bork during his Senate confirmation hearings. In response to questions from Senator Dennis DeConcini (D-Ariz.), Bork stated:

I do not think you can use the Ninth Amendment unless you know something of what it means. For example, if you had an amendment that says “Congress shall make no” and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.<sup>104</sup>

And, while Judge Bork was referring to the Ninth Amendment as somewhat of an “ink blot” rather than the notion of natural rights itself, the point holds true nonetheless. What, exactly, is natural right? As the following section will argue, the Court’s use of natural rights jurisprudence to overturn acts of various legislatures has undermined the institution’s legitimacy and politicized it immensely. First, however, it is necessary to examine whether substantive due process is supported by the Fourteenth Amendment.

### Substantive Due Process under the Fourteenth Amendment

The language of the Due Process Clause in the Fourteenth Amendment is nearly identical to that in the Fifth: “...Nor shall any state deprive any person of life, liberty, or property, without due process of law.”<sup>105</sup> Thus, the textualist argument put forth in the

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<sup>104</sup> Ibid.

<sup>105</sup> U.S. Const. Amend. XIV.

previous chapter remains relevant. On its face, the Amendment does not imply that there are liberties—“fundamental” or otherwise—that the state simply cannot take away.

However, several scholars have argued that under an originalist interpretative framework, the Due Process Clause within the Reconstruction Amendment does, in fact, have a more substantive component. Indeed, since the concept of natural rights and due process continued to evolve in the decades following the *Bull* decision, it is necessary to analyze whether, by the time of the Fourteenth Amendment, the meaning of the clause had so evolved as to support today’s substantive due process jurisprudence. Throughout the 1800s courts and lawyers began to accept more novel interpretations of the clause in order to incorporate a theory of natural rights into the Constitution.<sup>106</sup> According to an article published by Williams in the Yale Law Journal, by 1868 a “recognizable form of substantive due process had been embraced by courts in 20 of the 37 then-existing states as well as by the United States Supreme Court.”<sup>107</sup>

However, the kind of “substantive” due process Williams argues pre-dates the Fourteenth Amendment is very different from the “fundamental” liberty jurisprudence that has become widely accepted in the 21st century. He argues that the pre-civil war due process cases appear to come in two primary forms: “vested rights” and “general law” due process. The former suggests that there are certain “vested rights” that cannot be retroactively impacted by legislation. As Alexander Hamilton put it: “The proposition, that a power to do, includes virtually, a power to undo, as applied to a legislative body, is

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<sup>106</sup> Ryan C. Williams, “The One and Only Substantive Due Process Clause,” *The Yale Law Journal* 120, no. 3 (December 2010): 408, <https://www.yalelawjournal.org/article/the-one-and-only-substantive-due-process-clause>.

<sup>107</sup> *Ibid.*

generally but not universally true. All vested rights form an exception to the rule.”<sup>108</sup>

Thus, in addition to obviously ex-post facto laws, those that specifically target vested rights are purportedly illegitimate, as well. As put by E.S. Corwin in “The *Dred Scott* Decision, in the Light of Contemporary Legal Doctrines:”

The doctrine of "vested rights" signified this: that property rights were sacred by the law of nature and the social compact, that any legislative enactment affecting such rights was always to be judged of from the point of view of their operation upon such rights, and that when an enactment affected such rights detrimentally without making compensation to the owner, it was to be viewed as inflicting upon such owner a penalty ex post facto and therefore as void.<sup>109</sup>

This understanding will have particularly profound consequences in the *Dred Scott* case.

And, interestingly, it was not Justice Taney’s understanding of the vested rights doctrine that was viewed as problematic at the time, but his proclamation that black persons could not be regarded as citizens.

Williams argues that the second “General Law” strand of due process jurisprudence developed in the 19th century assumed that all citizens live under “general” and “impartial” laws.<sup>110</sup> Therefore, designated individuals or classes cannot be relegated to hierarchical classes or provided special privileges. This is, according to Williams, what Daniel Webster was referring to in his famous *Trustees of Dartmouth College v.*

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<sup>108</sup> Alexander Hamilton, “The Examination No. XII,” *NY Evening Post*, Feb. 23, 1802, reprinted in 25, *The Papers of Alexander Hamilton*, 529, 533 (Harold C. Syrett ed., 1977). [https://docs.google.com/viewerng/viewer?url=https://www.yalelawjournal.org/pdf/922\\_gvpzasif.pdf](https://docs.google.com/viewerng/viewer?url=https://www.yalelawjournal.org/pdf/922_gvpzasif.pdf) Originally sourced from Ryan Williams’ “The One and Only Substantive Due Process Clause,” page 423.

<sup>109</sup> Edward S. Corwin, “The Dred Scott Decision, in the Light of Contemporary Legal Doctrines,” *The American Historical Review* 17, no. 1 (October 1911): 62.,63, doi:10.1086/ahr/17.1.52.

<sup>110</sup> Ryan C. Williams, “The One and Only Substantive Due Process Clause,” *The Yale Law Journal* 120, no. 3 (December 2010): 424, 425 <https://www.yalelawjournal.org/article/the-one-and-only-substantive-due-process-clause>.

*Woodward* (1819) speech.<sup>111</sup> In this way, the “general law” cases appear to reflect the principles enunciated in the Equal Protection Clause.

Thus, an understanding of vested rights that strictly prohibits ex-post facto laws as well as the general law philosophy hardly reflect the same substantive due process doctrine adopted in the *Lochner* line of cases or in those articulating a constitutional right to privacy, dignity, etc. In fact, these strands (at least as described here) of due process arguably could be better characterized as procedural in nature. The proposition that an individual may not be deprived of life, liberty, or property by a subsequent act of the legislature could be formulated in traditional due process terms. Professor Harrison formulates the argument as follows:

Suppose we assume, for separation of powers reasons, that only judicial power may affect a direct deprivation of life, liberty, or property. Assume further that each branch must use the procedures appropriate to it, a conclusion I say results from a natural reading of the Due Process Clauses. It would follow that all direct deprivations must be effected through judicial procedures, and hence through the application of pre-existing law.<sup>112</sup>

However, as I will argue, the kind of “vested rights” doctrine that Justice Taney employs takes on a much more “substantive” form.

Furthermore, the notion that citizens must be regulated by “impartial” laws, too, is sharply distinguishable from what we know as substantive due process jurisprudence today. Rather, it would appear that this line of cases reflects some notion that individuals in like circumstances should be treated similarly (equal protection) and that if those

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<sup>111</sup> *Ibid.*, 425.

<sup>112</sup> John Harrison, "Substantive Due Process and The Constitutional Text," *Virginia Law Review* 83, no. 3 (April 1997): 522, Accessed January 14, 2018, doi:10.18411/a-2017-023.  
[http://www.law.virginia.edu/pdf/faculty/hein/harrison/83va\\_1\\_rev493\\_1997.pdf](http://www.law.virginia.edu/pdf/faculty/hein/harrison/83va_1_rev493_1997.pdf).

similarly situated are treated differently, there is some deficiency in process (procedural due process).

Thus, neither the plain language of the Fifth or Fourteenth Amendment Due Process Clauses nor an examination of what was meant by “due process” at the time these amendments were enacted would appear to support today’s substantive due process jurisprudence. But is that the end of the discussion or is it necessary to go further—to treat the Constitution as a living document whose meaning legitimately extends beyond its plain language and the authors’ intent?

### Section Summation

As argued throughout this section, on their faces, the Fifth and Fourteenth Amendments do not support the assertion that the judiciary is given constitutional license to adjudicate on the grounds of natural rights. The Ninth Amendment, however, affords both textualists and various sects of originalism a reasonable path towards its understanding. Regardless of whether one finds natural rights jurisprudence constitutionally legitimate, however, its politicizing effects on the federal judiciary generally (as well as the Supreme Court specifically) are more clear and profound. The following section is devoted to a historical review of this phenomenon, as well as how the doctrine of substantive due process has evolved over the course of the American judiciary.

## Section Three: The Politicizing Role of Substantive Due Process in American Jurisprudence

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### *Dred Scott v. Sandford* (1957): The Original Substantive Due Process Case?

Today, substantive due process is hailed by liberals as an essential judicial check on governmental infringements of the American peoples' intrinsic human rights. From abortion to sexual sodomy to a plethora of other "private" acts, courts have repeatedly used the doctrine over the past six decades to stifle governmental intrusion into the lives of its citizens. These decisions, explicitly or implicitly, often rest on judicial identification and interpretation of natural or unenumerated rights.

With that being said, one of the (if not *the*) most infamous and universally denounced Supreme Court decisions rested, at least in part, on the Court's understanding of the substantive (property) rights ostensibly protected by the Fifth Amendment's Due Process Clause—an understanding with implications for basic human rights that would be an anathema to today's proponents of substantive due process. Indeed, according to Evan Bernick, former Assistant Director of the Center for Judicial Engagement at the Institute for Justice, "perhaps nothing has damaged the reputation of the doctrine more than [its] association with *Dred Scott v. Sandford*."<sup>113</sup> For this reason, the decision holds particular relevance for this thesis.

However, *Dred Scott* was almost as complex with respect to due process as it was legally unsound. To some, the decision rested on the Court's understanding of natural

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<sup>113</sup> Evan Bernick, "*Dred Scott*, Substantive Due Process, and the Logic of Natural Rights: A Further Reply to Matthew Franck," The Huffington Post, December 21, 2015, [https://www.huffingtonpost.com/evan-bernick/dred-scott-substantive-du\\_b\\_8855416.html](https://www.huffingtonpost.com/evan-bernick/dred-scott-substantive-du_b_8855416.html).

rights—to others, it relied on some notion of “vested” property rights, and still to others, on a commitment to “resolve” the issue of slavery in the Territories, once and for all, without regard to established jurisprudence. As such, scholars of equally impressive pedigree have disagreed vehemently over how, exactly, the Court understood the Fifth Amendment’s Due Process Clause.

And, while the conceptual underpinnings of the Court’s decision are up for debate, its history as well as direct implications for Dred Scott are not. Dred Scott and his family had been taken by their owners through both slave and free states as well as the Territories during the course of a number of years’ sojourn.<sup>114</sup> After two unsuccessful attempts to gain his freedom through state court actions, Scott sued in the federal court system in Missouri.<sup>115</sup> At the time the action was filed, Dred Scott and his family resided in Missouri, while his purported “owner” resided outside the state.<sup>116</sup>

As a direct consequence of the Supreme Court’s ruling, Dred Scott was to remain a slave. Furthermore, the Court declared that blacks could not be—nor, as an entire race, were they ever intended to be—citizens of the United States with right to sue in federal court.<sup>117</sup> Lastly, the Court went on in dicta to state that despite the proclamation in Section II, Clause II of Article IV that “The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,”<sup>118</sup> the federal government had no legitimate constitutional authority to regulate slavery in the Territories, thereby voiding the Missouri

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<sup>114</sup> “Dred Scott v. Sandford.” Oyez. Accessed February 20, 2018. <https://www.oyez.org/cases/1850-1900/60us393>.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> U.S. Const. Art. IV, § 2

Compromise. From both a moral and legal perspective, the *Dred Scott* ruling has been resolutely denounced across the board.

Both on the issue of standing and on the legality of the Missouri Compromise, Chief Justice Taney, who authored the (7-2) majority decision, had to engage in an extraordinarily convoluted exercise in judicial gymnastics. In declaring that Dred Scott lacked standing to bring his case for freedom in the federal court system, the Supreme Court both explicitly and implicitly leaped over several remarkable hurdles. Specifically, Chief Justice Taney:

- Ignored the failure of the Defendant to raise an objection to Dred Scott's standing in the lower courts;
- Created a novel distinction between state and US citizenship;
- Established an "exception" for blacks who could vote in five of the thirteen states and who were considered citizens of both the nation and their respective states when the Constitution was ratified
- Distinguished prior Congressional grants of freedom to blacks residing in other US territories.<sup>119</sup>

Perhaps the most notorious aspect of Chief Justice Taney's ruling, of course, is his proclamation that the principles enunciated in the Declaration of Independence were never meant to apply to the black race:

[Negroes were] beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.<sup>120</sup>

To allow slavery in a society where all men are deemed to be created equal would mean that the Framers themselves were hypocrites. It would imply that our forefathers were

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<sup>119</sup> Earl M. Maltz, "The Last Angry Man: Benjamin Robbins Curtis and the Dred Scott Case," *Chicago-Kent Law Review*, 9th ser., 82, no. 1 (December 2009): 265-276, <https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=3577&context=cklawreview>.

<sup>120</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1856).



“utterly and flagrantly inconsistent with the principles they asserted.”<sup>121</sup> The only way the Framers could have accepted the notion of slavery while simultaneously and without hypocrisy hold that conviction that all men are created equal would be to categorically exclude slaves from the citizenry. And being excluded from the citizenry, slaves—and their descendants—were necessarily precluded from access to the federal court system. Interestingly, then, despite abundant evidence to the contrary, Chief Justice Taney could have ended the case simply by concluding that the descendants of black slaves could not be American citizens.

However, the Court’s decision went much further in scope and legal interpretation. At least in part, it did so in the name of the Fifth Amendment’s Due Process Clause. As society’s conception of what constitutes an inalienable privilege evolves with the times, hindsight affords us an all-too-clear mirror for us to examine of our errors. This is perhaps most evident from Justice Taney’s *Dred Scott v. Sandford* (1857) decision:

Thus, **the rights of property are united with the rights of person**, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law.... [A]n Act of Congress which deprives a citizen of the United States of his liberty or property, **merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name of due process of law**.... And if the Constitution recognizes the right of property of the master in a slave, **and makes no distinction between that description of property and other property owned by a citizen**, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the Government.<sup>122</sup>

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<sup>121</sup> Id., 410.

<sup>122</sup> Id., 450, 451. Emphasis added in bold.

It is primarily this language that is cited by those who tie the notion of substantive due process to the *Dred Scott* case. According to scholars such as Robert Bork and the late David P. Currie, the decision “was at least very possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. Wade*.”<sup>123</sup> Indeed, while the passage above explicitly referred to the Fifth Amendment’s Due Process Clause, it is abundantly clear that the type of due process was not “procedural.” Indeed, the means by which the Missouri Compromise (or any other federal act) was passed was irrelevant. For this reason, the ruling clearly enunciated a substantive component to the Due Process Clause.

Whether or not the *Dred Scott* case was truly a substantive due process decision as that term is understood in modern jurisprudence, however, is not so simple a question. Certainly the Court did not go beyond the language of the Constitution in the same way necessary to find a constitutional right to “privacy.” Nor did the decision suggest or imply that the right to hold property—in the form of slaves—was so inherent or fundamental that it could never be curtailed by governmental action: After all, the Northern states did not authorize or condone slavery.

How, exactly, the substantive nature of Justice Taney’s reading should be (or was) understood at the time the decision was issued may very well differ from today’s notion of the doctrine. With that being said, one could be forgiven for reading Justice Taney’s decision as stating: 1) The Constitution grants white men a right (a *substantive* right) to property; 2) the Constitution makes no distinction between the ownership of slaves and

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<sup>123</sup> David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888* (Chicago: University of Chicago Press, 1985), 271.

other forms of property; 3) Congress is legally precluded from depriving white men of their slave property in the Territories. However, if this were truly the case, and the right to own slaves were both natural and absolute, it would seem to imply that no government body would have the authority to ban slavery anywhere. While it might be possible to logically draw such a conclusion from various excerpts of the decision, this most certainly is not how the outcome was understood.

Thus, while it might be more compelling for my overall thesis, the argument is not so black and white. Rather than resting on a pure notion of “natural” rights, it may be that the conceptual underpinning of the decision related to a particular notion of property rights that was well established when the case was decided. As argued by Edward S. Corwin in “The Dred Scott Decision, in the light of Contemporary Legal Doctrines”:

What Taney was attempting to do...was to engraft the doctrine of "vested rights " upon the national constitution as a limitation upon national power by casting round it the "due process of law" clause of the Fifth Amendment. But neither the doctrine of "vested rights" nor yet such use of "due process of law" was novel, and indeed, in 1857, the former was comparatively ancient. The doctrine of “vested rights” signified this: **That property rights were sacred by the law of nature....**<sup>124</sup>

Thus, those who give weight to the widely spread recognition of “vested rights” must also note that, in a sense, it had a natural rights foundation. To others, though, Chief Justice Taney’s argument was less “natural” and simply implied that “when slaveholders moved their property from slave jurisdictions to free territories, they could not lose their rights in their slaves; otherwise the federal government would have destroyed their vested

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<sup>124</sup> Edward S. Corwin, "The Dred Scott Decision, in the Light of Contemporary Legal Doctrines," *The American Historical Review* 17, no. 1 (October 1911): 62-63, doi:10.1086/ahr/17.1.52., Emphasis added in bold.

property rights (and given them to the slave), thus taking from A and giving to B.”<sup>125</sup> In this manner, Professors Balkin and Levinson view the doctrine used in *Dred Scott* very differently than how it is applied today.

Meanwhile, other commentators such as Bernick agree that *Dred Scott* was, in fact, a substantive due process case—albeit one that was wrongly decided—and, in support of this view, cites Justice Benjamin R. Curtis’ dissenting opinion. According to Bernick, Justice Curtis—like the majority—accepted the notion of natural rights, but rather associated them with blacks’ right to freedom rather than the whites’ right to property. Specifically, Curtis stated: “Slavery, being contrary to natural right, is created only by municipal law.”<sup>126</sup> Unfortunately for Bernick, while Justice Curtis did indeed dissent from the majority, his assertion that “slavery is contrary to natural right” was not meant to imply that it was always illegal. Indeed, he explicitly stated that the institution may be created by positive law. This understanding was also pronounced by Justice McLean:

What gives the master the right to control the will of his slave? **The local law, which exists in some form.** But where there is no such law, can the master control the will of the slave by force... By virtue of what law is it, that a master may take his slave into free territory, and exact him the duties of a slave? The law of the Territory does not sanction it. No authority can be claimed under the Constitution of the United States, or any law of Congress. Will it be said that the slave is taken as property, the same as other property which the master may own? To this I answer, **that colored persons are made property by the law of the State**, and no such power has been given to Congress...<sup>127</sup>

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<sup>125</sup> Jack M. Balkin & Sanford Levinson, Thirteen Ways of Looking at Dred Scott, 82 Chi.-Kent. L. Rev. 49 (2007). Available at: <http://scholarship.kentlaw.iit.edu/cklawreview/vol82/iss1/3>.

<sup>126</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 624 (1856)

<sup>127</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 548 (1856). Emphasis added in bold.

Meanwhile, the doctrine of substantive due process means precisely that positive, duly passed public policy may be overridden by the court system in the name of natural or unenumerated rights. Thus, to suggest that since the dissenting justices believed slavery was contrary to natural right implied that it could be prohibited over positive law is unfounded.

In short, legal scholars can be found on both sides of the debate about whether or not *Dred Scott* was a substantive due process case in the vested rights tradition, whether it rested on some natural rights concept, or whether it was virtually devoid of the doctrine entirely. Often, those opposing the concept of substantive due process attempt to associate the case more closely with the philosophy, and those in favor of its broader, modern application deny its connection.

The discussion is not helped by the fact that the complex structure and meandering style employed by Chief Justice Taney complicates the job of following the case entirely. Insofar as Taney appears to be committed to providing a determinative “answer” to the question of slavery in the Territories, his decision indeed has something of a “kitchen sink” quality: Any rationale, ideology, historical distortion, or intellectual somersault that could be used (including, but not limited to, references to the Fifth Amendment’s Due Process Clause) was fair game so long as it supported the Justice’s pre-ordained conclusion.

Under these circumstances, it is fair to say that some notion of what we might today call a “substantive” right to property appears to be one of several factors in the decision. While Chief Justice Taney only referred to the Due Process Clause once (and in

passing), the basic concept underlying today's substantive due process concept was articulated elsewhere in the decision:

The powers of the Government, and the rights of the citizen under it, are positive and practical regulations plainly written down. **The people of the United States have delegated to it certain enumerated powers, and forbidden it to exercise others. It has no power over the person or property of a citizen but what the citizens of the United States have granted.** And no laws or usages of other nations, or reasoning of statesmen or jurists upon the relations of master and slave, can enlarge the powers of the Government, or take from the citizens the rights they have reserved.<sup>128</sup>

Indeed, the reference to the Constitution as one that delegated strictly enumerated powers evokes an understanding of the Ninth and Tenth Amendments outlined in the previous section. However, an equally strong case can be made that, ironically enough, the conceptual underpinning of *Dred Scott* (to the extent one finds one) was a substantive notion of “equal protection” of various forms of property. The Court stated:

Now, as we have already said in an earlier part of this opinion, upon a different point, the right of property in a slave is distinctly and expressly affirmed in the Constitution. The right to traffic in it, like an ordinary article of merchandise and property, was guaranteed to the citizens of the United States, in every State that might desire it, for twenty years. . . **And no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description.** The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights.<sup>129</sup>

The dissent of Justice Curtis likewise characterized the majority's decision as one that rested on some notion of “equal protection” of different forms of property. He described the majority decision as one that:

[i]s said to rest upon the equal right of all citizens to go with their property upon the public domain, and the inequality of a regulation which would admit the

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<sup>128</sup> Id., 451. Emphasis added in bold.

<sup>129</sup> Id., 451, 452. Emphasis added in bold.

property of some and exclude the property of other citizens; and, inasmuch as slaves are chiefly held by citizens of those particular States where slavery is established, it is insisted that a regulation excluding slavery from a Territory operates, **practically, to make an unjust discrimination between citizens of different States, in respect to their use and enjoyment of the territory of the United States**<sup>130</sup>

This “general law” understanding of substantive due process was thus applied to property rather than the individual rights of people to be treated equally before the law. In this manner, the Court blithely ignored the rather obvious fact that the respective states could—and were always intended to have—diverse public policies related to various forms of property, including slavery. Indeed, if Chief Justice Taney’s logic were applied today, those who obtained marijuana in states where its recreational possession and use was legal could carry it into states where it is strictly prohibited. Of course, such an interpretation cannot be reasonably inferred from the text of the Fifth Amendment (or the Fourteenth, for that matter).

Regardless, it appears that rather than purely asserting a property right of the individual against the power of the federal government, the Taney Court relied on a modified version of “vested” or “general law” substantive due process that had already been acknowledged as legitimate by the legal community. Of course, its acceptance does not necessarily make it permissible or totally void from a connection to natural law jurisprudence. Furthermore, while Taney did not directly go so far as to propose an absolute right to slave ownership, his understanding of “vested rights,” some conception of arbitrariness, and the Fifth Amendment is nonetheless a preeminent (and particularly

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<sup>130</sup> Id., 620. Emphasis added in bold.

glaring) example of how justices may manipulate or ignore evidence more easily with the substantive due process doctrine.

It is clear that when discussing due process, Chief Justice Taney's decision did not refer to the manner by which the Missouri Compromise denied slaveholders of their property rights. For this reason, those who claim that the opinion had no substantive due process component are on unsteady footing. Furthermore, it's difficult to reconcile whether his understanding of substantive due process was exclusively in the "vested rights" tradition in light of his assertion that the "rights of property are united with the rights of person." Indeed, it seems that the Court ruled against Scott because there was some *unconscionable notion of arbitrariness* in a certain property right being taken away based on one's location. In this manner, Chief Justice Taney blended traditional conceptions of "vested" property rights with a more modern notion—that the Court has the authority to substitute its judgment for that of Congress with regard to what deprivations of property are justified.

### The *Dred Scott* Case and the Politicization of the Supreme Court

Impassioned political leaders, newspapers, and members of the general public in both the North and the South reacted to the *Dred Scott* decision with unrelenting fervor. It is clear from a variety of sources that the outcome of the case itself was (at least in the North) regarded not only as poor legal interpretation, but as judicial activism. As such, in addition to providing modern scholars a focus point for spirited debate over the history and evolution of substantive due process, the case also represents one of the most highly political decisions in American constitutional history.



As previously outlined, the working definition for this thesis assesses the degree of politicization of the Supreme Court using five interrelated factors:

- The degree to which the Court makes controversial decisions that are important to the public and inconsistent with the strongly held views of a not insubstantial sector of the public, based on a rationale that is obscure.
- The extent to which the Supreme Court deviates (or appears to deviate) from established precedent or modes of judicial interpretation to reach a particular result in cases that have broad political implications.
- The extent to which Supreme Court composition is the focus of political processes, including election rhetoric and voting priorities.
- The extent to which Supreme Court nomination and confirmation is subject to a political litmus test, especially at the expense of judicial qualifications and expertise.
- The degree to which Supreme Court justices are polarized along the legal spectrum.

By these criteria, the *Dred Scott* case was among the most political—and among the most politicizing—decisions ever rendered by the Supreme Court.

With respect to the first two criteria, it is abundantly clear from the dissents filed by Justices Curtis and McLean that the decision deviated from precedent in several ways. As already mentioned, while the “vested rights” doctrine had been applied previously, its use here was groundbreaking in its scope. Additionally, the conclusion itself that Congress could not regulate slavery in the Territories was, of course, extraordinary. The notion had not been seriously contested from a legal standpoint since the Missouri Compromise, and, given that the Constitution explicitly addressed congressional regulation of the slave trade, it would be odd indeed for the body to have no authority over the issue in the Territories. Meanwhile, the political implications of the case were as broad and pervasive as any in the Court’s history.

Additionally, the repercussions on political processes and events were profound. The case had extraordinary political and economic consequences, and was a major contributing factor in laying the immediate groundwork for (or, at the very least, expediting the timeline of) the Civil War.<sup>131</sup> The formation of the Republican Party and ultimate election of Abraham Lincoln was in large part attributable to the North's reaction to the decision and its implications with respect to the spread of slavery in the Territories.<sup>132</sup> Meanwhile, while the South hailed the decision as a vindication of its most cherished institution. Furthermore, according to the historian Paul Finkelman, Abraham Lincoln believed *Dred Scott* was "the first step in a Democratic conspiracy to nationalize slavery."<sup>133</sup>

The dicta in *Dred Scott* suggested that Congress had no power to preclude the expansion of slavery into the Territories, thereby upsetting the precarious political compromise in the Kansas-Nebraska Act that had until that time staved off a showdown. Under the reasoning of the case, the North would lose political power, since it was anticipated that many of the new states admitted would be slave states. Additionally, each slave would be counted towards the southern states' populations as three-fifths of a person, thereby increasing the slave holding states' seats in the House of Representatives.

Additionally, historians now believe that President Buchanan knew the result of the *Dred Scott* decision before the resolution of the case.<sup>134</sup> During his inauguration, President-elect Buchanan declared that expansion of slavery into the territories was a

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<sup>131</sup> Paul Finkelman, "Scott v. Sandford: The Court's Most Dreadful Case and How It Changed History," *Chicago-Kent Law Review*, 2nd ser., 82, no. 1 (December 2006): 3, <https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3570&context=cklawreview>.

<sup>132</sup> *Ibid.*, 47.

<sup>133</sup> *Ibid.*, 47

<sup>134</sup> *Ibid.*, 45-47.

“judicial question” and that he would “cheerfully submit” to the outcome.<sup>135</sup> However, Justice Grier had informed President Buchanan about the inner-workings of the Court.<sup>136</sup> Thus, Finkelman argues, “the Court and the President-elect worked closely to get the decision Buchanan and Taney wanted and to get the nation to accept it.”<sup>137</sup>

Perhaps unsurprisingly, few newspaper articles in the South thoroughly examined the constitutional legitimacy of the decision.<sup>138</sup> As the following sections will show, it is far less likely for the winners of substantive due process cases to dwell on the constitutional merits of various cases than losers. This may be because the thrill of major victory overshadows the desire to examine the technical arguments that pervade in the courtroom. However, as I see it, it is because often times the legal grounds are extraordinarily difficult to defend.

Indeed, rather than exploring the legal rationale for its victory, publications from the *Mercury* paper in Charleston, South Carolina to the *Richmond Inquirer* lauded the decision as vindication of the traditions, laws, and culture of the southern people.<sup>139</sup> Interestingly, the South also published far fewer reactions to the case than the North—often merely citing a restatement of the facts or the implications of the decision itself.<sup>140</sup>

That the Supreme Court lost legitimacy in the eyes of northern states, however, is beyond dispute. Rather than an exercise of clearly defined law, northerners regarded the

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<sup>135</sup> Ibid., 45.

<sup>136</sup> Ibid., 46.

<sup>137</sup> Ibid. 47.

<sup>138</sup> Alix Oswald, "The Reaction to the Dred Scott Decision," *Chapman University Historical Review*, 1st ser., 4 (2012): 177, <https://journals.chapman.edu/ojs/index.php/VocesNovae/article/view/328/704>.

<sup>139</sup> Ibid., 175-177.

<sup>140</sup> Ibid., 178.

Court's decision as the majority's flagrant attempt to solve the "slavery question" once and for all. One article in the *Chicago Daily Tribune* declared:

Since the organization of the government, no event has occurred that will entail upon the country the consequences, which are involved in this partisan movement of the slavery propagandists. It is the first step in a revolution which, if not arrested, nullifies the Revolution of '76 and makes us all slaves again.<sup>141</sup>

Another article continued:

It is in vain that we may look for power in the Constitution to establish Slavery anywhere. The Constitution is the charter of our Freedom, and in every sense the blackest, poorest or meanest man, except he be convicted of crime, is entitled to the fullest protection of 'Life, Liberty, and the pursuit of happiness.'<sup>142</sup>

And, as noted previously, historians largely agree that instead of calming the intensity of the slavery debate, the *Dred Scott* decision exacerbated the hostility that culminated in the Civil War.<sup>143</sup> As such, the case marks a major turning point in both American legal and political history.

It may be properly argued that Chief Justice Taney and his Court would have found *Dred Scott*—and all black persons—ineligible for citizenship regardless of the doctrine employed. Indeed, judicial activism cannot be said to have begun with substantive due process. However, as the remainder of the historical analysis will show, wide-ranging authority to adjudicate along the grounds of "arbitrariness," "justice," "dignity," or "privacy" opens doors for the Court to accomplish public policy goals that would otherwise be more difficult to defend. Indeed, before such a doctrine was

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<sup>141</sup> "The Political Decision," *Chicago Daily Tribune*, March 13, 1857.

<sup>142</sup> "Dred Scott on the Missouri Compromise," *Chicago Daily Tribune*, February 9, 1857.

<sup>143</sup> Paul Finkelman, "Scott v. Sandford: The Court's Most Dreadful Case and How It Changed History," *Chicago-Kent Law Review*, 2nd ser., 82, no. 1 (December 2006): 3, <https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=3570&context=cklawreview>.

available, judges were forced to legislate the “old-fashioned” way: They lied about it.<sup>144</sup> To be sure, then, bad legal interpretation and judicial activism can find a foothold in other constitutional provisions and using other conceptual underpinnings. However, as the remaining case studies seek to demonstrate, the doctrine of substantive due process leaves adjudicative bodies particularly vulnerable to politicization.

Perhaps it is largely for this reason that, in his dissent, Justice McLean regarded the decision as “more a matter of taste than of law.”<sup>145</sup> Furthermore, Justice Benjamin Curtis resigned from the Supreme Court largely due to controversy and dispute surrounding the *Dred Scott* decision.<sup>146</sup> Thus, the final criteria for politicization outlined—the degree of polarization among justices themselves—is clearly met in the current case.

### The *Lochner* Era and Liberty of Contract

The *Slaughter-House Cases* (1873) set the precedent that the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment did not have a substantive or “natural rights” component.<sup>147</sup> This changed in *Allgeyer v. Louisiana* (1897), which was the first case to elucidate a “liberty of contract” inherent in the Due Process Clause of the Fourteenth Amendment. Of course, since the clause addresses states and not the federal government, this decision also marked one of the first times the

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<sup>144</sup> Antonin Scalia, “Constitutional Interpretation the Old Fashioned Way,” March 14, 2005, Accessed January 17, 2018, [https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia 2010-2011/Constitutional\\_Interpretation\\_Scalia.pdf](https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%2010-2011/Constitutional_Interpretation_Scalia.pdf).

<sup>145</sup> *Dred Scott v. Sandford*, 60 U.S. 393, 533 (1856)

<sup>146</sup> Oyez, “Benjamin R. Curtis,” Oyez, [https://www.oyez.org/justices/benjamin\\_r\\_curtis](https://www.oyez.org/justices/benjamin_r_curtis).

<sup>147</sup> Oyez, “Slaughter-House Cases,” <https://www.oyez.org/cases/1850-1900/83us36>.

Supreme Court applied natural or “unenumerated” rights jurisprudence to state legislation.

The Louisiana statute in question prohibited companies from contracting with marine insurance firms that had not “complied in all respects with the laws of [the] State.”<sup>148</sup> Since regulatory hurdles made it difficult for out-of-state insurance firms to legally contract with in-state companies, the state effectively steered the marine insurance market to those firms that operated within the state. When Allgeyer & Co sought to insure a shipment of cotton through Atlantic Mutual Insurance Company, which was based in New York City, the state filed suit.<sup>149</sup>

Writing for a unanimous Court, Justice Rufus Wheeler Peckham declared the following:

The "liberty" mentioned... means 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... [We] do not intend to hold that in no such case can the state exercise its police power. **When and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises.....**To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the federal Constitution the defendants had a right to perform.<sup>150</sup>

Justice Peckham, perhaps the most adamant supporter of economic substantive due process, narrowly tailored his decision to the case at hand while altogether speaking in circles. Indeed, in terms of its level of obfuscation, Justice Peckham’s writing is eerily

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<sup>148</sup> *Allgeyer v. Louisiana*, 165 U.S. 578, 579 (1897)

<sup>149</sup> *Id.*, 579-562.

<sup>150</sup> *Id.*, 589-591. Emphasis added in bold.

similar to that of Chief Justice Taney. In short, he appears to state that the regulation violates the Due Process Clause because it cannot be “dignified” as due process of law.

In this case, *Allegeyer*’s purported liberty interest outweighed those of the state. However, the scope and nature of the substantive due process doctrine were not properly defined by the Court. Indeed, as we shall see, establishing general rules and interpretive frameworks for substantive due process becomes increasingly difficult with its evolution. Perhaps this is because the doctrine is, by its nature, tied to “living Constitution” theory. How, after all, can even a rudimentary code of analysis be formulated and maintained if a doctrine’s limits are, by definition, allowed to evolve with social norms?

Nonetheless, even at this preliminary stage, the battleground was set for the foundational battle that would pervade the substantive due process debate over the next four decades. The notion of economic substantive due process had its genesis in the clash between the state government’s police power and an individual or corporation’s liberty to pursue a trade, engage in an activity, or otherwise further its business interest. In this era, the Court took on the responsibility of weighing “natural” or “American” liberties against the state’s ends (often to protect workers or promote an economic policy). In doing so, often with heavy, longstanding ties to the business community, the federal judiciary overturned state legislation aimed at furthering the public good.

### *Lochner v. New York* (1905)

When examined through this lens, it is clear how the *Allegeyer* case paved the way for *Lochner v. New York* (1905), which appropriately gave the era of economic substantive due process its name. The state law in dispute prohibited owners of bakeries from allowing their employees to work more than 60 hours a week or 10 hours in a

day.<sup>151</sup> After repeatedly violating the statute, Joseph Lochner, the owner of a small bakeshop, filed suit. Once appealing and losing his case in the state's highest court, he was granted a writ of certiorari to bring his case before the Supreme Court. Delivering the opinion of the Court, Justice Rufus Peckham again underscored the newly fashioned "realm" protected by the Due Process Clause:

The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution.... The right to purchase or to sell labor is part of the liberty protected by this amendment unless there are circumstances which exclude the right.<sup>152</sup>

The State of New York rested its case on the assertion that, at the time, bakers faced particularly adverse working conditions. According to Professor Hirt in his treatise on the *Diseases of the Workers*:

The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps and swollen legs. The intense heat in the workshops induces the workers to resort to cooling drinks, which, together with their habit of exposing the greater part of their bodies to the change in the atmosphere, is another source of a number of diseases of various organs.<sup>153</sup>

Despite evidence from health experts indicating the benefit of limiting bakers' working hours to 60 hours per week (or ten per day), the Court overturned New York's law, holding that it did not fall within the jurisdiction's legitimate police powers. Instead, the majority found that the state's health concerns were invalid. Therefore, since there was no "material danger to the public health or health of the employees," it was declared that:

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<sup>151</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>152</sup> *Id.*, 45. 53.

<sup>153</sup> *Id.*, 70.



the individuals whose rights are thus made the subject of legislative interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person, and the legislature of the State has no power to limit their right as proposed in this statute.<sup>154</sup>

In this manner, the Court enunciated a substantive element to the Fourteenth Amendment's Due Process Clause.

Interestingly, perhaps the clearest evidence that the *Lochner* decision's substantive due process basis politicized the Supreme Court is found in the dissenting opinions. Joined by Justices White and Day, Justice Harlan scribed one of the most famous dissents in American constitutional history—an opinion that admitted there may be a valid “liberty of contract” concept embedded in the Fourteenth Amendment, but found that this right was not absolute:

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare or to guard the public health, the public morals or the public safety.<sup>155</sup>

Thus, rather than negating the validity of the substantive due process doctrine entirely, Justice Harlan merely disagreed on its scope, and whether it was exceeded in this particular case. In support of his assertion, he cited *Jacobson v. Massachusetts* (1905):

The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import... an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.<sup>156</sup>

In this manner, Justice Harlan's decision appears to be more about deference to the legislative realm than a rejection of the liberty of contract concept. Unless a public policy measure duly enacted by the states and aimed at furthering the public interest in some

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<sup>154</sup> *Id.*, 61.

<sup>155</sup> *Id.*, 67. (Justice Harlan, dissenting).

<sup>156</sup> *Jacobson v. Massachusetts*, 197 U. S. 11, 26 (1905)

meaningful way was “plainly, palpably” and “beyond all question” inconsistent with the Constitution of the United States, Justice Harlan argued, the Court should presume good-faith on the part of the legislative body.<sup>157</sup> Only as a consequence of the Court’s error in refraining from deference, then, did the dissent find fault with the majority’s decision. In this regard, the Court improperly resolved matters:

which have been supposed to belong exclusively to the legislative departments of the several States exerting their conceded power to guard the health and safety of their citizens by such regulations as they in their wisdom deem best.<sup>158</sup>

As a result, Justice Harlan somewhat narrowly tailored his critique while simultaneously asserting that the precedent set may “seriously cripple the inherent power of the States.”

While Justice John Marshall Harlan’s is potentially the more famous of the two, Justice Holmes’ dissent was an equally (if not more) scathing rebuke of the 5-4 majority’s opinion:

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 a majority to embody their opinions in law.** It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract...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.... I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, **unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe**

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<sup>157</sup> *Lochner v. New York*, 198 U.S. 45, 73 (1905) (Justice Harlan, dissenting).

<sup>158</sup> *Id.*, 73. (Justice Harlan, dissenting).

**fundamental principles as they have been understood by the traditions of our people and our law.**<sup>159</sup>

The short, decisively written dissent struck to the very heart of the matter. Interestingly, though, even Justice Holmes admitted in his last paragraph that the Fourteenth Amendment may allow for some form of natural law jurisprudence. However, if anything, his incisive dissent underscored the great problem of substantive due process: Many rational and fair men may reasonably disagree on what constitutes “fundamental principles” or the “traditions of our people.” Unless Justice Holmes was willing to accuse his colleagues of *purposefully* distorting the Constitution to accomplish political ends, he must have assumed that they honestly believed the liberty of contract theory to be a “fundamental principle” that was embedded in the “traditions of our people.” And while he may, in fact, have been accusing his fellow justices of outright, intentionally unfounded judicial activism, this is far from clear. Rather, his colleagues may have simply had a different perception of what constituted a natural right.

American scholarly and legal disapproval of the *Lochner* decision and its aftermath is well documented and extensive. In fact, according to Professor Amar Akhil at Yale Law School:

the very word “Lochner” is for legal insiders synonymous with judicial overreach. *Lochner* is thus not just a case, but an era and an attitude. In legal discourse it has even become a verb. To “Lochner” or to “Lochnerize” is to commit the same kind of judicial sin that characterized many of the Court’s rulings in what is now known as “the *Lochner* era” — roughly the mid-1880s through the mid-1930s — in which the Court without clear textual warrant struck down a multitude of reasonable reform statutes regulating free-market excesses<sup>160</sup>

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<sup>159</sup> Id., 75, 76 (Justice Holmes, dissenting). Emphasis added in bold.

<sup>160</sup> Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books), 273.

In fact, the nearly universal denunciation of the *Lochner* case and its progeny has had repercussions for constitutional drafting and legal interpretation across the globe. For example, Pierre Trudeau was well aware of the use of the substantive due process to strike down minimum wage, child labor, and work hour legislation,<sup>161</sup> and took steps to insulate Canada's Charter from the effects of the doctrine. In front of the Special Joint Committee of the Senate and the House of Commons on the Constitution in 1970, Barry Strayer, who was responsible for drafting Canada's 1969 constitutional proposals, noted that due process created problems under the American Constitution in relation to liberty and property, stating: "It has been used by the courts to strike down legislation which the majority of Americans apparently regard as being socially desirable."<sup>162</sup> Ultimately, in order to avoid the possibility of the Canadian court system adopting some form of economic substantive due process, he included a Due Process Clause in his draft which omitted the protection of property in place of "security of person."<sup>163</sup>

While recent attempts have been made by economic libertarian scholars such as David Bernstein and others to "rehabilitate" *Lochner*, the majority of legal scholars continue to hold the view of legal philosopher Ronald Dworkin, who observed that *Lochner* is the "whipping boy" of American constitutional law.<sup>164</sup>

### *Lochner's* Politicizing Effects

Given that *Lochner* is still widely deemed to be synonymous with judicial activism, it is somewhat hard to imagine how the decision would not politicize the

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<sup>161</sup> Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism," *SSRN Electronic Journal*, January 1, 2004, 16, doi:10.2139/ssrn.363220.

<sup>162</sup> *Ibid.*, 17.

<sup>163</sup> *Ibid.*, 19.

<sup>164</sup> *Ibid.*, 3.

Supreme Court. Indeed, if one wanted to turn the Court into an effective policy-making body, “judicial activism” would be the way to go. However, it is worthwhile to assess *Lochner* through more structured framework for measuring politicization.

First, though, it is impossible to address the political nature of the *Lochner* decision and its aftermath without thoroughly examining the Court’s connection to the industrial titans (as well as the laissez-faire philosophy) that dominated the day. Indeed, Justice Peckham was a close friend and advisor to a variety of business leaders including John Rockefeller, John Pierpont Morgan, Sr., and Cornelius Vanderbilt.<sup>165</sup> When not in public service, Peckham often served as their legal counsel, and he also had close connections with fellow members of the Board of Trustees for the Mutual Life Insurance Company of New York.<sup>166</sup> And, while it should be duly noted that Peckham often voted to break up large businesses in antitrust cases,<sup>167</sup> his personal life nonetheless explains his largely pro-business judicial leanings.

In fact, it is no coincidence that the Supreme Court, and the legal profession generally, maintained a firm commitment to the liberty of contract doctrine. According to the Oxford scholar Edward Corwin, the American Bar Association (founded in 1878):

became a sort of juristic sewing circle for mutual education in the gospel of laissez faire... The country was presented with a new, up-to-date version of natural law... The guarantees which the Constitution affords private rights were intended to supply, above all other things, a legal and political sanction to the

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<sup>165</sup> Megan W. Benett, "Rufus W. Peckham, Jr.," Historical Society of the New York Courts | New York Legal History / Legal Luminaries : New York State Court of Appeals, <http://www.nycourts.gov/history/legal-history-new-york/history-legal-bench-court-appeals.html?http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/peckham-rufus-jr.html>.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid.

laws of political economy and to the process of evolution as forecast by Herbert Spencer.<sup>168</sup>

In stark contrast with the revival of substantive due process in the 1960s, the *Lochner* era reflected judicial activism with a conservative, capitalistic bent. According to John P. Frank: the “new bench was chosen from a bar which had imbedded that part of the truncated philosophy of laissez-faire which became popular among lawyers for enterprise in the last half of the nineteenth century.”<sup>169</sup> Thus, particularly among affluent, educated circles, almost religious-like credence was regularly given to capitalistic, anti-regulation, and union-busting policies.

It is with this background that the previously expounded factors concerning *Lochner*’s politicizing effects will be analyzed. First, it appears clear that the *Lochner* decision and its progeny constituted controversial decisions that were important to the public and inconsistent with the strongly held views of a not insubstantial sector of the public, and these decisions were based on a rationale that is obscure. It is readily apparent from the dissenting opinion written by Justice Holmes that the *Lochner* case was decided based on an economic view that a large swath of the country “did not entertain.” The obscurity of the doctrine, too, is evident from the fact that the Court consistently chose to evaluate its limits on a case-by-case basis. Rather than clearly defining what, precisely, was within its grounds, the Court simply decided to pick and choose what legislation it would find sufficiently obtrusive to its notion of “liberty.”

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<sup>168</sup> Sidney G. Tarrow, "Lochner versus New York: A Political Analysis," *Labor History* 5, no. 3 (1964): 292, doi:10.1080/00236566408583950.

<sup>169</sup> *Ibid.*, 292.

The second factor relates to the extent to which the Supreme Court deviates (or appears to deviate) from established norms to reach a particular result in cases that have broad political implications. Here, too, it appears that the *Lochner* approach registered as highly political: While the stage was set for liberty of contract jurisprudence in *Allgeyer*, the doctrine was both novel and relatively obscure. Additionally, the *Lochner* approach to economic legislation certainly had broad political implications: As Justice Harlan observed, the failure of the Court to defer to legislative bodies in these matters would deprive them of their legitimate police powers, which could “cripple” their ability to perform the basic functions of a modern state. Finally, with respect to the fifth and final factor—the degree to which Supreme Court justices are polarized along the legal spectrum—the extent of politicization is also evident from Holmes’ dissent, which was one of the most accusatory of judicial activism in the Court’s history. The third and fourth factors—the extent to which Supreme Court composition is the focus of political processes, including election rhetoric, voting processes, and Supreme Court nominations—requires further discussion.

The high regard for property rights (and, by extension, the notion that liberty of contract was fundamental) among elites and the dissenting view of the growing industrial underclass meant that the *Lochner* opinion received mixed responses from various areas of the country. The *Los Angeles Times*, *New York Times*, *New York Herald*, and *Dallas Morning News*, for example, all supported the outcome, with some publications declaring

it a victory for the “sacred rights of the freeman” and a much-needed prospective blow to the strike to the tyranny of socialist rule.<sup>170</sup>

Of course, others were more hostile to the decision. Shortly after its release, *The Baker's Journal* declared that *Lochner* was “the hardest blow ever dealt by the courts of this country to organized labor”<sup>171</sup> and later issued an article asserting the following;

[t]he bakery workers die like flies, of consumption, rheumatism and other physical punishments for the breaking of nature's laws. But what do the learned justices care for the laws of nature? **Capitalist laws are alone sacred to them!** What are wage workers for but to be exploited!<sup>172</sup>

While none ultimately followed through, 85,000 bakers threatened to strike and cause a bread famine.<sup>173</sup> *The Worker*, a prominent socialist newspaper, declared the outcome of the *Lochner* case, “a new *Dred Scott* decision.”<sup>174</sup> As such, it is clear that unions across the country regarded the decision as a highly political one. As put by Victoria Nourse at the Georgetown Law Center:

Such cases sent children to the mills and sweatshops, allowed employers to prevent individuals from joining unions, restricted the ability of unions to boycott, and kept minimum wage and hour legislation for able-bodied men in litigation limbo for thirty years. **People demonstrated, fought, and voted based on these issues; these cases left such an important impression because there were focal points for the discontent of great masses of people.**<sup>175</sup>

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<sup>170</sup> Victoria F. Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights," *California Law Review*, 3rd ser., 97, no. 3 (June 2009): 778, <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1135&context=californialawreview>.

<sup>171</sup> David E. Bernstein, "Lochner v. New York: A Centennial Retrospective," *Washington University Law Review*, 5th ser., 83 (2005): 1501, [https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1259&context=law\\_lawreview](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1259&context=law_lawreview).

<sup>172</sup> *Ibid.*, 1501. Emphasis added in bold.

<sup>173</sup> D. Grier Stephenson, Jr., "The Supreme Court and Constitutional Change: *Lochner* v. New York Revisited," *Villanova Law Review*, 2nd ser., 21, no. 2 (1976): 217-218, <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2089&context=vlr>.

<sup>174</sup> *Ibid.*, 217.

<sup>175</sup> Victoria F. Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights," *California Law Review*, 3rd ser., 97, no. 3 (June 2009): 775-776, <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1135&context=californialawreview>. Emphasis added in bold.



With industrialization rapidly changing the economic landscape of the United States, government's role in shaping the public's social outlook and fiscal welfare needed to evolve. For many urban, working class people, the Court came to represent an out-of-touch institutional body that had appropriated the authority (and, some would say, exercised the audacity) to overrule the democratic will of society's most vulnerable.

The decision also clearly impacted election rhetoric and politicians' views of the judiciary. The 1912 Progressive party platform supported "such restrictions of the power of the courts as shall leave to the people the ultimate authority to determine fundamental questions of social welfare and public policy."<sup>176</sup> Insofar as the judiciary commandeers the authority to settle questions rightly left to the people and their respective legislatures, this may be regarded as politicization in and of itself.

However, it was Theodore Roosevelt who became one of *Lochner*'s most avid critics. While he did not specifically deny the existence of a liberty of contract, Roosevelt publicly criticized the decision because it fundamentally disregarded the will of the people to decide a question of public policy that he believed rightly fell within the legislative realm. The decision, he declared, was "nominally against State rights... but really against popular rights, against the democratic principle of government by the people under the forms of law."<sup>177</sup> At a later date, he further articulated his position:

In the New York Bakeshop Case it is our duty to say that it is for the people of a State to decide whether they intend to be true to the school of political economy of the eighteenth century individualism philosophers or whether they intend to act

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<sup>176</sup> Sidney G. Tarrow, "Lochner versus New York: A Political Analysis," *Labor History* 5, no. 3 (1964): 303, doi:10.1080/00236566408583950.

<https://www.tandfonline.com/doi/pdf/10.1080/00236566408583950>

<sup>177</sup> Victoria F. Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights," *California Law Review*, 3rd ser., 97, no. 3 (June 2009): 780, <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1135&context=californialawreview>.

on the principles set forth in such books as those of Professor Rose on “Social Control” and by Father Ryan on “A Living Wage.”<sup>178</sup>

Thus, while he did not attack the notion of substantive due process doctrine as faulty jurisprudence in and of itself, he did bristle at the notion that judicial intervention undermined the will of the people, as reflected in duly enacted legislation. When running in the 1912 presidential election, Roosevelt called *Lochner* a manifestation of judicial “tyranny.”<sup>179</sup> And, while Woodrow Wilson ultimately won the election, then-President Taft believed the Constitution was the “supreme issue” of the race.<sup>180</sup>

The *Lochner* case set a longstanding federal legal precedent under which the Court struck down the regulation of the sale of securities, standardization of the price of gasoline, and other state measures.<sup>181</sup> In light of the number of cases that followed in *Lochner*’s footsteps and the impact these cases had on the lives of an increasingly disgruntled working class, it is no wonder that “Lochner” is among the only Supreme Court cases to give birth to an “era.” For these reasons—and based on a structured analysis—it appears clear that the *Lochner* decision is accurately associated with increased politicization of the Supreme Court and the judiciary generally.

However, it could be argued that *Lochner*’s politicizing effects were ultimately short-lived and relatively less pronounced than the case studies to be examined in the latter half of the 20th century. Indeed, *Lochner*’s legacy was tempered by the Court’s return to a more fact and circumstance-based jurisprudence. In contrast to the *Lochner* decision, which relied heavily on abstract principle, subsequent “liberty of contract”

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<sup>178</sup> Ibid., 780.

<sup>179</sup> Ibid., 782.

<sup>180</sup> Ibid., 782-783.

<sup>181</sup> Ibid., 783.

cases began to look much more seriously at the present conditions and particulars of the legislation at issue. For example, in *Muller v. Oregon* (1908), the Court upheld a law limiting the work of women in factories due to their “physical structure.”<sup>182</sup> According to Sidney G. Tarrow’s “*Lochner versus New York: A Political Analysis*,” this marked a turning point from which the Court softened its strict adherence to the liberty of contract doctrine and began to examine legislation “in the light of actual industrial conditions, unlike their approach in the *Lochner* case.”<sup>183</sup>

Consider the following quote by Stephenson in “The Supreme Court and Constitutional Change: *Lochner v. New York*”:

The *Lochner* litigation was one of the first opportunities presented for constitutional confirmation of the modern regulatory state. Debate over the constitutionality of the New York statute symbolized the broader dispute over fundamental changes in the fabric of the American polity.<sup>184</sup>

The case indeed came at a time of rapid political and economic change for the nation. Ultimately, organized labor and many of its policies won the policy landscape through the democratic process. As the court adjusted (or softened) its judicial philosophy concerning substantive due process, the politicization of the Court as a potent election issue dissipated. Particularly with World War I, the country at large faced pressing challenges that threatened to compromise the stability of global relations, leaving substantially less air time for bakers’ hours. As Professor Nourse observed:

The Progressive Era... was full of reform and regulation... from consumer protection and the federal reserve to worker’s compensation; from regulations of

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<sup>182</sup> Sidney G. Tarrow, “*Lochner versus New York: A Political Analysis*,” *Labor History* 5, no. 3 (1964): 303-304, doi:10.1080/00236566408583950.

<https://www.tandfonline.com/doi/pdf/10.1080/00236566408583950>

<sup>183</sup> *Ibid.*, 303-304.

<sup>184</sup> D. Grier Stephenson, Jr., “The Supreme Court and Constitutional Change: *Lochner v. New York* Revisited,” *Villanova Law Review*, 2nd ser., 21, no. 2 (1976): 221, <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2089&context=vlr>.

drink, lotteries, fight films, and stolen cars to seditious speech to birth control—and the Court’s case law did little to squelch any of these regulatory impulses, for good or ill<sup>185</sup>

Thus, it appears that despite the Court’s convictions regarding the centrality of a fundamental right to contract found nowhere in the constitutional text, the democratic process was simply too powerful for even the most activist Court to oppose indefinitely. For this reason, the politicization of the Supreme Court in this era became fully realized at its tail end, but was ultimately extinguished with *West Coast Hotel v. Parrish* (1937).<sup>186</sup> Only with the nation in the midst of the Great Depression and the President attempting to “pack” the Court did the body abandon its stringent final stand on economic regulations.

### Privacy, “Penumbra,” and Substantive Due Process

In order to understand natural rights jurisprudence in the 21st century, it is first necessary to trace the rebirth and evolution of substantive due process beginning in the 1960s. For almost 30 years after the end of the *Lochner* era, the doctrine was scorned as a blemish on American constitutional history.<sup>187</sup> However, its revitalization has marked an interesting trend since the 1960s: in general, the American public increasingly favor the rights protected by the Court in this new period. Access to contraception, abortion, and other “private” privileges against intrusion from the state are all concepts that, from a political perspective, many Americans (if not an emerging majority) appear willing to

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<sup>185</sup> Victoria F. Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights," *California Law Review*, 3rd ser., 97, no. 3 (June 2009): 754, <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1135&context=californialawreview>.

<sup>186</sup> *Ibid.*, 792.

<sup>187</sup> D. Grier Stephenson, Jr., "The Supreme Court and Constitutional Change: *Lochner* v. New York Revisited," *Villanova Law Review*, 2nd ser., 21, no. 2 (1976): 217, <https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=2089&context=vlr>.

support at the ballot box. However, this does not necessarily make these public policies constitutional rights.

The Court's decision to embrace this unique, new form of substantive due process certainly has enlarged its scope to include rulings on intimate questions previously reserved to the political arena. Largely as a consequence, our Supreme Court (and the federal judiciary generally) has experienced the political attention, scrutiny, and polarization it does today. In discussing this phenomenon, this chapter will examine three landmark cases: *Griswold v. Connecticut* (1965), *Roe v. Wade* (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992). After outlining the decisions themselves, this paper then analyzes their implications with respect to the politicization of the Supreme Court.

### *Griswold v. Connecticut* (1965)

Although the notion of a constitutional “right to privacy” (particularly in the form of bodily autonomy) was most famously solidified in popular culture by *Roe v. Wade* (1973), the understanding that the Constitution implies such a liberty without its explicit mention developed from *Griswold v. Connecticut* (1965). In this case, the named appellant, Estelle Griswold, the Executive Director of Planned Parenthood League of Connecticut, challenged Section §§ 53-32 of the Connecticut General Statutes, which stated:

Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.<sup>188</sup>

In addition, Section 54-196 held:

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<sup>188</sup> *Griswold v. Connecticut*, 381 U.S. 479,480 (1965)

Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.<sup>189</sup>

The Planned Parenthood League of Connecticut provided counsel on contraception to both married and unmarried couples. When found in violation of these state laws, Griswold and others were fined \$100 each.<sup>190</sup> They then sued in state court, asserting that the statute violated an implied constitutional right to marital privacy.

In the 7-2 majority opinion, Justice Douglas remarked that a number of the provisions in the Bill of Rights were indirectly implicated by the questions posed in *Griswold v. Connecticut*. For example, while the First Amendment holds no scripted right of “association,” the Court had repeatedly affirmed the right to gather in means that were of “social, legal, and economic benefit [to] the members.”<sup>191</sup> Justice Douglas continued:

The right of “association”... includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion, and, while it is not expressly included in the First Amendment, its existence is necessary in making the express guarantees fully meaningful.<sup>192</sup>

In a similar manner, Justice Douglas contended that the notion of “privacy” is found throughout the Bill of Rights, and that insofar as the common thread can be reasonably discerned, its application must be consequential. The Third Amendment prohibits the quartering of soldiers during peacetime in private houses. The Fourth Amendment affirms the “right of the people to be secure... against unreasonable searches and seizures.”<sup>193</sup> Meanwhile the Fifth Amendment right to protection against self-

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<sup>189</sup> Id., 480.

<sup>190</sup> Id., 480.

<sup>191</sup> Id., 483.

<sup>192</sup> Id., 483.

<sup>193</sup> Id., 484.

incrimination affords citizens a so-called “zone” of privacy that government may not force him to surrender to his detriment. And, finally, the Ninth Amendment provides that the written proclamation of various rights “shall not be construed to deny or disparage others retained by the people.”<sup>194</sup> By tying these Amendments together, Justice Douglas painted a picture of the “emanations” and “penumbras” he used to justify the remainder of his decision.<sup>195</sup>

Relying on this string of assertions, Justice Douglas then contended that the *Griswold* case before the Court “concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”<sup>196</sup> He wrote:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>197</sup>

Insofar as the law remained in this realm, the governmental purpose “may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”<sup>198</sup> Furthermore, since robust enforcement of the Connecticut statute would require governmental search and intrusion into the bedrooms of married couples, he alleged the law “is repulsive to the notions of privacy surrounding the marriage relationship.”<sup>199</sup>

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<sup>194</sup> *Id.*, 484.

<sup>195</sup> *Id.*, 484.

<sup>196</sup> *Id.*, 485.

<sup>197</sup> *Id.*, 486.

<sup>198</sup> *Id.*, 485.

<sup>199</sup> *Id.*, 486.

Indeed, the Connecticut law was repugnant to ordered conceptions of marital unions. However, robust reading of the law requires more than mere associative reasoning about abstract ideas. Any astute observer should understand that the text of the First, Third, and Fourth Amendments imply, in some sense, a certain right of privacy against the state. However, this is the case for virtually *any* law proclaiming that the government cannot do something. The Bill of Rights was, of course, precisely designed to achieve this purpose. By definition, when a restriction on government intervention exists, some corollary *private* liberty resides explicitly for the people. With that being said, a specifically enumerated provision in the Bill of Rights need not imply any protection for rights not explicitly mentioned (with the obvious exception of the Ninth Amendment). While the notion of state authorities barging into the bedrooms of intimate couples to determine whether they use contraception is surely offensive to the notion of civil liberty, Justice Douglas failed to seriously formulate his reasoning from the constitutional text itself. Rather, he extrapolated from various unconnected Amendments in order to reach a conclusion that while viscerally agreeable and politically expedient, is legally problematic.

It is of note that Justice Douglas grounded his decision by connecting the alleged right of marital privacy to a value that is fundamental in nature to American social life. Thus, he voted to side with the majority not because he disliked the Connecticut law (although he almost surely did), but because it was antithetical to a deeply-rooted institution. Thus, the ruling was grounded in the Court's understanding of a fundamental social institution that was "older than the Bill of Rights—older than our political



parties...”<sup>200</sup> This analysis is very different than that developed by the Supreme Court in the coming decades, which, as discussed below, focused on the personal autonomy of the individual, “respect,” or “dignity.” Meanwhile, the liberties protected by *Griswold v. Connecticut* were those supposedly essential to our historical traditions. In the future, Justice Scalia would remark on how this would change:

Within the last 20 years, we have found to be covered by due process the right to abortion, which was so little rooted in the traditions of the American people that it was criminal for 200 years; the right to homosexual sodomy, which was so little rooted in the traditions of the American people that it was criminal for 200 years.<sup>201</sup>

At some point, then, the Court would begin to more boldly substitute its moral judgements for those of various legislatures. However, in the seminal case of *Griswold v. Connecticut* (1965), the Court’s decision was rooted in the essentially historical observation that there was something deeply un-American in a law that invaded the bedrooms of married couples.

Regardless, a textualist approach to constitutional interpretation would support Justice Black’s dissent: “The Court talks about a constitutional “right of privacy” as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the “privacy” of individuals. But there is not.”<sup>202</sup> Justice Black contended that substantive due process provided the Court a kind of “blank check” to invalidate laws that it deemed improper, rather than illegal. He stated:

The due process argument... is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this

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<sup>200</sup> *Id.*, 486.

<sup>201</sup> Antonin Scalia, “Constitutional Interpretation the Old Fashioned Way,” March 14, 2005, Accessed January 17, 2018, [https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia 2010-2011/Constitutional\\_Interpretation\\_Scalia.pdf](https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%2010-2011/Constitutional_Interpretation_Scalia.pdf).

<sup>202</sup> *Griswold v. Connecticut*, 381 U.S. 479, 508 (1965)

Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." **If these formulas based on "natural justice"... are to prevail, they require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is, of course, that of a legislative body.**<sup>203</sup>

Justice Black was precisely right. Throughout his tenure on the Supreme Court, Justice Black continually employed his strict adherence to the text of the Constitution in order to defend the system of governance the Framers intended. As he once told the *New York Times* in 1967, "I was against using due process to force the views of judges on the country. I still am. I wouldn't trust judges with that kind of power and the Founders did not trust them either."<sup>204</sup> Whether against "economic liberty" arguments in cases such *Carolene Products* (1937) or privacy contentions in the final terms of his tenure, Justice Black vigorously denounced substantive due process even when doing so was inconsistent with his own personal, political preferences.

It is noteworthy that Justice John Marshall Harlan II's dissent in *Poe v. Ullman* (1961), the predecessor case to *Griswold v. Connecticut*, provided one of the most strident (and oft cited) defenses of substantive due process to date. In it, Justice Harlan asserted that the liberty implied in the Fourteenth Amendment's Due Process Clause prescribed "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."<sup>205</sup> Unfortunately, the difficulty in adjudicating along such lines is determining what is "arbitrary" or

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<sup>203</sup> Id., 511-512. Emphasis added in bold.

<sup>204</sup> Nicandro Iannacci, "Hugo Black, Unabashed Partisan for the Constitution," National Constitution Center, August 12, 2017, <https://constitutioncenter.org/blog/hugo-black-unabashed-partisan-for-the-constitution>.

<sup>205</sup> *Poe v. Ullman*, 367 U.S. 497, 543 (1961).

“purposeless” and what is not. While liberal legal scholars often hail the dissent as one of the pre-eminent, early defenses of the doctrine, Justice Harlan specifically rejected the notion that the due process doctrine could be stretched to the lengths it reaches today:

The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as **laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis....It is one thing when the State exerts its power either to forbid extramarital sexuality altogether, or to say who may marry,** but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy.<sup>206</sup>

Thus, it is clear that (at least at the time of the *Griswold* ruling) the scope of due process was dependent on what was “deeply pressed into the substance” of American social life. 50 years ago, same-sex relations, extramarital sexuality, and a myriad of other social mores did not fall into this category.

It should perhaps be emphasized that even justices who are deeply concerned about judicial overreach via the Due Process Clause fail to adequately account for the power their precedents may set. According to Justice Byron White in his dissenting opinion in *Moore v. East Cleveland* (1977), “no one was more sensitive than Mr. Justice Harlan to any suggestion that his approach to the Due Process Clause would lead to judges roaming at large in the constitutional field.”<sup>207</sup> As we will see in the coming sections, notions of “privacy” or “personal liberty” allegedly embedded in the Fourteenth Amendment have expanded tremendously since *Griswold*. Indeed, Justice Kennedy

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<sup>206</sup> Id., 546, 553. Emphasis added in bold.

<sup>207</sup> *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977)

regarded *Griswold* as the “most pertinent beginning point”<sup>208</sup> for the reasoning he would employ in *Lawrence v. Texas* (2003).

Often, like in *Griswold*, subsequent due process decisions are similarly reasonable from a political or social standpoint. However, from a legal perspective, it appears that the scope of due process is defined by what particular justices believe is “arbitrary” at a certain point in time. As such, its limits are extraordinarily vague and difficult to define, let alone maintain.

### *Roe v. Wade* (1973)

Although the notion that substantive due process protects various aspects of private life was solidified in *Griswold v. Connecticut*, *Stanley v. Georgia*, *Meyer v. Nebraska*, as well as several other cases, *Roe v. Wade* (1973) remains the best known modern case addressing the scope of the Due Process Clause in the context of private life. In it, Norma L. McCorvey (known as “Jane Doe”), a resident of Texas, sought an abortion in her home state of Texas.<sup>209</sup> At the time, Articles 1191-1194 and 1196 of the Texas Penal Code made it illegal for women to have an abortion unless it was “procured or attempted by medical advice for the purpose of saving the life of the mother.”<sup>210</sup> After attempting and failing to obtain an abortion, she filed suit against Henry Wade, the District Attorney for Dallas County, alleging that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.<sup>211</sup>

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<sup>208</sup> *Lawrence v. Texas*, 539 U.S. 558, 564 (2003)

<sup>209</sup> CNN Library. “Roe v. Wade Fast Facts.” CNN. April 15, 2018.  
<https://www.cnn.com/2013/11/04/us/roe-v-wade-fast-facts/index.html>.

<sup>210</sup> *Roe v. Wade*, 410 U.S. 113, 118 (1973)

<sup>211</sup> *Id.* 113-115.

Justice Blackmun delivered the opinion of the Court. In his decision, he declared that despite the deep philosophical, religious, and personal implications of abortion statutes, “Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection.”<sup>212</sup> Before delving into the heart of the argument, Blackmun proceeded to do a deep dive into the ancient history of abortion in an apparent attempt to discredit the validity of the state prohibition (and similar, modern statutes across the country). He noted that, “it perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage.”<sup>213</sup> However, the validity of such an assertion as well as the robust backstory is not relevant to solving the case at hand.

He then stated:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.<sup>214</sup>

Of course, as noted previously, the text of the Fourteenth Amendment itself merely makes clear that an individual may, in fact, be deprived of his life, liberty, or property, as long as the deprivation is done in accordance with “due process.” And while unenumerated or “natural rights” jurisprudence philosophy is arguably consistent with a textualist reading of the Ninth Amendment, it is far from clear that the right to an abortion is one reserved “to the people” rather than a matter of public policy reserved to the state. Furthermore, such an understanding requires neglect of various historical

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<sup>212</sup> Ibid. 116.

<sup>213</sup> Ibid., 129.

<sup>214</sup> Ibid., 153.

circumstances in addition to abstract, principle-based reasoning. Justice Blackmun continued:

As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.... We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.<sup>215</sup>

Weighing the state interest against that of the pregnant mother, however, is precisely what the Texas state legislature had already done. Again, such a “balancing act” is emphatically not the prerogative of the Courts or the judicial branch.

Blackmun’s concession that, at “some point,” the “state interests as to protection of health, medical standards, and prenatal life, become dominant” made clear that such priorities may be compelling.<sup>216</sup> Indeed, the rationale for state action in this area was explained at length early in the opinion:

The State’s interest and general obligation to protect life then extends, it is argued, to prenatal life... recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.<sup>217</sup>

However, the honorable Justice believed that the state’s interest was to be given substantial weight only after the first trimester. Why, precisely, is far from clear.

Interestingly, Justice Blackmun’s first draft of the *Roe* opinion was less sweeping than the final version.<sup>218</sup> Preliminarily, the right to an abortion would be extended only to

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<sup>215</sup> Ibid., 154.

<sup>216</sup> Ibid. 155.

<sup>217</sup> Ibid., 150.

<sup>218</sup> Harvard Law Today, “Backlash from *Roe v. Wade* Continues to Shape Public Discourse, Says Klarman,” Faculty Scholarship, March 25, 2013, <https://today.law.harvard.edu/backlash-from-roe-v-wade-continues-to-shape-public-discourse-says-klarman/>.

the first trimester of pregnancy. However, after a suggestion from Justice Lewis Powell's clerk, the time frame was extended.<sup>219</sup> Since 90 percent of abortions take place in the first trimester, Professor Klarman remarked that:

late-term abortions are a symbolic issue but one of great potency, as Republicans have shown in the last 15 years. *Roe* put the court on the wrong side of public opinion by extending the right beyond what the public was willing to accept.<sup>220</sup>

Thus, the error of *Roe* was twofold: First, and most importantly, Justice Blackmun employed suspect legal doctrine to undermine the democratic will of dozens of states and millions of Americans. Second, he extended the scope of his decision far beyond where he needed to in order to accomplish the crux of his agenda.

On the other side of the debate, Justice White's scathing dissent lashed his colleagues for their alleged judicial overreach:

I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant women and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. **The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the woman, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but, in my view, its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.**<sup>221</sup>

By declaring that only at a certain point in a woman's pregnancy was the life of the fetus a compelling interest for the state, Justice Blackmun and the majority exempted the issue of abortion (at least in large part) from the democratic process. As the following section will demonstrate, the "realm(s)" protected by substantive due process has grown even

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<sup>219</sup> Ibid.

<sup>220</sup> Ibid.

<sup>221</sup> *Roe v. Wade*, 410 U.S. 113, 222, 223 (1973) (Justice White, dissenting). Emphasis added in bold.

further since *Roe*. Indeed, its expansion has risen to the point where it is exercised in lieu of more applicable constitutional provisions and doctrines.

*Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)

The Court revisited the issue of abortion in *Planned Parenthood v. Casey* (1992). At this point in the Rehnquist Court's era, conservatives appeared poised to overturn the *Roe* ruling with the votes of Justices Sandra Day O'Connor, Antonin Scalia, Clarence Thomas, David Souter, and the Chief Justice himself. Additionally, Justice White (who was appointed by a Democrat), had originally dissented in *Roe*, as well. As part of a promise on the campaign trail, Republican presidential candidate Ronald Reagan pledged to nominate a woman to the highest bench in the land.<sup>222</sup> Especially towards the end of O'Connor's tenure on the Supreme Court, her record demonstrated herself to be much more of centrist than many initially anticipated. To some legal analysts' surprise, O'Connor, Souter, and Kennedy voted to uphold the "essential holding" in *Roe*:

Concluding that consideration of the fundamental constitutional question resolved by *Roe v. Wade*, 410 U.S. 113, principles of institutional integrity, and the rule of *stare decisis* require that *Roe*'s essential holding be retained and reaffirmed... **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.** Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>223</sup>

This was surely the most bold—and almost certainly most romantic—description of what is encompassed by substantive due process. How such a proposition should be applied is

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<sup>222</sup> "Reagan's Nomination of O'Connor," National Archives and Records Administration, <https://www.archives.gov/legislative/features/oconnor.html>.

<sup>223</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 834, 851 (1992). Emphasis added in bold.



not entirely clear, and the Court refrained from establishing a structured system or framework for future cases.

Furthermore, the decision stated:

Overruling *Roe*'s central holding would not only reach an unjustifiable result under *stare decisis* principles, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law.<sup>224</sup>

First and foremost, *Planned Parenthood* affirmed the conclusion reached in *Roe* that the Fourteenth Amendment's Due Process Clause encompasses a substantive element to the word "liberty" that protects a woman's qualified right to bodily autonomy, and therefore abortion. However, the decision also explained at length the importance of the doctrine of *stare decisis*. The opinion stated that when having decided an issue of "national controversy" by "accepting a common mandate rooted in the Constitution," the Court must be extremely cautious not to be guilty of or giving the perception of being guilty of, "surrender[ing] to political pressure."<sup>225</sup>

Indeed, in the long run, constantly changing precedent may threaten to undermine the credibility of the Court system and rule of law generally. However, in and of itself, precedent can only tell us what was done, not what was done well. Furthermore, failing to overturn bad rulings simply because they were declared recently is, in fact, taking political considerations into judicial decision-making. As noted by Justice Rehnquist's opinion:

Under this principle, when the Court has ruled on a divisive issue, it is apparently prevented from overruling that decision for the sole reason that it was incorrect, *unless opposition to the original decision has died away*.<sup>226</sup>

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<sup>224</sup> Id., 865.

<sup>225</sup> Id., 867.

<sup>226</sup> Id., 958. (Justice Rehnquist, dissenting)

Such an understanding of *stare decisis* would be truly novel and, perhaps even more importantly, dangerous to the role of the Court. Indeed, as argued by Justice Scalia, in its effort not to appear overly political, the Court arguably swayed in the other direction:

The only principle the Court “adheres” to, it seems to me, is the principle that the Court must be seen as standing by *Roe*. That is not a principle of law (which is what I thought the Court was talking about), but a principle of *Realpolitik*—and a wrong one at that.<sup>227</sup>

In response to the heart of the argument proposed by the majority opinion, Justice Scalia continued:

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**. . . . How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the fact of this distressing phenomenon, and more attention to *the cause of it*. That cause permeates today’s opinion: **a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls “reasoned judgment,” which turns out to be nothing but philosophical predilection and moral intuition.**<sup>228</sup>

This excerpt perfectly synthesized the overarching problem with an overly expansive, substantive interpretation of the Due Process Clause or Ninth Amendment. In order to protect various “essential spheres of liberty,” regardless of how politically appealing or apparently “natural,” the judiciary necessarily deprives citizens of their democratic right to resolve the issue themselves. While they may not reach the correct, satisfactory, or

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<sup>227</sup> Id. 997-998. (Justice Scalia, dissenting).

<sup>228</sup> Id. 979, 999, 1000. (Justice Scalia, dissenting). Emphasis added in bold.

even moral decision, the ultimate right to determine public policy is their own. Indeed, it is not altogether surprising that Justice Scalia equated the judgment of the Court that day to that of Chief Justice Taney in *Dred Scott*.<sup>229</sup> The desire to end an issue, particularly one with such divisive consequences for the country, can be overwhelming for judges. It is arguable that Blackmun and the majority, under the name of substantive due process and guise of legitimate constitutional law, fell vulnerable to the same kind of political expediency.

### *Griswold, Roe, Planned Parenthood, and the Politicization of the Supreme Court*

In measuring the extent to which *Griswold*, *Roe*, and *Planned Parenthood* contributed to the politicization of the Supreme Court, we return to the familiar analytical framework:

- The degree to which the Court makes controversial decisions that are important to the public and inconsistent with the strongly held views of a not insubstantial sector of the public, based on a rationale that is obscure.
- The extent to which the Supreme Court deviates (or appears to deviate) from established precedent or modes of judicial interpretation to reach a particular result in cases that have broad political implications.
- The extent to which Supreme Court composition is the focus of political processes, including election rhetoric and voting priorities.
- The extent to which Supreme Court nomination and confirmation is subject to a political litmus test, especially at the expense of judicial qualifications and expertise.
- The degree to which Supreme Court justices are polarized along the legal spectrum.

Based on this analytical framework, it would appear that the direct politicizing effect of *Griswold* was negligible. The Connecticut law regulating contraceptive use

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<sup>229</sup> Id., 998. (Justice Scalia, dissenting).

invalidated in the case was rarely enforced—and, as a direct consequence, even the most conservative of the state’s constituents did not gather up in arms as a result of the Court’s ruling. And, while the Supreme Court was a major issue in the 1968 election,<sup>230</sup> the *Griswold* case was not the focus of that year’s electioneering. Nor did the Supreme Court nomination and confirmation processes begin to apply a “Griswold litmus test,” and the *Griswold* decision did not result in lasting schisms or substantive polarization within the Court. Indeed, even the democratic process saw very little movement to revitalize aspects of the law. Nonetheless, as the first decision to announce a “privacy” right inherent in the Fourteenth Amendment, the decision was pivotal to the ultimate resolution of more controversial cases.

*Roe*, on the other hand, ranks as a highly (if not the most) politicizing case based on all of the factors enumerated above. With respect to the first factor, it is clear that—then and now—the country is extremely divided over the issue of abortion. According to Harvard Law School Professor Michael Klarman, when it released the *Roe* decision, “the Supreme Court struck down the abortion laws of 46 states and opened the floodgates for a wave of opposition that has never abated.”<sup>231</sup> Professor Klarman argues that the Court’s decision relied heavily on a 1972 poll that concluded 63% of Americans thought abortion should be a “private decision between women and their doctors,” although 32 states still allowed abortions only when a woman’s life was in danger.<sup>232</sup> Of course, the nation had not reached such a consensus. In fact, according to an article published by *Time* titled, “A

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<sup>230</sup> William G. Ross, "The Supreme Court Should Be a Key Election Issue," JURIST - Forum, October 31, 2012, Accessed October 21, 2017, <http://www.jurist.org/forum/2012/10/william-ross-sctus-election.php>.

<sup>231</sup> Harvard Law Today, "Backlash from *Roe v. Wade* Continues to Shape Public Discourse, Says Klarman," Faculty Scholarship, March 25, 2013, <https://today.law.harvard.edu/backlash-from-roe-v-wade-continues-to-shape-public-discourse-says-klarman/>.

<sup>232</sup> Ibid.

Stunning Approval for Abortion,” a poll directly prior to the decision demonstrated that abolishing first-trimester restrictions was favored among Americans by only one percentage point more than those in opposition.<sup>233</sup> Thus, while the matter was resolved legally, the piece concluded that “it remains a lightning rod for intense national debate.”<sup>234</sup>

Indeed, Klarman argues that, in large part, politicizing Supreme Court cases have occurred in the latter half of the 20th century because the progressive bench was too far ahead of the rest of the country.<sup>235</sup> This conclusion is also promoted by scholars such as William Eskridge, who contends that the Supreme Court’s issuance of such a far-reaching decision led pro-life Americans to explore other, more extreme measures in order to accomplish their policy goals outside the traditional democratic arena.<sup>236</sup> In overstepping its bounds, the Court not only confounded legislatures across the country with an impracticable trimester framework to assess the constitutional validity of state regulation, but also strengthened the ferocity of pro-life activist movements.

Furthermore, the rationale expressed in *Roe* concerning the “right to privacy” was quite obscure. The Court failed to adequately or definitively articulate the theories’ limitations, which explains why many, including Justice White, found the decision to represent “an exercise of raw judicial power.”<sup>237</sup> The vagueness of Justice Blackmun’s

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<sup>233</sup> Lily Rothman, “A Stunning Approval for Abortion: *Roe v. Wade* Reactions,” *Time*, January 22, 2015, <http://time.com/3669867/roe-v-wade-history/>.

<sup>234</sup> *Ibid.*

<sup>235</sup> Harvard Law Today, “Backlash from *Roe v. Wade* Continues to Shape Public Discourse, Says Klarman,” Faculty Scholarship, March 25, 2013, <https://today.law.harvard.edu/backlash-from-roe-v-wade-continues-to-shape-public-discourse-says-klarman>

<sup>236</sup> William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 520 (2001). Obtained via *Beyond Backlash*, page 971.

<sup>237</sup> *Roe v. Wade*, 410 U.S. 113, 222 (1973)

private liberty interest in *Roe* was perhaps only superseded by Justice Kennedy's "heart of liberty" passage. It can hardly be said that the Framers (or even a substantial block of the American public) were comfortable with the judiciary deciding contentious matters on the grounds of what constitutes a sufficiently important "mystery of the universe."

The second factor assesses the extent to which the Supreme Court deviates (or appears to deviate) from established precedent or modes of judicial interpretation to reach a particular result. In fact, a good argument can be made that the Court's failure to articulate a clear and easily understood rationale for its decision has contributed to the ongoing controversy. While the reaction to *Roe* was undoubtedly due in large part to the controversial nature of abortion, it is also in part explained by the lack of clear textual support in the Constitution for the Court's expansive reading of the Due Process Clause.

Supposedly, privileges protected by substantive due process fall under a category of "fundamental" rights. These are, in theory, practices so intrinsically vital to the human or American experience that their deprivation—regardless of the legal process by which they are taken—constitutes a blatant affront to natural law. In light of the robust controversy surrounding the issue of abortion, how could the Court reasonably conclude that a women's right to a first trimester abortion was "fundamental" in this sense?

Under the name of "natural rights" and with little textual grounding for its claims, the 7-2 majority appeared to much of the American public as ivory tower progressives who simply "knew better" than the people themselves. And despite remarkably consistent political division over the morality of abortion, the Warren, Burger, and Rehnquist Courts would use the framework adopted in *Roe* to overturn spousal notification, parental consent, and informed consent requirements. In this manner, more than 40 years before

*Obergefell v. Hodges* (2015), the Court opened itself to a judicial “slippery slope” that would provide fodder for conservative attacks for decades. Indeed, the nuts, bolts, and runway were far more slippery than anticipated.

Even those who defend the ultimate outcome, such as legal scholars Heymann and Barzelay, note that the valid underlying “principles” elucidated by Justice Blackmun’s majority opinion were:

never adequately articulated by the opinion of the Court... [which] leaves the impression that the abortion decisions rest in part on unexplained precedents, in part on an extremely tenuous relation to provisions of the Bill of Rights, and in part on a raw exercise of judicial fiat.<sup>238</sup>

And, while this thesis disagrees that the principles themselves were acceptable, the point still holds that the poorly constructed argument itself further strengthened the case of the Court’s detractors, leaving the institution open to charges that the decision was a political rather than judicial one.

Third, *Roe* had—and continues to have—an enormous impact on both election rhetoric and political processes. Interestingly, though, it appears it took some time for the Republican Party to formalize itself as the “pro-life” party. In fact, the 1976 Republican Party Platform was relatively nuanced on the issue:

The question of abortion is one of the most difficult and controversial of our time.... There are those in our Party who favor complete support for the Supreme Court decision which permits abortion on demand. There are others who share sincere convictions that the Supreme Court's decision must be changed by a constitutional amendment prohibiting all abortions. Others have yet to take a position, or they have assumed a stance somewhere in between polar positions.... The Republican Party favors a continuance of the public dialogue on abortion and

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<sup>238</sup> Heymann & Barzelay, “The Forest and the Trees: *Roe v. Wade* and Its Critics,” page 784, B.U.L. Rev. 765 (1973).

supports the efforts of those who seek enactment of a constitutional amendment to restore protection of the right to life for unborn children.<sup>239</sup>

To the nation's surprise, it was a former movie star who capitalized on the increasingly organized political movement around abortion and the Court system. According to Klarman:

*Roe v. Wade* generated a politically potent right-to-life movement that helped elect Ronald Reagan president in 1980 and has significantly influenced national politics ever since.<sup>240</sup>

Alongside pledging to nominate the first woman justice to the Supreme Court, the former California Governor also promised his fellow Republicans to appoint someone who would help overturn the *Roe* decision, as well as those that prohibited prayer in schools.<sup>241</sup> Indeed, political mobilization around figures such as Jerry Falwell, founder of the Moral Majority coalition, was robust in the 1980s, and the organization's support of Reagan was both early and fervent.<sup>242</sup>

Interestingly, as Governor of the Golden State, Reagan himself had signed legislation loosening restrictions for abortion procedures.<sup>243</sup> And, as President, Reagan's judicial appointments, particularly those to the Supreme Court, were not all subject to the kind of "litmus test" we see today. Justice O'Connor, for example, had a mixed record while in Arizona politics and, in his personally diary, Reagan wrote of the soon-to-be

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<sup>239</sup> The American Presidency Project, "Republican Party Platforms: Republican Party Platform of 1976 - August 18, 1976," The American Presidency Project, <http://www.presidency.ucsb.edu/ws/index.php?pid=25843>.

<sup>240</sup> Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-sex Marriage* (Oxford, UK: Oxford University Press, 2014), x.

<sup>241</sup> NCC Staff, "Ronald Reagan's Big Impact on the Supreme Court," National Constitution Center, <https://constitutioncenter.org/blog/ronald-reagans-big-impact-on-the-supreme-court>.

<sup>242</sup> PBS Staff, "God In America." PBS. <http://www.pbs.org/godinamerica/people/jerry-falwell.html>.

<sup>243</sup> Paul Kengor, "Reagan's Darkest Hour," National Review, January 22, 2008, , <https://www.nationalreview.com/2008/01/reagans-darkest-hour-paul-kengor-patricia-clark-doerner/>.



Justice: "Called Judge O'Connor and told her she was my nominee for Supreme Court. Already the flak is starting and from my own supporters. Right to Life people say she is pro abortion. She declares abortion is personally repugnant to her. I think she'll make a good Justice."<sup>244</sup> However, the religious right was furious.

Reverend Falwell warned that the "church people could leave him [Reagan] in droves,"<sup>245</sup> while the head of the National Pro-life Political Action Committee, Peter Gemma Jr., regarded the nomination as a "contradiction to the Republican Party Platform" and "everything that candidate Reagan said and even President Reagan has said in regard to social issues."<sup>246</sup> Despite impending party realignment over social issues, it appears the religious right did not yet have the power in the 1980s it does today to institute a "political litmus" test for Supreme Court justices.

However, it is clear President Reagan's opposition to abortion grew more pronounced as his presidency went on. In 1983, he published the first book written by a sitting President, "Abortion and the Conscience of a Nation:"

Make no mistake, abortion-on-demand is not a right granted by the Constitution. No serious scholar, including one disposed to agree with the Court's result, has argued that the framers of the Constitution intended to create such a right. Shortly after the *Roe v. Wade* decision, Professor John Hart Ely, now Dean of Stanford Law School, wrote that the opinion "is not constitutional law and gives almost no sense of an obligation to try to be." Nowhere do the plain words of the Constitution even hint at a "right" so sweeping as to permit abortion up to the time the child is ready to be born. Yet that is what the Court ruled.<sup>247</sup>

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<sup>244</sup> Fox News, "Transcript: Former Justice Sandra Day O'Connor on 'FNS'," *Fox News*, accessed May 2007, <http://www.foxnews.com/story/2007/05/20/transcript-former-justice-sandra-day-oconnor-on-fns.html>.

<sup>245</sup> Malone, Julia. "A Closer Look at Nation's First Woman High Court Nominee." *The Christian Science Monitor*. July 08, 1981. <https://www.csmonitor.com/1981/0708/070837.html>.

<sup>246</sup> *Ibid*.

<sup>247</sup> NRO Primary Document, "Abortion and the Conscience of the Nation," *National Review*, June 10, 2004, <https://www.nationalreview.com/2004/06/abortion-and-conscience-nation-nro-primary-document/>.

Reagan went on to compare the audacity of the Court's sweeping decision to *Dred Scott*, connect abortion to infanticide, and cite the Declaration of Independence in both his moral and judicial arguments against the *Roe* decision as well as those who support the alleged "right to choose."<sup>248</sup> From then on, Reagan's first-choice appointments would be more stringent on the issue. Of course, only Justice Antonin Scalia (again, not receiving a single dissenting vote from the Senate), and not Robert Bork, would make the initial cut. Only as a consequence of Bork's Senate rejection would Ronald Reagan nominate Anthony Kennedy, who would be much more sympathetic to "privacy" issues during his tenure.

As time has passed since *Roe*, the decision has created perhaps the most unbreakable "litmus test" for Democratic and Republican nominees alike. Today, it is hard to imagine a Democrat nominating a Justice to the highest Court in the land without a clear record affirming women's "right to choose." Similarly, the far-right evangelical vote remains a strong voice in the Republican Party. While it appears conservative Presidents have failed to adequately vet justices on this issue in the past, the appointment of Justice Gorsuch may mark a trend towards more stringent consistency in this regard.

Finally, the degree to which justices are politicized along the legal spectrum when it comes to abortion merits careful consideration. When *Roe* was initially announced, no decision went so boldly against public opinion on a contentious social issue. By the time of *Planned Parenthood v. Casey*, the Court ended with a more moderate outcome—one that upheld certain restrictions on abortion while negating others. However, while some

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<sup>248</sup> Ibid.

have lauded the decision as a kind of compromise on a difficult matter, the push and pull of various interests regarding public policy should be the product of the legislative realm.

To a justice who prioritizes the letter of the law, there can be no such “wiggle room.” In other words, a moderate may simply be someone who rules in accordance with “what is halfway between what the text means and what she would like it to mean.”<sup>249</sup>

While this may be a means of decreasing the “gap” between justices on the legal spectrum in accordance with various quantitative metrics, upholding the “essential” holding in *Roe* effectively meant that the justices were no less polarized than in 1973. Of course, this was well exemplified by Justice Scalia’s dissent.

### Sodomy, Same-Sex Marriage, and Substantive Due Process

In *Bowers v. Hardwick* (1986), the Court ruled that the Fourteenth Amendment did not imply a fundamental right to same-sex sodomy. However, it appears that the Court’s stringent adherence to the doctrine of *stare decisis* articulated in *Casey* (1992) was to be selectively applied since, in 2003, the Court reversed its *Bowers* precedent in *Lawrence v. Texas*. The question must be asked: Were the justices in the *Bower* decision more or less knowledgeable than the majority in *Lawrence* about what constituted “fundamental rights?” Of course not, but societal views (and especially the opinions of the “liberal elite”) had changed drastically. And while the Court’s decision was consistent with the direction of the nation, its leap ahead reflected extraordinary impatience—not to mention disregard for the democratic process—that further politicized its role within our governing scheme.

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<sup>249</sup> Joe Carter, “Justice Scalia’s Two Most Essential Speeches,” ERLC, February 18, 2016, <https://erlc.com/resource-library/articles/justice-scalias-two-most-essential-speeches>.

*Bowers v. Hardwick* (1986)

In delivering the opinion of the Court in *Bowers v. Hardwick* (1986), Justice White drew a distinction between the previous privacy cases the Court had ruled upon and the case at bar. In doing so, he explored what is meant by a “fundamental” right protected by substantive due process. First, he turned to a case not discussed at length in this thesis, *Palko v. Connecticut* (1937), which stated that the rights protected by the doctrine are those implicit in the concept of “ordered liberty.”<sup>250</sup> Furthermore, in *Moore v. East Cleveland* (1977), which dealt with a due process privacy claim involving zoning ordinances and the “sanctity of the family,” the Court declared that fundamental rights must be “deeply rooted in this Nation's history and tradition.”<sup>251</sup> Since same-sex sodomy was outlawed by all thirteen states during ratification of the Bill of Rights and the practice had largely been regarded as a moral perversion since that time, Justice White contended that the Court was not:

inclined to take a more expansive view of our authority to discover new fundamental rights embedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.<sup>252</sup>

On these grounds, the Court’s majority opinion firmly ruled that the alleged constitutional right to engage in same-sex sodomy was “facetious, at best.”<sup>253</sup>

Joined by Justices Brennan, Marshall, and Stevens, Justice Blackmun delivered the dissenting opinion. At the core of his argument was the assertion that the “private

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<sup>250</sup> *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986)

<sup>251</sup> *Id.*, 192.

<sup>252</sup> *Id.*, 194.

<sup>253</sup> *Id.*, 194.

sphere” of liberty inherent in the Fourteenth Amendment is broader than that implied in the majority opinion: “We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life.”<sup>254</sup> Engaging in intimate behavior with another human being, Justice Blackmun argued, is a vital part of the human experience. Insofar as there is no material or moral difference between heterosexual and homosexual relations, the ability to engage in such conduct should be uniform. And, especially since the Georgia law applied to both heterosexual and homosexual sodomy, the Court should have struck it down on those grounds.

Furthermore, in a footnote, Justice Blackmun went on to equate the case at hand to *Loving v. Virginia* (1967), which legalized interracial marriage.<sup>255</sup> Resting on religious arguments and the fact that many states prohibited interracial marriage when the Fourteenth Amendment was ratified, the state of Virginia argued that the races should not mix with respect to the marriage institution. According to the dissenting justices in *Bowers*, then, viewing fundamental rights through a purely historical lens led to unacceptable consequences (of course, *Loving* was largely decided on equal protection—rather than substantive due process—grounds).

Similarly, Justice Blackmun argued in a footnote that one (albeit not the primary) reasons the Court struck down the Connecticut General Statute prohibiting contraception to married couples in *Griswold* was that enforcement of the law would almost certainly represent an unreasonable search.<sup>256</sup> In a similar manner, regulating sexual relations—

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<sup>254</sup> Ibid., 204.

<sup>255</sup> Ibid., 214.

<sup>256</sup> Ibid. 214.

homosexual or otherwise—would necessarily require state intrusion into the bedrooms of average Americans not otherwise charged with a crime. The question must be asked, then, is it possible for the state to proactively enforce such a policy without “unreasonably” surveilling its citizens? Thus, there were other potential grounds on which the Court could have struck down the Georgia sodomy law. Rightly or wrongly, the Court would overturn the *Bowers* ruling 17 years later.

*Lawrence v. Texas* (2003)

In *Lawrence*, the Court declared that the Fourteenth Amendment’s Due Process Clause implied a substantive component that was broad enough to encompass intimate homosexual relations between consenting adults. In response to a reported weapons disturbance, officers in Houston, Texas entered the home of John Geddes Lawrence and arrested him (alongside his sexual partner) for “deviate sexual behavior,” in violation of Tex. Penal Code Ann. § 21.06(a).<sup>257</sup> After losing the case in the Court of Appeals for the Fourteenth Texas District, the petitioners were granted writ of certiorari to the Supreme Court.

The 5-4 majority opinion authored by Justice Kennedy struck down the laws of 13 states and declared that, in line with the *individual* liberty interest articulated in *Eisenstadt v. Baird* (1972), the right to engage in intimate sexual relations fell under a similar umbrella. Justice Kennedy proceeded to define the “liberty interest” broadly:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.<sup>258</sup>

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<sup>257</sup> *Lawrence v. Texas*, 539 U.S. 558, 563 (2003)

<sup>258</sup> *Id.*, 567.

Justice Kennedy thus made the case about more than sexual behavior, but about “dignity.” In this manner, the Court formally departed its substantive due process jurisprudence from one remotely tied to “ordered liberty,” deeply embedded traditions and institutions, or even the elusive concept of “privacy.” And, while Justice Kennedy’s *Casey* opinion was the first to articulate such a broad concept of implied liberty with his “mystery of human life” paragraph, *Lawrence* further enlarged the protection afforded to include the notion of “respect” for the individual:

It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.<sup>259</sup>

Thus, it was the dignity to explore an intimate, “enduring bond” free of prosecution from a governing entity that formed the basis of the Court’s opinion. From this angle, it is clear how *Lawrence* foreshadowed the extension of due process protection to homosexual marriage.

Joined by the Chief Justice and Justice Thomas, Justice Scalia wrote the primary dissenting opinion, which, among other things, underscored the importance of allowing the democratic process to run its course:

What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new “constitutional right” by a Court that is impatient of democratic change. It is indeed true that “later generations can see that laws once thought necessary and proper in fact serve only to oppress,” and when that happens, later generations can repeal those laws. But it is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best.<sup>260</sup>

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<sup>259</sup> Id. 567.

<sup>260</sup> Id., 603-604. (Justice Scalia, dissenting).

Interestingly, from the time *Bowers* was decided, the number of states with the kind of sexual sodomy laws that *Lawrence* overturned fell from 25 to 13.<sup>261</sup> Thus, Justice Kennedy was indeed correct that society generally had begun to demonstrate an “emerging awareness” that sex between consenting adults should be a private matter. However, as argued by the dissenting opinion, how could an “emerging awareness” possibly become a right “deeply embedded” in our traditions and culture as a society? Rather than allowing citizens to debate and persuade each other to embrace a more nuanced, genuine path to mutual understanding and respect for the gay community, the Court simply mandated it (or at least attempted to). While perhaps an effective means of furthering the socially progressive consensus that the nation would come to realize, the “natural rights” argument put forth by the majority ultimately rested on precarious footing and carefully selected precedent.

Justice Scalia warned in his dissenting *Lawrence* opinion not to believe the majority’s assurance that the case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”<sup>262</sup> In one of his many clever lines, he continued:

This case “does not involve” the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court. Many will hope that, as the Court comfortingly assures us, this is so.<sup>263</sup>

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<sup>261</sup> Id., 573.

<sup>262</sup> Id., 578. (Justice Scalia, dissenting).

<sup>263</sup> Id., 606. (Justice Scalia, dissenting).



Thus, while many legal scholars did not anticipate *Roe* resulting from *Griswold* or *Lawrence* from *Casey*, the existence (and speed) of the slippery slope had become abundantly clear to proponents of a restrained judiciary by the start of the 21st century.

*Obergefell v. Hodges* (2015)

In *Obergefell*, the Court consolidated and granted writ of certiorari to cases from Michigan, Kentucky, Ohio, and Tennessee, which had all defined marriage as a contractual union between one man and one woman.<sup>264</sup> At issue were the following two questions: 1) whether the Fourteenth Amendment requires states to issue marriage licenses to couples of the same sex, 2) whether a state that does not authorize the issuance of marriage licenses to homosexual is required to recognize the validity of such a license issued by another state. Again, as in *Planned Parenthood v. Casey* and *Lawrence v. Texas*, Justice Kennedy authored the Opinion of the Court. In doing so, he articulated four fundamental principles that form the foundation of the Court's decision declaring a right of same-sex marriage: 1) that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy; 2) the marriage relationship is "a two-person union unlike any other;" 3) the marriage relationship "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education, and 4; that "marriage is a keystone of our social order."<sup>265</sup> Throughout the rest of his opinion, it appears that the equal protection clause was employed primarily in its connection to substantive due process. The relationship between the equal protection and

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<sup>264</sup> *Obergefell v. Hodges*, 576 U.S. 1 (2015)

<sup>265</sup> *Id.* 3-4.

Due Process Clauses (and therefore the equality and liberty more generally) was intertwined.

In what appears to have become characteristic of Justice Kennedy's views regarding the application of substantive due process cases, the majority opinion stated:

The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation.<sup>266</sup>

Again, the dignity to explore this relationship to its fullest potential formed the root of what makes the two-person marriage generally (and, as applied in this case, same-sex marriage) a fundamental right. Of course, as simply explained by Justice Thomas in his dissenting opinion, there is no “Dignity Clause” in the Fourteenth Amendment.<sup>267</sup>

Just as Theodore Roosevelt argued that the “Bakery Shop” case robbed the American public of the right to decide a question of economic policy justly left in the legislative arena, Justice Scalia wrote a scathing dissent, articulating his view of the threat the majority decision posed to American democracy:

So it is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.<sup>268</sup>

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<sup>266</sup> Id., 13.

<sup>267</sup> Id., 93 of the official decision pdf document. Page 16 of Justice Thomas' dissent. <https://supreme.justia.com/cases/federal/us/576/14-556/case.pdf>

<sup>268</sup> Ibid., page 70 of official court pdf document. Page 2 of Justice Scalia's dissent.

Thus, it appears that regardless of the era, the Court's decision to articulate firmly justiciable, unenumerated rights has almost always been met with a backlash alleging judicial intrusion of democratic processes. Insofar as "natural rights" such as "dignity" exist, then, this thesis circles back to a question posed in the first section: Whose role is it to define—let alone protect—them?

### *Bowers, Lawrence, Obergefell, and the Politicization of the Supreme Court*

Of the cases in this chapter, *Lawrence* and *Obergefell* clearly had the most politicizing effects. However, to careful observers of the Court's apparently selective adherence to the *stare decisis* doctrine, *Bowers* appears to play a consequential (albeit indirect) role as well. By choosing to abide the principle in *Casey* and not *Lawrence*, the Court ironically demonstrated to the American public that observance of *stare decisis*—if not uniform—could delegitimize the institution. Of course, in evoking the doctrine, this is precisely what O'Connor and the plurality opinion had sought to avoid. As the only two cases in this chapter to strike down state laws, the remainder of the analysis will focus on *Lawrence v. Texas* and *Obergefell v. Hodges*.

- The degree to which the Court makes controversial decisions that are important to the public and inconsistent with the strongly held views of a not insubstantial sector of the public, based on a rationale that is obscure.
- The extent to which the Supreme Court deviates (or appears to deviate) from established precedent or modes of judicial interpretation to reach a particular result in cases that have broad political implications.
- The extent to which Supreme Court composition is the focus of political processes, including election rhetoric and voting priorities.
- The extent to which Supreme Court nomination and confirmation is subject to a political litmus test, especially at the expense of judicial qualifications and expertise.
- The degree to which Supreme Court justices are polarized along the legal spectrum

With respect to the first criteria outlined, it is worth discussing what constitutes a “not insubstantial sector of the public.” The nation did indeed shift dramatically with respect to its views of sodomy from 1986 to 2003. However, in those states that maintained anti-sodomy laws on the books (and perhaps especially those specifically targeting homosexual intimacy), religious evangelicals and other social conservatives remained steadfast in their desire to repudiate homosexuality as a social ill. Of course, the same could be said of constituents in states that had outlawed same-sex marriage. In addition, employing the same “heart of liberty” foundation as *Casey* made the *Lawrence* and *Obergefell* rationales extremely obscure.

While the *Casey* decision enunciated a broad conception of “liberty” inherent in the Fourteenth Amendment, its sweeping application to a new, particularly contentious subject such as same sex sodomy was novel. Thus, while the precedent may have been established, it was far from uniformly recognized as legitimate. In addition, various different (and possibly, at times, inconsistent) definitions of what constituted a natural right had been entertained by the Court previously. Did the “fundamental right” of liberty protected by the Due Process Clause depend on some conception of ordered liberty, American traditions or values, or an abstract principle such as “dignity,” “autonomy,” or “privacy?” By taking the broadest possible interpretation, the Court could reasonably have been said to deviate from (or, at the very least, redefine) judicial norms.

Third, largely as a result of the *Lawrence v. Texas* decision, legislators across the country considered preemptively amending the Constitution to include a ban on same-sex

marriage. Indeed, President Bush supported the Federal Marriage Amendment in 2004.<sup>269</sup>

In addition, largely as a response to the Massachusetts Supreme Judicial Court ruling in 2003 that legalized same-sex marriage at the state level, Bush declared in his 2004 State of the Union address:

Activist judges, however, have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people's voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our Nation must defend the sanctity of marriage.<sup>270</sup>

Similar rhetoric concerning the issue would continue in the 2008 and 2012 elections.

And, when *Obergefell* was released in 2015, virtually every Republican candidate denounced the decision, with Texas Senator Ted Cruz deeming it “naked and unadulterated judicial activism.”<sup>271</sup> In similarly emphatic fashion, former Arkansas Governor Mike Huckabee refused to “acquiesce to an imperial court.”<sup>272</sup> Surely, if any of these candidates won the Presidency, their judicial nominations to the Supreme Court would have included a second “litmus test” alongside that demanded by opponents of *Roe*.

Finally, the degree to which justices are polarized along the legal spectrum in these cases is abundantly clear from the dissenting opinions. It appears that when it comes to “fundamental rights” jurisprudence, either a justice protects some intrinsic natural liberty necessary to full realization of the human experience or, as a necessary

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<sup>269</sup> CNN, “Bush Calls for Ban on Same-sex Marriages,” CNN, February 25, 2004, <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage/>.

<sup>270</sup> CNN, “Transcript of State of the Union,” CNN, January 20, 2004, <http://www.cnn.com/2004/ALLPOLITICS/01/20/sotu.transcript.6/index.html>.

<sup>271</sup> Prokop, Andrew. “Republican Reactions to the Supreme Court Same-sex Marriage Decision, Ranked by Anger.” Vox. June 26, 2015. <https://www.vox.com/2015/6/26/8851381/gay-marriage-republican-responses>.

<sup>272</sup> Ibid.

consequence, deprives the people of their sovereign democratic right to govern themselves.

### Section Summation

Using the case studies explored in this section, it is clear that substantive due process has played an important role in the politicization of the Supreme Court. While *Dred Scott*, *Lochner v. New York*, and the multitude of “privacy” or “dignity” cases analyzed have impacted rhetoric surrounding the institution in different ways, it appears clear that the invocation of natural rights to strike down legislation is a particularly polarizing way of interpreting the law.

It should be noted here, then, that there are two ways of understanding this thesis. Insofar as one believes that substantive due process jurisprudence is illegitimate from a legal standpoint *and* has significant polarizing effects on the Court, the doctrine should be resolutely denounced across the board. However, if it is conceded that natural rights jurisprudence has firm (albeit not indisputably clear) legal grounds in addition to politicizing repercussions for the judiciary, it appears our Constitution has an inherent, serious flaw. This analysis would imply that the Framers failed to adequately define and balance the powers of the three branches in the manner we commonly believe they were designed (and ought) to function. Thus, regardless of whether one finds natural rights jurisprudence legitimate from a purely interpretative standpoint or not, the doctrine of substantive due process creates troubling implications for our government’s system of powers.

## Section Four: A Critical Examination of Judicial Politicization Moving Forward

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### Concluding Remarks

Having explored both the constitutional merits of substantive due process or “natural rights jurisprudence” and its politicizing effects, it is necessary now to assess how the politicization of today’s Supreme Court should be addressed moving forward. Unfortunately, simply prescriptions for large-scale change are often elusive. Nonetheless, four approaches are worth careful consideration.

First, when appropriate, the Court should employ other constitutional provisions in cases concerning an alleged “fundamental liberty” interest. For example, both *Obergefell* and *Lawrence* could have been decided on the grounds of equal protection, rather than substantive due process. The wide-ranging authority to adjudicate along the lines of such a broad concept such as “dignity,” or “liberty” implies that, when the Court does on these grounds, that the American public are somehow less moral than the justices themselves. Such a dynamic is not healthy for the functioning of the branches, and it may very well incentivize backlash against the bench.

And, while a larger interpretive stretch, *Griswold* and *Lawrence* could have been decided along unreasonable search and seizure grounds, as well. The text of the Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated <sup>273</sup>

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<sup>273</sup> U.S. Const. Amend. IV.

It should be duly noted that, in both of these cases, law enforcement found the defendants in violation of the respective state statutes without engaging an unreasonable search. However, it would nonetheless have been reasonable for the Supreme Court to take the view that this Amendment not only prohibits law enforcement officials from intrusively investigating a potentially illegal act without a warrant or reasonable cause, but also precludes legislatures from enacting criminal statutes that necessarily depend on unreasonable searches to be enforced proactively.<sup>274</sup>

Insofar as no other, suitable textual evidence can be advanced (without intellectual distortion, of course), the Court should employ the Bill of Rights provision that most clearly suggests the existence of enforceable unenumerated rights: the Ninth Amendment. As explored in Section One, there is, at the very least, a comprehensible textualist argument for natural rights in the original Bill of Rights. None exists in the Fifth or the Fourteenth.

It might be argued that, in the end, political actors (legislators, the executive branch, interest groups, the media, the public, etc.) do not care what the rationale is behind the Court's rulings. Instead, they focus exclusively on whether or not they are in agreement with the outcome. Thus, if other constitutional provisions are used to reach a conclusion that some sector of the population deems objectionable, another rationale will be used to find fault with the Court's ruling. Nonetheless, without substantive due process, the Court will at least be forced to adjudicate controversial issues on the basis of

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<sup>274</sup> This interpretation may have adverse implications for searches of other "private" places in enforcing other laws. For example, one might reasonably contend if there is no substantive difference between raiding an individual's sock drawer for contraceptives versus heroine. Nonetheless, this paper maintains that the "unreasonableness" of the search is dependent on its underlying purpose, rather than simply its location.



language that is included in the constitutional text, and employing recognizable principles of interpretation.

Second, to the extent that justices are steadfast in their belief that the Constitution mandates Courts to adjudicate natural rights, the liberties protected under substantive due process should remain those that are truly necessary to maintain a functioning “scheme of ordered liberty.”<sup>275</sup> Insofar as a compromise must be reached with regard to natural rights jurisprudence, such a standard would limit the scope of the judiciary to decisively end robust democratic debate on social issues rightly left for the people to decide.

Third, civic engagement and instruction must emphasize the role of the Court as neutral arbiter. Rather than promoting the Court as the final tribunal of good versus bad, students should be taught at an early age the founding, intended purpose of the federal judiciary. While perhaps cliché, a return to the institution’s roots as the “bulwark of a limited Constitution,” rather than the defender of broadly (and, often times, inadequately) defined principles could be beneficial to tempering its currently politicized state.

Finally, the current state of the Supreme Court cannot be understood without a firm grasp of our gridlocked political system generally. Distance between the two major parties and the public themselves (both ideologically and geographically) is growing. Although revitalization and expansion of the scope of substantive due process has allowed the Court to rule on questions further outside of its legitimate adjudicative sphere, the push for justices who reinforce the doctrine comes from the legislative arena. Thus, the highly political nature of judicial nominations as an election issue, polarization

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<sup>275</sup> *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)

among the justices themselves, and the other underlying factors contributing to the Court's politicization should not be viewed in a silo. Just as the Framers created a system of government in which the legislative, executive, and judicial branches respect one another despite their firmly different roles and perspectives, we must begin to try and mutually understand where our fellow Americans are coming from both socially and economically.

If nothing else, the election of President Trump demonstrated the animosity and lack of empathy patriots of different political views have come to have for one another. This core issue, of course, did not begin with substantive due process. Nonetheless, it does influence the polarized nature of our general governing scheme, overall health as a society, and sense of companionship with our fellow citizens. Unfortunately, this thesis does not propose concrete answers to this perplexing and difficult problem, but merely seeks to draw its attention to the politicization of the judiciary generally.

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