THE IRONIC HISTORY OF SUBSTANTIVE DUE PROCESS: THREE CONSTITUTIONAL REVOLUTIONS

By THOMAS TANDY LEWIS

The Due Process Clauses of the Fifth and Fourteenth Amendments mandate that neither the federal nor state governments may deprive a person "of life, liberty, or property, without due process of law." Although both clauses were primarily designed to require fair and accepted procedures in criminal trials (now called "procedural due process"), the doctrine of substantive due process (henceforth SDP) holds that government is forbidden from placing unreasonable, arbitrary, or unnecessary restraints on the substance of liberty or property "regardless of the fairness of the procedures used."[1] Any limits on liberty or property, in other words, must be justified by an adequate governmental interest in protecting the public's safety or welfare, because due process includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."[2]

In its role as an interpretative community, the Supreme Court for more than a century has utilized the SDP doctrine as a kind of paradigm, or a dominant conceptual framework, that defines and resolves particular categories of legal problems.[3] At least three times the Court has fundamentally changed its approach to SDP. During the so-called *Lochner* period, dated from approximately 1897 to 1937, the majority of the justices applied the doctrine as a defense for economically oriented liberties that tended to favor the interests of employers and to prohibit many legislative protections for workers. During these years, the justices also used the doctrine to protect some non-economic liberties. After the constitutional revolution of 1937, the Court ceased to use SDP as a means of according heightened protection for economic liberties. During the next three decades, the majority of the justices did not explicitly refer to the doctrine, so that it was almost forgotten. Then, following the famous case, *Griswold v. Connecticut* (1965), the Court resurrected the doctrine in order to provide heightened constitutional protection for a generic "right to privacy," which included reproductive freedom, intimate relationships, and personal autonomy.

The Americans who wrote and ratified both the Fifth and Fourteenth Amendments were profoundly influenced by the natural law/natural rights tradition.[4] No doubt, this is one reason why the concept of SDP has always been overlapping with the enigmatic Ninth Amendment, which refers to the existence of rights not enumerated in the Constitution. Since the Ninth Amendment and SDP are equally open-ended and vague, it should not be surprising that their applications always reflect the values and ideologies of the judges making the application.

The SDP doctrine emerged in the 1850s, when a few state courts gradually began to apply a substantive component to the due process clauses of their state constitutions, usually to protect the rights of property owners.[5] The U.S. Supreme Court made its first SDP reading of the Fifth Amendment in the infamous *Dred Scott* decision of 1857. Speaking

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for the majority, Chief Justice Roger Taney invalidated the portion of the Missouri Compromise that had prohibited citizens from taking their slaves into free portions of federal territory. He declared that the statute had unconstitutionally deprived citizens of liberty and property for no good reason, so that the prohibition "could hardly be dignified with the name due process of law."[6]

During Reconstruction, the Supreme Court again endorsed the SDP doctrine when it declared that legal-tender greenbacks were unconstitutional, but the decision was reversed the very next year.[7] When John Bingham and other Republican framers of the Fourteenth Amendment included a Due Process Clause, it is unlikely (but not impossible) that they expected that the clause would protect substantive rights. Many of these men, however, expected the new Privilege or Immunity Clause to incorporate most, perhaps all, of the substantive and procedural rights found in the first eight amendments, as well as a few other rights found in the common law.[8] Bingham and others expressed a desire to reverse *Barron v. Baltimore* (1831), in which the Court had ruled that the Bill of Rights were not binding on the states. Since one of the main purposes of the Fourteenth Amendment was to ensure the constitutionality of the Civil Rights Act of 1866, moreover, the framers often emphasized the rights of citizens to acquire, possess, use, and transfer private property. With their natural rights perspective, they were fond of quoting Justice Bushrod Washington's famous dictum in *Corfield v. Coryell* (1823), which had interpreted the Privileges and Immunities Clause of Article IV as referring to those rights "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments."[9]

The evidence suggests that most state legislators ratifying the Fourteenth Amendment had narrow views about its significance. They tended to assume that the only purposes of the amendment were to provide citizenship and a few civil rights for the emancipated slaves in the South.[10] Apparently the Supreme Court shared this narrow view, for in *Twitshell v. Pennsylvania* (1868), a case involving criminal procedures, the U.S. Supreme Court did not suggest that the new amendment would make any of the procedures in Bill of Rights binding on the states. A few years later in *Pumpelly v. Green Bay* (1872), a case dealing with the taking of private property, the Court made no mention of the new amendment, and it simply assumed that the Takings Clause of the Fifth Amendment was not binding on the states.[11]

In the seminal *Slaughterhouse Cases*, the Court's first serious interpretation of the Fourteenth Amendment, a 5-4 majority of the justices approved a state-mandated monopoly that put hundreds of unfortunate butchers out of work. Justice Samuel Miller's opinion for the majority emphasized that the new amendment had not fundamentally altered the nature of American federalism, and that the Court had no authority to act as "a perpetual censor upon all legislation of the states." The most significant aspect of Miller's opinion was his narrow reading of the P or I Clause (which has never really been overturned). Likewise, Miller simply dismissed the SDP argument as unworthy of serious consideration. In dissent, however, Justice Joseph Bradley accepted the SDP doctrine as a basis for a substantive liberty to work in lawful occupations. Justice Stephen Field also wrote a dissenting opinion, but he based his dissent on the P or I Clause rather than SDP.[12] In subsequent cases, Justice Field would adopt Bradley's SDP argument and become its most outspoken proponent.

Although allowing the *Slaughterhouse* monopoly, the justices were nevertheless committed to the idea of economic liberty. In *Loan Association v. Topeka* (1874), the justices voted 7-1 to strike down a Kansas tax designed to support private businesses involved in

public works. Justice Miller's majority opinion did not refer to the Fourteenth Amendment, but rather Miller wrote that the limits on the power to tax "grow out of the essential nature of all free government." In dissent, Justice Nathan Clifford protested that the justices had no authority to "nullify an act of a state legislature on the vague ground that they think it opposed to a general latent spirit supposed to pervade or underlie the Constitution."[13]

In *Munn v. Illinois* (1877), a 7-2 majority of the Court again rejected the SDP argument when it allowed the states to enforce Granger laws regulating the prices of strategic businesses "affected with a public interest." In a strong dissent, Justice Field articulated the SDP argument, insisting that the liberty of the Due Process Clause encompassed more than "mere freedom from physical restraint or the bonds of a prison."[14] When writing *Pace v. Alabama* (1883), in contrast, Field upheld the constitutionality of state bans on interracial marriage without any mention of liberty or the Due Process Clause.

By the 1880's, support was growing for Field's paradigm of economic SDP. Influential legal writers like Thomas Cooley and Christopher Tiedman were adding their prestige to this point of view,[15] and several state courts issued rulings which assumed that the SDP approach was good law.[16] Increasingly justices on the Supreme Court included *obiter dicta* implying acceptance of the approach. In *Stone v. Farmer's Loan & Trust* (1886), Chief Justice Morrison Waite interpreted due process to mean that states could not require businesses to operate at a loss or take private property without just compensation.[17] That same year, in *Santa Clara County v. Southern Pacific Railroad*, the justices ruled that corporations were persons under the Fourteenth Amendment, and thus protected by the Due Process Clause. Then in *Mugler v. Kansas* (1887), Justice John Marshall Harlan's majority opinion, while upholding a state's economic regulation, announced that henceforth the Court would scrutinize the purposes of such regulations and would rule them to be unconstitutional unless the regulations had "a real or substantial relation" to the legitimate police powers of the states.

In 1897, the Court finally established economic SDP as binding precedent in two watershed cases: *Allgeyer v. Louisiana* and *Chicago, Burlington & Quincy Railroad Co. v. Chicago*. Justice Rufus Peckham, who had replaced Field as the strongest crusader for SDP, wrote *Allgeyer*, overturning a state law prohibiting businesses from purchasing most forms of insurance from companies located outside the state. The decision recognized constitutional protection for a "liberty of contract," a concept not mentioned in the Constitution. In the *Chicago* case, Justice Harlan utilized the same SDP doctrine to "incorporate" the Fifth Amendment's Taking Clause into the Fourteenth Amendment. Harlan wrote:

> Since the adoption of the 14th Amendment, compensation for private property taken for public use constitutes an essential element of 'due process of law,' and without such compensation, the appropriation of private property to public uses, no matter under what form of procedures is taken, would violate the provisions of the Federal Constitution.[18]

For the next forty years, a pro-business Supreme Court struck down almost two hundred economic regulations as unreasonable restrictions on either the "liberty of contract" or the "liberty of enterprise." The most famous of these cases was *Lochner v. New York*

(1905), when a 7-2 majority of the justices voted to overturn a state law which had limited work in bakeries to sixty hours a week. Justice Peckham's opinion for the Court explained that the act unreasonably interfered with "the rights of the individual," as well as "with the right of contract between the employer and the employee." In a strong dissent, Justice Harlan argued that bakery workers were subordinate to employers in negotiating contracts, and he pointed to evidence indicating that these workers, because of long hours and terrible conditions, rarely lived beyond fifty years of age. Likewise, Justice Oliver Wendell Holmes's dissent criticized the Court for its restrictive view of police power, and declared that the Constitution was "not intended to embody a particular economic theory."[19] Three years later, the Court's majority utilized the SDP doctrine to strike down the Erdman Act, which had prohibited employers from requiring Yellow Dog Contracts as a condition of employment.[20]

During the so-called "Lochner Age," the Court recognized that the liberty of contract was not absolute, but it demanded a very compelling case for allowing restrictions on that liberty. In *Holden v. Hardy* (1898), it upheld an eight-hour day for workers in underground mines, where the dangers of long hours appeared obvious. In *Muller v. Oregon* (1908), the Court voted 9-0 to accept a maximum-hour law for women, after Louis Brandeis presented his famous "Brandeis Brief," demonstrating that long hours endangered women's health.[21] In 1923, nevertheless, the conservative justices overturned a federal law establishing a minimum wage for women working in the nation's capital.[22]

Progressive critics of the SDP approach—notably Roscoe Pound, Theodore Roosevelt, Edward Corwin, and Justices Holmes and Brandeis—accused the Court of going beyond its judicial role and acting as a "super legislature."[23] Some progressives of the period concluded that the Fourteenth Amendment had been produced as a conspiracy to protect the rights of property. Charles Collins wrote that the amendment had "become the Magna Carta of accumulated wealth and organized capital."[24]

Progressives were mistaken, however, when they assumed that the Lochner-Age justices were simply using SDP as a surreptitious tool for defending unbridled capitalism. Influenced by nineteenth-century liberalism, these justices were convinced that they were protecting the natural rights of the individual against arbitrary deprivations by government. In the case of *Buchanan v. Warley* (1917), it should be noted that the Court used SDP to prohibit government from putting race-based restrictions on the right to purchase property. Likewise, in *New State Ice Co. v. Liebmann* (1932), Justice George Sutherland's opinion for the Court persuasively argued against a classic special interest law that burdened consumers and prevented small businesses from competing with established ice companies.[25]

With President Hoover's appointments of Owen Roberts, Charles Evan Hughes, and Benjamin Cardozo, the Court's majority gradually became less committed to defending economic liberties. In *Nebbia v. New York* (1934), the three new judges joined with Holmes and Brandeis to uphold a counter-depression law which set minimum and maximum rates on the retail sale of milk. The decision was important because of its very narrow protection for liberty of enterprise. Going beyond *Munn*, it gave state legislatures a green light to regulate the prices of small competitive businesses not "affected with a public interest." Roberts's opinion for the Court declared that states "may regulate a business in any of its aspects." Yet, in *Morehead v. Tipaldo* (1936), Justice Roberts joined with the four conservatives (called the "four horsemen") to strike down a New York minimum wage for women and children. The *Morehead* decision was very unpopular. One survey

found that all but ten of 344 newspaper editorials disagreed with the ruling.[26] Even the Republican platform of 1936 advocated minimum-wage and maximum-hour legislation. *Morehead* was one of the rulings that encouraged President Roosevelt to announce his Court-packing plan on March 7, 1937, in which Roosevelt accused the Court of abusing its judicial power and acting like a legislative body.

A few months before the plan was announced, however, Justice Roberts had already modified his views, having joined the four moderate to liberal justices in *West Coast Hotel Co. v. Parrish* (1937), which upheld a state minimum wage law for women and thus reversed the *Adkins/Morehead* precedents. Chief Justice Hughes calmly explained the reasoning behind the watershed decision:

> The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivations of liberty without due process of law.... Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.[27]

Just two weeks later, in *N.L.R.B. v. Jones & Laughlin Steel Corporation*, the Court reversed the *Adair/Coppage* precedents by upholding the constitutionality of the Wagner Act, which protected the right of employees to participate in union activities without interference by employers. With the twin decisions of *Parrish* and *N.L.R.B.*, the Court ceased its rigorous SDP scrutiny of restraints on contracts. Henceforth the Court would show great deference to legislative determinations in economic regulations. The Court, in other words, would uphold any such regulation if the legislators could articulate a rational and coherent purpose for the regulation—not a difficult hurdle to overcome.

During the Lochner Age, it must be emphasized, the Court had sometimes utilized SDP doctrine in defense of liberties outside the economic sphere. In the case of *Jacobson v. Massachusetts* (1905), the Court recognized in dicta that individuals possessed the common-law liberty to refuse unwanted medical treatments, except when governmental coercion was justified to protect the public's health. In *Meyer v. Nebraska* (1925), a 7-2 majority struck down a state law prohibiting the teaching of non-English languages beyond the eighth grade, with Justice McReynolds explaining that the Due Process Clause protected the rights "to contract, to engage in...common occupations, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God...and generally to enjoy the privileges essential to the orderly pursuit of happiness by free men."[28] In a similar ruling, *Pierce v. Society of Sisters* (1925), the justices unanimously voted to overturn an Oregon statute prohibiting parents from sending their children to private schools. McReynolds' opinion for the Court had recognized that "the parental right to guide one's child intellectually and religiously is a substantial part of the liberty and freedom of parents."[29] When overturning protection for the liberty of contract in 1937, the Court made no mention of their decisions recognizing non-economic substantive rights, which presumably meant that *Jacobson/Meyer/Pierce* remained binding precedents.

In addition to recognizing certain rights not enumerated in the Constitution, the Lochner-age Court had also utilized the SDP approach to make the speech/press portions of the First Amendment binding on the states. This important development began unexpectedly in *Gitlow v. New York* (1925), with Justice Edward Sanford's casual dicta:

> For present purposes we may and do assume that freedom of speech and of the press—what are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the due process clause of the 14th Amendment from impairment by the states.[30]

Incorporation of the free expression principle became firmly established in two 1931 cases: *Stromberg v. California* and *Near v. Minnesota*. The end of economic SDP in1937 did not reverse these incorporation holdings, even though they were based on the SDP approach.

Indeed, as the justices allowed economic SDP to slide into insignificance, they signaled a new concern for the relationship between the Fourteenth Amendment and the personal liberties enumerated in the Bill of Rights. In *Palko v. Connecticut* (1937), a case dealing with state criminal procedures, Justice Cardozo formulated his influential theory of "partial incorporation." Cardozo reasoned that selective portions of the Bill of Rights would be absorbed into the concept of due process because "they represented the very essence of a scheme of ordered liberty," or because they were "principles of justice so rooted in the tradition of our people as to be ranked as fundamental."[31] Cardozo did not make a distinction between procedural and substantive rights, and he subsumed both under the concept of due process. The *Palko* opinion was soon followed by Justice Harlan Stone's well known Footnote Four of *Caroline Products v. U.S.* (1938), which suggested in dicta that the Court in the future would very likely apply stricter scrutiny to issues of civil liberties and racial discrimination than to issues of economic regulation.[32]

In view of *Palko* and *Caroline Products*, it is not surprising that the Court incorporated the First Amendment's free assembly guarantee in 1937, its free petition guarantee in 1939, and its religious exercise guarantee in 1940.[33] With the incorporation of the establishment clause in 1947, the Court had incorporated all of the substantive rights in the first eight amendments except for the Second and Third Amendments.

That same year, in *Adamson v. California*, a Fifth Amendment procedural case, the Justices conducted a heated exchange concerning how and why the Fourteenth Amendment applied to the Bill of Rights. The majority of the justices accepted some version of *Palko*'s concept of ordered liberty/fundamental rights, which was basically a SDP approach. In a long and vigorous dissent, however, Justice Hugo Black argued in behalf of an alternative doctrine, usually called "full incorporation." Black insisted that the framers had intended for the Fourteenth Amendment, especially its P or I Clause, to protect all of the first eight amendments, but no rights except for those enumerated in the Constitution. He denounced *Palko* as a subjective "natural-law-due-process formula" which gives justices a license "to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain." In contrast, Justice Felix Frankfurter defended the *Palko* approach, and wrote that it would have been "strange" for the framers to refer to the specific commands of the Bill of Rights in "such a roundabout and inexplicit way."[34]

Given this debate, it is interesting to note that the liberal justices did not press for an explicit application of the P or I Clause, which would have necessitated the overturning of *Slaughterhouse*. Such an approach would have provided constitutional protection for substantive liberties without the logical gymnastics associated with SDP.[35] Apparently the justices avoided this strategy because of fears that the P or I Clause would raise anew the specter of special protections for economic liberties. In the 1935 case in which the Court

used the P or I clause as a limitation on state taxing power, Justice Stone dissented and warned that such a path "would enlarge judicial control of state action and multiply restrictions upon it...sufficient to cause apprehension for the rightful independence of local government."[36]

While ignoring the P or I Clause, the Court continued to expand the application of the substantive provisions in the Bill of Rights to the states through the Due Process Clause. In *NAACP v. Alabama* (1958), the Court held that the First and Fourteenth Amendments protected a freedom of association. In the watershed case of *Alberts v. California* (1958), the Court reinterpreted the concept of free expression so that it significantly limited the authority of the states to proscribe pornographic materials. In spite of the SDP foundation of the decision, John Marshall Harlan was the only justice to recognize a logical distinction between the First Amendment's prohibition of "all laws" restricting free expression and the Fourteenth Amendment's protection of liberty.[37]

The Court also utilized the SDP approach to incorporate substantive equal protection into the Due Process Clause of the Fifth Amendment (sometimes called "reverse incorporation"). This interpretation, ironically, had its real beginning with the Japanese-American cases during World War II. While Justice Black's opinion for the Court upheld the resettlement policy, Black wrote that the Due Process Clause mandated the "strict scrutiny" of any "legal restrictions which curtail the civil rights of a single group."[38] In 1954, the Court pointed to Black's dictum as one of the main precedents for *Bolling v. Sharpe*, when the justices unanimously agreed that it was unconstitutional for Congress to operate segregated schools in the District of Columbia. Chief Justice Earl Warren argued:

> Liberty under law... extends to the full range of conduct which the individual is free to pursue and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.[39]

A decade after *Bolling*, the Court in *Aptheker v. Secretary of State* (1964) again utilized a SDP reading of the Fifth Amendment when ruling that the policy of denying passports to Communists was an invalid restraint on the liberty of citizens to engage in foreign travel. In *Shapiro v. Thompson* (1969), the Court likewise recognized a constitutional right of free movement within the borders of the United States, but in contrast to foreign travel, the justices at the time could not agree about where the right to domestic travel was located in the Constitution.[40]

Over many years, the Court gradually built upon the *Meyer/Pierce* precedents to establish broad constitutional protection for a right to privacy. The first important case was *Skinner v. Oklahoma* (1942), which overturned a state law that had allowed sterilization for "feeble-minded" or habitual criminals. Writing for the majority, Justice William Douglas included a dictum recognizing the liberty to reproduce as "one of the basic civil rights of man."[41]

In *Poe v. Ullman* (1961), the Court examined a Connecticut law prohibiting the sale or use of contraceptives (a law really designed to prevent aggressive birth control clinics from operating in the state). Because of a technical question of standing, the majority of the justices refused to consider the case, but Justice Harlan nevertheless wrote an unusu-

ally cogent dissent in which he used SDP analysis to conclude that the law was unconstitutional. The concept of due process, asserted Harlan, constituted "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[42]

The great positivist of the period, Justice Black, tried to ignore such articulations of the SDP doctrine. When the Court in 1963 upheld a Kansas law giving lawyers a monopoly over debt adjustments, Black tried to put the nails in SDP's coffin. He declared that the Court had finally "discarded" the notion "that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely." The Court had thus returned "to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgments of legislative bodies, who are elected to pass laws."[43]

Just two years later, however, Black was dismayed when the Court overturned Connecticut's anti-contraception law in the landmark case of *Griswold v. Connecticut*. Writing for a 7-2 majority, Justice Douglas denied that the decision was based on the same SDP approach as the *Lochner* line of cases. In a rather confusing explanation, he wrote that the defense of liberty was valid when used to protect "fundamental rights" but that it was invalid when the justices struck down laws they considered "unwise." Apparently Douglas was able to declare that the *Griswold* decision was not based on SDP because of his conviction that the Bill of Rights applied to the states through the P or I Clause. His interpretation emphasized a theory of "penumbras," asserting that the Constitution protected "zones of privacy" derived from partial shadows cast by the First, Third, Fourth, Fifth, and Ninth Amendments. By claiming that the decision was not based on SDP, Douglas was apparently trying to give Black a way to join the majority.

But the two dissenters, Justices Black and Potter Stewart, insisted that *Lochner* and *Griswold* were founded on the same theoretical foundations, and that both decisions created the same problems for judicial subjectivity. In contract, Justices Harlan and White explicitly endorsed the SDP approach as the basis for joining the *Griswold* majority. Justice Arthur Goldberg took the unusual approach of minimizing the Due Process Clause and emphasizing the Ninth Amendment.[44] While the *Griswold* majority disagreed about the theoretical justification for the decision, they agreed that the Fourteenth Amendment protected a substantive right of generic privacy, including some degree of reproductive freedom.

As Justice Black feared, the *Giswold* precedent appeared to initiate a great expansion of the SDP methodology. In the case of *Loving v. Virginia* (1967), the justices unanimously voted to strike down Virginia's anti-miscegenation law, which had prohibited and punished racial intermarriage. Black was able to join the decision because of the equal protection argument, but Chief Justice Warren's opinion for the Court relied upon both equal protection and a SDP-based liberty of marriage (referring to *Meyer* and *Pierce*). Warren's clerk, Benno Schmidt, later remembered that it had been necessary to tone down the SDP emphasis on the freedom to marry in order to keep Black from writing a separate opinion.[45]

In *Eisenstadt v. Baird* (1972), the Court significantly expanded the right to reproductive autonomy when it voided a state's ban on distribution to unmarried persons. "If the right of privacy means anything," Justice William Brennan's declared for a 6-1 majority, "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether or not to beget a child."[46] Brennan's skillful choice of words suggested that reproductive autonomy was now a "fundamental right," so that any restrictions on that right would trig-

ger "strict scrutiny," requiring the government to demonstrate a "compelling state interest" and also to show that less restrictive means were not available. Under this demanding standard, restrictions would almost always be struck down, so that a law might be found unconstitutional even if not entirely arbitrary or unreasonable.[47]

The *Griswold* and *Eisenstadt* decisions prepared the path for the monumental case, *Roe v. Wade* (1973), when the Court held that a woman had a fundamental right to obtain a legal abortion. Speaking for a 7-2 majority, Justice Harry Blackmun did not refer to the penumbral theory, and he very timidly suggested that the majority's decision was built upon a SDP foundation:

> The right to privacy, whether it is found in the Fourteenth Amendment's concept of liberty and restrictions upon state action, as we feel it is, or...in the Ninth Amendment's reservations to the rights of the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

Blackmun applied strict scrutiny to restrictions on a woman's liberty, while also holding that a fetus was not a "person" as the word was used in the Constitution. He concluded, moreover, that the states could not exercise their police powers to protect a fetus until after it reached the stage of viability. Justice Stewart, who had dissented in *Griswold*, joined the *Roe* majority, and declared that he had changed his mind about the validity of the SDP approach:

> So it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" which is protected by the Due Process Clause of the Fourteenth Amendment.[48]

In *Roe*, the majority of the justices were hesitant to join Stewart in such an explicit and direct reliance on the SDP doctrine. At the time, many scholarly works continued to associate SDP with the conservative economic policy of the *Lochner* line of cases.[49] This hesitancy gradually disappeared, however, after Justice Stewart was chosen to write the opinion of the Court in *Cleveland Board of Education v. LaFleur* (1974), which held that it was unconstitutional for a school board to require public school teachers to take maternity leaves during the fifth month of pregnancy. Writing for the majority, Stewart declared that the Due Process Clause required that "rules must not needlessly, arbitrarily, or capriciously impinge upon the vital area of a teacher's constitutional liberty," and he noted that this SDP-based protection applied especially to "freedom of personal choice in matters of marriage and family life."[50]

Following Stewart's *LaFleur* opinion, the majority of the justices were soon explicitly acknowledging that the right to legal abortions was based on the SDP doctrine.[51] Reflecting this acknowledgement, the term "liberty interest" increasingly tended to replace the term "right of privacy." From the perspective of SDP, the most significant of the later abortion decisions was *Planned Parenthood v. Casey* (1992), in which Justice Sandra Day O'Connor's opinion prohibited any "undue burden" on the right of women to obtain abortions, grounding the right on "a realm of personal liberty which the government may not enter.... At the heart of liberty is the right to define one's own concept of

existence, of the meaning of the universe, and of the mystery of human life." In dissent, Chief Justice Rehnquist was now willing to accept that the Due Process Clause protected traditional values of "marriage, procreation, and contraception," but he argued that governmental interest in protecting fetal life was an adequate basis for prohibiting abortions.[52]

After openly accepting SDP, the Court was asked to consider a large number of liberty-interest cases associated with family relationships and personal autonomy. While upholding a zoning ordinance that limited a residential neighborhood to single-family dwellings, the Court in *Moore v. East Cleveland* (1977) overturned a zoning ordinance that preventing a grandmother from letting two grandsons live with her. In his opinion for the plurality, Justice Lewis Powell interpreted the Due Process Clause as protecting those substantive liberties which are "deeply rooted in this Nation's history and tradition," a formula that would have great appeal among moderate and conservative members of the Court.[53] In *Zablocki v. Redhail* (1978), the justices struck down a Wisconsin law, which had prohibited second marriages by non-custodial parents unless they could show an ability to pay court-ordered child support. By 1984, the concept and term "freedom of intimate association" was being used in a number of SDP cases.[54] In *Troxel v. Granville* (2000), the Court recognized a SDP right of parents to care for and control their children, overturning a state law that had protected the right of grandparents to petition for visitation rights.

In 1990, the Rehnquist Court broke new ground by using SDP as a foundation for affirming a common-law right to refuse medical treatment. In a case dealing with the mandatory use of anti-psychotic drugs in prisons, Justice Anthony Kennedy wrote that "the forcible injection of medication into a non-consenting person's body represents a substantial interference with the person's liberty."[55] Later that year in *Cruzan v. Director, Missouri Department of Health*, the Court was confronted with a life-or-death case in which parents wanted to remove a feeding tube that provided hydration and nutrition to their daughter who was mired in a persistent vegetative state. State officials had denied the request because a statute required "clear and convincing" evidence that the patient would agree with the decision. Although the justices upheld the law with a 5-4 vote, all the justices except Scalia were willing to "assume" that the Due Process Clause guaranteed a competent person the liberty to refuse all medical interventions, even if the inevitable result would be death. In effect, the *Cruzan* decision allowed states a great deal of flexibility in legislating living wills and related matters.[56] While recognizing a right to die in some circumstances, however, the justices in *Washington v. Glucksberg* (1997) upheld the prerogative of states to criminalize the practice of physician-assisted suicides. As Chief Justice Rehnquist framed the issue, the Due Process Clause did not guarantee a right "to commit suicide with another's assistance." In concurring opinions, however, four justices recognized the liberty interests of patients to obtain relief of pain during a terminal illness, and Justice Breyer endorsed SDP protection for a "right to die with dignity."[57]

On many occasions the justices rejected the validity of SDP-based liberty-interest claims. In *Kelly v. Johnson* (1976), for example, a 6-2 majority of the justices voted to uphold police department regulations concerning the hair length of police officers. In *Michael H. v. Gerald D.* (1989), the justices voted 5-4 to reject the SDP claim of an unmarried natural father to file for paternity privileges in a situation involving a married woman. Likewise, in *DeShaney v. Winnebago County* (1989) they voted 6-3 to reject a SDP-based suit against a county in which social workers had failed to take action to prevent a father from killing his son.[58] In the controversial case of *Bowers v. Hardwick* (1986),

a 5-4 majority held that the Due Process Clause did not protect the liberty of persons to engage in homosexual acts, even consenting adults in a private home. Justice Byron White's opinion pointed to the nation's "history and tradition," and he warned against using SDP to create "judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[59]

With the Rehnquist Court's tendency to support property rights, there were a few indications that the SDP doctrine might again be used to protect economic interests. In 1992, for instance, the majority of the justices accepted the idea that punitive awards in civil suits may violate the Due Process Clause if the awards were "grossly excessive."[60] Five years later, the justices applied this conclusion by voting 5-4 in *BMW v. Gore*, overturning a punitive award of $2 million when the actual damages were only $4,000.[61] Few informed observers, nevertheless, really expected a true rebirth of economic SDP.

In the post-*Griswold* period there has been a clear tendency for conservatives to denounce the SDP doctrine as a tool of liberal "activism." Justice Antonin Scalia, the most outspoken opponent of the doctrine, insists that "due process" does not mean "due substance," and he describes the doctrine as "the departure that has enabled judges to do more freewheeling lawmaking than any other."[62] Likewise, conservative jurist Robert Bork has sharply criticized decisions based on the SDP, including *Bolling*, *Griswold*, and *Roe*. Bork describes SDP as a "momentous sham" that has been utilized "by judges who want to write their personal beliefs into a document."[63] Other conservative jurists, including Chief Justice Rehnquist, have been willing to accept the SDP doctrine, but with the proviso that "liberty interests" should be defended with the rational basis test rather than with the stricter compelling interest test. Rehnquist's approach would mean that SDP would only be a basis for overturning legislative acts that place a substantial burden on liberty or property without rationally advancing a legitimate public interest.[64]

During the post-*Griswold* period, unquestionably, the most outspoken supporters of SDP have been lawyers and jurists committed to a liberal point of view. Harvard professor Lawrence Tribe, who has argued for the expansion of SDP-based privacy rights before the High Court, writes that "the error of decisions like *Lochner v. New York* lay not in judicial intervention to protect "liberty" but in a misguided understanding of what liberty actually required in the industrial age."[65] Emphasizing the value of liberty more than due process, Tribe sometimes refers to the "Liberty Clause."[66] Another outstanding liberal theorist, Ronald Dworkin, has utilized the SDP doctrine as one of the main tools for a "moral reading" of the Constitution, so that the abstract clauses of the document might be approached with "the understanding that they invoke moral principles about political decency and justice."[67] Rather then being troubled by the open-ended nature of SDP, Dworkin welcomes an approach in which rights depend on judicial philosophy rather than on a literal reading of an old constitutional text.

It is indeed ironic that the same SDP paradigm has provided foundations for ideological positions as different as the *Lochner* line of cases and the *Griswold/Roe* line of cases. It should be noted, nevertheless, that these two applications have much in common. Each application is based on a particular vision of liberty, reflecting the dominant moral values of a given period of history. One perceptive commentator has gone so far as to write that "substantive due process is ethical argument by another name."[68] Influenced by the higher law tradition in American history, the majority of the justices of the Supreme Court have usually recognized the need for some approach that upholds general notions of fairness and liberty. Yet, given the potential abuse of unrestrained subjectivism, even justices emphasiz-

ing the SDP approach have often expressed a need for caution. Justice John Paul Stevens, for instance, has written: "The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in the [SDP] field."[69] There is, however, no effective way of enforcing self-restraint; thus, it is very likely that the future of substantive due process will continue to include some interesting and surprising developments.

ENDNOTES

1 *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). Justice Sandra O'Connor argues that the word "process" can encompass both the purposes and the means of enforcing the law, so that SDP is not an oxymoron. *Wolff v. McDonnell*, 418 U.S. 539, 829, (1974). At least since *Hurtado v. California* (1884), the Supreme Court has understood the term "due process" to connote protection against arbitrary action.

2 Many writers have argued that Thomas Kuhn's theory of "paradigm shifts" in science can be applied to fields such as the law. Bruce Ackerman emphasizes how sweeping reinterpretations have occurred in various "constitutional moments." *We the People* (Cambridge: Harvard Univ. Press, 1991, 1998).

3 A good discussion in Suzanna Sherry, "The Founders' Unwritten Constitution," *University of Chicago Law Review*, 54 (1987), 1127-1177.

4 Especially *Wynehamer v. New York*, 13 New York 387 (1856). James Ely, Jr. shows that many state courts emphasized economic liberty, "The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process." *Constitutional Commentary*, 16 (Summer 1999), 315-335.

5 *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 620-21, (1857). Justice Benjamin Curtis denounced the SDP approach as a departure from the "fixed rules of interpretation."

6 *Hepburn v. Griswold*, 8 Wallace 603 (1870); *Second Legal Tender Cases*, 12 Wallace 457 (1871).

7 Michael Kent Curtis makes a strong case for this position in *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Durham: Duke Univ. Press, 1986), 48-49, 66-67, 88.

8 Well documented in Alfred Avins, "The Fourteenth Amendment and Real Property Rights," *Open Occupancy vs. Forced Housing Under the Fourteenth Amendment* (Chicago: Bookmailer, 1963), 72-73, 85-87.

9 See Lambert Gingras, "Congressional Misunderstanding and the Ratifiers' Understanding: The Case of the Fourteenth Amendment," *American Journal of Legal History*, 40 (1996), 41-71.

10 *Pumpelly v. Green Bay Co.*, 13 Wallace 166, 176-77 (1871).

11 *Slaughter-House Cases*, 16 Wallace 36, 78, 96-97, 116, 122 (1873).

12 *Loan Association v. Kansas*, 87 U.S. 655, 663, 665 (1874).

13 *Munn v. Illinois*, 94 U.S. 113, 140-43 (1877). See Charles McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations," *Journal of American History*, 61 (17975), 970-1005.

14 Well documented in Clyde Jacobs, *Law Writers and the Courts* (Berkeley: Univ. of Cal. Press, 1954).

15 For example, *Matter of Jacobs*, 98 N.Y 98, 106 (1885); *Godcharles & Co. v. Wigeman*, 113 Pa. 431, 437 (1886).

16 *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331, (1886).

17 *Chicago, Baltimore & Ohio Railway Co. v. Chicago*. 166 U.S. 224, 239, (1897).

18 *Lochner v. New York*, 198 U.S. 45, 68, 74 (1905). See Paul Kens, *Judicial Power and Reform Politics: The Anatomy of Lochner v. New York* (Lawrence: Univ. Press of Kanssas, 1990).

19 *Adair v. U.S.*, 208 U.S. 161 (1908). The Court struck down a similar state law in *Coppage v. Kansas*, 236 U.S. 1 (1915).

20 See Nancy Woloch, *Muller v. Oregon: A Brief History with Documents* (Boston: Bedford/St. Martin's, 1995).

21 *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

22 Brandeis used the term in *Burns Baking Co. v. Bryan*, 264 U.S. 504, 534 (1924).

23 Charles Collins, *The Fourteenth Amendment and States* (New York: Little, Brown & Co., 1912), 137-38.

24 Hadley Arkes emphasizes Sutherland's ethical commitment to liberty in *The Return of George Sutherland: A Jurisprudence of Natural Rights* (Princeton: Princeton Univ. Press, 1997).

25 See Peter Irons, *The New Deal Lawyers* (Princeton: Princeton Univ. Press, 1982), 287. Drew Pearson, *The Nine Old Men* (New York: Doubleday, 1937), 70.

26 *West Court Hotel v. Parrish*, 300 U.S. 379, 391-92, 396 (1937). Roberts later claimed that he would have voted differently in *Morehead* if the Court had been asked to overturn *Adkins*.

27 *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

28 *Pierce v. Society of Sisters*, 268 U.S. 510, 520 (1925).

29 The year before, in *Prudential Insurance Co., v. Cheek*, the Court had held that the First Amendment's free speech clause was not applicable to the states. Richard Cortner demonstrates the SDP basis for incorporation in *The Supreme Court and the Second Bill of Rights* (Madison: Univ. of Wis. Press, 1991), 57-62.

30 *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

31 Stone was perhaps influenced by Brandeis' earlier suggestion that the Court should use a "more liberal rule" when protecting property rights than when protecting civil liberties. *St. Joseph Stock Yards Co. v. U.S.*, 298 U.S. 38, 77 (1936).

32 *DeJonge v. Oregon*, 229 U.S. 353 (1937); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Everson v. Board of Education*, 330 U.S. 1 (1947). There are logical and historical problems in incorporating the Establishment Clause; for instance, see F.W. O'Brien, "The Blaine Amendment, 1875-76," *University of Detroit Law Journal*, 41 (1963), 137-162.

33 *Adamson v. California*, 332 U.S. 319, 325 (1937). Although Black's quotations were accurate, his choice of historical facts was rather selective.

34 Observed in many works, such as Lawrence Tribe, *American Constitutional Law* (Mineola: Foundation Press, 1988), 554, 774.

35 *Colgate v. Harvey*, 296 U.S. 404, 405 (1935); also *Hague v. C.I.O.*, 307 U.S. 404, 445 (1935).

36 *Roth v. U.S.; Alberts v. California*, 354 U.S. 476, 502 (1957).

37 *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944). At the state level, the Court had earlier combined equal protection and due process in *Buchanan v. Warley*, 245 U.S. 60, 81, (1917).

38 *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

39 When a 7-2 majority based the right on the P or I Clause in *Saenz v. Roe* (1999), Justice Clarence Thomas warned of "yet another convenient tool for inventing new rights."

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

41 *Poe v. Ullman*, 381 U.S. 540, 541, 543 (1961). For Harlan's views on SDP, see Tinsley Yarborough, *John Marshall Harlan: Great Dissenter of the Warren Court* (New York: Oxford Univ. Press, 1992), 308-15.

42 *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

43 *Griswold v. Connecticut*, 381 U.S. 479, 482, 492, 501-02 (1965). In later cases, Douglas repudiated Harlan's SDP and the Palko test, writing that both were "highly subjective and dependent on the idiosyncrasies of individuals judges as *Lochner, Coppage*, and *Adkins* illustrate." *Boddie v. Connecticut*, 401 U.S. 371, 385 (1971). Apparently Douglas did not think his concern for privacy was a subjective value judgment.

44 In Bernard Schwartz, *The Ascent of Pragmatism* (New York: Addison-Wesley, 1990), 292-93.

45 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

46 The importance of the strict scrutiny test for fundamental rights became clear in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Shapiro v. Thompson*, 394 U.S. 618 (1969).

47 *Roe v. Wade*, 410 U.S. 113, 153, 168 (1973). Bernard Schwartz gives an excellent account of the decision in *Decision: How the Supreme Court Decides Cases* (New York: Oxford Univ. Press, 1996), 229-236.

48 Many works only consider SDP within the *Lochner* tradition. See Alfred Kelly, Winfred Harbison & Hrman Belz, *The American Constitution* (New York: Norton, 1991), II, 495.

49 *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974).

50 Justice Stewart referred to a person's "property interests" and "interest in liberty" in *Board of Regents v. Roth*, 408 U.S. 562, 564, 577. Rehnquist used the term "liberty interest" as early as *Paul v. Davis*, 424 U.S. 693, 710, 71s (1976).

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

52 *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977). Compare with *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

53 First used in *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

54 *Washington v. Harper*, 494 U.S. 210, 229 (1990).

55 *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 278 (1990).

56 *Washington v. Glucksberg*, 521 U.S. 702 (1997).

57 *DeShaney v. Winnebago County*, 489 U.S. 190, 195 (1989).

58 *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). Justice Powell later said he had "probably made a mistake" in upholding the law. See Alan Ides, *"Bowers v. Hardwick*: The Enigmatic Fifth Vote," *Washington and Lee Law Review*, 49 (1992).

59 *Pacific Mutual Life Insurance Co., v. Haslip*, 59 U.S. 443, 459.

60 *BMW of North America v. Gore*, 517 U.S. 559 (1996). Scalia's strong dissent rejected SDP except when used to incorporate some of the substantive guarantees in the Bill of Rights.

61 Quoted in *A Matter of Interpretation* (Princeton: Princeton Univ. Press, 1997), 24, 143. Justices Scalia and Souter strongly disagree about the validity of SDP doctrine in *County of Sacramento v. Lewis*, 118 S.Ct. 1708 (1998).

62 For Bork's views on SDP, see *The Tempting of America* (New York: Free Press, 1989), 31, 95-96, 234. SDP was a major topic in the Senate Judiciary Committee's hearings over Bork's confirmation.

63 Basically the approach advocated by Edward Keyes, *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process* (University Park: Penn. State Univ. Press, 1996), 168-69.

64 Tribe, *American Constitutional Law*, 769. Also see Tribe's article, "Substantive Due Process of Law," *Encyclopedia of the American Constitution*, (1989), 1796-1803.

65 For example, in *Abortion: The Clash of Absolutes*, (New York, 1990), 89.

66 Especially in *Freedom's Law: The Moral Reading of the Constitution* (Cambridge: Harvard Univ. Press, 1996), 2-3.

67 Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York: Oxford Univ. Press, 1982), 168.

68 In *Collins v. Harker Heights*, 503 U.S. 116, 125 (1992).

69 Quoted, Ibid.