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The Influence of the Warren Court and Natural Rights on Substantive Due Process

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INTRODUCTION

Due process of law ensures that every person is treated fairly by the United States legal system and legal process. It was established by two separate amendments to the Federal Constitution.[1] Initially the Due Process Clause appeared for the first time in the Fifth Amendment, which was ratified in 1791. It applied only to the federal government. Later, the Fourteenth Amendment which was ratified in 1868, made the Due Process Clause binding upon the states. The Due Process Clauses of the Constitution are inarguably cornerstones of American liberty, nearly unsurpassed in their daily relevance to all citizens.

Historically, due process was derived from the Magna Carta. The United States Supreme Court originally applied due process to protect the contractual and property rights of individuals as well as corporations. Over time, however, the doctrine of due process developed a duplicity in its application, evolving into two distinct forms: procedural due process and substantive due process.[2]Procedural due process governs all governmental processes and delineates exactly what steps must occur in order for an individual to be deprived of life, liberty or property as punishment for crimes.[3] The government is required to abide by preordained processes "in order to safeguard the individual against the power of the state".[4]

Substantive due process, on the other hand, is an evolution in the concept of procedural due process. Surpassing the concept of due process, substantive due process "also protects certain rights unrelated to procedure" including the right to contract freely, the right to work, the right to privacy and the right to possess a firearm in the home for self-defense.[5] In the 1997

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[1] Linda R. Monk, *The Words We Live By: Your Annotated Guide to the Constitution* (New York, N. Y.: Stonesong Press, 2003), 170.
[2] Edward White, *The Constitution and the New Deal* (Cambridge, Mass: Harvard University Press, 2006), 244.
[3] U.S. Constitution, amend. 14, sec. 1.
[4] Monk, *The Words We Live by*, 170.
[5] Ryan Strasser, "Substantive Due Process," LII / Legal Information Institute, June 26, 2017, accessed July 04, 2018, https://www.law.cornell.edu/wex/substantive_due_process.

Washington v Glucksberg case, Chief Justice William H. Rehnquist's majority opinion defined substantive due process as the idea that "the Due Process Clause guarantees more than fair process, and the 'liberty it protects includes more than the absence of physical restraint'".[6] Through the lens of substantive due process, the law at issue in a particular case is examined by the Supreme Court in order to "determine whether it violates fundamental rights not specifically mentioned in the Constitution".[7]

The division of due process into separate procedural and substantive components has been met with heated controversy. Substantive due process has its origins in property and economic-based rights due process, but has blossomed in the modern era as a bastion of defense for personal and individual liberties. Chief Justice Earl Warren (serving 1953-1969) defended this change through fierce jurisprudence promoting substantive due process. Using a modern iteration of natural law, the Court implied that several expansive provisions to the Constitution were applicable to the ages, thereby giving judges license to correct breaches of civil liberty when such liberty is infringed upon by the State.

As a result of this change in jurisprudence by some Justices, the Court soon became viewed as increasingly political. Some members of the public and press vociferously decried the Court as partisan, unwilling to maintain judicial neutrality. An examination of modern media, including the most recent Supreme Court confirmation hearings, confirms the view that judicial discretion and humility are under a microscope. Not only the public, but legal professionals as well, have become increasingly wary of a Court taking an expansive reading of Constitutional provisions. Concern that personal preferences may become a part of judicial decisions is

[6] Washington v Glucksberg, 521 U.S. 702, 720 (1997)
[7] Monk, *The Words We Live by*, 170.

widespread, and substantive due process is at the heart of this impassioned debate among academic and legal circles.

NATURAL LAW

The task of coaxing these unenumerated Constitutional rights from the terse text of the aging document is incredibly complex and represents some of the most delicate work deliberated by the Court. To this end, the philosophical concept of natural law is deeply intertwined with the idea of substantive due process, and has on occasion "and with varying degrees of importance, escaped the confines of theory to influence directly the standards created and applied by officials".[8] Natural law embodies the concept that certain immutable principles exist which supersede human-made law, and at a high level of abstraction, commands that human beings are always to be treated as ends "and never as means only".[9]

Historically, the Framers of the Constitution took significant cues from the Magna Carta of 1215, through which King John of England promised to act in accordance with the law, as well as the development of the principle of legality (the rule of law) in the 17th Century through the English Bill of Rights. The concept of due process, emanating primarily from the Magna Carta as well as from the *Commentaries on the Laws of England* by Sir William Blackstone, influenced the demands of the American colonies in the months and years leading up to the American Revolution. The founding documents include the Due Process Clause as a principle to establish legal fairness and place limits on governmental power.

The concept of the principle of legality, often under the guise of substantive due process or "natural justice," has been burdened as the "source of legal standards for international law [including the Nuremberg Trials], centuries of development in the English common law, and

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[8] Dennis M. Patterson, *A Companion to Philosophy of Law and Legal Theory* (Malden, MA: Blackwell, 2008), 228.
[9] Robert P. George, "Natural Law." *American Journal of Jurisprudence* 52 (2007): 57.

certain aspects of United States Constitutional law".[10] The writings of natural law philosophers such as John Locke, Montesquieu, and St. Thomas Aquinas had "a great influence on the Framers of the American Constitution".[11] Many modern natural law theorists frequently followed in the same footsteps as the Framers, "self-consciously writing in the tradition of Aquinas".[12] Renowned scholar John Finnis continued Aquinas' argument, stating that under the proscriptions of natural law humans have an obligation to obey only *just* laws; "laws which are unjust are not 'laws' in the fullest sense of the term". [13]

Natural law principles were indisputably intertwined in the philosophy of the Framers. This ideology remained deeply embedded and influential throughout the development of the United States legal system. These immutable principles of natural rights were so critical to the founding of the United States of America that only during the pre-revolutionary period were they questioned, and even then only in application to the preservation of property rights. After the revolution against Colonial rule, the philosophical underpinnings of natural law were enshrined in the Constitution by the Framers. Once the Constitution was ratified and became binding upon the states, the courts began the ongoing deliberation considering the crucial conception of natural law under a legal analysis.

A critical juncture in American jurisprudence was handed down in in *Calder v Bull*, 1798, in which Justice Samuel Chase held that an act of the legislature "contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."[14] While Justice Chase's opinion is a clear invocation of higher legal principles than

[10] Patterson, *A Companion to Philosophy of Law and Legal Theory*, 228.
[11] Robert E. Goodin, *A New Handbook of Political Science* (Oxford: Oxford University Press, 2011).
[12] Patterson, *A Companion to Philosophy of Law and Legal Theory*, 230.
[13] Ibid.
[14] Calder v Bull, 3 U.S. 386, 388 (1798)

merely what a statute mandates, he was met with some disagreement among his peers. However, Chase's ruling has nonetheless become a cornerstone in modern U.S. case law.[15] This judicial rift proved to be somewhat prophetic, with Justice Chase and his colleague Justice Iredell disagreeing as to whether "extra-constitutional considerations", or anything other than the codified law relevant to that particular case could be considered.[16] Unanimously, Chase and Iredell both agreed that the Court had decided the issue correctly, but differed only on precisely which sources could be drawn upon in order to reach a verdict.[17]

Calder v Bull resulted in a pivotal precedent. A legislative act not worthy of the title "law" does not have to be considered as such by the judiciary, which paved the way for a paradigm shift which "arguably lent a textual basis for the sort of jurisprudence that…Justice Chase had advocated in *Calder*".[18]

Following in the mold of cases such as these, natural law has continued to be a visceral force in the modern era. This influence can be seen both in the judiciary through prominent figures such as Justices Neil Gorsuch and Clarence Thomas, as well as through extra-judicial figures such as Martin Luther King Jr. who have had equal impact on the legal fabric of the United States.[19] Due to the combination of proponents of natural law ideology remaining relevant in the modern era, in conjunction with the textual basis, a natural rights philosophy has infused the Due Process Clause with substantive content, creating a proverbial wall of

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[15] Douglas S. Mock "Natural Law in American Jurisprudence: Calder v. Bull and Corfield v. Coryell and their Progeny." Order No. 10623449, Boston University, 2017, 4.
[16] Douglas S. Mock "Natural Law in American Jurisprudence: Calder v. Bull and Corfield v. Coryell and their Progeny." Order No. 10623449, Boston University, 2017, 44.
[17] Calder v Bull, 3 U.S. 386, 388 (1798)
[18] Douglas S. Mock "Natural Law in American Jurisprudence: Calder v. Bull and Corfield v. Coryell and their Progeny." Order No. 10623449, Boston University, 2017, 106.
[19] Mattei I. Radu, *Incompatible Theories: Natural Law and Substantive Due Process*, 54 Villanova Law Review 247 (2009)

separation. As a result, courts routinely rule that the government "may not interfere with personal and private decisions".[20]

THE CONCEPT OF SUBSTANTIVE DUE PROCESS

Substantive due process, which began as an extension of the original Due Process Clause, now has come to be one of the primary tools for the judiciary as it renders opinions fundamental to the furthering of "modern liberty", which should embody "the evolving standards of decency that mark the progress of a maturing society".[21] Up until the middle to the late 19th century, the Due Process Clause was only understood and applied in the sense of procedural protection "against detention or incarceration without the benefit of some official legal proceeding."[22]

Through a substantive interpretation of the Due Process Clause, beginning primarily in the late 19th century, the Court has found implicit rights guaranteed across a panoply of fields including the protection of property, protection from excessive punitive damages, the right to same-sex marriage, the right to an abortion, the right to contract freely, the right to contraception and many more.[23] In many ways, the modern iteration of this ideology can be traced to Justice Field in 1867, who was a lifelong advocate of natural law and sought to imbue certain "immutable principles" of natural law and the God-given rights of the individual into the Constitution.[24]

British jurist William Blackstone, whose writings were a significant influence on the intentions of the Framers, was a scholar of natural law and believed that an individual's reputation was inherent in the right to personal security and by extension encapsulated within the

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[20] Douglas S. Mock, "Natural Law in American Jurisprudence: Calder v. Bull and Corfield v. Coryell and their Progeny." Order No. 10623449, Boston University, 2017, 190.
[21] Trop v Dulles, 356 U.S. 86, 101 (1958)
[22] White, *The Constitution and the New Deal*, 241.
[23] Trop v Dulles, 356 U. S. 86, 101 (1958)
[24] Carl B. Swisher, *Stephen J Field: Craftsmen of the Law* (Washington: Brookings Institution, 1930) 413.

right to due process.[25] In a continuation of this line of reasoning, Justice Steward claimed that if a state makes any charge that could potentially cause serious harm to an individual's standing within the community, then "due process would accord an opportunity to refute the charge."[26] Justice Field, expounding upon the same vein of thought, concluded in the *Test Oath* cases that the inalienable rights all men possess extend beyond simply life, liberty, and the pursuit of happiness, and include "in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law".[27] Field pressed his ideas further, cementing the idea of sub-textual rights implicit in the Constitution, writing that any legislation which purports to abridge or restrict any of the aforementioned rights "is punishment, and can in no other [way] [be] defined".[28]

With the Court espousing views such as these, a sphere of "individual private activity" became recognized. These activities were not to be encroached upon by the state or federal government.[29] Such views were largely unrelated to the Fourteenth Amendment, which cites the Due Process Clause in the second sentence. A mere seventeen of the 529 words spell out the amendment in full, which has become the "handiest constitutional tool in the judicial kit bag and a constitutional provision deployed in court more often than any other – more often, perhaps, than all others combined".[30] The relatively innocuous sentence reads "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor

[25] William Blackstone, *Commentaries on the Laws of England* (Boston: Beacon Press, 1962)
[26] David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* (Chicago, IL: University of Chicago Press, 1994), 543.
[27] Bradwell v State of Illinois, 83 U.S. (16 Wall.) 130 (1873)
[28] Ibid.
[29] White, *The Constitution and The New Deal*, 241.
[30] Akhil Reed Amar, *America's Constitution: A Biography* (New York, NY: Random House, 2005), 385.

deny to any person within its jurisdiction the equal protection of the laws".[31] However, the original draft of the Fourteenth Amendment lacked a due process clause altogether and simply read "Congress shall have power to…secure to all citizens…the same political rights and privileges; and to all persons in every State equal protection in the enjoyment of life, liberty, and property."[32]

A substantive reading of the Due Process Clause grants the federal judiciary immense powers to define, quantify, and protect not only rights unenumerated within the Constitution but also to bring the Constitution into the present day by permitting the Courts to address issues of modern relevance.[33] The judicial separation between procedural and substantive due process can be said to mark the beginning of the modern selective incorporation of the Bill of Rights provisions with the 14th Amendment Due Process Clause that is applicable to the states.[34] It is in no small part due to the increasing presence of substantive due process that the modern social notion of the "living constitution" was born.

According to New York University Professor of Law Burt Neuborne, some of the most important clauses of the Constitution do not have a single objective meaning. Therefore, disagreements regarding the best modern reading of the Constitution are to be expected, and perhaps to an extent even fostered.[35] Accordingly, the role of interpretation falls to judges, and after more than two centuries of American democracy, there remains no consensus on the correct method for synthesizing meaning from the Constitution's terse text.[36] By comparison, while the substantive due process doctrine may not manifest itself in daily trial court hearings, it has the

[31] U.S. Constitution, amend. 14, sec. 1.
[32] Benjamin B. Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction 51 (1914)
[33] Amar, *America's Constitution*, 385.
[34] White, *The Constitution and the New Deal*, 245.
[35] Burt Neuborne, *Madison's Music: On Reading the First Amendment* (New York, NY: New Press, 2015), 149.
[36] Ibid.

potential to be increasingly more relevant to the evolving fabric of our national judiciary through the continued enumeration of previously unrecognized, constitutionally-defended freedoms. This sentiment was expressed by the primary author of the 14th Amendment, John Bingham, who stated in a lecture "Nothing can be clearer than this, that under the representative system the rights of the minority are as sacred and inviolable as the rights of the majority."[37]

LINEAGE OF SUBSTANTIVE DUE PROCESS CASELAW

Judges in cases as deplored as *Dred Scott v Sanford*, to the now renounced Lochner era, even to the civil rights victory of *Obergefell v Hodges*, have relied on substantive due process to render their decisions. This doctrine remains a forceful component in the highest levels of American jurisprudence.[38] By 1868, there existed a "recognizable form of substantive due process" which had been argued and to some degree accepted "by a large majority of the courts that had considered the issue".[39]

Many would argue, including current Chief Justice John G. Roberts, that the now infamous 1857 *Dred Scott v Sanford* decision marks the birth of substantive due process.[40] This particular case centered on a slave who had been moved by his owner to a new territory, one that did not recognize slavery as a result of the Missouri Compromise.[41] In the 7-2 majority opinion, Chief Justice Roger Taney argued that with respect to the Missouri Compromise, the jurisdiction Congress had over the territory did not grant them the license to make laws which conflicted with existing constitutional limitations.[42]

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[37] "Speech of Hon. John A. Bingham." *Belmont chronicle,* Sept. 16, 1869. Library of Congress. https://chroniclingamerica.loc.gov/lccn/sn85026241/1869-09-16/ed-1/seq-1/ (accessed Feb 7, 2019).
[38] Roald Y Mykkeltvedt, *The Nationalization of the Bill of Rights: Fourteenth Amendment Due Process and the Procedural Rights* (Port Washington, NY: Associated Faculty Press, 1983), 19.
[39] Ryan C. Williams, The One and Only Substantive Due Process Clause (March 6, 2010). *Yale Law Journal*, Vol. 120, 2010.
[40] Obergefell v Hodges, No. No. 14–556 slip op. at 13 (June 26, 2015)
[41] Dred Scott v Sandford, 60 U.S. 393 (1856)
[42] Cass Sunstein, "Constitutional Myth-Making: Lessons from the Dred Scott Case," University

The Court concluded that, pursuant to the Fifth Amendment, "a law that deprives someone of property because he has brought it into a particular place could hardly be dignified with the name of due process of law".[43] While Taney's argument was sagacious, it was internally vulnerable.[44] In the process of defending the right to have property transported from one United States territory to another, irrespective of the differing legislation governing the states and territories, the rights inherent in the due process clause were liberated from the realm of the defined procedural guarantees and expanded to include tangible and corporeal rights. According to the reasoning of the Taney Court, due process of law was "satisfied by fugitive-slave hearings presided over by a financially biased adjudicator… but violated by free-soil laws like the Northwest Ordinance."[45]

Although *Dred Scott* is now recognized as a massive oversight in judicial jurisprudence, the decision is less well-remembered to be a result of flawed legal reasoning.[46] Taney's distorted understanding of the Constitution and the substantive guarantee sent a freed man back to slavery. Thankfully, the decision was temporary with respect to the rights of former slaves, yet the underlying reasoning continued to impact judicial reasoning.[47] The *Dred Scott* decision displays jurisprudence uniquely entwined with the idea of substantive due process and a product of the federally applicable Fifth Amendment. The Fourteenth Amendment, from which modern

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of Chicago Law, Occasional Paper No. 37 (1996): (accessed June 20, 2018).
[43] Dred Scott v Sandford, 60 U.S. 393 (1856)
[44] David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888.* (Chicago: Univ. of Chicago Press, 1997), 264.
[45] Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction*. (New Haven, CT: Yale University Press, 2008), 306.
[46] Currie, *The Constitution in the Supreme Court: The First Hundred Years,* 264.
[47] Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By.* (New York: Basic Books, 2015), 145.

substantive due process derives its state governing power, was directly influenced by *Dred Scott* and opens with language that, in no uncertain terms, renounces Taney and his decision.[48]

Roughly fifty years later, *Lochner v New York* (1905) cited the due process clause of the Fourteenth Amendment to rule that the Bakeshop Act was unconstitutional. The Bakeshop Act prohibited employers from allowing an employee to work in a "biscuit, bread, or cake bakery or confectionery establishment" for longer than 10 hours in a single day or longer than 60 hours in a work week.[49] By use of a substantive interpretation of the due process clauses, the Court ruled that an individual has an inherent right to contract freely. This decision was met with ardent reproach from its beginning. Justice Harlan declared the majority opinion to be facially wrong because "the hour law fell within the police power".[50] The Lochner decision demonstrates the danger that can accompany the implementation of the substantive due process doctrine, as this case gave rise to the much discredited "Lochner Era" of the Supreme Court's jurisprudence.[51]

During this roughly 30-year period, the Court repeatedly struck down labor laws passed by the government. In fact, according to Steven Emanuel, between the turn of the century through the generally accepted passing of the era in 1937, the Supreme Court held 159 separate statutes to be in violation of the Constitution under the Fourteenth Amendment.[52] Regardless of the reproachful eye of history, there is no evidence in *Lochner* that the judges in the case were motivated by anything other "than a sincere motive to protect liberty or even equality".[53] Despite

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[48] U.S. Constitution, amend. 14, sec. 1.
[49] Lochner v New York, 198 U.S. 45 (1905)
[50] Victoria Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights." California Law Review 97, no. 3 (June 2009): 753. Accessed September 2, 2018.
[51] Steven Emanuel, *Emanuel Law Outlines: Constitutional Law* (New York, NY: Wolters Kluwer, 2014)
[52] Emanuel, *Emanuel Law Outlines.*
[53] Victoria Nourse, "A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights." California Law Review 97, no. 3 (June 2009): 756.
Accessed September 2, 2018.

this optimistic view of the judges' intentions, *Lochner* stands as an example of the proclivity of the Court to "impos[e] its own values on legislative decisions through substantive due process".[54]

Contrary to a certain amount of public political opinion, the usage of substantive due process is not a partisan tool to serve the purposes of the liberal agenda. The above *Lochner* case has been widely considered to be explicitly in favor of conservative economic practices by enshrining the freedom of contract under the umbrella of constitutionally consecrated individual freedoms. In more liberal view, Justice Holmes, who served on the Supreme Court from 1902-1932, has been quoted as saying that due process may be put forth in aid of what is sanctioned by morality or greatly and immediately necessary to the public welfare.[55] In *BMW v Gore,* the Court again employed the doctrine to reach an opinion that was regarded as a thundering victory for those in the conservative camp.[56]

BMW v Gore centered on a BMW vehicle that had been slightly damaged during production or shipping, then repainted and sold as new. In the midst of the suit, evidence revealed that the practice of repairing slight damages to a vehicle was commonplace. Policy dictated that if damage to the vehicle did not amount to 3% of the net cost, then the damage was repaired and the vehicle marketed as new. After Mr. Gore sued for damages in his home state of Alabama, a jury sided in favor of his suit and handed down $4,000 in compensatory damages as an approximation of the lost value of the vehicle. Additionally, the jury assessed $4 million in punitive damages to BMW of North America, Inc., although the Supreme Court of Alabama later reduced this to $2 million. The exorbitant sum was justified by the state court, referencing the long history of BMW continuing the practice and numerous vehicles affected by the policy. In

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[54] Monk, *The Words We Live by*, 216.
[55] "Are Fit to Rule Says Roosevelt." *Webster City Freeman* March 26, 1912. Library of Congress. https://chroniclingamerica.loc.gov/lccn/sn85050913/1912-03-26/ed-1/seq-7/ (accessed Feb 6, 2019).
[56] Bruce Allen Murphy, *Scalia A Court of One* (New York: Simon & Schuster Paperbacks, 2015), 411

this case, some judges questioned if the exceptionally large punitive damages were in violation of the Due Process Clause of the Constitution. The Supreme Court emphasized there was no "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable" which would be applicable in all scenarios.[57] Even so, the Court concluded that the "grossly excessive award" imposed in the *Gore* case was indisputably outside the realm of the constitutionally tolerable.[58] The significance of this case is apparent as it underscores the legal reasoning of the Court. Not only does the Fourteenth Amendment guarantee substantive freedom from excessive punitive damages for individuals, but BMW as a corporation was entitled to the same substantive guarantees granted to individuals.

MODERN ERA (WARREN COURT) – 1965

Despite these examples, implementation of substantive due process is not unilaterally held in contempt. Substantive due process has seen multiple iterations throughout its existence, transitioning from an almost exclusive focus on economic rights and property rights, to embracing the rights of individuals, minorities, and the disaffected in society.[59] Perhaps the most significant shift in the implementation of substantive due process rights came as a result of the Warren Court (1953-1969), which brought the Court into the Progressive Era, and has become nearly synonymous with the protection of "racial and religious minorities, refashioning the law of democracy, and solicitude for First Amendment values and for the rights of the criminally accused and the poor."[60] This evolution in jurisprudence was based on two primary concepts. First, that the Constitution is a living document, fluid in its evolution and adaptation to the needs

[57] BMW of North America, Inc. v Gore, 517 U. S. 559 (1996).
[58] Ibid.
[59] Morton J. Horwitz, "The Warren Court and the Pursuit of Justice," Washington and Lee Law Review 50, no. 1 (Winter 1993): 5
[60] Ryan C. Williams, "The Paths to Griswold," Notre Dame Law Review 89, no. 5 (May 2014): 2155

of a developing culture. Secondly, the "reemergence of the discourse of rights" as a more pronounced method of determining the constitutional needs of a society.[61]

The emergence of the discourse of rights is a reflection of the evolving societal nature of natural law. In cases decided before the Warren Court, Thomist views underpinning previous natural law jurisprudence were largely disregarded. Instead, a progressing society pushed for changes widely believed to capture the spirit of the Constitution. As a result, two major shifts in jurisprudence emerged in the later 20th century. Foremost, prior to the Warren Court, originalism (the belief that a judge should interpret the words of the Constitution faithful to the meaning those words had when the Constitution was adopted) was considered to be orthodoxy.[62] However, beginning in the 1960s and flourishing in the 1970s the notion of the living Constitution began to take hold in academia and then in the judiciary. This philosophy promotes alternative notion that the Constitution can adapt its meaning, if necessary, to meet the needs of an evolving society. Secondly, pre-Warren Court legalese generally considered a natural rights/natural law based philosophy to be staunchly conservative and unyielding to changing societal values. However, in the 1970s, natural law began a shift towards a philosophy emphasizing individual natural rights and autonomy.[63]

However, this conception of natural rights was a far-removed concept from what the Framers of the Constitution would have considered to be natural law philosophy. There is clearly nothing inherently wrong with change. Political discourse in society is necessary in order for society to progress, this is how new laws are passed, previous wrongs are corrected, and change

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[61] Morton J. Horwitz, "The Warren Court and the Pursuit of Justice," Washington and Lee Law Review 50, no. 1 (Winter 1993): 5
[62] Morton J. Horwitz, "The Warren Court and the Pursuit of Justice," Washington and Lee Law Review 50, no. 1 (Winter 1993): 6
[63] Morton J. Horwitz, "The Warren Court and the Pursuit of Justice," Washington and Lee Law Review 50, no. 1 (Winter 1993): 8

is enacted for the betterment of the population. It is important to note the relevance of this discourse to the *political* climate however, which is and should remain rightfully distinct from the judiciary.[64] This distinction has been blurred over time, as the views of the society change that the Supreme Court's interpretation of certain provisions of the Constitution evolve in concert to some degree. During the era of the Warren Court the views of society were becoming considerably more progressive and moving in a certain amount of harmony. Likewise, the Court appeared to base an increasing number of decisions on reasoning that was "philosophical, political, and intuitive", rather than legal in the conventional sense.[65]

It is in part due to this development that decisions rendered under this model, while respected judicially and entitled to respect under the principles of stare decisis, have historically been seen to carry less legitimacy with the public and higher views of partisanship.[66] This phenomenon has become apparent to individuals in varied echelons of society, from political scientists to Justices' of the High Court.

A case argued in 2010 before the District Court for Northern California concerning the right of homosexual individuals to marry illustrates this phenomenon. The presiding judge asked the attorney "[I]sn't the danger, perhaps not to you and perhaps not to your clients, but the danger to the position you are taking, is not that you're going to lose this case, either here or at the Court of Appeals or at the Supreme Court, but that you might win it?"[67] This commentary underscores the gravity of the judiciary interjecting itself in an area of law long left to the

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[64] U. S. Const. art. III, § 2
[65] Mark V. Tushnet, *The Warren Court in Historical and Political Perspective* (Charlottesville, NC: University Press of Virginia, 1995), 40-42.
[66] Meredith Heagney, "Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit | University of Chicago Law School." The University of Chicago: The Law School, 15 May 2013. www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit. (Accessed Oct. 16, 2018).
[67] Transcript of Record, Perry v Schwarzenegger, No C 09-2292-VRW (N.D. Cal. June 16, 2010), 309

legislature. The Judge was worried (and with the vision of hindsight, one can conclude rightfully so) that if the judiciary compelled the country to unilaterally recognize same-sex marriage, then the policy would never carry the legitimacy that it would if the legislature, through the will of *The People*, had brought about such a result.

By the time that the Supreme Court finalized the matter in 2015, many states had already chosen to embrace same-sex marriage as their own. Many had not reached the same decision, although in all likelihood it was only a matter of time until such a right was recognized nationally. The distinction remains important, that nationally there would inevitably be dissenters, just as there were within those states that had already sanctioned same-sex marriage. As Justice Ginsburg has opined, when nine lawyers in robes settle an issue that has not historically been a Court matter, the decision carries noticeably less legitimacy than it would have had it been the result of a majority of the electorate bringing such policy into existence.[68]

This concern is not to say remotely that the courts, or in particular the Supreme Court, are not cognizant of (and receptive to) public opinion. Such concerns are only aimed at preserving legitimacy in the eyes of those who find fault with the judgment of the Court. According to some researchers, at particular points through recent judicial history, there has been a statistically significant correlation between public opinion and the rulings of the court on cases of public interest.[69] Over a half-century-long period, political scientists studied opinions handed down from the Court for which there existed polling data indicating what the preferred outcome would have been for the public.[70] Within these studies, political scientist Thomas Marshall found 146

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[68] Meredith Heagney. "Justice Ruth Bader Ginsburg Offers Critique of Roe v. Wade During Law School Visit | University of Chicago Law School." The University of Chicago: The Law School, 15 May 2013. www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit. (accessed October 16, 2018).

[69] Thomas R. Marshall. *Public Opinion and the Supreme Court* (Boston, MA: Unwin Hyman, 1989), 192

[70] Greenhouse, Linda. "Public Opinion & the Supreme Court: The Puzzling Case of Abortion." *Daedalus* 141, no. 4 (2012): 69-82. doi:10.1162/daed_a_00174.

separate cases that could be used as accurate data points. From this sample he was able to conclude that approximately 65% of the rulings from the Court coalesced remarkably well with currently prevailing public opinion.[71] As an example of this phenomenon, in 1972 *Roe v Wade* was supported by 63% of men and 64% of women across party lines (68% of Republicans and 59% of Democrats) although this included both hard and soft rationales for abortion.[72]

In a significant number of the most groundbreaking rulings of the Warren Court (and those of subsequent Courts), the doctrine of substantive due process was called into service in order to justify the decision of the majority in a plethora of cases, setting the stage for many of the more famous rulings from the 1970's. With the economic or property rights based conception of the substantive interpretation of the clause essentially fizzling out around the end of the early 20th century, the jurisprudence of the Warren Court sanctioned the imbuement of the due process clause with substantive content. However, the crux of the chronological and jurisprudential shift was focusing the thrust of the substantive content on civil rights and individual liberties.[73] This interpretation became an accepted part of U.S. Constitutional law throughout much of the judiciary and the legal academy alike.[74] During this period, the Warren Court amassed more power than the judiciary had ever known previously, and this power, in conjunction with the paradigm shift in jurisprudential approach cemented a shift in U.S. Constitutional law and individual rights, the effects of which are still being seen clearly to this day, and the full implications of which may not be fully realized for decades to come.

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[71] Marshall, Public Opinion, 192
[72] George Gallup. "Abortion Seen Up to Woman, Doctor," The Washington Post, August 25, 1972. See Greenhouse, Becoming Justice Blackmun, 91
[73] Cass R. Sunstein, "Justice Breyer's Democratic Pragmatism" (John M. Olin Program in Law and Economics Working Paper No. 267, 2005) 3
[74] Cass R. Sunstein, "Justice Breyer's Democratic Pragmatism" (John M. Olin Program in Law and Economics Working Paper No. 267, 2005) 4

Representing the continued influence of the Warren Court jurisprudence is the recently controversial, yet still widely celebrated line of landmark civil rights cases culminating in the nation-wide legalization of same-sex marriage.[75] In these decisions the Court applied the doctrine of substantive due process, operating under the guiding principles of natural law to hold that laws motivated by moral disapproval of a disaffected class cannot be in harmony with the values set forth by the Constitution.[76] This line of cases began primarily with the 1996 case of *Romer v Evans,* in which the Superior Court invalidated an amendment to Colorado's state constitution. The amendment, which barred conferring protected status to individuals or couples on the basis of non-heteronormative sexual conduct, that did not satisfy the requirements of the Federal Constitution.[77] In this well-known case, the Court justified its ruling under the Equal Protection Clause, refraining from reliance on substantive due process.[78] *Romer v Evans* then served to lay the groundwork for the 2003 case *Lawrence v Texas*, The Court struck down a Texas statute criminalizing homosexual sodomy, this time invoking a substantive interpretation of the due process clause as the primary rationale for its decision.[79]

Building upon precedent set in the *Lawrence v Texas* case, the Court ruled in *Obergefell v Hodges* that same-sex couples had the federally protected right to marry under the due process clause of the Fourteenth Amendment. The opening sentences of the case outline the most modern understanding of the rights inherent in the substantive due process doctrine. Justice Anthony Kennedy opined that "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution".[80] The Court held that under the due

[75] Obergefell v Hodges, No. No. 14–556 slip op. at 13 (June 26, 2015)
[76] Lawrence v Texas, 539 U.S. 558 (2003)
[77] Romer v Evans, 517 U.S. 620 (1996)
[78] Ibid.
[79] Lawrence v Texas, 539 U.S. 558 (2003)
[80] Obergefell v Hodges, No. No. 14–556 slip op. at 13 (June 26, 2015)

process and equal protection clauses of the Fourteenth Amendment, the right to marry was a natural right bestowed upon all individuals regardless of sexual orientation and that to nullify this without due process of law was a violation of the Constitution. The Court linked these two clauses in the opinion, stating they are "connected in a profound way" in spite of the fact that their provisions are independent of one another.[81] Rights secured in the liberty guarantee of due process and those established through equal protection may originate through differing avenues, yet in some cases "each may be instructive as to the meaning and reach of the other".[82] Depending on the particular facts of the case at hand, the Court's opinion continues to illustrate how one clause might offer a fuller insight into the scope of the right under scrutiny, irrespective of the fact that the right could be identified in either.[83] Furthermore, this opinion makes clear that the rights of those individuals seeking fundamental liberty from state or federal government, or those persons who claim protections guaranteed to all individuals, are inextricably linked by the Fourteenth Amendment. These individuals can embrace the knowledge that deliverance is available.

The aforementioned cases represent the continued impact of Warren Court jurisprudence, identifying fundamental rights infringed upon by the states and securing liberty for citizens. While the precise genesis of the judicial recognition of substantive content in the Due Process Clause is debated, supporters were noted as early as the beginning of the 1900's. Experts accept that by the middle of the 19th century "the Court was certainly considering and applying substantive due process concerns".[84] However, it was not until the 20th century that the focus on

[81] Obergefell v Hodges, No. No. 14–556 slip op. at 13 (June 26, 2015).
[82] Ibid.
[83] Ibid.
[84] Douglas S. Mock "Natural Law in American Jurisprudence: Calder v. Bull and Corfield v. Coryell and their Progeny." Order No. 10623449, Boston University, 2017, 190.

economic or property rights was cast by the wayside in favor of a pronounced focus on personal freedom and the autonomy of the individual.[85] Several scholars have referred to this modern conception as the "new morality", exemplified not only by the line of cases that culminated in *Obergefell* but also by *Roe v Wade* and its progeny, upholding the right of a woman to make her own choice regarding the terminate of a pregnancy.[86]

CRITICISM - SUBSTANTIVE DUE PROCESS OVERREACH

As much as substantive due process has allowed social rights in society to progress with spectacular bursts of speed, the doctrine remains at the center of heated debate and at times vitriolic criticism. Once allegations of bias or partisanship are thoroughly dismissed, one can consider the arguments against the doctrine solely on their merits. The question of the doctrine's validity focused on Constitutional interpretation, if the judiciary can create justice at times when it deems that none is specified. Further stemming from this initial objection are questions regarding Constitutionally allotted powers to the judiciary, limits, and boundaries on what the Court can do, and implications for the erosion of Constitutionally consecrated governmental structure. Justice Byron White positioned himself at the vanguard of this debate in his dissent in *Moore v City of East Cleveland,* emphasizing the importance of bearing in mind that "the substantive content of the [Due Process] Clause is suggested neither by its language nor by pre-constitutional history" and such content which is present in the modern iteration of the Due Process Clause "is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments."[87] It is clear from this that the doctrine of Substantive Due

[85] Douglas S. Mock "Natural Law in American Jurisprudence: Calder v. Bull and Corfield v. Coryell and their Progeny." Order No. 10623449, Boston University, 2017, 190.
[86] Ibid.
[87] Moore v City of East Cleveland, 431 U.S. 494 (1977)

Process is a recent institution, and not one particularly steeped in the historical traditions of the United States Constitution.

Those critical of substantive due process are cautious that judges unconstrained by the guiding text of the Constitution may result in the judiciary acting as a "second legislature", writing their own policy preferences into law by means of judicial opinions.[88] In *Bowers v. Hardwick*, which upheld a Georgia statute classifying homosexual intercourse as illegal sodomy, Justice Byron White once more expressed his agreement with this worry, writing that "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."[89] Justice Curtis, while dissenting in the abhorrent *Dred Scott* case, stated that when the Constitution is no longer interpreted according to objective rules which govern the interpretation of laws then the Constitution is robbed of substantive meaning.[90] Once the words of the Constitution as they were written are no longer the binding law of the land, this country is governed not by laws but by men "who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean."[91] The Founding Fathers warned of such a slippery slope, including Thomas Jefferson who vociferously argued that judges could become inflated with power and "twist and shape…[the Constitution]… as an artist shapes a ball of wax."[92]

ABORTION TRIFECTA

[88] Lino Graglia. "Our Constitution Faces Death By 'Due Process,'' *Wall Street Journal*, May 24, 2005, accessed September 12, 2018.
[89] Bowers v Hardwick, 478 U.S. 186, 194-95 (1986)
[90] Dred Scott v Sanford, 60 U.S. 393, 621 (1856).
[91] Ibid.
[92] Lino Graglia. "Our Constitution Faces Death By 'Due Process,'' *Wall Street Journal*, May 24, 2005, accessed September 12, 2018.

Demonstrating the potentially dangerous nature of the slippery slope of judicially created law, the trifecta of abortion rights cases that began with *Roe v Wade*, reiterated by *Planned Parenthood of Southeastern Pennsylvania v Casey*, and reaffirmed in a renewed specificity through *Whole Woman's Health v Hellerstedt,* stand as a pernicious testimony to vagueness of law. Only with solemn reverence will the Court overrule a previous judgment, strictly adhering to the principles of stare decisis.[93] Latin for "let the decision stand", stare decisis stands as a fundamental tenet of the judiciary. Stare decisis provides structural support for law and gives the necessary precedential value to Court decisions. However, the potential exists to give way to a domino effect of spiraling jurisprudence based in preexisting case law and value judgments as opposed to strict textual adherence.[94] In multiple aspects of the Constitution, judicial practice and academia are inching towards a plateau where Constitutional law practices cease to improve. Legal scholars pontificate on the jurisprudence of the Court and scrutinize "every nuance of the latest Supreme Court case, but seem unconcerned about the Amendment's text, unaware of its history, and at times oblivious or hostile to the common sense of common people".[95]

Roe v Wade stands as the genesis of current abortion laws. The Court, based on the Due Process Clause of the Fourteenth Amendment, determined that a fundamental right to privacy included the right to an abortion, including the right of physicians to conduct their practice as they see fit, and free from governmental restrictions absent a compelling state interest.[96] In the decision, the Court balanced the compelling interest of the state in the health of the woman and the potential life of the fetus. To accomplish this, only those abortions performed prior to the

[93] Jeffrey A. Segal and Harold J. Spaeth, "The Influence of Stare Decisis on the Votes of United States Supreme Court Justices," American Journal of Political Science 40, no. 4 (November 1996).
[94] Ibid.
[95] Akhil Reed Amar, "Fourth Amendment First Principles," Harvard Law Review 107, no. 4 (1994).
[96] *Planned Parenthood of Southeastern PA. v. Casey*, 505 U. S. 833 (1992)

approximate end of the first trimester of pregnancy were legalized, as well as those unfortunate instances where the fetus had no chance at a "meaningful life outside of the mother's womb".[97]

At the time, Associate Justice Rehnquist was extremely critical of the Court's invocation of Due Process rights as a structural basis for the legal reasoning, succinctly remarking in his dissent that the majority opinion had accomplished the "seemingly impossible feat of leaving this area of law more confused than it found it".[98] Significantly, the criticism here is not directed at the social or political outcome of the decision, but rather focused on the mechanism by which the decision was reached. The policy outcome of the decision is irrelevant – the avenue by which the policy was determined stands at the crux of the debate. Rehnquist continued to castigate the majority opinion for what he, as well as many others, saw as a blatant departure from the guidance of the Constitution, suggesting that the arbitrary nature of the trimester framework "partakes more of judicial legislation than it does a determination of the intent of the drafters of the Fourteenth Amendment".[99]

Respected scholar of Constitutional law Raoul Berger delved deeply into the drafting and legislative history surrounding the genesis of the Fourteenth Amendment. He did not find evidence that the Framers were trying to convey any sort of sub-textual Pandora's box of inherent rights and were instead "almost constantly pre-occupied with the plight of the former slaves", and little proof of anything further.[100]

The resounding focal point of this criticism centers on the Court's involvement in molding the meaning of Constitutional clauses to agree with particularly moral issues of the

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[97] Roe v Wade, 410 U.S. 113 (1973)
[98] Ibid.
[99] Ibid.
[100] United States, Congress, *Examination of Congressional Intention in Use of the Word "Person" in the Fourteenth Amendment: Abortion Considerations*, by Karen J. Lewis (Congressional Research Service, the Library of Congress, 1981), accessed September 09, 2018, https://congressional.proquest.com/congressional/docview/t21.d22.crs-1981-aml-0032?accountid=3611.

present and future.[101] Some Constitutional scholars question cases where the right in question is not an "express, implied, or enacted entitlement or part of America's lived Constitution, then in what way, precisely, is it a genuinely *constitutional* right?"[102] This question is one that the majority in *Roe* neglected to highlight or even address in their landmark opinion.[103] Constitutional scholars such as Justice Blackmun, who authored the *Roe* opinion, neglected to quote so much as a line of the specific text of the Constitution upon which he claimed that the majority opinion was justified.[104]

Nearly twenty years later the trimester-based test of *Roe* was nullified, while the underlying principle remained intact through the equally divisive *Planned Parenthood v. Casey*. The Court held that the trimester framework was inconsistent with respect to the state's compelling interest in the life of the child. Therefore, the Court adopted the standard of the "undue burden" as the line of demarcation dictating when the state could or could not intervene in the right of a woman to obtain an abortion.[105] In their affirmation of the central *principle* of *Roe*, the court by extension reaffirmed the existence of an implicit and substantive guarantee to the right to privacy within the Fourteenth Amendment. *Planned Parenthood v Casey* and cases of similar precedential tone deepened the sentiment expressed by Chief Justice Rehnquist, among others, that while "Considerations in favor of stare decisis are at their acme in cases involving property and contract rights… the opposite is true in cases such as… [Payne v Tennessee]".[106]

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[101] Amar, *America's Unwritten Constitution,* 122.
[102] Amar, *America's Unwritten Constitution,* 123.
[103] Roe v Wade, 410 U.S. 113 (1973)
[104] Amar, *America's Unwritten Constitution,* 123.
[105] *Planned Parenthood of Southeastern PA. v. Casey*, 505 U. S. 833 (1992)
[106] Jeffrey A. Segal and Harold J. Spaeth, "The Influence of Stare Decisis on the Votes of United States Supreme Court Justices," American Journal of Political Science 40, no. 4 (November 1996).

While *Casey* did not further inflame the issue of substantive due process, the judicially created "undue burden" test solved one problem while creating another. The line at which a burden became "undue" was not described in any particular detail. This omission left Court with the duty of being the final arbiter to determine if any given burden was unreasonable. Chief Justice Rehnquist again voiced profound worry that the Court, through a questionably legitimate attempt at advancement, had taken license upon itself by way of *Roe v Wade* and was gravely overstepping its Constitutional boundaries.[107]

The dissenting opinion, joined by Justices Scalia, Thomas, and White, declared the majority's result an "unjustified Constitutional compromise" which left the Court to rule on all types of abortion regulations "despite the fact that it lacks the power to do so under the Constitution".[108] To the originalist (meaning an individual who believes that judges should interpret the Constitution as close to its original public meaning as possible), which three of the four dissenting Justices were, analysis of the historical record provided the most damning evidence. This record indicated that when the Fourteenth Amendment was ratified in 1868, a minimum "28 of the then-37 States and 8 Territories had statutes banning or limiting abortion".[109] Clearly, any implicit right to an abortion through a substantive guarantee to privacy by way of the Due Process Clause was entirely foreign to those who drafted the language of the amendment.[110]

The inherent ambiguity of the "undue burden" standard came before the Court in *Whole Woman's Health v. Hellerstedt*. In this case, a Texas statute ruled that abortion centers needed to adhere to the standards of an ambulatory surgical centers. Doctors were required to have

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[107] *Planned Parenthood of Southeastern PA. v. Casey*, 505 U. S. 833 (1992)
[108] Ibid.
[109] Roe v Wade, 410 U.S. 113 (1973)
[110] *Planned Parenthood of Southeastern PA. v. Casey*, 505 U. S. 833 (1992)

admitting privileges at a hospital no further than thirty miles from the abortion center where they practiced. These provisions were challenged as creating an undue burden on the right of a woman to have an abortion.[111] The Court ruled in favor of Whole Woman's Health, striking down both provisions and therefore by extension ruling them to be in violation of the Constitution through the substantive right to privacy asserted in *Roe v Wade*.[112] The lack of nearby abortion clinics for many women in Texas resulted in what the Court deemed to be unreasonable transit times, which placed considerable obstacles in a woman's goal to receive care at the abortion clinic.[113] Amazingly, these three landmark cases and many others accompanying them, stem from two words of a single sentence in the Fourteenth Amendment.[114]

When Justice Harry Blackmun authored the opinion in *Roe v Wade,* he clearly did not make a historical discovery of something implicitly promised in the words of the Fourteenth Amendment that no judge or constitutional scholar had yet noticed.[115] Regardless of an individual's political feelings on the matter, the issue of abortion legalization was at that moment plucked from the sphere of public debate and forced into the realm of Constitutionally consecrated rights, to be firmly cemented in place by the doctrine of stare decisis, and destined to guide the Court in future cases. Chief Justice Roberts took a resigned and pragmatic stance to judicial opinions of this nature, encouraging those who agreed with the political outcome of the decision to celebrate that outcome, but not to celebrate the Constitution, as "it had nothing to do with it."[116]

PRIVILEGES AND IMMUNITIES CLAUSE

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[111] *Whole Woman's Health v. Hellerstedt*, No. 15–274 slip op. at 13 (June 27, 2016)
[112] Ibid.
[113] Ibid.
[114] Lino Graglia, "Our Constitution Faces Death By 'Due Process," Wall Street Journal, May 24, 2005, accessed September 12, 2018.
[115] Ibid.
[116] Obergefell v Hodges, No. No. 14–556 slip op. at 13 (June 26, 2015)

Save for *Dred Scott v Sanford* as well as a couple of lesser-known rulings such as *Wynehamer v The People*, any precedents in American jurisprudence predating the Civil War that may be utilized to mark the dawn of judicially-oriented reconstruction of the procedural due process ideology are challenging to discover.[117] Due to the fact that the historically traditional procedural understanding of the 5th Amendment due process clause was so ubiquitously accepted, attempting to reason that the inclusion of the due process clause in the later Fourteenth Amendment would in any significant way impair the authority of state governments is challenging.[118] Sterling Professor of Law at Yale University Akhil Amar noted that in a variety of cases, particularly *Griswold v. Connecticut*, reliance on the due process clause seems "quite unpromising".[119] At the heart of Professor Amar's criticism is the text, as a cursory reading of the clause itself reveals that the state may, with impunity, deprive individuals of life, liberty, or property, provided the prerequisite procedures have been followed.[120] Notably, at no point in the *Griswold* opinion does the Court identify procedural error in the law that banned the use of contraceptives amongst married individuals. It is readily apparent that "the Court's real objection to the law was not procedural but substantive."[121]

Professor Amar laments Justice Harlan's *Griswold v Connecticut* opinion, noting the particularly dubious bedrock of substantive due process. Professor Amar identifies Justice Harlan's omission of the adjacent and noticeably more applicable clause of the Fourteenth Amendment: "No State shall make or enforce any law which shall abridge the privileges or

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[117] Frank R. Strong, *Substantive Due Process of Law: A Dichotomy of Sense and Nonsense* (Durham, NC: Carolina Academic Press, 1987), 39.
[118] Roald Y. Mykkeltvedt, *The Nationalization of the Bill of Rights: Fourteenth Amendment Due Process and the Procedural Rights* (Port Washington, NY: Associated Faculty Press, 1983), 20.
[119] Amar, *America's Unwritten Constitution*, 118.
[120] Ibid.
[121] Amar, *America's Unwritten Constitution,*119.

immunities of citizens of the United States."[122] The *Griswold* case stands as another example of Warren Court cases, which brought substantive due process into the modern era.[123] Centered around a Connecticut statute that prohibited the use of contraceptives by married couples, the Court struck down the statute by using the Fourteenth Amendment's Due Process clause.[124] Justice Harlan's decision to forego the privileges or immunities clause was reasonable, given the numerous civil rights cases which relied on the Due Process clause compared to the remarkably few decisions that invoked the privileges and immunities clause, with the overriding goal of continuity of jurisprudential bedrock.[125]

However, as Professor Amar opines, a mere history of basing civil rights cases on the overburdened due process clause is not sufficient justification for continuing to do so, nor is it reason to ignore issues of such pressing magnitude. Indeed, Professor Amar continues to explain that the ultimate responsibility of the Court is "not to thoughtlessly exalt the case law but to thoughtfully expound the Constitution".[126] While this approach risks limiting the argument on its merits to the textualist methodology of Constitutional interpretation, Amar's rejoinder counters that "Textualism presupposes that the specific Constitutional words ultimately enacted were generally chosen with care. Otherwise, why bother reading closely?"[127]

The 2010 landmark case of *McDonald v Chicago* is the judicial refinement of the *District of Columbia v Heller* decision and mirrors some key aspects of the legal reasoning of *Griswold*, including Professor Amar's perceived flaw.[128] *District of Columbia v Heller* paved the way for

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[122] Amar, *America's Unwritten Constitution,* 118.
[123] Philip B. Kurland, *The Supreme Court and the Constitution: Essays in Constitutional Law from the Supreme Court Review* (Chicago, IL: University of Chicago Press, 1971), 263.
[124] Griswold v Connecticut, 381 U.S. 479 (1965)
[125] Amar, *America's Unwritten Constitution,* 118.
[126] Ibid.
[127] William Michael Treanor, "Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights," SSRN Electronic Journal, December 2007.
[128] McDonald v Chicago, 561 U.S. 742 (2010)

future cases, striking down elements of a statute that banned handguns and required trigger locks on other firearms as a violation of the Second Amendment.[129] *McDonald v Chicago* addressed the right of gun ownership for individuals, finding that the Fourteenth Amendment did indeed apply the Second Amendment to the states through the Due Process clause.[130] Justice Clarence Thomas concurred joined several parts of the majority opinion, agreeing with the judgment, yet filed a separate concurring opinion to elucidate his jurisprudence and further criticize the Court.[131]

Justice Thomas studied the wording of the Fourteenth Amendment at the time of its ratification, as well as works from the First Continental Congress. He also examined the writings of Sir William Blackstone and the Magna Carta. This information revealed crucial details about the Framers at the time the Constitution was drafted. [132] Such an analysis revealed that the words "privileges" and "immunities" were commonly understood to be synonymous with "rights" and therefore, despite the very limited reading given to the privileges and immunities clause in the 1873 *Slaughter-House* cases, Thomas argued that this clause would be a significantly more appropriate source of the judgment than the beleaguered due process clause.[133]

The dissenters of the *Slaughter-House* cases, as well as its detractors of today, do not hesitate to argue that the opinion was too broad, to the extent that the privileges and immunities clause was very nearly written out of the Constitution for all practical intents and purposes. Justice Thomas is undaunted at legal precedents hindering the process of working past previous decisions in order to have a more "legitimate source of unenumerated social rights".[134] Historical

[129] District of Columbia v Heller, 554 U.S. 570 (2008)
[130] Bruce Allen Murphy, *Scalia A Court of One* (New York: Simon & Schuster Paperbacks, 2015), 411
[131] McDonald v Chicago, 561 U.S. 742 (2010)
[132] Ibid.
[133] Ibid.
[134] Currie, *The Constitution in the Supreme Court: The First Hundred Years,* 345.

analysis into the potential depth of the privileges and immunities clause leads many scholars to believe the clause offers an objective and inherent advantage over the due process clause in terms of establishing the legitimacy of Constitutionally consecrated social rights.[135]

CONCLUSION

Substantive due process resides at the heart of many of the Supreme Court's most important civil rights cases and is woven into many of its most controversial opinions.[136] A pervasive presence, it infiltrates and influences judicial processes, masquerading behind opinions and regarded as everything from triumphs of social justice to those so reprehensible they are dismissed as aberrations in the history of the Court. The impact of Substantive Due Process on American jurisprudence cannot be underestimated. As Justice David Souter explains, in Constitutional text, many of the clauses provide expansive guarantees which require judicial interpretation. Such clauses include freedom from unreasonable searches, equal protection of the laws, and of course the right to due process.[137] These clauses are unique and challenging in that they "cannot be applied like the requirement for 30-year-old senators; they call for more elaborate reasoning to show why very general language applies in some cases but not in others, and over time the various examples turn into rules that the Constitution does not mention".[138]

Those opposed to expanding the substantive reach of due process rights argue that as a consequence of the perceived fraying of the Court's impartial legitimacy through substantive rulings, principals of natural law should only be viewed in the context of the role of the judiciary

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[135] Amar, *America's Unwritten Constitution*, 118.
[136] Laura Inglis, "Substantive Due Process: Continuation of Vested Rights?" American Journal of Legal History 52, no. 4 (October 1, 2012), doi:10.1093/ajlh/52.4.459.
[137] Murphy, *Scalia*, 415
[138] Ibid.

and there should be great resistance to expanding "the substantive reach of [the due process clause], particularly if it requires redefining the category of rights deemed to be fundamental".[139]

Across the last two and a half centuries, natural rights and natural law philosophy have profoundly impacted the Supreme Court jurisprudence, particularly "in the aftermath of the Constitution's Fourteenth Amendment", and undergoing a second blossoming through the landmark decisions of the Warren Court.[140] These decisions, spreading across the political and ideological spectrum, represent a jurisprudence that transcends partisanship.[141] While Justice Thomas has attempted to influence legal thinkers and judges alike to allow natural law to infuse the Privileges and Immunities Clause with substantive content, he has been largely alone in this endeavor.[142] In accordance with contemporary legal thought, the Fourteenth Amendment's Due Process Clause has continued to be the avenue by which judges have most frequently protected "individual rights and liberties".[143] Natural law has played a pivotal role in developing the civil rights landscape of the United States, and despite legitimate concerns from a number of legal authorities, substitutive due process will likely continue to be used by the Court to recognize fundamental but unenumerated right inherent in the Constitution.

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[139] Bowers v Hardwick, 478 U.S. 186, 194-95 (1986)
[140] Douglas S. Mock "Natural Law in American Jurisprudence: Calder v. Bull and Corfield v. Coryell and their Progeny." Order No. 10623449, Boston University, 2017, 184.
[141] Ibid.
[142] Douglas S. Mock "Natural Law in American Jurisprudence: Calder v. Bull and Corfield v. Coryell and their Progeny." Order No. 10623449, Boston University, 2017, 191.
[143] Ibid.

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