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THE DUE PROCESS CLAUSE AS A LIMITATION ON THE REACH OF STATE LEGISLATION: AN HISTORICAL AND ANALYTICAL EXAMINATION OF SUBSTANTIVE DUE PROCESS

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Since the adoption of the due process clause of the fourteenth amendment, the Supreme Court has vacillated on the appropriate standard of review by which questions of infringement of liberty and property interests by state legislation are to be judged. This Article discusses the doctrine of substantive due process and examines its use by the Supreme Court since the adoption of the fourteenth amendment. The authors criticize the current Court's narrow and inconsistent construction of the due process clause. They recommend that the Court adopt and apply a standard of reasonableness when reviewing the reach of state legislation.

INTRODUCTION

In his recent book analyzing the fourteenth amendment, noted constitutional scholar Raoul Berger stated that "[t]he [f]ourteenth [a]mendment is the case study *par excellence* of what Justice Harlan described as the Supreme Court's 'exercise of the amending power', its continuing revision of the Constitution under the guise of interpretation."[1] The most dramatic example of the Supreme Court's exercise of its "self-proclaimed power"[2] to review the Constitution and to widen or limit its scope occurs when the Court construes the

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1. R. BERGER, GOVERNMENT BY JUDICIARY 1 (1977). [hereinafter cited as BERGER], citing Reynolds v. Sims, 377 U.S. 533, 591 (1964) (Harlan, J., dissenting).
2. Although the concept of judicial review has been firmly entrenched since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the legitimacy of it under the Constitution has been questioned. *Compare* R. BERGER, CONGRESS V. THE SUPREME COURT (1969) *with* L. LEVY, JUDICIAL REVIEW AND THE SUPREME COURT (1967). *See generally* BERGER, *supra* note 1, at 351–62; Grey, *"Do We Have an Unwritten Constitution?"*, 27 STAN. L. REV. 703 (1975).

substantive aspects of that deceptively simple phrase, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."[3] Indeed, one commentator observed that the history of substantive due process is the "classic example of 'government by judiciary.'"[4] Depending on the prevailing political slant of the members of the Court, the due process clause has been viewed alternatively as a constitutional mandate for restraint of state legislative regulation or for indulgence of the rights vested in the citizens of the state.

For approximately the first eighty years of constitutional adjudication, the Supreme Court did not employ the due process clause contained in the fifth amendment as a vehicle by which to limit the substance of federal legislation.[5] Once the due process clause appeared in the fourteenth amendment, however, a conflict began between those who saw due process as a check on the content of burgeoning legislation and those who believed its use should be limited to guaranteeing procedural rights.

After the adoption of the fourteenth amendment, the Court initially approached the due process clause cautiously, attempting to limit its use as a protection against state legislative measures.[6] By the turn of the twentieth century, however, the Court had fully accepted the due process clause as a means of protecting certain liberty or property rights not explicitly guaranteed by the Bill of Rights from encroachment by an exercise of the states' police powers. This expanded review came to be known as substantive due process. For the next thirty years, the Court wielded the due process clause "to strike down state laws, regulatory of business and industrial conditions, because they [were] unwise, improvident, or out of harmony with a particular school of thought."[7] During this period, known as the *Lochner* era,[8] the Court expansively interpreted the due process clause to use it as a means of engrafting its members' views on the fabric of American society.

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3. U.S. CONST. amend. XIV, § 1.
4. R. MCCLOSKEY, THE AMERICAN SUPREME COURT 132 (1960), cited in BERGER, *supra* note 1, at 249.
5. A. MASON & W. BEANEY, AMERICAN CONSTITUTIONAL LAW 321-22 (3d ed. 1964) [hereinafter cited as MASON & BEANEY].
6. See text accompanying notes 78-117 *infra*.
7. Williamson v. Lee Optical of Okla., Inc., 348 U.S 483, 488 (1955). *See also* MASON & BEANEY, *supra* note 5, at 322: "[T]he [due process] clause was no sooner inserted in the [f]ourteenth [a]mendment than it became the rallying point for those who resisted the effort of the government to control the expanding industrial economy."
8. The leading case of the period was Lochner v. New York, 198 U.S. 45 (1905). The legislation reviewed in *Lochner*, as well as most of the cases of this period, involved economic matters affecting the marketplace. *See generally* Strong, *The Economic Philosophy of Lochner: Emergence, Embrasure & Emasculation*, 15 ARIZ. L. REV. 419 (1973).

Beginning in 1934, however, in the case of *Nebbia v. New York*,[9] the Court indicated that it no longer favored a type of judicial review that permitted it to "sit as a superlegislature to weigh the wisdom of legislation."[10] By 1965, the Court had retreated so far from the expansive construction given the due process clause during the *Lochner* era that most commentators and observers could safely declare the demise of substantive due process.[11]

After some ambiguity in interim decisions,[12] the Court grudgingly dusted off the concept of substantive due process in 1977 and once again acknowledged it as the basis for decision in *Moore v. City of East Cleveland, Ohio*.[13] The analysis employed in *Moore*, however, did not embody the expansive view of the due process clause that marked the *Lochner* era. Indeed, last Term in the case of *Exxon Corp. v. Governor of Maryland*,[14] the Court further constricted substantive due process as a limitation upon the powers of the state.

It is the purpose of this article to trace the Supreme Court's use of the due process clause as a check upon the content of legislation that restricts liberty or property rights not explicitly protected by the Bill of Rights. The authors believe that the emerging picture shows that the Supreme Court has abdicated its role of protecting certain liberty and property rights against unreasonable legislation in favor of endowing state legislation with a conclusive presumption of constitutionality. The only exception to this presumption of constitutionality occurs when the Court decides that certain rights are so fundamental that they are included within the due process clause's liberty interest, and therefore deserve constitutional protection. In their conclusion, the authors advocate that the Court steer a middle course between the excesses of the *Lochner* era and the unduly restrictive view of today in order to protect basic liberty and property rights against unreasonable legislation.

I. THE CONCEPT OF SUBSTANTIVE DUE PROCESS AND THE MODE OF DUE PROCESS REVIEW

The emergence of due process as a check on the content of legislation is a microcosm of the eternal tension in a democratic society between the rights of the individual and the power of the government to affect those rights. Although this conflict often appears to involve an intra-governmental struggle between the

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9. 291 U.S. 502 (1934).
10. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).
11. *See, e.g.*, McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 S. CT. REV. 34, 42-43 [hereinafter referred to as *McCloskey*].
12. See text accompanying notes 208-12 *infra*.
13. 431 U.S. 494 (1977).
14. 98 S. Ct. 2207 (1978).

legislature and the judiciary, the foundation of the debate is the individuals' right to freedom of life, liberty and the pursuit of happiness.

The concept of substantive due process parallels the social compact theory first enunciated by John Locke in the seventeenth century.[15] This theory conditions the power of government upon its protecting rights inherent in the citizenry and reserved to them when entering into the contract to be governed.[16] This is considered a "natural law" that transcends any written constitution. Indeed, a written constitution is not considered the source of the citizen's rights, but rather merely reinforces them.[17] Natural law principles forbid exercises of the government's police powers that do not serve the public good but instead restrict inherent rights to liberty or property.[18] The Supreme Court acknowledges natural law principles when it applies certain extra-constitutional rights to the liberty and property interests of the fourteenth amendment.[19]

The corollary to the extra-constitutional liberty and property rights vested in the citizenry is the government's police powers to further the public good. As noted by the Court, "the term 'police power' connotes the time tested conceptional limits of public encroachment upon private interests."[20] More specifically, Justice

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15. LOCKE, TWO TREATISES ON CIVIL GOVERNMENT excerpted in SOURCES OF WESTERN CIVILIZATION 95-136 (McGarry ed. 1963).
16. The inherent right thought by Locke to be most deserving of protection was the preservation of property. *Id.* at Book II § 124, cited in Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment,* 18 CALIF. L. REV. 583, 588 (1930) [hereinafter referred to as *Howe*].
17. See Henry v. Dubuque & P. R.R. Co., 10 Iowa 540, 544 (1860) ("To be . . . protected [in the use and enjoyment of property] and thus secure . . . is a right inalienable, a right which a written constitution may recognize or declare, but which existed independently of and before such recognition, and which no government can destroy.").
18. *See generally* T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE UNION (1868); Corwin, *The "Higher Law" Background of American Constitutional Law,* 42 HARV. L. REV. 149, 365 (1928-29) [hereinafter referred to as *Corwin*]; Grant, *The Natural Law Background of Due Process,* 31 COLUM. L. REV. 56 (1931); *Howe, supra* note 16. Opposed to the natural law concept of inherent rights was the theory that the citizenry surrendered its inherent rights to government upon the adoption of a constitution. See Vanhorn's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 310 (1795) ("The preservation of property . . . is a primary object of the social compact, and, by the late constitution of Pennsylvania, was made a fundamental law.").
19. *See, e.g.,* Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977). The Justices disagreed as to whether the right implicated in *Moore,* that of an extended family to live together, rested in the liberty interest or the property interest. *Compare* Justices Powell's and Marshall's opinions, *Id.* at 494; 506 *with* Justice Stevens's opinion. *Id.* at 513. During the *Lochner* era, the Court generally focused on the inherent right of liberty to contract, which it held came within the liberty interest. Prior to the fourteenth amendment's adoption, the Court focused on the right to enjoy one's property interests. Notwithstanding Stevens's opinion in *Moore,* the Court continues to focus on the liberty interest. *See, e.g.,* Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113 (1973).
20. Goldblatt v. Town of Hempstead, New York, 369 U.S. 590, 594 (1962).

Taney defined the police powers of government inherent in every sovereignty "as the power to govern men and things within the limits of its dominion."[21]

Because the rights inherent in the citizenry are not absolute,[22] and because the very existence of government implies a power to govern, the Court is required to balance the respective interests involved when there is a conflict. During the period when substantive due process was a viable and vital theory, the following question was posed by the Court:

> Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual . . .?[23]

The cornerstone of the mode of review suggested by the question quoted above was "reasonable." An unreasonable exercise of the police powers was labeled a deprivation of due process that was prohibited by the Constitution.[24]

The substantive due process review originally applied by the Court to ascertain the reasonableness *vel non* of legislation involved a two-step scrutiny of the objectives or ends sought to be obtained by the legislation and the means employed to achieve the ends.[25] This analytical process clearly focused on the reasonableness factor; the nature of the right implicated by the legislation was expounded on by the Court but did not actually form the basis for decision.

When using the first step of the analysis during the *Lochner* era, the Court generally closely scrutinized the legislative objectives to determine if they truly comported with the Court's vision of what would further the public good.[26] Although the Court acknowledged the legislature's power to enact legislation promoting the public health, safety, morals and general welfare, it maintained that the due process clause empowered it to serve as the final arbiter of

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21. Thurlow v. Massachusetts, 46 U.S. (5 How.) 504, 583 (1847). *See also* E. FREUND, THE POLICE POWER, PUBLIC POLICY AND CONSTITUTIONAL RIGHTS iii (1904) ("[T]he power of promoting the public welfare by restraining and regulating the use of liberty and property.").
22. *See* Charles Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522, 534 (1923), in which the Court declared:

> While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances.

23. Lochner v. New York, 198 U.S. 45, 56 (1905).
24. *See, e.g.,* Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897).
25. Perry, *Substantive Due Process Revisited: Reflections on (And Beyond) Recent Cases,* 71 NW. U.L. REV. 417, 422 (1977).
26. *See Howe, supra* note 16, at 588-89. In *Lochner,* the Court invalidated a New York law limiting bakers' work week to 60 hours because, *inter alia,* the interests of the public were not "in the slightest degree affected." 198 U.S. at 57.

whether the public good would be served by the objective sought to be attained by the legislation.[27] If the Court's view of the public good conflicted with that of the legislature, the Court invalidated the legislation as an arbitrary and capricious exercise of governmental power, which, when measured against the protected right, was infirm under the Constitution.[28]

The second step formerly taken by the Court under substantive due process review required that the means be reasonably related to the desired objectives of the legislation.[29] Moreover, even if there was some relationship between the means and the end, unduly restrictive means in light of other possible or existing measures were held to be a deprivation of due process.[30] During the *Lochner* era, the burden of showing that the means related to the end was not insurmountable, and the Court could be persuaded that the public good was served by legislation that the Court normally would have invalidated.[31]

The limitation of substantive due process review begun in *Nebbia* was in large part a revolt by the members of the Court against imposing their personal views as to which legislative objectives served the public good. Although the Court rhetorically continued to apply the principle that the objectives of governmental power had to be reasonable and in the public interest, the Court absolutely deferred to the legislatures' determination of what objectives were desirable and therefore reasonable. Similarly, although the Court in *Moore* applied the second step of the former mode of review, the end-means test, the opinion in *Exxon Corp.* ended its application, except where legislation implicated a fundamental right.

Moore, the first decision in forty years to invalidate state legislation solely on substantive due process grounds, did not actually address the issue of proper legislative objectives, except to

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27. In determining what constituted the public good, the Court apparently was guided by the theory of Social Darwinism as advocated by Herbert Spencer. See R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 1860-1915 (1945). The Court was seemingly so enamored with the theories of Mr. Spencer that Justice Holmes, a frequent dissenter during the *Lochner* era, believed it necessary to admonish his fellow justices that the fourteenth amendment "does not enact Mr. Herbert Spencer's Social Statistics." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).
28. Lochner v. New York, 198 U.S. at 53-56.
29. *See, e.g.,* Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937) (regulations requiring natural gas producers to prorate the production of gas were invalid because the means, proration, bore no reasonable relation to the ends, prevention of waste and protection of correlative rights). *Cf.* Roe v. Wade, 410 U.S. 113 (1973) (state cannot prohibit abortions during the first trimester of pregnancy as it bears no reasonable relation to protection of the mother's life).
30. *See, e.g.,* Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937); Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926). *See also* Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977).
31. *See, e.g.,* Muller v. Oregon, 208 U.S. 412 (1908), but compare with Adkins v. Children's Hosp., 261 U.S. 525 (1923).

hold that they were not reasonably served by the ordinance in question. The Court in *Moore* concentrated on the right allegedly infringed upon rather than on the reasonableness *vel non* of the legislation. The Court now pays scant attention to the reasonableness of legislation unless a governmental interest is sufficiently important to require balancing with the right of the individual.[32]

Whereas reasonable legislation was the focal point under original substantive due process analysis, the Court now focuses on the nature of the right that is claimed to be abridged by an exercise of the police powers. The question of the reasonableness *vel non* of legislation has lost any relevance except where a fundamental right is at issue. Generally, those guarantees in the Bill of Rights are considered so fundamental as to be encompassed by the liberty interest of the due process clause. In addition, the Court recognizes the rights to privacy and sanctity of the family as fundamental enough to American values to be within the ambit of the liberty interest of the due process clause.[33]

Once a right is found to be fundamental enough to be part of constitutionally protected liberty, the Court then closely scrutinizes the legislation allegedly impugning the right. If the Court rejects the right as not being within the liberty interest, then there is no meaningful review of legislation. Even the most unreasonable legislation apparently does not violate the due process clause under "new" substantive due process review unless the right abridged is considered by the Court to be fundamental so as to be within the liberty interest of the due process clause.

II. THE ROOTS OF SUBSTANTIVE DUE PROCESS

The concept of due process of law originated[34] in the clause of the Magna Charta that provided,

> [n]o free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed, or exiled, or in any manner destroyed, nor shall we go upon him, nor shall we send upon him, except by a legal judgment of his peers or by the law of the land.[35]

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32. *Cf.* Roe v. Wade, 410 U.S. 113 (1973) (balancing the state's interest in mothers' health and in fetuses against the mothers' interest in securing an abortion).
33. *See* text accompanying notes 208–12, 218 *infra*.
34. Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 276 (1855).
35. MAGNA CHARTA Ch. 29, quoted in *Corwin, supra* note 18, at 177. A debate has always surrounded the Magna Charta as to whether it was a tribute to human rights or merely a grant of feudal privilege inimical to popular liberties. W. Brockelbank, *The Role of Due Process in American Constitutional Law*, 39 CORNELL L.Q. 561, 561–65 (1954) [hereinafter referred to as *Brockelbank*].

The concept was reiterated approximately 100 years later in Chapter 3 of 28 Edward III:

> No man of what state or condition he be, shall be put out of his land or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law.[36]

Coke stated that the phrases "law of the land" and "due process of law" were synonymous.[37]

Convincing arguments have been set forth that the phrases "due process of law" or "law of the land" refer only to procedures that must be followed in judicial proceedings.[38] A plain reading of either in the context of the English statutes quoted above certainly gives added credence to those arguments. The Supreme Court's recent application of the due process clause in *Moore,* however, affirms that such discussions are entirely academic. *Moore* clearly establishes that due process refers to both the manner and the substance of government action. The historical transformation from procedure to both procedure *and* substance is evidence of the Supreme Court's struggle to limit state infringement of certain liberty or property rights that were considered to be inherent in every citizen of the country, albeit not expressly contained in the Constitution.

Although there is some evidence that this problem was considered by the Framers,[39] the Court first addressed the issue of extra-constitutional limitation on the states' police powers in the *seriatim* opinions in *Calder v. Bull.*[40] In that case, the Connecticut legislature had passed a law setting aside a probate decree that had denied recordation of a will. A second probate hearing was held that approved the will and entered it into the probate record. The plaintiffs, who would have shared in the decedent's estate had the will been set aside, brought suit claiming that the Connecticut statute was an *ex post facto* law and, therefore, prohibited by the Constitution.[41]

The Court upheld the Connecticut statute, holding that the *ex post facto* clause of the Constitution applied only to criminal laws enacted by the states. A disagreement among members of the Court with regard to natural law concepts of rights and implied limits on

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36. 28 Edw. III c. 3 (1335) quoted in Corwin, *The Doctrine of Due Process of Law Before the Civil War,* 24 HARV. L. REV. 366, 368 (1911).
37. 2 EDWARD COKE'S INSTITUTES 56, quoted in Hurtado v. California, 110 U.S. 516, 524 (1884). There has been some controversy as to the accuracy of Coke's pronouncement, but as noted by one commentator, "Coke's mistakes, it is said, *are* the common law." *Brockelbank, supra* note 35, at 562 (emphasis in original).
38. *See, e.g.,* BERGER, *supra* note 1, at 195-214.
39. *Id.* at 300-11.
40. 3 U.S. (3 Dall.) 386 (1798).
41. *Id.* at 386-87.

government power was evident, however, in the opinions of Justices Chase and Iredell.[42] Justice Chase opined that the state legislature should not be considered omnipotent:

> [A]lthough its authority [is] not . . . expressly restrained by the constitution, or fundamental law of the state. . . . The purposes for which men enter into society . . . are the foundation of the legislative power, [and] they will decide what are the proper objects of it. The nature, and ends of legislative power will limit the exercise of it.[43]

Justice Chase further noted that "a law that takes property from A and gives it to B" violates a person's rights under the social compact.[44] "It is against all reason and justice, for a people to intrust a Legislature with such powers . . ." and would be "political heresy" to permit the legislature such powers.[45]

Thus, Justice Chase perceived that the legislature in making the laws was bound by principles of natural law set forth in the social compact that inherently limited the power of the legislature. Justice Iredell, on the other hand, was concerned with the jurisdiction of the Court to invalidate legislative measures:

> If, then, a government, composed of legislative, executive and judicial departments, were established by a Constitution which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void. It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government any court of justice would possess a power to declare it so.[46]

Presaging the post-*Nebbia* era, Justice Iredell declared that the courts cannot pronounce a state statute void merely because "in their judgment, [it is] contrary to the principles of natural justice."[47]

Out of the theory espoused by Justice Chase in *Calder* emerged the judicial doctrine of vested rights.[48] Chief Justice Marshall, who

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42. *Id.* at 386-95; 398-400.
43. *Id.* at 388.
44. *Id.*
45. *Id.* Justice Chase found, however, that the Connecticut statute was not excessive and did not "take property from A. and give it to B." because the plaintiffs possessed no vested rights as a result of the invalidation of the will.
46. *Id.* at 398. Justice Iredell subsequently in his opinion recognizes that any act of a legislature violative of a constitutional provision is "unquestionably void." *Id.* at 399.
47. *Id.* at 399.
48. *Howe, supra* note 16, at 590. The doctrine of vested rights prohibits the legislature from depriving an individual of a right that has vested under existing law. *Id.*

had not participated in *Calder,* wrote the opinion in *Fletcher v. Peck*[49] in 1810 and engrafted the doctrine of vested rights onto the obligation of contract clause in the Constitution.[50] In *Fletcher,* the Court set aside a Georgia statute that attempted to cancel a series of land sales to private purchasers. Chief Justice Marshall stated that the Georgia legislature was prevented from depriving the plaintiffs of vested rights "either by general principles, which are common to our free institutions, or by the particular provisions of the constitution of the United States. . . ."[51]

The idea of extra-constitutional limitations on state power pursuant to natural law continued to appear in decisions issued by the Court[52] after *Fletcher.* The Court, however, generally employed the obligation of contract clause and the doctrine of vested rights to restrain excesses of legislative power.[53] The most illustrious of the obligation of contract clause cases was *Trustees of Dartmouth College v. Woodward,*[54] decided in 1819, in which the Court invalidated three New Hampshire legislative acts altering the charter of Dartmouth College.[55] The Court held that the charter, which had been granted by the King of England in 1769, was a contract that had not been dissolved as a result of the Revolution. As such, any legislation attempting to alter the charter impaired vested rights protected by the obligation of contract clause in the Constitution.[56]

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49. 10 U.S. (6 Cranch) 87 (1810).
50. U.S. CONST. art. I, § 10.
51. 10 U.S. (6 Cranch) at 139. *But see* BERGER, *supra* note 1, at 253, citing Frankfurter, *John Marshall and the Judicial Function,* 69 HARV. L. REV. 217, 225 (1955) (Marshall's occasional references to natural law were "'literary garniture . . . and not a guiding means for adjudication.'"). Although Justice Marshall might have been unsure about the source of limitation which estopped the Georgia legislature, Justice Johnson, in a concurring opinion, stated, "I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity." 10 U.S. (6 Cranch) at 143 (Johnson, J., concurring).
52. *See, e.g.,* Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815). The Court had before it a Virginia statute which attempted to divest the Episcopal Church of its property in that state. Justice Story, writing for a majority of the Court, stated that a legislature cannot repeal a legislative grant of the right to hold property based "upon the principles of natural justice, upon the fundamental laws of every free government, [and] upon the spirit and letter of the Constitution . . . ." *Id.* at 52. *Accord,* Wilkinson v. Leland, 27 U.S. (2 Pet.) 627 (1829). *See also* Grant, *The Natural Law Background of Due Process,* 31 COLUM L. REV. 56, 60–65 (1931).
53. *See generally* Hale, *The Supreme Court and the Contract Clause,* 57 HARV. L. REV. 352 (1944), cited in Allied Structural Steel Co. v. Spannaus, 98 S. Ct. 2716 (1978).
54. 17 U.S. (4 Wheat) 518 (1819).
55. The legislature sought, *inter alia,* to increase the number of trustees, to grant the governor of the state the power to appoint the additional trustees and to create a board of overseers. *Id.* at 626.
56. Professor Grant, in his article on the natural law background of the due process clause, strenuously argued that, although the *Dartmouth College* case on its face did not rest on natural law considerations, this was the actual basis for decision. 31 COLUM. L. REV. at 61-63.

Thus, the Court, uncomfortable with a pure application of natural law as a limitation on legislative power, employed the obligation of contract clause to the same end.[57] The obligation of contract clause, however, proved to be just as untrustworthy as the application of natural law, and often led to strained decisions by the Court.[58] In addition, the obligation of contract clause provided no protection against excessive legislative power affecting prospective uses of property.[59]

While the Supreme Court relied upon the obligation of contract clause to limit legislative powers, the state courts, led by the Supreme Court of North Carolina in 1804 in *Trustees of the University of North Carolina v. Foy*,[60] had discovered that the due process or law of the land clauses in their state constitutions could serve the same ends.[61] The North Carolina legislature had enacted a law repealing an earlier land grant to the university. The *Foy* court, relying in part on the law of the land clause contained in the state constitution stated,

> [the law of the land clause] seems to us to warrant a belief that members of a corporation as well as individuals shall not be deprived of their liberties or properties unless by a trial by jury in a court of justice, according to the known and established rules of decision derived from the common law and such acts of the Legislature as are consistent with the Constitution.[62]

Similarly, in *Hoke v. Henderson*,[63] decided in 1833, the Supreme Court of North Carolina held that a person's interest in remaining in

57. *See Howe, supra* note 16, at 594. The various state courts divided on whether the principles of natural law limited the legislative power, or whether a specific constitutional limitation was necessary. *Compare* Menges v. Wertman, 1 Pa. 218 (1845) *with* Regents of the University of Maryland v. Williams, 9 Md. (G. & J.) 365 (1838). Last Term, in Allied Structural Steel Co. v. Spannaus, 98 S. Ct. 2716 (1978), the Court noted that the obligation of contact clause was "perhaps the strongest single constitutional check on state legislation during our early years as a Nation . . . ." *Id.* at 2721.
58. This was recognized by Justice Johnson in his note to Satterlee v. Mathewson, 27 U.S. (2 Pet.) 380, 681, 686 (1829). He further recognized that the problem could have been avoided if the Court in *Calder* had not confined the *ex post facto* clause to criminal law. *Id.* The obligation of contract clause was also limited in Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 36 U.S. (11 Pet.) 419 (1837), which held that ambiguities in the contract were to be resolved in favor of the legislative will of the people.
59. Ogden v. Saunders, 25 U.S. (12 Wheat) 213 (1827).
60. 5 N.C. (2 Hayw.) 57 (1804).
61. Another theory touched upon by the courts in the early years after the revolution was use of the separation of powers and vested rights doctrines to limit the power of the legislature. *Howe, supra* note 16, at 594-96. Under that theory, the scope of the legislative power is limited to laws that prescribe for the future. As the legislature is only possessed of legislative power, any laws affecting vested rights were impermissible exercises of power as that was within the jurisdiction of the judiciary. *Id.* at 594.
62. 5 N.C. at 63. *Accord,* Allen v. Peden, 4 N.C. (2 Hayw.) 442 (1816).
63. 15 N.C. (2 Dev.) 1 (1833).

public office was a property right and a statute that arbitrarily forced his removal from that office violated the law of the land clause in its state's constitution.

In 1843, the Court of Appeals of New York invalidated a statute permitting the eminent domain power of the state to be used to allow a private individual to construct a private road across the land of another.[64] The court specifically employed the due process clause contained in the New York constitution, and relying on the North Carolina decision in *Hoke,* declared that it prevented extra-judicial forfeiture of property.[65]

The "locus classicus" of substantive due process[66] was the New York court's decision in 1856 in *Wynehamer v. New York.*[67] The court in *Wynehamer* rejected Justice Chase's view in *Calder* that principles of natural justice provided authority for the judiciary to strike down legislation that the court believed was an excessive exercise of the police powers.[68] The statute in *Wynehamer* forbade the storage or sale of intoxicating beverages except for medicinal purposes. The court looked to the due process clause of its state's constitution and held that insofar as the citizens of New York had vested rights in liquor obtained prior to the passage of the statute, they were deprived of their property without due process. The legislature was thus barred by the due process clause from attempting to destroy vested rights.[69]

III. SUBSTANTIVE DUE PROCESS IN THE SUPREME COURT

A. *Pre-Fourteenth Amendment.*

The concept of due process as protecting extra-constitutional rights from unreasonable exercises of state legislative power was not before the Supreme Court prior to the adoption of the fourteenth amendment.[70] The due process phrase contained in the fifth

64. Taylor v. Porter, 4 Hill 140 (N.Y. 1843).
65. *Id.* at 148. *Accord,* Westervelt v. Gregg, 12 N.Y. 202 (1854).
66. BERGER, *supra* note 1, at 254-255.
67. 13 N.Y. 378 (1856).
68. *Id.* at 391. This was a rejection of abolitionist dogma, which strongly relied on natural law concepts. BERGER, *supra* note 1, at 255.
69. 13 N.Y. at 393. *Accord,* Ex Parte Dorsey, 7 Porter 293 (Ala. 1838); Norman v. Heist, 5 W. & S. 171 (Pa. 1843); State v. Hayward, 3 Rich 389 (S.C. 1832); Van Zant v. Waddell, 2 Yerg. 260 (Tenn. 1814), discussed in Corwin, *The Doctrine of Due Process of Law Before the Civil War,* 24 HARV. L. REV. 366, 382-84 (1911). Additionally and very significantly, the court in *Wynehamer* "enlarged the scope of vested rights to include not only title and possession of the property in question, but also the right to use it in the manner permitted by law at the time it was acquired." *Howe, supra,* note 16, at 602. Substantive due process and the decision in *Wynehamer* were not without critics, however, even then, and were repudiated in part by the New York court in a decision some 10 years later. BERGER, *supra* note 1, at 256. But substantive due process was eventually ardently accepted by that court. *See* In the Matter of Jacobs, 98 N.Y. 98 (1885).
70. See text accompanying note 5 *supra.*

amendment could not be applied as a limitation on state legislative enactments because none of the provisions in the Bill of Rights shielded persons from state action.[71] Due process was not, however, without mention.

In 1855, in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[72] the Supreme Court cast some light on the meaning of due process of law.[73] Although commentators have differed as to whether the Court in *Murray* envisioned due process as a mere procedural guarantee or as a limitation on the legislature,[74] the language of the Court clearly indicates that due process did include a substantive limitation on the reach of legislative power:

> [T]he warrant now in question is legal process, that is not denied. It was issued in conformity with an act of Congress. But is it "due process of law?" The constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law', by its mere will.[75]

Scott v. Sanford,[76] decided two years later, explicitly rested on substantive due process grounds. Writing for the Court, Chief Justice Taney stated that the federal government could exercise no power over the property of a citizen, in this case, slaves, beyond that which the Constitution confers, and that a law depriving a citizen of his vested property rights was beyond the power of the Congress and violative of due process of law.[77] Thus, there was a precedent in the Supreme Court for the use of the due process clause to limit legislative exercises of power that infringed upon extra-constitutional liberty or property rights.

B. Post-Fourteenth Amendment.

With the adoption of the fourteenth amendment, the Court began to review infringements on property rights in the context of the due process clause rather than in the context of the obligation of

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71. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833).
72. 59 U.S. (18 How.) 272 (1855).
73. *Id.* at 276-77. The Court stated that "due process of law" was synonymous with the phrase "by the law of the land" contained in the Magna Charta.
74. *Compare* BERGER, *supra* note 1, at 256 n.33; *with Howe, supra* note 16, at 584-85.
75. 59 U.S. (18 How.) at 276.
76. 60 U.S. (19 How.) 393 (1857).
77. *Id.* at 447-50.

contract clause.[78] The early cases examined whether the due process clause expanded the Court's jurisdiction to review the substance of state legislative action. The parameters of the liberty and/or property rights protected by the clause were not subjected to close scrutiny.

1. Slaughter-House Cases

The initial foray into defining the provisions of the fourteenth amendment came in 1873 in the *Slaughter-House Cases.*[79] There, the Court was faced with a fourteenth amendment attack on a Louisiana law that granted a private corporation an exclusive monopoly to operate slaughterhouses in the New Orleans area. Justice Miller wrote the opinion for the Court and narrowly interpreted the provisions of the fourteenth amendment.[80] With regard to the due process clause, he noted that although the argument had not been pressed,

> it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed . . . upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.[81]

Justice Miller went on to say that any other construction would "constitute this court a perpetual censor upon all legislation of the States."[82]

Thus, Justice Miller refused to employ the due process clause as a grant of jurisdiction to the Court to protect the free use of existing and vested property rights against the exercise of state police powers. Although his analysis of the due process clause was brief, it

78. Allied Structural Steel Co. v. Spannaus, 98 S. Ct. 2716, 2721 (1978).
79. 83 U.S. (16 Wall.) 36 (1872).
80. Regarding the privileges and immunities clause, the Court held that it was intended only to guarantee certain rights of national citizenship and did not protect a corporation against a state law that created a monopoly. *Id.* at 75-80. *See* BERGER, *supra* note 1, at 37-51. The equal protection clause was limited to racial discrimination. 83 U.S. (16 Wall.) at 81. While Justice Miller's construction of the equal protection clause has not stood the test of time, his limited interpretation of the privileges and immunities of a United States citizen continues to be the test employed by the Court. *See* Madden v. Kentucky, 309 U.S. 83 (1940).
81. 83 U.S. (16 Wall.) at 80. Justice Miller's opinion can be read as a continuation of Justice Iredell's theory in *Calder* that natural law concepts regarding the limitation of government power should not be a basis for constitutional adjudication. Justice Miller, however, was by no means clear on that subject and his position often vacillated. *Compare* Hepburn v. Griswald, 75 U.S. (8 Wall.) 603, 638 (1869) (Miller, J., dissenting) *with* Gelpcke v. Dubuque, 68 U.S. (1 Wall.) 175, 207 (1864) (Miller, J., dissenting) *and* Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874).
82. 83 U.S. (16 Wall.) at 78.

may be observed that he rejected the concept of extra-constitutional rights as being included within the liberty or property interests as well as the view that the Court was empowered to use due process as a limitation upon the content of legislation.

Just as Justice Miller's opinion may be traced to Justice Iredell's comments in *Calder* that the legislative powers of the state were not subject to judicial veto, Justices Bradley's and Field's dissents in *Slaughter-House* evolved out of Justice Chase's opinion in *Calder* that natural law limited the legislative power.[83] Justice Bradley stated that "the right of any citizen to follow whatever lawful employment he chooses to adopt . . . is one of his most valuable rights, and one which the Legislature of a State cannot invade, whether restrained by its own constitution or not."[84] Justice Bradley further stated that the right to choose a lawful employment was "a portion of . . . liberty," and the right to continue in an occupation already chosen was within a citizen's property interest.[85] Therefore, the Louisiana law, he believed, deprived the butchers of their liberty and property, and the deprivations were without due process of law because the objective of the statute, a state created monopoly, went beyond the permissible purpose of the state's police power by benefiting one citizen at the expense of another.[86]

The thrust of the majority opinion in *Slaughter-House* was that the fourteenth amendment placed no additional restrictions upon the states' police power other than those that existed prior to the amendment's adoption.[87] The case retarded the use of the due process clause as the means by which to review the content of legislation.[88]

2. Post-*Slaughter-House*

The year after *Slaughter-House* Justice Miller wrote the opinion for the Court in *Loan Association v. Topeka*.[89] In that case, the Court construed a Kansas statute that permitted the city to issue bonds aiding private enterprises, thereby implying a power to tax to

83. *Id.* at 111.
84. *Id.* at 113-14.
85. *Id.* at 122.
86. Justice Field in his dissent took the view that the due process clause was intended to "give practical effect to the declaration of 1776 of inalienable rights . . . ." *Id.* at 105.
87. Butchers' Union v. Crescent City, 111 U.S. 746, 747 (1884).
88. The Court continued in other cases, however, to recognize the principle that there are inherent limitations on the legislative power. Thus, in Cole v. La Grange, 113 U.S. 1 (1885); Parkersburg v. Brown, 106 U.S. 487 (1882); and Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874), the Court, without defining the origin of the limitation, invalidated various statutes on the grounds that they violated fundamental rights, which exceeded the proper scope of legislative power. *See* Grant, *The Natural Law Background of Due Process*, 31 COLUM. L. REV. 56, 63-65 (1931).
89. 87 U.S. (20 Wall.) 655 (1874).

pay off the bonds. The plaintiffs in *Loan Association* argued that the state legislature exceeded its state constitutional authority by permitting taxation aiding private citizens at the expense of other private citizens.

The Court agreed, noting that "[t]he theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers."[90] The Court held that a law that furthered only the interests of private citizens went beyond the proper scope of the legislative power. Therefore, any tax levied by the state had to be imposed for a public purpose and not to benefit the interests of a few.[91]

It must have been difficult for attorneys of the time to distinguish *Slaughter-House* and *Loan Association.* Although they were decided only one year apart, one case upheld a law benefiting one group of private citizens at the expense of another group, while the other case invalidated such an attempt.

Justice Miller addressed the apparent paradox in 1877 in *Davidson v. New Orleans.*[92] In that case, the legislation subjected to review had assessed the plaintiff for the drainage of privately owned swamp land that was contiguous to his property. The plaintiff argued that this assessment deprived him of his property rights without due process of law in violation of the fourteenth amendment.[93] The Court accepted the proposition that the plaintiff had been deprived of a property right,[94] but refused to recognize that the due process clause empowered the Court to remedy a deprivation that was visited upon the plaintiff as the result of the substance of state legislation. Justice Miller noted, however, that if the Court "were sitting in review of a Circuit Court of the United States, as [it was] in the *Loan Association v. Topeka* case," it could take cognizance of the deprivation of property rights.[95] The decision in *Loan Association* was based on "federal common law,"[96] which

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90. *Id.* at 663.
91. *Id.* at 664-66.
92. 96 U.S. 97 (1877).
93. *Id.* at 100.
94. Justice Miller analogized the plaintiff's position in *Davidson* to the hypothetical one voiced by Justice Chase many years before in *Calder*:

> It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law.

Id. at 102.
95. *Id.* at 105.
96. Prior to the decision in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), the Court employed principles of what was termed "federal common law" to decide cases in which the basis for invoking federal jurisdiction was diversity of citizenship. *Erie,* decided within the same period as when the Court was retreating from substantive due process analysis, held that the federal courts must use state laws in diversity cases.

protected extra-constitutional liberty or property rights against the reach of state legislation. *Davidson* and *Slaughter-House,* however, involved interpretations of what constituted the due process required by the fourteenth amendment. The due process clause implicated the relationship between the federal judiciary and the states; federal common law had no such effect.

The Court further distinguished due process from federal common law in deciding the question of whether due process mandated that the state must compensate a person for the deprivation of his property for a public use.[97] Six years before *Davidson,* the Court had ruled in *Pumpelly v. Green Bay Co.*[98] that "a clear principle of natural equity" required that the state compensate those whose property was taken for a public use.[99] In *Davidson,* however, the Court held that the requirement of just compensation was not part of the due process owed by the state to its citizens.[100]

Justice Bradley, although concurring in the result in *Davidson,*[101] continued to take issue with Justice Miller's narrow view of the due process clause. Justice Miller believed that even if a deprivation of property had occurred, the plaintiff had received due process of law as a result of state judicial proceedings.[102] Justice Bradley remarked, however, that property may be taken without due process in ways other than by "direct [legislative] enactment or the want of judicial proceeding."[103] He believed that the Court was entitled pursuant to that provision, "not only to see that there is some process of law, but 'due process of law,' provided by the State law when a citizen is deprived of his property. . . . [I]n judging what

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97. The plaintiff relied on the just compensation clause contained in the fifth amendment. U.S. CONST. amend. V, cl. 5 ("[N]or shall private property be taken for public use, without just compensation.").
98. 80 U.S. (13 Wall.) 166 (1871).
99. *Id.* at 179. The Court eventually changed its position and ruled that due process requires just compensation when the state exercises its power of eminent domain. Chicago, B. & Q. R.R. Co. v. Chicago, 166 U.S. 226 (1897); Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. 403 (1896). *See generally* Grant, *The Natural Law Background of Due Process,* 31 COLUM. L. REV. 56, 71-80 (1931).
100. 96 U.S. at 105 ("[I]t must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment . . . was left out."). This reasoning was to be applied later in Hurtado v. California, 110 U.S. 516 (1884), which held that due process did not include the right to a grand jury indictment.
101. 96 U.S. at 107 (Bradley, J., concurring).
102. As stated by Justice Miller:

> [I]t is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case.

96 U.S. at 105. Justice Miller relied, *inter alia,* on Kennard v. Louisiana, 92 U.S. 480 (1876), a case in which the Court held that a statute providing for judicial review in the event of an election contest afforded the parties due process of law.
103. *Id.* at 107.

is 'due process of law,' *respect must be had to the cause and object of the taking . . . .*"[104]

Despite the Court's refusal to accept due process as a limitation on the reach of the police powers in *Slaughter-House* and *Davidson,* litigants strenuously urged the Court to adopt due process as a means by which to apply the natural law theory discussed above [105] of inherent limitations on the legislative power.[106] In *Davidson,* Justice Miller noted with disapproval the multitude of cases filed in the Court alleging due process deprivations.[107] As the composition of the Court began to change, however, the Court gradually expanded its view of the scope of due process.

In 1877, in *Munn v. Illinois,*[108] the Court upheld state legislation that regulated rates charged by grain elevator operators. Although deferring to the legislative determination of rates, the Court conditioned the state's power to regulate grain elevator operators' property rights on its being in furtherance of the public good.[109]

Ten years later, the Court expressly announced its intention to begin reviewing the content of state legislation in *Mugler v. Kansas.*[110] The issue before the Court in *Mugler* was the constitutionality of a Kansas criminal statute and constitutional provision that prohibited the manufacture and sale of intoxicating liquors. The defendant, who had been convicted under the statute, argued that his rights to manufacture and sell food and drink were fundamental liberty rights, and the right to continue to use his property for those purposes was a fundamental property right. The Court upheld the defendant's conviction, agreeing with the legislative judgment that intoxicating liquor was inimical to the public welfare, and therefore a proper end of the state's police powers.[111] The Court made clear, however, that it did not consider itself constrained to defer blindly to any judgment made by the legislature:

> There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute . . . the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed . . . . The courts are not bound by mere forms, nor are they to be misled by mere

104. *Id.* at 107 (emphasis added). Justice Bradley went on to declare that if the taking was "arbitrary, oppressive and unjust," there occurred a deprivation of due process. *Id.*
105. See text accompanying notes 15-821 *supra.*
106. See G. GUNTHER, CONSTITUTIONAL LAW: CASES & MATERIALS 553 (9th ed. 1975).
107. 96 U.S. at 104.
108. 94 U.S. 113 (1877).
109. *Id.* at 134-35.
110. 123 U.S. 623 (1887).
111. *Id.* at 661-63.

> pretenses. They are at liberty — indeed, are under a solemn duty — to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution.[112]

In the *Railroad Commission Cases,*[113] the Court, although again upholding rate regulations, warned that there was a limit to legislative regulation and that "the power to regulate is not a power to destroy."[114] In *Chicago M. & St. P. Ry. v. Minnesota,*[115] the Court invalidated rates set by a state rate commission, holding that the reasonableness of the rate was a question for the judiciary.[116] Finally, by 1898, the Court established a formula by which the judiciary could judge the reasonableness of rates set by the states.[117]

Thus, after *Slaughter-House,* the Court came to acknowledge that due process constituted a substantive guarantee against unreasonable regulation.[118] This coincided with the emerging socio-economic forces culminating in the excesses of the *Lochner* era.

C. *The Adoption Of Substantive Due Process*

1. Doctrine

Along with the continuing advocacy by the bar that due process included a substantive guarantee against unreasonable legislation,

112. *Id.* at 661. Justice Harlan, who wrote the opinion in *Mugler,* in the next Term wrote the opinion in Powell v. Pennsylvania, 127 U.S. 678 (1888). In *Powell,* the Court upheld a Pennsylvania statute that made it a crime to manufacture or sell products made of an oleaginous substance to take the place of butter or cheese produced from unadulterated milk or cream. The defendant attempted to introduce evidence showing that the prohibited product was wholesome and not dangerous to the public. *Id.* 681-82. The Court upheld the exclusion of the evidence, stating that the question whether oleomargarine was so dangerous to the public health so as to justify prohibition as opposed to regulation was for the legislature. *Id.* at 685-87. This, of course, was a substantial retreat from his position in *Mugler.*
113. 116 U.S. 307 (1886).
114. *Id.* at 331.
115. 134 U.S. 418 (1891).
116. In Budd v. New York, 143 U.S. 517, 546 (1892), the Court diluted this holding somewhat by ruling that it could review rates set by a commission but not by the legislature.
117. Smyth v. Ames, 169 U.S. 466 (1898). The formula required that the intrastate rate be fair to the railroad and the public.
118. Although the case did not reach the constitutional issue of due process of law, a significant decision during this period was Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1886), in which the Court stated that a corporation was a "person" within the meaning of the due process clause. This case was argued by Roscoe Conklin, one of the drafters of the fourteenth amendment. *Brockelbank, supra* note 35, at 568 n.35.

Social Darwinism, as advanced by Herbert Spencer, began to influence the Court at the end of the nineteenth century.[119] Social Darwinism, rooted in Darwin's theory of survival of the fittest in a natural setting, stressed individualism and discouraged government regulation.[120] This theory coincided with Adam Smith's economic doctrine of *laissez faire,* and together, they formed a doctrinal basis for the theory that open competition, free from government control, would best advance the interests of the rapidly expanding economy.[121]

These social and economic theories were thought to embody what was in the public good. A law that subjected the individual to government regulation was deemed inimical to the public good, unless special circumstances were shown, such as through the Brandeis brief, establishing through extra-judicial sources that *laissez faire* was not in the public's best interest.[122] Judicial application of these socio-economic theories became known as substantive economic due process.

Prior to the adoption of substantive economic due process, the majority of the Court disagreed with either Locke's theory of inherent limitations on the legislative power or Spencer's sociology or both. In *Powell v. Pennsylvania,*[123] for example, the Court held that a statutory scheme prohibiting persons from engaging in what had previously been a lawful business did not infringe upon a fundamental constitutional right protected by the fourteenth amendment, and was not cognizable of remedy by the Court. This conflicted with Locke's theory that natural law granted the right to make use of one's property, thereby limiting the exercise of government power. It also conflicted with Smith's and Spencer's theories that permitting the individual freely to function in the marketplace is in the best interests of society. The mating of these socio-economic theories with the legal theories relating to the meaning of due process brought about the birth of substantive economic due process.

2. Adoption

The case generally recognized as the first to apply substantive economic due process was *Allgeyer v. Louisiana.*[124] The Louisiana legislature had enacted a statute that made unlawful the issuance of marine insurance by anyone who did not comply with various

119. See note 27 *supra.*
120. *Id.*
121. *See generally* S. FINE, LAISSEZ FAIRE AND THE GENERAL WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT (1956); R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 1860-1915 (1945).
122. *See* Muller v. Oregon, 208 U.S. 412 (1908).
123. 127 U.S. 678 (1888). See note 112 *supra.*
124. 165 U.S. 578 (1897).

statutory prerequisites. To secure insurance from such an issuer was also a violation of the law. The violation of the statute alleged in *Allgeyer* was the sending of a letter through the mail notifying an out-of-state insurer that an extant insurance policy would attach to certain specified bales of cotton.[125] The Supreme Court of Louisiana had affirmed the convictions, ruling that the act of writing the letter of notification in the state was done to effect a policy of marine insurance in violation of the statute.[126]

The Supreme Court reversed the Louisiana court, holding that the statute was a violation of the Constitution and "afforded no justification for the judgment" against the defendant.[127] Focusing on the fundamental right that the law violated, the Court stated,

> The liberty mentioned in [the fourteenth] amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[128]

The Court then found that penalizing the defendant for conduct occurring outside the state deprived him of due process of law.

The Court carefully pointed out that the liberty to contract was not an absolute bar against the exercise of the state's police power but must be balanced against the public good served by the legislation. The Court went on to note that "[w]hen and how far such power may be legitimately exercised with regard to these subjects must be left for determination to each case as it arises."[129] But that determination was now clearly within the province of the Court.

The liberty to contract born in *Allgeyer*[130] that would justify the invalidation of unreasonable legislation soon became the standard right recognized by the Supreme Court in the substantive due process area. The leading decision was *Lochner v. New York*.[131] In

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125. *Id.* at 588. The original insurance contract was made outside the state.
126. *Id.* at 589.
127. *Id.* at 593.
128. *Id.* at 589.
129. *Id.* at 590. The Court went on to hold that it was within the state's police powers to regulate the conduct of business within the state, but punishing its citizens for an act arising outside the state must fall in light of the protected liberty interest.
130. The first decision in this country actually to turn on the liberty of contract was Godcharles & Co. v. Wigeman, 113 Pa. St. 431 (1886). *See Strong, supra* note 8, at 425 n.31, citing R. Pound, *Liberty of Contract,* 18 YALE L.J. 454, 455 (1909).
131. 198 U.S. 45 (1905).

Lochner, the statute in question forbade employers from requiring bakery employees to work over sixty hours in one week, or ten hours in one day. First, the Court recognized that the statute interfered with the right of contract enjoyed by the employers and employees and guaranteed by the liberty interest in the fourteenth amendment.[132] Next, the Court found that a statute prescribing maximum hours of labor for bakers was not within the police powers of the state because it did not promote the safety, health, morals and general welfare of the citizens.[133] This view represented a societal judgment based upon the theories of Smith and Spencer.

The Court then articulated the standard that would be employed to invalidate legislation it thought would unreasonably abridge the functioning of the free market:

> It is a question of which of two powers or rights shall prevail, — the power of the State to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.[134]

The Court went on to reiterate its opinion that there was no foundation for the proposition that the statute was "necessary or appropriate" as a health law, because the bakers' trade was not an unhealthy one.[135] The relationship between the statute and the preservation of health was not shown to be "clearly the case," and therefore "the individuals, whose rights are thus made the subject of legislative interference, are under the protection of the Federal Constitution regarding their liberty of contract as well as person . . . ."[136] The Court stated that,

> [i]t is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law.[137]

132. *Id.* at 53.
133. *Id.* at 53-57.
134. *Id.* at 57-58.
135. *Id.* at 58-62.
136. *Id.* at 61.
137. *Id.* at 64.

The opinion in *Lochner* recognized the bakers' liberty to contract, but did not dwell on whether it was a fundamental right. The Court's recognition of the right was secondary to its analysis of whether the legislation was unreasonable. Because it was unreasonable, the legislature had exceeded its powers, which meant that the liberty to contract was deprived without due process of law.

*D. Post-*Lochner *— The Reign Of Substantive Economic Due Process*

Lochner initiated the reign of the due process clause as a limitation on what practices could be regulated by the states and how. Although *Lochner* most definitely possessed social implications, it became the precedent by which economic regulations were invalidated by the Court on the grounds that they were unreasonable and must fail in light of the liberty or property interests involved.[138] In those cases, following the traditional analytical framework discussed above,[139] the Court focused on the nature of the legislative objectives and based its decisions upon whether it agreed with those objectives.[140]

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138. *See, e.g.,* Morehead v. New York *ex rel.* Tipaldo, 298 U.S 587 (1936) (statute forbidding employment of women at an oppressive and unreasonable wage unconstitutional as violative of liberty to contract to obtain terms of employment; state has no power to set minimum wage where no emergency); New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (statute which required an ice company in obtaining a license to show necessity for ice business in location desired was an unreasonable interference with business violative of the liberty to choose an occupation); Williams v. Standard Oil Co. of La., 278 U.S. 235 (1929) (statute fixing prices at which gasoline may be sold was an unconstitutional exercise of the police powers where business is not affected with a public interest); Louis K. Liggett Co. v. Baldridge, 278 U.S. 105 (1928) (statute requiring that a pharmacy be owned by a pharmacist unreasonably interfered with the property right of owning a business); Ribnik v. McBride, 277 U.S. 350 (1928) (although a state may regulate an employment agency, it may not fix the prices charged by it); Fairmont Creamery Co. v. Minnesota, 274 U.S. 1 (1927) (statute requiring manufacturers of milk or cream to purchase milk or cream at the same price from all buyers invalidated because it had no reasonable relation to the anticipated evil of monopoly); Tyson & Brother v. Banton, 273 U.S. 418 (1927) (the right of a theater owner to set the admission price for tickets was a valuable property right, which the state could not violate because the business was not affected with a public interest); Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924) (statute fixing the weight for loaves of bread was an unreasonable interference with business); Charles Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923); (statute requiring employers to pay wages fixed by an industrial court unreasonably deprived individuals of their liberty to contract); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (an Act of Congress fixing a minimum wage that must be paid to women unreasonably infringed upon the right to contract about one's own affairs); Adams v. Tanner, 244 U.S. 590 (1917) (statute forbidding employment agencies destroyed an individual's right to engage in a lawful business and was arbitrary and oppressive); Coppage v. Kansas, 236 U.S. 1 (1915) (statute which prohibited employers from requiring or prohibiting their employees from joining a union as a condition of employment impugned both the employer's and employee's liberty and property interests and did not bear a reasonable relation to the legislative purpose).

139. See text accompanying notes 23-31 *supra.*

140. *See* Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 42-43 (1972).

Although the thought of this era conjures up visions of the Court arbitrarily striking down legislation left and right, more statutes than not survived due process analysis.[141] Of course, this was often the result of the Court's agreement with the legislative purpose, but there were also recognized exceptions to the rules enunciated in *Lochner*. Thus, businesses involving employment particularly injurious to health,[142] or affected with a public interest,[143] or in the throes of an emergency situation[144] were all subject to varying degrees of state or federal regulation. It can be observed that in the Court's view these exceptions only exemplified what was reasonable.

The Court was not without its critics during this era,[145] including those on the Court itself. The laws invalidated were often the states' attempts to solve the problems brought on by the Industrial Revolution or later, the Depression. Dissenters such as Justices Holmes and Brandeis[146] often soundly criticized the majority of the Court for acting as a reactionary force retarding the states' attempts to ameliorate social problems. The dissenters also criticized the majority of the Court for usurping the legislative powers,[147] thus continuing the legal debate of whether due process included the right to be free from unreasonable legislation.

IV. THE DEMISE OF SUBSTANTIVE ECONOMIC DUE PROCESS

In 1929, the stock market crash triggered the Depression, which had a strong impact on the philosophy underpinning the decisions in *Lochner* and its progeny. As discussed previously, proponents of *laissez faire* and Social Darwinism advocated the natural order in the market place, with minimal governmental intrusion.[148] The Depression arguably proved that the natural order led to economic chaos, anarchy, and destruction.[149] The liberty to contract free from governmental regulation threatened the survival of the marketplace. In addition, the ravages of the Depression highlighted the need for governmental protection against a downwardly spiraling economy.

141. *See* G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 565 (9th ed. 1975).
142. *See, e.g.*, Bunting v. Oregon, 243 U.S. 426 (1917) (mills); Holden v. Hardy, 169 U.S. 366 (1898) (coal mines).
143. *See, e.g.*, Wilson v. New, 243 U.S. 332 (1917).
144. *See, e.g.*, Block v. Hirsh, 256 U.S. 135 (1921).
145. *See, e.g.*, Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).
146. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting); New State Ice Co. v. Liebmann, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).
147. These dissents were later drawn upon by the Court as the basis for decisions that rejected the substantive due process era. *See, e.g.*, North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 166-67 (1973).
148. *See* text accompanying notes 119-23 *supra*.
149. *See generally* White, *From Sociological Jurisprudence to Realism*, 58 VA. L. REV. 999 (1872).

The Depression also paved the way for the ascendency of Franklin Roosevelt to the Presidency of the United States. The conservative Court during the *Lochner* era slowly began to change and Roosevelt's more liberal appointees began to dominate the Court.[150] Further, much of Roosevelt's far-reaching New Deal legislation had been struck down by the Court employing the type of analysis exemplified by *Lochner.*[151] Roosevelt responded with the famous Court-packing plan by which to change more rapidly the political complexion of the Court. Arguably, this affected judicial independence.

Along with the differences of opinion regarding the meaning of due process that were always present on the Court during the *Lochner* era,[152] these political and economic forces combined to dissuade the Justices from imposing their predilections on legislative policies. Legally, the Court began to question its constitutional right to sit as a "superlegislature." Practically, the Court questioned its own ability to answer the complex issue of what served the public good.

A. Nebbia

Nebbia v. New York,[153] decided in 1934, marked the beginning of the post-*Lochner* era. New York had established a Milk Control Board with the power to fix retail prices that could be charged for milk. The defendant in *Nebbia* had been convicted of selling milk below the price set by the Board. On appeal, he attacked the constitutionality of the statute and the Board's order that set the price. The Court reviewed the legislative history of the statute, which showed that its purpose was to alleviate instability in an essential industry. In response to the defendant's claim that the statute and order were excesses of the police power, the Court recognized that the defendant's right to use of his property and his liberty of contract were not absolute and must yield in the face of legislation designed to serve the public good.[154]

In reviewing the due process clause, the vehicle of constitutional attack, the Court stated that it required that legislation "not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."[155] The reasonableness of any regulation depended "upon the relevant facts."[156] The Court went on to note that although the Constitution limited the powers of the state, it did not guarantee "the

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150. *McCloskey, supra* note 11, at 42-43.
151. *See, e.g.,* United States v. Butler, 297 U.S. 1 (1936).
152. See text accompanying notes 145-47 *supra.*
153. 291 U.S. 502 (1934).
154. *Id.* at 523-25.
155. *Id.* at 525.
156. *Id.*

unrestricted privilege to engage in a business or to conduct it as one pleases."[157]

After balancing the rights guaranteed by the fourteenth amendment against the legislation affecting them, the Court in *Nebbia* retreated from the *Lochner* era practice of judging whether the objectives of the legislation were proper advancements of the public good. The Court noted that the state was free to adopt whatever economic policy it chose, so long as it "may reasonably be deemed to promote public welfare."[158] "With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal."[159]

The language in *Nebbia* suggests, however, that due process still protected against unreasonable legislation. Laws still could not be arbitrary or capricious, and the Court expressly retained the end-means test. But whatever the language in *Nebbia,* it began, with few exceptions,[160] the deluge of cases that thoroughly rejected the Court's practices during the *Lochner* era.

In 1937, the Court in *West Coast Hotel Co. v. Parrish*[161] overruled one of the leading cases of the *Lochner* era[162] and upheld a statute providing for minimum wages for women. Three years later, *Osborne v. Ozlin*[163] upheld a statute against due process attack that prohibited insurance companies from doing business in the state without a resident agent. Also upheld was a provision that set limits on the compensation that must be paid to the agent. In *Olsen v. Nebraska,*[164] the Court upheld a price fixing statute in the employment agency industry, stating, "[w]e are not concerned . . . with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice that 'should be left where . . . it was left by the Constitution — to the states and to Congress.'"[165] In *Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co.,*[166] the Court stated that under the constitutional doctrine announced in *Nebbia* "the due process clause

157. *Id.* at 527-28.
158. *Id.* at 537.
159. *Id.*
160. *See, e.g.,* Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937); Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936); Treigle v. Acme Homestead Ass'n, 297 U.S. 189 (1936).
161. 300 U.S. 379 (1937). Some commentators select *West Coast Hotel* as the beginning of the demise of substantive economic due process instead of *Nebbia. See, e.g., McCloskey, supra* note 11, at 36-37.
162. Adkins v. Children's Hospital, 261 U.S. 525 (1923). *Moorehead,* decided the year before *West Coast Hotel* but two years after *Nebbia,* had invalidated such legislation.
163. 310 U.S. 53 (1940).
164. 313 U.S. 236 (1941).
165. *Id.* at 246, quoting Ribnik v. McBride, 277 U.S. 350, 375 (1928) (Stone, J., dissenting).
166. 335 U.S. 525 (1949).

is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare."[167]

In 1963 in *Ferguson v. Skrupa*,[168] the Court upheld a statute that prohibited any persons except lawyers from engaging in the business of debt adjustment. The plaintiff in that case was not a lawyer but had been engaged in the business for many years. The lower court found that the statute was an unreasonable regulation of a lawful business. The Supreme Court reversed, stating:

> We conclude that the Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting. Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We refuse to sit as a "superlegislture to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause "to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." Nor are we able or willing to draw lines by calling a law "prohibitory" or "regulatory." Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.[169]

Thus, after the arguably excessive judicial intervention characterizing the *Lochner* era, the Court refused to continue to subject to judicial review legislative determinations regarding the objectives of a statutory scheme. State legislatures were free to identify any aspect of the economy and attempt to regulate it. A state statute intended to regulate economic affairs has not been invalidated by the Supreme Court in over forty years. Unless an aggrieved party could establish that a specific constitutional provision was violated, such as the commerce clause, no relief could be had from legislation that sought to adjust "the burdens and benefits of economic life

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167. *Id.* at 536-37.
168. 372 U.S. 726 (1963).
169. *Id.* at 731-32 (footnotes omitted). *See also* Duke Power Co. v. Carolina Environmental Study Group, Inc., 98 S. Ct. 2620 (1978); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950); Daniel v. Family Security Life Ins. Co., 336 U.S. 220 (1949).

. . . ."[170] In short, the concept that there were any extra-constitutional limitations on the states' police powers pursuant to the due process clause was almost a dead letter. Only the language of the end-means test survived.

B. Exxon Corp. v. Governor of Maryland[171]

Writing in 1962, one commentator, considering the options open to the Court in the 1930's when seeking to abandon substantive economic due process, stated that one "possibility was to retain the rhetoric of the rational basis standard, but to apply it so tolerantly that no law was ever likely to violate it. This was the course ultimately chosen . . . ."[172]

As previously discussed, substantive due process review entailed two steps: first, a determination if the legislation embodied a permissible objective; and second, a determination if the means chosen bore a reasonable relation to that objective.[173] *Nebbia* and its progeny established that the Court would no longer judge the purposes or objectives of a legislative scheme. Instead, it would defer to the legislative judgment.

The second part of the test, however, was carefully retained by the Court both in *Nebbia* and in subsequent cases. Thus, in *Thompson v. Consolidated Gas Utilities Corp.*,[174] the Court reviewed a gas proration order issued by the Railroad Commission of Texas. The avowed purpose of the regulatory scheme was to conserve a natural resource of that state by preventing waste, while also protecting the correlative rights of the parties being regulated. In an opinion written by Justice Brandeis,[175] the Court stated that "the

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170. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976). Many of the states have retained substantive economic due process. *See, e.g.*, State v. A. J. Bayless Markets, Inc., 86 Ariz. 193, 342 P.2d 1088 (1959); United Interchange Inc. v. Spellacy, 144 Conn. 647, 136 A.2d 801 (1957); Chicago Title & Trust Co. v. Village of Lombard, 19 Ill. 2d 98, 166 N.E.2d 41 (1960); Pacesetter Homes, Inc. v. Village of South Holland, 18 Ill. 2d 247, 163 N.E.2d 464 (1960); Gilbert v. Mathews, 186 Kan. 672, 352 P.2d 58 (1960); United States Brewers' Ass'n, Inc. v. State, 192 Neb. 328, 220 N.W.2d 544 (1974); Berger v. State Board of Hairdressing, 371 A.2d 1053 (R.I. 1977). *See also* Fasino v. Mayor, 122 N.J. Super. 304, 300 A.2d 195 (1973), *aff'd*, 129 N.J. Super. 461, 324 A.2d 77 (1973); Commonwealth v. Stone, 191 Pa. Super. Ct. 117, 155 A.2d 453 (1959).

171. 98 S. Ct. 2207 (1978).

172. *McCloskey, supra* note 11, at 39.

173. See text accompanying notes 23-31 *supra*.

174. 300 U.S. 55 (1937).

175. As noted previously, during the *Lochner* era, Justices Brandeis and Holmes often dissented to the Court's review of the purposes of various state economic regulatory schemes. *See, e.g.*, Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 114 (1928) (Brandeis and Holmes, JJ., dissenting); Ribnick v. McBride, 277 U.S. 350, 359 (1928) (Stone, Holmes, and Brandeis, JJ., dissenting); Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 517 (1924) (Holmes and Brandeis, JJ., dissenting). Their dissents were the forerunners of the Court's adoption of the standard of due process review in *Nebbia*. In later cases in which the Court abstained from meaningfully reviewing statutory economic schemes, Justice Brandeis's dissents were relied upon in applying the proper standards of review. *See, e.g.*, North

proration orders would not be valid if shown to bear no reasonable relation either to the prevention of waste or the protection of correlative rights, or if shown to be otherwise arbitrary."[176] Since there was no reasonable relation between the means chosen (proration) and the purposes sought (prevention of waste and protection of correlative rights), the Court held that those means resulted in a deprivation of the plaintiffs' property in violation of the fourteenth amendment.

Economic regulatory legislation was also held to be an invalid exercise of the police power in *Treigle v. Acme Homestead Association.*[177] Louisiana had sought to preserve the assets of its building and loan associations by enactment of a statutory scheme that redefined the method for the withdrawal of shareholders' interests. The Court recognized that a state had an interest in preventing injury and loss to members of building and loan associations. The sections of the statute in question, however, did not "tend to conserve the assets of the association, to render it more solvent, or to insure that its affairs [would] be administered so as to protect the investments of the continuing and withdrawing members."[178] Consequently, the exercise of police power was not deemed to have been exercised for an end that was in fact beneficial to the public; nor were the means adopted reasonably suited to the accomplishment of that end. The questioned sections were held to impair the obligation of the plaintiff's contract and to deprive him arbitrarily of vested property rights without due process of law.[179]

Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973).

176. 300 U.S. at 69-70.

177. 297 U.S. 189 (1936).

178. *Id.* at 196-97.

179. A review of later due process cases discloses that the Court purportedly scrutinized economic regulatory legislation to determine if the ends of a statutory scheme were accomplished by methods consistent with due process (*i.e.,* whether the means selected by a state had a reasonable or rational relation to the objective sought to be attained). In Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955), for example, one of the state regulations held constitutional was a provision prohibiting optometrists from renting or occupying space in a retail store. The Court identified the legislative purpose as an attempt to free the profession from all taints of commercialism and held that the regulation had a "*rational relation to that objective* and therefore . . . [was not] beyond constitutional bounds." 348 U.S. at 491 (emphasis added). *See also* Ferguson v. Skrupa, 372 U.S. 826, 833 (1963) (Harlan, J., concurring "on the ground that this state measure bears a reasonable relation to a constitutionally permissible objective."); Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 224 (1949) ("[We cannot] say that the statute has no relation to the elimination of those evils."); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("[R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.").

In other cases before the Court that generally are cited as proof of the demise of economic substantive due process, the issue of whether the means rationally approached the legislative objective was not argued or was too obvious to merit discussion. *See, e.g.,* North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973); Day-Brite Lighting, Inc. v. Missouri, 342 U.S.

In *Exxon Corp. v. Governor of Maryland,*[180] one of the appellants sought review of its due process challenge based on the dictates of *Nebbia* that the means must rationally relate to the legislative end.[181] The Maryland legislature had enacted a statute that, *inter alia,* prohibited producers and refiners of petroleum from continuing directly or through a subsidiary to operate existing company-operated retail service stations.[182] The Court of Appeals of Maryland had enunciated the objective of the statutory scheme, including paragraph (c), which relates to existing stations, as the preservation of competition by assuring the continued existence of independent retail service station dealers.[183]

The appeal to the Supreme Court on substantive due process grounds was based on the appellant's argument that paragraph (c) relating to existing company-operated stations bore no rational relationship to the objective of preserving competition by assuring the continued existence of independent retail service station dealers.[184] This appellant expressly disavowed any intention of requesting the Court to adjudicate the wisdom of paragraph (c) or deciding whether it served the public interest.

The Court's response to this narrow due process argument was that the statute "bears a reasonable relation to the State's legitimate purpose in *controlling the gasoline retail market.*"[185] This holding was the first instance in which the purpose of the Maryland statute had been expressed so broadly. More significantly, the Court departed from the rule expressed since *Nebbia* that due process requires that the means employed by a state to control an industry's activities by regulation or prohibition must reasonably relate to the state's real purpose in controlling that industry. In *Exxon,* the Court held that the regulation need merely relate to the control of the

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421 (1952); Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); Olsen v. Nebraska, 313 U.S. 236 (1941). In these cases the wisdom of the legislative scheme was questioned rather than the relationship between the ends and the means.

180. 98 S. Ct. 2207 (1978).

181. The appellant making this argument was represented by Mr. Preston, one of the authors of this article.

182. Md. Ann. Code art. 56, § 157E(c) (1976).

183. See Governor of Maryland v. Exxon Corp., 279 Md. 410, 370 A.2d 1102 (1977).

184. Out of 3800 existing retail service stations, only 209 were operated by producers and refiners of petroleum products. Appellants argued that it was irrational to believe that 209 stations could conceivably monopolize a retail trade consisting of 3800 gasoline stations, which, by necessity, will spread out over the state. Thus, 3500 dealers could not be threatened by 209 company-operated stations, and therefore the means embodied in paragraph (c) did not relate to the objectives. The Maryland court had also focused on the continuing existence of independent dealers that might be threatened if the companies diverted supplies to company-operated stations. The appellants responded to this by pointing out a specific provision of the Maryland statute (paragraph f) as well as other laws forbidding misallocation of gasoline to company-operated stations. Thus, paragraph (c) was not intended to achieve this goal, nor did it rationally do so.

185. 98 S. Ct. at 2213 (emphasis added).

affected industry in order to comport with substantive due process. Conceivably, *any* state regulation directed towards a segment of a particular industry can be deemed to relate to the control of that industry. Thus, any regulation could comport with the standard that requires the means to relate to the end if the end is said to be the control of the industry. Consequently, any regulation could comport with substantive due process.[186] The decision in *Exxon,* in conjunction with other post-*Nebbia* cases, bestows upon statutes regulating economic matters conclusive constitutionality.[187]

C. Related Matters

The trend begun in *Nebbia* against employing substantive due process to strike down state statutes quickly spilled over into other areas of constitutional adjudication. As was discussed previously, the Court, prior to the adoption of the fourteenth amendment, had used the obligation of contract clause and the doctrine of vested rights to protect extra-constitutional property rights.[188] Although the clause was infrequently used after the ratification of the fourteenth amendment, the Court in the same year it decided *Nebbia* made clear that it would not revive the obligation of contract clause to replace the due process clause and substantive economic due process.[189] Although the Court used the obligation of contract clause last Term to invalidate an aspect of a state statute regulating economic matters,[190] the tenor of the decision suggested that it would probably not radically diminish the Court's reluctance to review closely laws that seek to adjust economic matters.

Another interesting aspect of judicial review of economic legislation is that of the role of the fifth amendment requirement of just compensation for a taking of property. It may be remembered that the Court's decision that this right was not included within due process had been overruled during the period when use of the due process clause was on the ascendancy.[191] Even Justice Holmes, the "Great Dissenter" in the substantive economic due process cases discussed above, had accepted the just compensation clause as being

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186. Appellants petition for rehearing on this basis was denied.
187. The Court, however, continues to pay lip-service to the requirement that the means rationally relate to the end. In Duke Power Co. v. Carolina Environmental Study Group, Inc., 98 S. Ct. 2620 (1978), petitioners contended that a statute that imposed a $560 million limitation on liability for nuclear accidents deprived them of due process of law under the fifth amendment. The Court ruled that the statute was "a legislative effort to structure and accommodate 'the burdens and benefits of economic life,'" *id.* at 2636; and that the liability ceiling in the event of nuclear accident rationally related to the Congressional purpose of encouraging the private development of electric energy by atomic power. *Id.* at 2636-40.
188. See text accompanying notes 48-59 *supra.*
189. Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398 (1934).
190. Allied Structural Steel Co. v. Spannaus, 98 S. Ct. 2716 (1978).
191. See note 105 *supra.*

part of due process when state action deprived a person of his property.[192] The Court now disfavors arguments based upon the just compensation clause as a vehicle to protect property rights.[193] Few cases, however, reach the Court on this issue.[194]

Finally, the development of the use of the equal protection clause paralleled the acceptance of due process as a means by which to protect economic interests from being treated differently. The Court, however, recently made it clear that equal protection could not substitute for due process to protect economic or property rights against state economic regulatory legislation.[195]

V. PERSONAL RIGHTS: THE "NEW" SUBSTANTIVE DUE PROCESS

During the *Lochner* era, the Court expanded the scope of due process to protect more than the economic liberties of business interests. In the case of *Meyer v. Nebraska,*[196] the Court stated that liberty included not only freedom from bodily restraint and the right to contract, but also, the rights "to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of . . . [one's] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[197] The statute set aside in *Meyer* forbade the teaching of languages other than English to students who had not yet reached the eighth grade. The defendant had been convicted for teaching German to a child in a Lutheran parochial school. The Court stated that if the statute was "arbitrary or without reasonable relation to some purpose within the competency of the State to effect," it violated the due process clause.[198]

The Court struck down the statute on two grounds. It continued to recognize the economic right to engage in an occupation, in this case, teaching. The Court went further, however, and discussed the historical importance of education in America. Although the Court admitted that the state's purpose in attempting to foster a homogeneous people was meritorious, forbidding the teaching of

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192. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Because the just compensation clause is in the Bill of Rights, arguably it was included in the fourteenth amendment due process clause under theories of incorporation. *But see* BERGER, *supra* note 1, at 134-56.
193. *See, e.g.,* Goldblatt v. Town of Hempstead, New York, 369 U.S. 590 (1962).
194. G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS, 602 (9th ed. 1975).
195. City of New Orleans v. Dukes, 427 U.S. 297 (1976).
196. 262 U.S. 390 (1923).
197. *Id.* at 399.
198. *Id.* at 399-400. The state court had found that the permissible objective of the statute was to ensure that English was the mother tongue of children in the state. *Id.* at 398.

foreign language was too extreme to be a reasonable means to achieve that end.[199]

In *Pierce v. Society of the Sisters,*[200] the Court invalidated a statute that required parents in Oregon to send their children between the ages of eight and sixteen to public school. The plaintiffs in that case were a religious school and a private military academy. The Court recognized the power of the state to regulate education, but found that the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[201] The Court also recognized the property interests of the schools in their continued existence.[202]

Although both *Meyer* and *Pierce* included the *Lochner*-type language of substantive economic due process review, there was a subtle reliance on the nature of the right implicated by the state action. In the midst of the post-*Nebbia* revolution,[203] the Court was careful to note that review under substantive due process analysis would still apply if the rights infringed upon by states' exercises of the police powers were within the express provisions of the Bill of Rights.[204] Since *Nebbia,* the Court has continued to define the liberty and property interests protected by the due process clause of the fourteenth amendment to include the guarantees in the Bill of Rights.[205] Further, the Court upon rare occasion has expanded upon the liberty interest to include rights of a personal nature.[206] In addition, when dealing with procedural due process, the Court has radically expanded the concept of property.[207]

Beginning in 1965, the issue of substantive due process began to receive attention once again in the context of personal rights. The Court relied on the right to privacy in *Griswold v. Connecticut,*[208] invalidating a statute prohibiting the use of contraceptives. Attempting to avoid any charges that the Court was deciding a case

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199. *Id.* at 402.
200. 268 U.S. 510 (1925).
201. *Id.* at 534-35.
202. *Id.* at 535-36.
203. See text accompanying notes 161-70 *supra.*
204. United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).
205. *See, e.g.,* First National Bank v. Bellotti, 98 S. Ct. 1407 (1978) (Massachusetts statute prohibiting business corporations to contribute funds to influence the vote unreasonable in light of corporation's first amendment rights); Gitlow v. New York, 268 U.S. 652 (1925) (right to liberty in the fourteenth amendment includes the freedoms of speech and press).
206. *See, e.g.,* Aptheker v. Secretary of State, 378 U.S. 500 (1964); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Bolling v. Sharpe, 347 U.S. 497 (1954); Skinner v. Oklahoma, 316 U.S. 535 (1942). Even Justices Brandeis and Holmes advocated a broad approach to the liberty interest and due process when rights of a personal nature were implicated by the state action. *See, e.g.,* Whitney v. California, 274 U.S. 357, 373 (1927) (Holmes and Brandeis, JJ., concurring). *But see* BERGER, *supra* note 1, at 270-71.
207. *See, e.g.,* Board of Regents v. Roth, 408 U.S. 564 (1972).
208. 381 U.S. 479 (1965).

based upon the personal preferences of the Justices, the opinion by Justice Douglas employed a substantive due process analysis while going to great lengths to avoid the phrase and to place the right to privacy within the Bill of Rights.[209]

In *Roe v. Wade,*[210] the Court again employed the right to privacy to invalidate an anti-abortion law. The Court in *Roe* stated that only those rights "'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in this guarantee of personal privacy."[211] The Court went on to find the right to privacy fundamental enough to be included in the fourteenth amendment's liberty interest. Once the right was recognized, the Court went on to judge the reasonableness of the legislation in light of the plaintiffs' liberty interest and the state's objectives in prohibiting abortions. The Court again, however, avoided expressly relying upon substantive due process.[212]

Then in *Moore v. City of East Cleveland, Ohio,*[213] the Court acknowledged its reliance on substantive due process as a means by which to limit exercises of the state police powers. The law in question in *Moore* was a housing ordinance limiting the occupancy of a dwelling to a single family. "Family" was defined in such a manner that Mrs. Moore violated the law by living in the dwelling with her son and two grandsons. She was convicted under the statute and her case eventually reached the Court.

The Court ruled that Mrs. Moore possessed a right to live with her family, and that it was fundamental enough to be protected by the liberty interest in the fourteenth amendment. The Court then identified the state objectives of the ordinance as preventing overcrowding, minimizing traffic congestion and avoiding an undue burden on the school system. The Court pronounced these "legitimate goals" but stated that "the ordinance . . . serves them marginally, at best," and held that because of the "tenuous relation" between the objectives and the means, the statute violated the due process clause.[214] The Court recognized the danger of using the due process clause to control the substance of state legislation because

209. *See* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 YALE L.J. 221, 287 (1973) [hereinafter referred to as *Wellington*]. The majority of Justices in *Griswold* explicitly stated that the right to privacy upon which the case turned was included in the fourteenth amendment concept of liberty. *Id.* Indeed, Justice Stewart stated in his concurring opinion in Roe v. Wade, 410 U.S. 113, 167-68 (1973), that *Griswold* could not rationally be understood unless considered a substantive due process case. Harlan's concurring opinion in *Griswold* made it clear that he considered it a substantive due process case, and as such, strongly disagreed with the Court's opinion. 381 U.S. at 499-500. For a discussion of *Griswold,* see *Wellington* at 285-97.

210. 410 U.S. 113 (1973).

211. *Id.* at 152.

212. For a discussion of *Roe* as a case involving substantive due process considerations, see *Wellington, supra* note 209, at 300-11.

213. 431 U.S. 494 (1977).

214. *Id.* at 500 (footnote omitted).

its use could give rise to "judicial intervention" based on the "predilections of those who at the time happen to be members of the Court."[215] Justice Powell implied that the Court had no alternative, however, because the liberty at stake in *Moore* was "deeply rooted in this Nation's history and tradition" so as to deserve constitutional protection.[216]

Thus, substantive due process had meaning only where the Court believed a personal right was so fundamental that it deserved constitutional protection. All of the Justices concurring in the result in *Moore* found that the ordinance did not reasonably serve the city's purpose in enacting it. Yet, this by itself was of no import unless the Court chose to annoint the deprived personal right as part of our fundamental liberty.[217] Although the ordinance was unreasonable regardless of the right involved, the Court apparently would have upheld the legislation if it had decided that Mrs. Moore's right to live with her grandsons was not part of her liberty interest.

The liberties implicated in *Moore, Roe,* and *Griswold* involved personal rights that the Court found to be fundamental. The three cases also involved marital or family interests. These extra-constitutional interests are the only ones implicated since 1965 that have triggered the Court's use of the due process clause as a limitation upon the substantive reach of state legislation.[218]

VI. CRITICISMS OF THE "NEW" SUBSTANTIVE DUE PROCESS

A synthesis of *Moore* and *Exxon* indicates that the Court will not guarantee due process protection against the reach of unreasonable legislation unless the Court accepts the right implicated as one of fundamental liberty. This "new" substantive due process is laced with contradictions. The Court is now determined that it not return to the *Lochner* era and impose the predilections of the current members of the Court when interpreting the due process clause. During the *Lochner* era, the Court broadly interpreted the clause and

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215. *Id.* at 502 (footnote omitted).
216. *Id.* at 503 (footnote omitted).
217. It could hardly be denied that liberty includes the right to live where one wants with whom one wants. Alternatively, Justice Stevens argued that the right involved in *Moore* was the right to use one's property as one wants. *Id.* at 513 (Stevens, J., concurring).
218. The Court has found that although liberty includes privacy, a person's right to privacy does not protect information regarding the use of drugs, Whalen v. Roe, 429 U.S. 589 (1977); the right to engage in a homosexual relationship, Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975); the right to protect one's reputation from defamation by public officials, Paul v. Davis, 424 U.S. 693 (1976); and the right of parents to prevent corporal punishment being meted out to their children, Baker v. Owen, 423 U.S. 907 (1976), *aff'g* 395 F. Supp. 294 (M.D.N.C. 1975). In addition, the liberty interest has been held not to extend to a police officer's choice of hairstyle. Kelley v. Johnson, 425 U.S. 238 (1976).

passed upon the validity of legislation based upon the Court's views regarding what served the public good. Under the "new" substantive due process, the Court restricts application of due process based upon the Court's belief of what rights are historically fundamental so as to deserve constitutional protections. In either case, the Court is making a societal judgment rather than a judicial one.

Further, in choosing which rights are part of "the teachings of history and . . . basic values that underlie our society,"[219] the Court arbitrarily ignores the teachings of our history that do not permit the distinction between the personal rights protected in *Griswold, Roe,* and *Moore* and the economic rights denied in the substantive economic due process cases. In *Exxon,* one of the rights implicated by the Maryland statute was that which permitted producers or refiners to continue operating their existing company-operated stations. Such vested property rights were recognized by some members of the Court as early as 1798 in *Calder v. Bull,*[220] and most certainly by the entire Court in 1810 in *Fletcher v. Peck.*[221] The Court, however, judging by the perfunctory analysis given the legislation in *Exxon,* refuses to recognize the right to continue using one's property as a fundamental part of our heritage or values. Yet, when construing the substantive reach of the due process clause, the Court itself has recognized the interdependence of liberty and property rights:

> Such difficulties indicate that the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized. J. Locke, Of Civil Government 82-85 (1924); J. Adams, A Defence of the Constitutions of Government of the United States of America, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, Commentaries, 138-40.[222]

The decision in *Exxon* also discloses the Court's inconsistent view with regard to the liberty to engage in an otherwise lawful occupation. Producers or refiners of petroleum products were in effect told that their right to continue engaging in the retail sale of

219. Griswold v. Connecticut, 381 U.S. 479, 501 (1965).
220. 3 U.S. (3 Dall.) 386 (1798). See text accompanying notes 40-47 *supra.*
221. 10 U.S. (6 Cranch) 87 (1810). See text accompanying notes 48-52 *supra.*
222. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

gasoline was not within the liberty interest of the due process clause. Yet, in *Schware v. Board of Bar Examiners,*[223] the Court apparently decided that the plaintiff's right to engage in the practice of law was part of the liberty protected by the fourteenth amendment. The Court ruled that the state deprived him of the liberty to engage in an occupation without due process of law when it arbitrarily denied him the right to take the bar exam based on behavior engaged in and beliefs held by the plaintiff more than fifteen years before the denial.[224] In *Exxon,* the Court did not require the state to show any rational connection between the prohibition against producers and refiners continuing to engage in an otherwise lawful occupation and the purposes of forbidding such continued operation. In *Schware,* however, the Court found that the reasons for prohibiting the plaintiff from taking the bar examination had no "rational connection with [the plaintiff's] fitness or capacity" to practice law.[225]

The distinction between *Schware* and *Exxon* turns on the nature of the right affected by the particular state action. In *Schware,* the rights impugned were of a personal nature, whereas *Exxon* purportedly regulated only the "burdens and benefits of economic life."[226] As a practical matter, statutes regulating business are in effect conclusively presumed constitutional. The teachings of history do not permit the distinction between those rights of a personal nature and those rights that implicate economic interests. Contributing to the climate for secession from England were British laws that restricted the colonists' business ventures, such as those prohibiting American manufacturers from manufacturing iron wares for export, or those requiring all goods or commodities that were shipped in or out of the colonies to be carried on British ships with British masters and predominantly British crews.[227] Indeed, one persuasive theory of history suggests that the Constitution was prompted by the economic interests of those who met in Philadelphia to bring forth a new nation.[228] Thus, the teachings of history suggest that economic interests and the rights of business were very much part of the fundamental values at the inception of this country.

But the most draconian aspect of the Court's present approach to substantive due process is the refusal to give effect to the

223. 353 U.S. 232 (1956).

224. During the 1930's and early 1940's, the plaintiff had used various aliases to obtain employment, had once been arrested but not convicted, and had been a member of the Communist Party. These were the reasons given by the Bar Examiners for not permitting the plaintiff to take the Bar Examination in the mid-1950's. 353 U.S. at 234-35.

225. *Id.* at 239.

226. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

227. R. HOFSTADTER, W. MILLER & D. AARON, THE UNITED STATES 66-71; 126-37 (2d ed. 1967).

228. C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (Free Press 6th ed. 1969).

historical and fundamental American concept that the powers of the legislatures are inherently limited by citizens' liberty and property rights. As noted previously, the concept that the legislatures' powers were limited emerged out of Locke's theory of the social compact.[229] By 1776 and the Revolution, Locke's ideas "had become virtually axiomatic in America."[230] Yet, in the area of substantive economic due process, the Court refuses to take more than at most a cursory look at the reasonableness of legislation that often either forbids the use of property and enjoyment of liberty or severely regulates them.[231] If the rights violated are of a personal nature, the Court decides whether they are important enough to deserve constitutional protection before consenting to view the reasonableness of legislation. In sharp contrast, rights not considered fundamental, but rights nonetheless, can be subjected to the most unreasonable regulation without implicating the Constitution.

The Court shirks its constitutional duty of guarding significant rights when it advises litigants that it is indifferent to unreasonable legislation and that any complaints should be addressed to the legislature. One clear purpose of the Constitution, whether contained in the Bill of Rights or in the fourteenth amendment, is to protect the rights of the minority from the tyranny of the majority. Although the majority must be able through their elected representatives to set policy, the rights of the minority should not be ignored by the judiciary.

VII. THE REASONABLENESS OF LEGISLATION

Rather than arbitrarily applying substantive due process review only where the Court deems a right fundamental, the Court should recognize that the due process clause limits the exercise of governmental power whenever legislation unreasonably results in the deprivation of any liberty or property right. This does not mean a return to the *Lochner* era when the Court believed its determinations regarding what served the public good superseded those of the legislature. The problem with the *Lochner* era was not that the Court judged the reasonableness of legislation in achieving a goal, but that the Court replaced the legislative judgment with its own opinion regarding what goals to achieve.

State or federal legislation should have the presumption of constitutionality befitting an expression of the will of the majority. It should not, however, be conclusively presumed constitutional solely because the Court does not happen at that time to favor the

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229. *See* text accompanying note 15-19 *supra*.
230. R. Hofstadter, W. Miller & D. Aaron, The United States 140 (2d. ed. 1967).
231. In *Exxon*, some of the producers or refiners who brought suit had testified that they could not operate the stations through dealer operations, but would be forced to withdraw from the Maryland market. Brief for Appellant Continental Oil Co. at 10, 34-35, Exxon Corp. v. Governor of Maryland, 98 S. Ct. 2207 (1978).

liberties infringed upon by the legislation. The Court should continue to defer to legislative judgment, but when that judgment is shown to be unreasonable, as when it is the result of pure legislative whim without foundation, or where the means embodied in the statute do not rationally approach the problem it purports to correct, the Court should play some role in protecting against the tyranny of the majority will. It was this type of analysis that was used by Justice Brandeis in *Thompson v. Consolidated Gas Utilities Corp.*[232] to invalidate state legislation that had no rational connection with what the state intended to accomplish.[233] Justice Brandeis did not advocate that the Court usurp the legislative function; indeed, he had fulminated against the majority of the Court's practice of usurping the legislative power.[234] But as exemplified by his opinion in *Thompson,* he believed that there were some restraints pursuant to the due process clause on the substance of state legislative regulations.

Weighing the reasonableness of legislation does not require that the Court return to the excesses of the *Lochner* era to impose its conceptions of what served the public good. For example, a statute such as the Virginia criminal statute in *Doe v. Commonwealth's Attorney*[235] prohibiting so-called "crimes against nature," which included sexual activities engaged in by homosexuals, should not be invalidated because a court believes that homosexuality does not present a danger to public morality or indecency. But insofar as the enforcement of such a statute permits the state to invade the privacy of the home and impose criminal sanctions upon consenting adults engaged in such practices, the reasonableness *vel non* of the statute should be examined by the courts. The majority's decision that homosexuality is an evil should be honored, but if there is no rational relationship between the majority's reasons for declaring homosexuality an evil and the effect of their declaration, the rights of the minority in personal decisions of intimate concern should be protected.[236]

Similarly, in *Exxon Corp. v. Governor of Maryland,*[237] the legislative judgment that the Maryland retail gasoline market would be benefitted by the exclusion of stations operated by producers or refiners of petroleum products should not be overturned because the courts believe that it would not benefit competition to restrict producers or refiners from expanding their operations. If the courts decide, however, that there is no rational basis for excluding existing competitors from an existing, highly competitive market in the name

232. 300 U.S. 55 (1937).
233. See text accompanying notes 174-76 *supra.*
234. See text accompanying notes 146-47 *supra* and note 175 *supra.*
235. 403 F. Supp. 1199 (E.D. Va. 1975), *aff'd,* 425 U.S. 901 (1976).
236. *Id.* at 1203 (Merhige, J., dissenting).
237. 98 S. Ct. 2207 (1978).

of preserving competition, the right to continue engaging in a lawful business should be protected.

Justice Holmes in *Nash v. United States*[238] ruled that reading the standard of reasonableness into the Sherman Act[239] did not result in that provision's being void for vagueness because reasonableness was capable of definition. This recognition of the standard of reasonableness is not any less valid for the Court when ascertaining the reasonableness of legislation. Legislation that is unreasonable because it has no foundation, but is the product of pure legislative whim, or legislation that does not rationally approach the objective it intends to address, should be deemed a deprivation of the process that is due the citizenry when the legislative branch enacts legislation affecting their liberty or property.[240] To believe otherwise is to grant the legislatures in this country carte blanche authority to regulate or prohibit any matters they choose, so long as they do not violate a specific constitutional provision, or the Court's narrow view of fundamental liberty, and no matter how oppressively those regulations or prohibitions are visited upon segments of society. The Court's continuing practice of shirking its duty to afford protection against the reach of legislation serves "to render the Constitution impotent"[241] as a charter protecting the individual against arbitrary government action.

Of course, legally, the methodology advocated herein requires that the judiciary use the due process clause as a control on the content of legislation. The authors are aware of Professor Berger's recent book in which he convincingly states the case that the due process clause was never intended to have such a use.[242] Whatever the merit of his arguments, judicial reliance upon the due process clause is an established fact of constitutional adjudication. A return to Justice Miller's opinion in *Slaughter-House*[243] is neither practical nor likely to occur.

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238. 229 U.S. 373 (1913).
239. 15 U.S.C. § 1 (1976).
240. Of course, legislation that is reasonable in that it is not the product of arbitrary or capricious whim, or which reasonably approaches the objectives of the legislature in enacting it still will adversely affect the rights of the citizenry. If such is the case, the Court should uphold the legislative judgment unless the right is so fundamental and important that the Court decides it cannot be abridged under almost any circumstance. This type of deference is generally accorded by the Court, for example, to the right to travel. *See, e.g.,* Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974). *But see* Califano v. Gautier Torres, 98 S. Ct. 906 (1978). Additionally, one commentator has advocated that the Court rule economic regulations violative of the due process clause "if the government can achieve the purposes of the challenged regulation equally effectively by one or more narrower regulations." Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process,* 80 HARV. L. REV. 1463 (1967).
241. Comment, Day-Brite Lighting, Inc. v. Missouri; *A New Light on the Constitution,* 47 NEV. L. REV. 252, 254-55 (1952).
242. BERGER, *supra* note 1.
243. See text accompanying notes 79-82 *supra*.

Further, one of the keys to the continuing vitality of the Constitution is its flexibility over the years since its drafting and ratification. The Constitution is not stagnant but evolves as the necessity of the times requires. When the fourteenth amendment was adopted, government regulation was not as prevalent as it is today. The growth of government necessarily diminished the freedom of those governed. It is not unreasonable for the Constitution to evolve to meet that change.

VIII. CONCLUSION

As noted in the opening paragraph of this article, the Court's changing applications of substantive due process have expanded or limited the Constitution's protections against governmental action. In each fluctuation, however, the Court has gone to excesses in either unreasonably scrutinizing legislation or unreasonably abridging basic rights. The best method to avoid excesses at either end of the spectrum is to establish a mode of review that permits the Court to determine the constitutionality of legislation based on judicial standards of reasonableness rather than on the individual Justices' personal views of what rights are fundamental enough to be protected, or what exercises of the police powers serve the public welfare.