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**PHIL 168; Winter 2008**

## **Handout #5: Judicial Review in a Constitutional Democracy**

### **THE DEBATE ABOUT JUDICIAL REVIEW**

**Judicial review** is the power of the judiciary to declare legislation unconstitutional. There is a popular debate between **judicial restraint** and **judicial activism**. People who frame the debate this way often (but not always) condemn judicial activism and praise judicial restraint. But it's often unclear how activism and constraint are being understood.

- (a) Activism is a simple pejorative used to express disagreement with a particular exercise of judicial review.
- (b) Activism consists in the exercise of judicial review to invalidate democratically enacted legislation.
- (c) Activism consists in reliance on substantive and potentially controversial moral and political principle in the exercise of judicial review to invalidate democratically enacted legislation.

Though the pejorative sense (a) often seems to be at work in public rhetoric over judicial activism/restraint, this sense is spectacularly unhelpful. This is because critics of judicial activism want to criticize particular exercises of judicial review **because** they are activist. But the pejorative sense of activism is just another way of stating their conclusion, not a premise in an argument for that conclusion.

Recognizing this, some commentators appeal to the anti-majoritarian interpretation of activism. Notice that, unless we are skeptics about judicial review as such (see below), there is no reason to think that activism in this sense is bad. (Notice also that the Rehnquist Court, which liked to think of itself as restrained, turns out to be one of the most activist courts in Supreme Court history, on this sense of activist.)

This may provide some reason to focus on our third sense of activism. This version of the public debate about restraint/activism parallels a scholarly debate between **interpretive** and **noninterpretive** review over the record of the Warren and Burger Courts in cases in which judicial review was exercised to protect personal and civil rights. The Court exercises interpretive review insofar as it invalidates legislation based on its interpretation of the Constitution; it exercises noninterpretive review insofar as it invalidates legislation as embodying unsound policy or political morality.

The debate concerns so-called **substantive due process**. Since the New Deal, the Court has rejected the doctrine of economic substantive due process, associated with Lochner v. New York (1905), which recognized the liberty of contract as a fundamental right deserving special protection. (I discuss the rise and fall of economic substantive due process in more detail in the Appendix at the end of this handout.) But whereas Lochner and economic substantive due process ended during the New Deal, substantive due process continued, insofar as the Court subsequently construed due process as protecting various fundamental personal and political liberties. For non-fundamental interests and liberties, the Court employs a legislatively deferential standard known as **rational basis review**.

- Legislation is constitutionally valid iff it pursues a **legitimate** governmental interest in a **reasonable** manner.

By contrast, for fundamental interests and liberties, the Court employs a much less deferential standard known as **strict scrutiny**.

- Legislation is constitutionally valid iff it pursues a **compelling** state interest in the **least restrictive** manner possible.

Part of substantive due process concerns the so-called **selective incorporation** of key provisions of the Bill of Rights (the first nine amendments) -- such as the right to freedom of speech and religion, the right against unreasonable search and seizure, the right to counsel, the right against self-incrimination, the right to compensation for property appropriated by the state, and the right against cruel and unusual punishment -- into the due process clause of the Fourteenth Amendment so as to make these provisions, applicable against the federal government, applicable against state and local governments as well. Modern substantive due process also includes recognition, under Fourth Amendment guarantee against unreasonable search and seizure and Fifth Amendment guarantee against self-incrimination, of the rights of accused in criminal proceedings, such as Miranda rights (Miranda v. Arizona) and the exclusionary rule (Mapp v. Ohio). Modern substantive due process also includes the recognition of **nonenumerated** substantive rights, such as the right to privacy, recognized in Griswold v. Connecticut (1965).

## **JUDICIAL REVIEW IN A CONSTITUTIONAL DEMOCRACY**

Most parties to these debates are not skeptics about judicial review. Within a constitutional democracy, such as our own, the constitution

- a) creates a federal government, specifying its powers, and dividing them among the branches of government, and
- b) allocates power, at least by implication, between federal and local government, but also
- c) recognizes certain rights of individuals against both local and federal government.

Judicial review is the power of the judiciary to determine if governmental action conforms to these constitutional powers and constraints. The rationale at work here is an argument from **institutional role** that is also advanced by Alexander Hamilton in Federalist #78 and by Chief Justice Marshall in Marbury v. Madison (1803).

1. It is the institutional role of the judiciary to interpret and apply the law.
2. The Constitution is the supreme law of our legal system.
3. Hence, it is the institutional role of the judiciary to interpret and apply the Constitution.
4. Hence, it is the institutional role of the judiciary to declare legislation unconstitutional if it determines that it conflicts with the Constitution.

This rationale for judicial review fits with a common understanding of the **separation of powers**. Roughly, the legislature is supposed to make law; the judiciary is supposed to interpret and apply the law; and the executive is supposed to enforce the law as interpreted by the

judiciary. This division of labor has a **democratic rationale**: the legislature, rather than the judiciary, should make law, because we want our law makers to be democratically accountable, as, in principle, legislators are and (federal and some state) judges are not. The institutional rationale for judicial review respects this division of labor. It instructs the judiciary to interpret the Constitution and measure legislation against this interpretation (interpretive review); it does not instruct the judiciary to decide if legislation is wise (noninterpretive review).

The debates that interest us focus on the exercise of judicial review to protect individual rights. Some parties to the debate are impressed by the so-called **counter-majoritarian** worry. In Democracy and Distrust John Hart Ely frames the worry this way.

Thus the central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like [D&D: 4-5].

But notice that this is really a quite general worry about judicial review, and it seems to misunderstand the institutional rationale for judicial review and the nature of our democratic commitments. Whereas we want our laws to be enacted by a majority, we have not accepted purely majoritarian politics. Concerns about the **tyranny of the majority** led framers of the Constitution to adopt constraints on what the community can do, even with democratic support. The resulting form of democracy is not pure majority rule, but rather a constitutionally limited democracy. Whereas judicial review may be at odds with pure majoritarianism, it is an essential part of a **constitutional democracy**. Because it is the institutional role of the judiciary, within our separation of powers, to interpret and apply the law, and because ours is a constitutionally limited democracy, it is the Court's job to see if the legislature has heeded its constitutional constraints, especially those protecting individual rights.

Of course, this defense of judicial review doesn't mean that the Court's interpretation of constitutional constraints on majority rule has always been good interpretation, but it does mean that there is nothing suspect about judicial review as such.

## INTERPRETATION AND JUDICIAL REVIEW

Has the Court's use of judicial review in substantive due process cases and other cases involving individual rights restricted itself to interpretive review? Surprisingly, debate about this question often does not turn on detailed analysis of the opinions in each case but rather turns on quite general features of these cases, especially the fact that the Court defended claims about individual rights that relied on substantive and controversial judgments of political morality. Still more surprising is the fact that at times both friends and critics of the Court on these matters have agreed that the decisions in question represent non-interpretive review. For instance, Michael Perry, a friend of the record of the Warren and Burger Courts, claims that

There is no point belaboring what today few if any constitutional scholars would deny: that precious few twentieth-century constitutional decisions striking down governmental action in the name of the rights of individuals -- the decisions featured in the 'individual rights'

section of any contemporary constitutional law casebook -- are the product of interpretive review.<sup>1</sup>

Both friends and critics of judicial review typically assume that interpretation is a matter of (a) the plain meaning of explicit constitutional language or (b) the (specific) intentions of the framers. They disagree, not about whether the Court is interpreting the Constitution properly, but about whether the Court should be restricted to its interpretive role – critics insisting that the Court is limited to interpretive review, and friends claiming that in some circumstances the Court ought to be free to appeal to extra-constitutional values.

But if we really accepted the terms of this debate, the critics would have a strong argument on their side – for they could claim that interpretive review and only interpretive review is compatible with the separation of powers (functions). But it is much more plausible to reject the terms of this debate. The issue is not fidelity to the Constitution, but how to interpret it.

We have already considered and rejected the plausibility of these interpretive assumptions. Appeal to plain meaning implies that interpretation cannot be controversial, but that prevents us from being able to represent interpretive disagreement in hard cases. There is interpretive room for appeal to the purposes or intentions of the framers. But we have seen that that appeal is ambiguous between two very different conceptions – one that appeals to specific intent and one that appeals to abstract intent. Controversial and progressive decisions will clearly count as non-interpretive only if the interpretive appeal is to specific intent. But we saw that there was a strong case to be made that abstract intent should dominate specific intent, especially in the interpretation of abstractly worded provisions of the sort we find in key provisions of the Bill of Rights and the Fourteenth Amendment.

Instead, the interpretation of abstractly worded and normatively loaded constitutional provisions should not be guided by either plain meaning or specific intentions. Instead, it should make (and defend) normative commitments about the extension of normative language in the constitution and articulate the best conception of those concepts that rationalize the adoption of specific constitutional provisions.

Of course, that doesn't automatically vindicate the Court's interpretive arguments in substantive due process review, but it does show that the critics' general argument against its substantive due process analysis is mistaken and rests on bad interpretive assumptions.

### **BORK, BROWN, AND GRISWOLD**

Bork is an outspoken critic of substantive due process, in general, and privacy, in particular. He thinks that interpretation must be guided by original meaning, for which our evidence is the (non-idiosyncratic) intentions of the framers. Though he thinks Brown v. Board of Education (1954) was correctly decided, he thinks Griswold (1965) represents non-interpretive review in which the Court has created new constitutional rights. Is Bork's jurisprudence consistent?

Bork thinks that Brown is defensible as interpretive review in light of plain meaning and original intention. But consider Raoul Berger's claim.

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<sup>1</sup>Perry, The Constitution, the Courts, and Human Rights, p. 92. This quotation undoubtedly gives a misleading picture of contemporary consensus in the constitutional literature. But it gives a fair sense of Perry's own view and the views of many constitutional scholars two decades or so ago.

Wilson, chairman of the House Judiciary Committee and the House Manager of the Bill, who could therefore speak authoritatively, had advised the House that the words "civil rights ... do not mean that all citizens shall sit on juries, or that their children shall attend the same schools. These are not civil rights." Wilson's statement is proof positive that segregation was excluded from the scope of the bill [Government By the Judiciary, pp. 118-19].

If interpretation is constrained by plain meaning and specific intent, Brown is non-interpretive review. But we can treat it as interpretive review if interpretation requires articulating and applying the best conception of abstract values that rationalize specific constitutional guarantees. On any remotely plausible conception of the demand that government treat its citizens with equal concern and respect, the psychological, social, and economic harms done by racially segregated education show it to be inconsistent with equal protection.

Is Griswold problematic if we employ the same interpretive standards that legitimize Brown? A right to privacy is, as Douglas concedes, nowhere enumerated in the Constitution. So Griswold cannot be defended by appeal to the plain meaning of explicit constitutional language. Equally clearly, the framers did not (specifically) intend the Bill of Rights to preclude birth control legislation. But then Griswold cannot be defended by appeal the specific intentions of the framers. And Douglas's defense of a right to privacy as one found in the "penumbras" of disparate rights in the Bill of Rights might sound like an exercise in non-interpretive review.

However, it is not unreasonable to suppose, as Douglas does, that a value of privacy -- really, personal autonomy -- is one of the values that provide a plausible rationale for the otherwise diverse cluster of personal liberties recognized in the Bill of Rights -- especially the First Amendment guarantee of free speech and association, the Third Amendment guarantee of a home owner's right not to have his house invaded during peace time without his consent, the Fourth Amendment guarantee against unreasonable search and seizure, the Fifth Amendment guarantee of due process, and the Ninth Amendment guarantee of nonenumerated rights retained by people. It is an interesting and important question, which Douglas does not address, what the scope of such a right to privacy should be. But whatever its exact scope, it is not implausible to suppose that a principle of personal autonomy broad enough to rationalize these disparate personal liberties in the Bill of Rights would extend to decisions about intimate association and reproduction within traditional family structures.

## APPENDIX: THE RISE AND FALL OF SUBSTANTIVE DUE PROCESS

Debates about the record of judicial review have often focused on the Court's interpretation of the due process clause of the Fifth and Fourteenth Amendments. We get a better sense of what is at stake in these debates by looking at debates over substantive due process and some of the history of that doctrine.

The due process clause says that no person shall be "deprived of life, liberty, or property without due process of law;" the Fifth Amendment makes due process applicable to the federal government, and the Fourteenth Amendment makes due process applicable to local government. The general question is what individual liberties or, more generally, rights due process protects. "Substantive due process" often refers to the Court's interpretation of due process early in the last century under which it invalidated legislation that interfered with liberty of contract. For obvious reasons (though ones that will become more obvious later) we might call this interpretation of due process **economic** substantive due process.

### BACKGROUND

Industrial development in the late nineteenth century brought significant changes in social and economic life. Improved technology and industrialization made ownership of the means of production (and not simply one's own labor power) economically important. Moreover, the operation of a market, especially in production goods (and not simply consumer goods), with unrestricted private property rights (including bequest) tends over time to produce fairly large concentrations of private property rights. In this way, there will emerge classes of property owners (i.e. those who have property rights in the means of production) and wage-laborers (i.e. those who have property rights only in their labor power). These two classes will then negotiate terms of economic interaction. But the inequalities in private property rights will tend to improve the bargaining position of property owners in relation to laborers. The difference in bargaining position will mean that laborers are often obliged to accept more onerous terms of cooperation than they would have accepted in a situation of equality of resources and bargaining position.

More onerous terms of cooperation can be detrimental to the laborers and, because they result from uneven bargaining position, create a **fairness** worry. But hardships for labor in a labor contract can also affect the quality of the goods produced; where the goods in question are ones in which the public has interests in quality-control (e.g. food stuffs), there is a **public welfare** objection to such contracts as well. It was in part to address these effects of concentrations of private property rights on laborers and the consuming public that in the late nineteenth century and early twentieth century many state legislatures began enacting various kinds of industrial regulation.

Earlier in the nineteenth century it had generally been held that private property can be regulated in certain ways provided that it is "affected with a public interest" -- this was the so-called Munn test.<sup>2</sup> But property owners correctly perceived that many such regulations were restricting their freedom to contract and eroding the value of their property and so they began to challenge the constitutionality of these regulations on due process grounds. (Interestingly, their principal claim was that these regulations deprived them of their **liberty**, not their property, without due process.) Beginning in the late 1880s the Court slowly began to heed this due process argument and to invalidate economic legislation that infringed liberty of contract, especially labor legislation,

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<sup>2</sup>Munn v. Illinois, 94 US 113 (1877).

regulation of prices, and restrictions on entry into business. This doctrine of economic substantive due process reached its zenith in Lochner v. New York (1905) and continued into the mid-1930s (during which time the Court invalidated approximately 200 bits of state legislation on economic substantive due process grounds).<sup>3</sup>

### **LOCHNER AND ECONOMIC, SUBSTANTIVE DUE PROCESS**

In Lochner the Court held unconstitutional New York legislation regulating the maximum hours that bakery employees could work (not more than 10 hours per day and 60 hours per week). The main questions were:

(1) Is liberty of contract protected by due process?

If so,

(2) Is the state legislation in pursuit of a legitimate interest or objective?

If so,

(3) Are the legislative means adopted pursuant to this end sufficiently appropriate?

A Court majority held that liberty of contract is a liberty protected by due process -- Yes to (1). To see if employers were deprived of this liberty without due process of law, the Court asked whether there was a legitimate state goal underlying the legislation [(2)]. The Court considered two possible state objectives: (a) the labor-law goal of redressing the unequal bargaining position of labor, and (b) the health and safety goal of quality-control of bakery goods. The Court rejected (a) as an illegitimate goal -- No to (2a) -- but accepted (ii) as a legitimate goal -- Yes to (2b). However, it argued that the regulations in the statute were not obviously necessary to, or the least restrictive means to, achieve this goal -- No to (3).

Dissent might have focused on either the affirmation of (1) or the denial of (2a). Unless all liberty is protected by due process, it's not clear why liberty of contract should be. Nor can all liberty be given absolute protection; familiar provisions of criminal and civil law restrict liberty in order to prevent various forms of harm and nuisance. In other words, if (1) is affirmed automatically, then it cannot be clear that the protection due process affords liberty of contract is absolute. How stringent the protection it receives will depend upon our interpretation of the requirements embodied in (2) and (3), and this may vary with different liberties. Nor is it clear why (2a) should be denied. Why is the objective of ensuring that contracts are negotiated on fair terms not a legitimate state objective?

Dissent centered on (3). It was agreed on all hands that protection of public health is a legitimate state goal; the dissent (Harlan (joined by White and Day) and Holmes) rejected the majority claim that the statute did not pursue this goal in the appropriate way. In particular, they

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<sup>3</sup>However, the Court's endorsement of economic substantive due process during this period should not be exaggerated. The Court did sustain a number of regulations during this period; and even when it invalidated legislation on economic substantive due process grounds, the Court, as in Lochner, was often divided. Holmes, Brandeis, Stone, Cardozo, and Hughes (CJ) dissented regularly in economic substantive due process cases.

rejected the Court's "second-guessing" of the legislative choice of means, claiming that the legislative means need be only reasonably calculated to secure the state end. As Harlan wrote

[I]n determining the question of the power to interfere with liberty of contract, the court may inquire whether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health .... But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation ....

After citing some evidence about the working conditions and health in the bakery trade tending to show that the working conditions make long working hours hazardous to the employees' health, Harlan concluded

It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion.

Though the distinction between different standards of review was only formulated clearly at a later point, we can say, with the benefit of hindsight, that the dissent was employing something like what is now known as **rational basis review**.

According to rational basis review, legislation is constitutionally valid iff it pursues a **legitimate** governmental interest in a **reasonable** manner.

This comparatively deferential standard of review can be contrasted with **strict scrutiny**.

According to strict scrutiny, legislation is valid iff it pursues a **compelling** state interest in the **least restrictive** manner possible.

In retrospect, we can see the majority in Lochner as employing a standard of review comparable to strict scrutiny.

## **THE DECLINE OF ECONOMIC, SUBSTANTIVE DUE PROCESS**

For a variety of reasons, by the mid-1930s the Court was ready to rethink and abandon economic substantive due process. Economic substantive due process began to seem economically and politically bankrupt: to many it seemed (a) that it was precisely the sort of laissez-faire policies that economic substantive due process encouraged that had led to the crash and the subsequent economic depression, and (b) that economic substantive due process was hampering New Deal efforts to respond to the Depression. In fact, it was (b) that led to Roosevelt's famous attempt to "pack the Court" (by adding new justices for every sitting justice over 70, up to a limit of fifteen) which, according to some, prompted the change in the Court's attitude, sometimes referred to as the "switch in time that saved nine." The change in outlook was also facilitated by a change in the Court's composition. The dissent view of economic legislation won out: the Court came to apply rational basis review. According to rational basis review, the state need only have a legitimate interest, and the Court will not in general second-guess the reasonableness of the legislative means

(though it will find a statute unconstitutional even under rational basis review if the state's means are obviously irrelevant to, or patently frustrate, the state's end).

In Nebbia v. New York<sup>4</sup> (1934) upheld a regulation of the New York Milk Control Board fixing retail milk prices in order to secure the stability of the milk industry. The Court held that liberty of contract is protected by due process but is not absolute and must yield to the public interest. It concluded that the due process clauses

... do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained. [The] Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases ....

In West Coast Hotel Co. v. Parrish<sup>5</sup> (1937) the Court upheld a minimum wage law for women. In the process it recognized the legitimacy of the state's objective in monitoring the fairness of contracts that the Court had denied in Lochner.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community.

Finally, in Williamson v. Lee Optical of Oklahoma<sup>6</sup> (1955) the Court clearly relied on rational basis review to uphold an Oklahoma law that made it illegal for an optician to fit or duplicate lenses without a prescription from an ophthalmologist or optometrist. The Court noted that, because many opticians could in fact reliably read a prescription off of a broken lens, the statute was not a perfect fit with the state's goal of protecting the health and welfare of the consuming public, but denied that such a fit was necessary.

The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, and not the courts, to balance the advantages and disadvantages of the new requirement. ... [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. [The] day is gone when this Court uses 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.

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<sup>4</sup>291 US 502 (1934).

<sup>5</sup>300 US 379 (1937).

<sup>6</sup>348 US 483 (1955).

## WHAT'S WRONG WITH LOCHNER

Lochner and economic substantive due process are now generally regarded as embarrassments (except perhaps by the so-called Constitution in Exile movement). Though the Court's rejection of economic substantive due process and its acceptance of rational basis review as the test for whether economic regulations satisfy due process in these and other cases is clear, the exact grounds for these developments is not clear. There seem to be two main possible grounds for the Court's rejection of economic substantive due process, each of which finds some echo in these opinions.

(1) According to the first view, what was wrong with Lochner was simply substantive due process. Due process requires only rational basis review, regardless of the kind of regulation involved. The Court should simply not be in the business of telling the legislature what it can or can't do. As Holmes wrote in his dissent in Lochner

I think that the word liberty [sic] in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion ....

And Justice Roberts in Nebbia maintained that due process in general requires only rational basis review, because reasonable pursuit of the general welfare is always a sufficient justification of regulations that infringe liberties.

(2) The alternative view distinguishes between the legitimacy of economic substantive due process and substantive due process. On this view, due process does require that interference with some liberties be subject to more stringent scrutiny than rational basis review. What was wrong with Lochner and **economic** substantive due process, according to this view, is that economic liberties, such as freedom of contract, are not among the more fundamental liberties deserving special protection. Even Holmes's dissent allows that there is no perversion of due process in invalidating democratically enacted legislation if

... it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.

On this view, even if economic legislation requires only rational basis review, other, more fundamental liberties might have to satisfy a more stringent test, such as strict scrutiny.

## NONECONOMIC, SUBSTANTIVE DUE PROCESS

It is important to decide between these two views of why Lochner and economic substantive due process were wrong, because while Lochner and economic substantive due process are now generally regarded as embarrassments, substantive due process is not. The Court has construed due process as protecting various fundamental noneconomic, personal and political liberties. As I noted earlier, the Court has taken the due process clause of the fourteenth Amendment to represent the "selective incorporation" of key provisions in the Bill of Rights (the first nine amendments) (e.g. right of freedom of speech and religion, right against unreasonable search and seizure, right to counsel, right against self-incrimination, right to compensation for property appropriated by the state, and right against cruel and unusual punishment) so as to make these provisions, applicable against the federal government, applicable against state government as well. And, as Griswold

reflects, Fourteenth Amendment due process incorporates not only enumerated provisions in the Bill of Rights, but also **nonenumerated** provisions, such as a right to privacy.

The general test for whether some interest or value is protected by due process is whether the value is **fundamental**. This test was invoked during economic substantive due process. In Meyer v. Nebraska<sup>7</sup> (1923) the Court articulated the test in these terms.

[The liberty guaranteed by the due process clause of the Fourteenth Amendment] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. ... [That] the State may do much [to] improve the quality of its citizens [is] clear; but the individual has certain fundamental rights which must be respected.

Cardozo articulates this test, in the post-Lochner era, in Palko v. Connecticut<sup>8</sup> (1937) in explaining the principle underlying selective incorporation.

In these and other situations [cases of incorporation] immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and, thus, through the Fourteenth Amendment, become valid as against the states.

[The] process of absorption has had its source in the belief that neither liberty nor justice would exist if they [the key, incorporated provisions in the Bill of Rights] were sacrificed.

Where the Court has found that a liberty is fundamental in this sense, it has in general subjected the legislation restricting this liberty to strict scrutiny, not rational basis review.

Modern substantive due process, therefore, presupposes the second view of what was wrong with Lochner and economic substantive due process; they were wrong because they gave special protection to the wrong liberties and interests. But to say that modern substantive due process presupposes the second view is not (yet) to say that it is defensible. There are two related challenges for substantive due process. One worry is that the doctrine of substantive due process is counter-majoritarian and undemocratic. We addressed this worry, at least in part, in our defense of the need for interpretive judicial review that enforces constitutionally protected individual rights. The Court can't hope to interpret the nature and scope of these rights without appealing to potentially controversial judgments of political morality. In particular, we can't recognize due process as a constraint on democratic legislation and accept a purely procedural account of due process as requiring nothing more than majoritarian processes. We must reject Holmes' suggestion that due process cannot "prevent the natural outcome of a dominant opinion". But accepting the coherence of substantive due process does not settle important questions about the scope of substantive due process. The Court needs a principled basis for distinguishing some liberties or

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<sup>7</sup>262 U.S. 390 (1923) (invalidating a state law prohibiting the teaching of any modern language other than English in any private or public grammar school).

<sup>8</sup>302 US 319 (1937).

interests as more fundamental than others. This is the central task of substantive due process jurisprudence.