UIC Law Review

Volume 30 | Issue 1 Article 3

Fall 1996

To Accomplish Fairness and Justice: Substantive Due Process, 30 J. Marshall L. Rev. 95 (1996)

James W. Hilliard

TO ACCOMPLISH FAIRNESS AND JUSTICE: SUBSTANTIVE DUE PROCESS

JAMES W. HILLIARD*

INTRODUCTION

Both the Fourteenth Amendment to the United States Constitution and article I, § 2 of the 1970 Illinois Constitution include the guarantee that no person shall be deprived of life, liberty, or property without due process of law.[1] Since the word "process" denotes a procedure or method, one could surmise that this guarantee refers only to reasonable procedures by which legislation applies to an individual.

However, based on concepts of fundamental fairness and justice, courts have always given this guaranty "substance." Courts interpret the due process guarantee as not only securing reasonable procedures, but also substantive rights that are included in the concept of "liberty."[2] Courts may review the "substance" of legislation rather than the procedure by which the government applies the law to an individual. This aspect of due process is known as substantive due process.[3] Courts use the doctrine of substantive due process as a check on the content of legislation, especially legislation that restricts rights not explicitly protected by the Federal or Illinois Constitution.

Almost everyone has an idea of what is fundamentally fair or just in the abstract. Nevertheless, almost everyone would disagree on what would be a fundamentally fair or just result under specific circumstances. Likewise, judges, lawyers, and commentators have long disagreed on the correct scope of substantive due process generally, and its application in specific cases. Indeed, some believe

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* J.D., University of Illinois College of Law, 1983; B.A., Northwestern University, 1980. The author is currently serving as a judicial clerk to Justice Charles Freeman of the Illinois Supreme Court. The author is grateful for the insight of Cynthia Cobbs and Frank Adams.

1. U.S. CONST. amend. XIV; ILL. CONST. art. I, § 2.

2. *See infra* notes 36-72 for a discussion of personal liberty and the guaranty of substantive due process.

3. Even those who accept the doctrine of substantive due process acknowledge that, grammatically, "'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.'" John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 420 (1978).

that the doctrine should not exist at all.[4]

This Article provides an overview of the constitutional doctrine of substantive due process in the United States and in Illinois. Part I examines the concept of substantive due process, showing that the doctrine is based on traditional American political theory. Part II distinguishes substantive due process from other constitutional theories that also protect individual rights. Part II then discusses how courts apply the doctrine in particular cases, particularly where legislation restricts fundamental rights. Finally, Part III addresses whether the doctrine should exist at all, and concludes that it should.

I. WHAT IS SUBSTANTIVE DUE PROCESS?

To understand the concept of substantive due process, one must first understand the nature of American government, including its formation and characteristics. Essentially, all power and rights initially and ultimately reside in the people.[5] The people formed government for their common welfare. Government exercises the law-making power through the legislature. However, the doctrine of substantive due process inhibits the legislature in exercising its law-making power which tends to affect an individual's liberty. Section A discusses the notion of sovereignty in both the British theory of government and the American theory of government. Section B then addresses the power of the American sovereign and the delegation of power by the sovereign. Section C briefly describes the scope of power a legislature retains over individuals. Finally, Section D discusses the constraints substantive due process places on the arbitrary exercise of government power. However, in order to fully comprehend the importance of such legislative restraints, it is essential to recognize the source of sovereign power.

A. The People Are the Ultimate Sovereign

One court has defined sovereignty as the supreme, absolute, uncontrollable power,[6] in other words, the absolute right to govern.[7] Sovereignty in government is that public authority which

4. *See generally* RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989) [hereinafter THE FOURTEENTH AMENDMENT]; RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) [hereinafter GOVERNMENT BY JUDICIARY]; ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW (1990).

5. RANDY E. BARNETT, THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT 79 (1993).

6. City of Bisbee v. Cochise County, 78 P.2d 982, 985-86 (Ariz. 1938).

7. *Id.*

sets the limits within which one may act.[8] It is the supreme power which governs all citizens and is the person or body of persons in the state to whom there is no political superior.[9]

According to the British theory of government, sovereignty does not vest in the people. In early English history, all attributes of sovereignty resided solely in the monarch. The monarch exercised all governmental powers incident to sovereignty: executive, legislative, and judicial.[10] All power, justice, and rights resided in the monarch and flowed therefrom. English subjects did not exercise any attributes of sovereignty. They did not possess rights, strictly speaking. Rather, English subjects enjoyed mere privileges that flowed, directly or indirectly, by grace from the sovereign.[11] Parliament eventually substituted itself for the monarch in wielding sovereign power. Indeed, the sovereign power of Parliament is traditionally and correctly described as "absolute, omnipotent, uncontrollable,"[12] and even transcendent.

In contrast, according to the American theory of government, the people are the ultimate sovereign. All legitimate authority flows from the people.[13] All governmental power vests in the people.[14] Rather than merely enjoying privileges flowing from a monarch or Parliament, the sovereign people possess inherent and inalienable rights.[15] The essential characteristic of our federal system of government, as opposed to European governments, recognizes individual rights against the state as a primary concern.[16]

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8. *Id.*

9. Cherokee Nation v. Southern Kansas R.R.., 33 F. 900, 906 (W.D. Ark. 1888).

10. D.C.M. YARDLEY, INTRODUCTION TO BRITISH CONSTITUTIONAL LAW 57-60 (7th ed. 1990).

11. Illinois v. Shumaker, 164 N.E. 408, 409 (Ill. 1928); State *ex rel.* McGrael v. Phelps, 128 N.E. 1041, 1045 (Ill. 1910).

12. Illinois v. Hill, 46 N.E. 796, 798 (Ill. 1896); Hawthorn v. Illinois, 109 Ill. 302, 305 (1883). *See also* A.W. Bradley, *The Sovereignty of Parliament—In Perpetuity?, in* THE CHANGING CONSTITUTION 79-82 (Jeffrey Jowell & Dawn Oliver eds., 3d ed. 1994); YARDLEY, *supra* note 10, at 33-36; 8 HALSBURY'S LAWS OF ENGLAND, *Constitutional Law*, ¶ 811 at 531 (4th ed. 1974).

13. *Hawthorn*, 109 Ill. at 306.

14. State *ex rel.* Ayres v. Gray, 69 So. 2d 187, 193 (Fla. 1953); *Shumaker*, 164 N.E. at 409; *Hawthorn*, 109 Ill. at 306; Field v. People *ex rel.* McClernand, 3 Ill. (2 Scam.) 79, 81-82 (1839); David F. Epstein, *The Political Theory of the Constitution, in* CONFRONTING THE CONSTITUTION 78 (Allan Bloom ed., 1990). The term "the people," as a practical matter, refers to qualified voters. 1 THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 82-83 (Walter Carrington ed., 8th ed. 1927).

15. Nunnemacher v. Wisconsin, 108 N.W. 627, 629 (Wis. 1906); Epstein, *supra* note 14, at 78-83. In *Nunnemacher*, while addressing the protest of an inheritance tax waged by the State, the court stated that the "government is the creature of the people." *Nunnemacher*, 108 N.W. at 629.

16. Fidelity & Casualty Co. v. Union Savings Bank Co., 163 N.E. 221, 222

B. The People Created Government and Delegated Only Some of Their Power to Government

The American people, as the ultimate sovereign, created constitutional governments to protect themselves and their fundamental rights, and to promote the common good. The people endowed the government with such powers and subjected it to such limitations, as they saw fit.[17] This includes both the federal government as well as state governments. Notably, the people, in their capacity as the ultimate sovereign, not state governments, established the Federal Constitution.[18]

With respect to sovereignty and the adoption of the Federal Constitution, the people "acquiesced in that document's grants of and restrictions on their rights."[19] However, the legislative powers that the people did not assign to the federal government transferred over to the state legislatures, except for those rights the people withheld to themselves in state constitutions.[20] In other words, the people retain those aspects of sovereignty that they did not choose to delegate to the federal or state government.[21]

The need for Americans to declare their retention of unenumerated rights after the formation of government is evidenced not only by courts and commentators, but also by fundamental documents. Probably the most familiar example is the Declaration of Independence.[22] Another familiar example of the people's retention of unenumerated fundamental rights is found in probably the most familiar example of enumerated rights: the Bill of Rights. The Ninth Amendment to the United States Constitution also of-

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(Ohio 1928).

17. *Ayres*, 69 So. 2d at 193; *Nunnemacher*, 108 N.W. at 629; *Hawthorn*, 109 Ill. at 306.

18. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 402-05 (1819).

19. Gautier v. Ditmar, 97 N.E. 464, 467 (N.Y. 1912).

20. *Id.*; 1 COOLEY, *supra* note 14, at 81.

21. *In re* Opinion of the Justices, 107 A. 673, 674-75 (Me. 1919).

22. THE DECLARATION OF INDEPENDENCE (U.S. 1776); Ill. Ann. Stat. at 14 (Smith-Hurd 1971). *See also* McKinster v. Sager, 72 N.E. 854, 856-57 (Ind. 1904).

> The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence.

Id. (quoting Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150, 159-60 (1897)).

fers Americans a source from which they can retain individual liberties. The Ninth Amendment declares "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[23]

Likewise, the Illinois Constitution contains a declaration that is nearly identical to the Ninth Amendment. Commentary explains that the Illinois provision "gives explicit recognition to the principle that the [Illinois] Bill of Rights is not an all-encompassing enumeration of a citizen's rights and immunities with respect to government action."[24] Similar declarations are found in over thirty state constitutions.[25]

However, it must be emphasized that courts have almost uniformly rejected the Ninth Amendment as a source of fundamental rights. As one court has explained:

> In contrast to the first eight amendments, the Ninth Amendment does not specify any rights of the people, rather it serves as a savings clause to keep from lowering, degrading or rejecting any rights which are not specifically mentioned in the document itself. The Ninth Amendment does not raise those unmentioned rights to constitutional stature; it simply takes cognizance of their general existence. This is not to say that no unenumerated rights are constitutional in nature, for some of them may be found in the penumbras of the first eight amendments or in the liberty concept of the Fourteenth Amendment and, thus, rise to constitutional magnitude. It is only to say, however, that unenumerated rights do not rise to constitutional magnitude by reason of the Ninth Amendment . . . .[26]

Despite the consistency of case law, many commentators continue to debate whether the Ninth Amendment is a source of fundamental rights.[27] At the least, the Ninth Amendment and similar

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23. U.S. CONST. amend. IX.

24. ILL. CONST. art. I, § 24, Constitutional Commentary at 973 (Smith-Hurd 1992).

25. *See* Ely, *supra* note 3, at 442 n.151 (listing 24 state constitutions with similar declarations; however, Minnesota and South Carolina apparently subsequently deleted their declarations). *See generally* ALASKA CONST. art. I, § 21; ARIZ. CONST. art. II, § 33; HAW. CONST. art. I, § 22; IDAHO CONST. art. I, § 21; MICH. CONST. art. I, § 23; N.M. CONST. art. I, § 23; OKLA. CONST. art. II, § 33; UTAH CONST. art. I, § 25.

26. Gibson v. Matthews, 715 F. Supp. 181, 187 (E.D. Ky. 1989) (quoting Charles v. Brown, 495 F. Supp. 862, 863-64 (N.D. Ala. 1980)). "[T]he Ninth Amendment was added to the Bill of Rights to ensure that the maxim *expressio unius est exclusio alterius* would not be used at a later time to deny fundamental rights merely because they were not specifically enumerated in the Constitution." *Id. Accord* Schertz v. Waupaca County, 683 F. Supp. 1551, 1561 (E.D. Wis. 1988) (collecting cases).

27. *See generally* BARNETT, *supra* note 5.; CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNREMUNERATED RIGHTS (1995); STEPHEN K. SHAW, THE NINTH AMENDMENT: PRESERVATION

state declarations are evidence of the reality that people retain rights that exist outside of a written constitution. Notwithstanding these declarations, state legislatures still hold a broad scope of power to enact laws.

C. Unless Restricted by the People, a State Legislature Exercises Plenary Law-Making Power

The people, through a state constitution, vest the law-making function of government in a state legislature. This sovereign power to enact laws is as full, unlimited, and uncontrollable as the ruler in any type of government.[28] Thus, a state legislature is naturally compared to the British Parliament.[29]

However, this analogy fails due to the different sources of sovereignty in the two societies. Again, in Britain, sovereignty resides in Parliament; in America, sovereignty resides in the people.[30] The people of a state, as the ultimate sovereign, vested their law-making power in the legislature in the first place, except for such restrictions they imposed in other sections of the state constitution or in the Federal Constitution.[31] Indeed, "written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their governments."[32]

Based on this discussion, it is clear that a state legislature does not turn to the provisions set forth in the state constitution for power to enact various forms of legislation.[33] Instead, the state legislature looks to the state constitution and the Federal Constitution for restrictions upon its power to act.[34] Therefore, the state legislature may act in every area of civil government, subject to the state and Federal Constitutions.[35]

D. Due Process Restrains Legislative Power

The concept of due process evolved in order to protect indi-

OF THE CONSTITUTIONAL MIND (1990).

28. Greenfield v. Russel, 127 N.E. 102, 105 (Ill. 1920). *See also* Hawthorn v. Illinois, 109 Ill. 302, 304-05 (1883); Harris v. Board of Supervisors, 105 Ill. 445, 450 (1882).

29. *Hawthorn*, 109 Ill. at 305; Illinois v. Hill, 46 N.E. 796, 798 (Ill. 1896).

30. *In re* Day, 54 N.E. 646, 648 (Ill. 1899); 1 COOLEY, *supra* note 14, at 173-75.

31. *Hawthorn*, 109 Ill. at 306; *Harris*, 105 Ill. at 450; Harder's Fire Proof Storage & Van Co. v. City of Chicago, 85 N.E. 245, 247-48 (Ill. 1908); 1 COOLEY, *supra* note 14, at 175-77.

32. Hurtado v. California, 110 U.S. 516, 531 (1894).

33. Locust Grove Cemetery Ass'n v. Rose, 156 N.E.2d 577, 580 (Ill. 1959).

34. *Id.*

35. *Id.*; *Greenfield*, 127 N.E. at 105; *Harder's Fire Proof Storage*, 85 N.E. at 248.

viduals from the arbitrary and capricious acts of legislative will.[36] In essence, the doctrine restrains legislation that restricts personal liberties not explicitly protected by a constitution.[37] This Section presents a thorough discussion of the theory of due process of law in both the Federal Constitution and the Illinois Constitution. It also distinguishes substantive due process from other constitutional theories which also protect individual rights.

1. Due Process of Law

The concept of due process of law has roots that extend back to the 29th chapter of Magna Carta, which guarantees essentially that no free man shall be deprived of life, liberty, or property without the "lawful judgment of his peers, or by the law of the land."[38] The phrase "law of the land" is equivalent to "due process of law."[39]

Further, the "liberty" that the concept of due process protects includes more than freedom from "servitude and restraint."[40] The term embraces "the right of every person to be free in the use of his or her powers, faculties, and property, in such lawful ways as he or she may choose, 'subject only to such restraints as are necessary to serve the common welfare.'"[41] However, this liberty, unlike natural liberty which is not bound by restraints, protects civil liberty.[42] Civil liberty is natural liberty restrained by human laws only as necessary and expedient for the general welfare.[43] In other words, the "liberty" protected by due process is not absolute.[44] This liberty, although broad, is subject to the exercise of the regulatory powers of government.[45]

In Britain, the guaranty guarded against usurpation and tyranny by the monarchy.[46] However, in America, the guaranty became a safeguard against capricious legislation.[47] American courts have long reasoned that "[t]he law of the land or due process of law cannot be taken to be the very act of legislation which wantonly

36. *Hurtado*, 110 U.S. at 527 (quoting Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819)).

37. *Id.*

38. MAGNA CHARTA ch. 39, in Ill. Ann. Stat. at 6 (Smith-Hurd 1971).

39. Twining v. New Jersey, 211 U.S. 78, 100 (1908).

40. Illinois v. Shephard, 605 N.E.2d 518, 524 (Ill. 1992).

41. *Id.* (quoting City of Mt. Vernon v. Julian, 17 N.E.2d 52, 55 (Ill. 1938)); *accord* Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954).

42. *Shephard*, 605 N.E.2d at 501.

43. *Id.*

44. *Id.*

45. *Id.* "The State may enact laws that regulate, restrain, and prohibit, although such regulation, restraint, or prohibition interferes with, curtails, or diminishes personal rights." *Id.*

46. Hurtado v. California, 110 U.S. 516, 532 (1894).

47. *Id.*

deprives a person of his rights."[48] Thus, "due process of law must mean something more than the actual existing law of the land, for otherwise it would be no restraint upon legislative power."[49] Legislation could destroy the enjoyment of life, liberty, or property despite the fairest possible procedures.[50] Courts have concluded that due process guarantees not only particular procedures, but further, "the very substance of individual rights to life, liberty, and property."[51]

The due process guaranty contained in the Fifth Amendment to the Federal Constitution binds the federal government and is a limitation upon the powers of Congress.[52] Likewise, the due process guaranty contained in the Fourteenth Amendment binds the states and is a limitation upon the power of state governments.[53] Also, it is well accepted that the Due Process Clause of the Fourteenth Amendment has its application in both substantive and procedural matters.[54] However, the due process clauses of both amendments impose the same restraint on federal and state legislation. The Fourteenth Amendment extends to individuals the same protection against arbitrary state legislation as the Fifth Amendment extends against arbitrary federal legislation.[55]

Similarly, the Illinois Constitution guarantees that "[n]o person shall be deprived of life, liberty or property without due process of law . . . ."[56] The guaranty limits the power of government, primarily, but not exclusively, the legislature, to enact laws that courts deem to be oppressive, arbitrary, or unreasonable as a matter of substance rather than procedure.[57] The concept has been memorialized in all of Illinois' constitutions.[58] Indeed "[a]ny suggestion that a new Constitution delete or tamper with this section [the due process clause] would in all probability be viewed as subversive. It is too fundamental and too deeply embedded in consti-

48. McKinster v. Sager, 72 N.E. 854, 858 (Ind. 1904).

49. *Hurtado*, 110 U.S. at 528 (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856)).

50. Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting).

51. *Hurtado*, 110 U.S. at 532.

52. Hallinger v. Davis, 146 U.S. 314, 319 (1892).

53. *In re* Kemmler, 136 U.S. 436, 448 (1890) (explaining *Hurtado*, 110 U.S. at 534-35).

54. Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring).

55. Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587, 610 (1935); Hibben v. Smith, 191 U.S. 310, 325 (1903).

56. ILL. CONST. art. I, § 2.

57. GEORGE D. BRADEN & RUBIN G. COHN, THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS 11 (1969).

58. ILL. CONST. art. I, § 2 (1970); ILL. CONST. art. II, § 2 (1870); ILL. CONST. art. XIII, § 8 (1848); ILL. CONST. art. VIII, § 8 (1818).

tutional and political history to tamper with."[59]

2. Substantive Due Process Distinguished

In order to fully understand substantive due process, the concept must be distinguished from other constitutional guarantees. Initially, due process is generally distinguishable from the guaranty of equal protection.[60] Each concept requires a different inquiry which emphasizes different factors. The concept of due process emphasizes the fairness of the relationship between the state and the individual, without regard to similarly situated individuals.[61] On the other hand, equal protection places emphasis on the state's disparate treatment as between groups of individuals similarly situated.[62]

In Illinois, although all past state constitutions included due process clauses, they lacked equal protection clauses. The 1970 Illinois Constitution was the first to have an Equal Protection Clause.[63] Illinois courts formerly did not distinguish between the concepts of due process and equal protection to a great extent. Illinois courts defined due process in terms of the equal protection of the laws, and considered equal treatment as essential to due process.[64] Today, however, Illinois courts distinguish between the two concepts.[65]

Also, the Due Process Clause of the Fourteenth Amendment

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59. BRADEN & COHN, *supra* note 57, at 14-15.

60. U.S. CONST. amend. XIV; ILL. CONST. art. I, § 2.

61. Evitts v. Lucey, 469 U.S. 387, 405 (1985). The Court upheld the respondent's writ of habeas corpus claim, stating that the Fourteenth Amendment due process clause guaranteed him the right to effective assistance of counsel. *Id.* at 404.

62. *Id.* at 405 (quoting Ross v. Moffitt, 417 U.S. 600, 609 (1974)).

63. ILL. CONST. art. I, § 2, Constitutional Commentary at 38 (Smith-Hurd 1992).

64. *See, e.g.*, Marallis v. City of Chicago, 182 N.E. 394, 395 (Ill. 1932) (stating that the Fourteenth Amendment "was intended not only that there should be no arbitrary deprivation of life, liberty, or property, but. . .that no greater burdens should be laid upon one than are laid upon others in the same. . .condition. . . ."); Illinois v. Gordon, 113 N.E. 864, 869 (Ill. 1916).

65. *See, e.g.*, Illinois v. R.G., 546 N.E.2d 533, 540, 550 (Ill. 1989). In *R.G.*, the court consolidated two cases in order to determine the constitutionality of a statute commonly referred to as a minor, required authoritative intervention (MRAI). *Id.* at 536. The trial court found the MRAI violated substantive due process, procedural due process and the equal protection clause. *Id.* The court recognized the Supreme Court's decisions supporting the fundamental right to choices regarding family life. *Id.* at 541. However, the court held that the MRAI at issue did not violate substantive due process or the equal protection clause in light of the existence of a compelling state interest to secure the welfare of children, accomplished by narrowly tailored means by which the State achieved the protection for the runaway children who benefited from the MRAI. *Id.* at 551.

specifically prohibits the states from depriving persons of life, liberty, or property without due process of law. Thus, a state must have caused, or significantly involved itself with, the due process violation.[66] However, the Illinois Due Process Clause literally does not prohibit the State from denying a person due process, but rather guarantees that a person shall not be deprived of due process. Thus, "[t]he Illinois Constitution does not by its terms limit the guarantee against deprivation of due process rights to action by the 'state.'"[67] However, the state due process guarantee has been interpreted to apply only to state action against an individual.[68]

More specifically, substantive due process differs from the guaranty of procedural due process, which prohibits a state from depriving an individual of a protected interest without a fair procedure.[69] This guarantee ensures that the State does not deprive an individual of a protected interest arbitrarily.[70] In order to satisfy procedural due process, an individual must be given notice and an opportunity to be heard and to defend against the claim in an orderly proceeding suited to the nature of the case.[71] In contrast, substantive due process prohibits a State from impermissibly restricting an individual's liberty. The doctrine places absolute limits on the State's ability to act against an individual, notwithstanding the procedural protections in place.[72] Therefore, substantive due process is separate and distinct from other constitutional guarantees of individual rights. In its application, though, courts apply substantive due process differently, dependent upon the existence of a fundamental right.

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66. Williams v. Nagel, 643 N.E.2d 816, 819 (Ill. 1994).

67. ILL. CONST. art. I, § 2, Constitutional Commentary at 38 (Smith-Hurd 1992).

68. Lehndorff Vermoegensverwaltung v. Cousins, 348 N.E.2d 831, 834-35 (Ill. 1976).

69. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

70. *Id. See also R.G.*, 546 N.E.2d at 540; Dennis E. v. O'Malley, 628 N.E.2d 362, 373 (Ill. 1993).

71. Wallace v. Tilley, 41 F.3d 296, 300 (7th Cir. 1994); Durkin v. Hey, 33 N.E.2d 463, 466 (Ill. 1941); Lakeview Trust & Savings Bank v. Estrada, 480 N.E.2d 1312, 1324 (Ill. App. Ct. 1985). *See generally* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.8, at 644-45 (2d ed. 1992). Grammatically, just as the term "substantive due process" is a *non sequitur*, the term "'procedural due process' is redundant." Ely, *supra* note 3, at 420 n.85.

72. *Collins*, 503 U.S. at 125; *R.G.*, 546 N.E.2d at 540; *Dennis E.*, 628 N.E.2d at 373. *See, e.g.*, Brown v. Brienen, 722 F.2d 360, 366-67 (7th Cir. 1983) (stating that the Supreme Court of the United States "has interpreted the due process clause of the Fourteenth Amendment to confer certain substantive rights based mainly on the Bill of Rights.").

II. HOW IS SUBSTANTIVE DUE PROCESS APPLIED?

Courts currently use two standards to determine whether legislation comports with the guaranty of due process: rational basis review and strict scrutiny. The standards are identical to those used for equal protection analysis.[73] The use of either standard depends on whether the challenged statute infringes on a life, liberty, or property interest that is a fundamental right. Further, whether a fundamental right exists often depends on a court's use of history in its analysis. This Part highlights the two standards of review the courts utilize in the application of a substantive due process claim. This Part also discusses the role a state court, specifically Illinois, plays in this determination both as to the Federal Constitution and the Illinois Constitution.

A. Rational Basis Review

The guaranty of due process, contained in the Fifth Amendment regarding federal action and in the Fourteenth Amendment and the Illinois Constitution regarding state action, does not prohibit governmental regulation for the public welfare. Rather, the guaranty requires that the governmental objective be accomplished by means consistent with due process.[74] As explained earlier, the purpose of the due process guaranty is to protect the individual against arbitrary state action.[75] In the context of due process, arbitrary action means willful and unreasonable action: action that depends on the governmental will alone rather than reason or judgment.[76] Since arbitrary action is equivalent to unreasonableness, substantive due process is a test of reasonableness.[77]

If the challenged legislation does not infringe on a fundamental right, due process requires only that the statute not be unreasonable, arbitrary, or capricious, and that the statute be rationally related to a legitimate governmental purpose.[78] Under rational basis review, a court identifies the public interest that the statute is intended to protect, examines whether the statute bears

73. Illinois v. Reed, 591 N.E.2d 455, 459 (Ill. 1992).

74. Nebbia v. New York, 291 U.S. 502, 525 (1934); BRADEN & COHN, *supra* note 57, at 10. In *Nebbia*, the New York state legislature instituted a price regulation for the milk industry. *Id.* at 516. In those industries which affect the public interest, such as the milk industry, the state may enact legislation and economic policy as long as such conduct reasonably promotes the public good; thereby satisfying the due process clause requirements. *Id.* at 538.

75. Twining v. New Jersey, 211 U.S. 78, 101 (1908).

76. Ashcraft v. Board of Educ., 404 N.E.2d 983, 985 (Ill. 1980).

77. *Id.*

78. *Nebbia*, 291 U.S. at 525; Messenger v. Edgar, 623 N.E.2d 310, 316-17 (1993); Illinois v. R.G., 546 N.E.2d 533, 540 (Ill. 1989).

a reasonable relationship to that interest, and determines whether the method used to protect or further that interest is reasonable.[79] Under this standard, the court will uphold the law upon finding any valid, comprehensible basis for finding a rational relationship.[80] Although rational basis review is deferential, it is not a mere formality. Courts have invalidated legislation that fails the due process rational basis test.[81]

B. Strict Scrutiny

If the challenged legislation infringes on a life, liberty, or property interest that is a fundamental right, a court strictly scrutinizes the government's asserted justification for the infringement.[82] The government must have a compelling or overriding interest in the legislation, and must narrowly tailor the legislation to effectuate only that interest.[83] Commentators have described this standard of review as strict in theory and usually fatal in fact.[84] Thus, the designation of a life, liberty, or property interest as a fundamental right will usually determine the result of the analysis.[85]

The most familiar liberties that the United States Supreme Court has recognized as fundamental under the due process clause of the Fourteenth Amendment are those enumerated in the Bill of Rights. The Court has noted the temptation, as a means to curb perceived judicial discretion, to limit individual liberty to those specifically enumerated rights.[86] Also, the Court has acknowledged that there are risks when the judiciary gives enhanced protection to certain substantive liberties without the guidance of the

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79. Illinois v. Lindner, 535 N.E.2d 829, 831-32 (Ill. 1989). The defendant in *Lindner* was convicted of criminal sexual assault and aggravated criminal sexual assault. *Id.* at 830. Upon offering a post-sentencing motion, the defendant asked the court not to forward information regarding the defendant's conviction to the Secretary of State, although the State's statute required the court to forward that information. *Id.* The defendant claimed that the statute would deprive him of life, liberty or property without due process of law. *Id.*

80. Illinois v. Hamm, 595 N.E.2d 540, 546 (Ill. 1992); Harris v. Manor Healthcare Corp., 489 N.E.2d 1374, 1382 (Ill. 1986).

81. *See, e.g.*, *Lindner*, 535 N.E.2d at 833 (stating that the statute was unconstitutional as an overextension of the state's police powers).

82. Poe v. Ullman, 367 U.S. 497, 543, 548 (1961) (Harlan, J., dissenting).

83. *R.G.*, 546 N.E.2d at 540 (citing Roe v. Wade, 410 U.S. 113, 155 (1973)); Boynton v. Kusper, 494 N.E.2d 135, 141 (Ill. 1986) (citing Zablocki v. Redhail, 434 U.S. 374, 388 (1978); 3 ROTUNDA & NOWAK, *supra* note 71, § 18.3, at 15.

84. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1451-52 (2d ed. 1988).

85. ARCHIBALD COX, THE COURT AND THE CONSTITUTION 122-23 (1987).

86. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846-48 (1992).

more specific provisions of the Bill of Rights. The only limit to such judicial intervention becomes the predilections of individual judges.[87]

Indeed, the Court is disinclined to discover new fundamental rights in the Due Process Clause. Certain justices have viewed the Court as most vulnerable and approaching illegitimacy when the Court confronts constitutional law developed by judges that is not rooted in the express language or framework of the Constitution.[88] Therefore, those justices are hesitant to broaden the scope of the substantive due process clauses of the Fifth and Fourteenth Amendments, especially in those situations where such an expansion would require "redefining the category of rights deemed to be fundamental."[89] "Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority."[90]

These concerns certainly justify caution and restraint, but judges should not forsake this constitutional principle.[91] The Due Process Clause of the Fourteenth Amendment is not a short-hand incorporation of the first eight amendments; thus, the Due Process Clause does not apply the specific provisions of the first eight amendments on the states as explicit restrictions.[92] Indeed, "it is settled that the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment embraces more than those freedoms expressly enumerated in the Bill of Rights."[93] This "liberty" is not a

87. Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977). Because the family at issue in *Moore* was an extended family, including grandsons and cousins, the Supreme Court reiterated that the Constitution vigorously protects the sanctity of the home and of the family. *Id.* at 503. The Court recognized that "the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 503-04. Not only did the Court emphasize that the extended family is entitled to the same constitutional protections as the traditional nuclear family, but the Court found that an individual has an implicit fundamental right in familial living arrangements. *Id.* at 498-500.

88. Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986).

89. *Id.*

90. *Id.*

91. *Moore*, 431 U.S. at 502.

92. Bartkus v. Illinois, 359 U.S. 121, 124 (1959). The defendant in *Bartkus* was tried and acquitted in a federal district court for robbery of a federally insured savings and loan. *Id.* at 121-22. In a subsequent trial in state court for the same offense, the defendant was convicted and sentenced to life imprisonment. *Id.* at 122. The defendant claimed that the second trial denied him of due process of law under the Fourteenth Amendment. *Id.* The Court upheld the State's conviction stating "[i]t would be in derogation of our federal system to displace the reserved power of States over state offenses by reason of prosecution of minor federal offenses by federal authorities beyond the control of the States." *Id.* at 137.

93. Zablocki v. Redhail, 434 U.S. 374, 392 (1978) (Stewart, J., concurring); *accord Bartkus*, 359 U.S. at 126.

series of isolated points, such as the freedom of press, speech, and religion,[94] and the freedom from unreasonable searches and seizures.[95] Rather, the liberty guaranteed by the Due Process Clause "is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."[96]

The Court has repeatedly described the general nature of, rather than specifically define, the rights that qualify for heightened judicial protection.[97] Substantive due process is a summarized constitutional guarantee of those rights that are "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [they] were sacrificed,"[98] or are "deeply rooted in this Nation's history and tradition,"[99] or, in other words, are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[100]

It is not appropriate to limit substantive due process by drawing arbitrary lines, such as limiting it to the precise language of other constitutional provisions. Rather, "[a]ppropriate limits come. . .from careful 'respect for the teachings of history [and], solid recognition of the basic values that underlie our society'."[101] Thus, the test for a fundamental right is necessarily part historical and part contemporary.

The Court has acknowledged the temptation "to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified."[102] However, to succumb to that temptation would be contrary to our laws.[103] Sometimes a narrow definition of a personal liberty precludes it from being considered fundamental. For example, while a person has a fundamental right to privacy in the context of family, marriage, and procreation, that person does not

94. U.S. CONST. amend. I.
95. U.S. CONST. amend. IV.
96. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).
97. *Bartkus*, 359 U.S. at 127; Rochin v. California, 342 U.S. 165, 169 (1951).
98. Palko v. Connecticut, 302 U.S. 319, 325-26 (1937), *quoted in Bowers*, 478 U.S. at 191-92 and *Rochin*, 342 U.S. at 169.
99. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).
100. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *quoted in Rochin*, 342 U.S. at 169 and *Palko*, 302 U.S. at 325.
101. *Moore*, 431 U.S. at 503.
102. *Planned Parenthood*, 505 U.S. at 847-49 (discussing the absence of the word "marriage" in the Bill of Rights although it finds protection in the Due Process Clause as a liberty interest from state interference).
103. *Id.*

have a fundamental right to engage in homosexual sodomy.[104] Similarly, while parenthood is a fundamental right, a natural father does not have any substantive parental rights over a child conceived within and born into an existing marriage with another man, which union embraces the child.[105]

However, the boundaries of substantive due process cannot be expressed as a simple rule.[106] The second Justice Harlan explained that due process had yet to be expressed as a precise definition or formula.[107] Justice Harlan spoke of the balance courts have maintained between respect for individual liberty and "the demands of organized society."[108]

> If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[109]

Substantive due process is, therefore, a flexible concept that responds to reason and experience reflected in the common law, and is revealed by the judicial process.[110] Indeed, Archibald Cox

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104. Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986); compare *id.* at 196-97 (Burger, C.J., concurring) with *id.* at 199-201 (Blackmun, J., dissenting).

105. Michael H. v. Gerald D., 491 U.S. 110, 125-27 n.6 (1989) (Scalia, J., plurality opinion). It was in *Michael H.* that Justice Scalia explained his "most specific relevant tradition" approach, which generated much debate among commentators. *See generally* Timothy L. Raschke-Shattuck, Note, *Justice Scalia's Due Process Methodology: Examining Specific Traditions*, 65 S. CAL. L. REV. 2743 (1992); L. Benjamin Young, Jr., Note, *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 VA. L. REV. 581 (1992); Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

106. *Planned Parenthood*, 505 U.S. at 848-51.

107. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

108. *Id.*

109. *Id.*

110. Bartkus v. Illinois, 359 U.S. 121, 126-27 (1959); Rochin v. California, 342 U.S. 165, 170-71 (1957). The Petitioner in *Rochin*, tried and convicted in state court for possession of narcotics, swallowed two capsules in order to prevent the police officers from preserving the evidence for trial. 342 U.S. at 166. Pursuant to police orders, the capsules were forcibly extracted from the Petitioner's stomach. *Id.* This evidence was used at against the Petitioner. *Id.* In holding that such conduct in the criminal setting violated the due process clause of the Fourteenth Amendment, the Court stated that a proper analysis of a due process clause claim requires a judgment "duly mindful of reconciling

has described this process as "the genius of American constitutionalism."[111] To assume that restraint on judicial exercise of judgment may be circumvented by "freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges."[112]

C. Illinois

Of course, it is as much the duty of a state court to protect an individual's rights under the due process clause of the Fourteenth Amendment as it is to protect his or her rights under a state constitution. The United States Supreme Court is the final interpreter of the United States Constitution. A state court must follow the United States Supreme Court's interpretation of the Federal Constitution,[113] including specifically the Due Process Clause of the Fourteenth Amendment.[114]

As a matter of state constitutional law, a state court may not infringe on the minimum level of protection declared by the United States Supreme Court in interpreting the Federal Constitution. However, the state court is free to impose higher standards and grant broader protections than those set by the Federal Constitution through its interpretation of similar provisions in the state constitution.[115] Specifically, in construing the Illinois Constitution's guarantee of due process, Illinois courts may look to the federal courts' interpretations of the Federal Due Process Clauses for guidance. However, the Illinois Supreme Court draws the final conclusions on how to construe the due process guarantee of the Illinois Constitution.[116] Notwithstanding the long precedent which has recognized substantive due process as a integral part of both the Federal Constitution and the Illinois constitution, the question remains whether this doctrine should continue to play a formidable role in constitutional jurisprudence.

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the needs both of continuity and of change in a progressive society." *Id.* at 172.

111. COX, *supra* note 85, at 134-35; *accord id.* at 328, 373.

112. *Rochin*, 342 U.S. at 171.

113. U.S. CONST., art. VI; Ellingsen v. Milk Wagon Drivers' Union, 35 N.E.2d 349, 351-52 (Ill. 1941).

114. Illinois v. Wilson, 78 N.E.2d 514, 520 (Ill. 1948); *accord* North Carolina v. Davis, 116 S.E.2d 365, 370-71 (N.C. 1960).

115. Miller v. Tennessee, 584 S.W.2d 758, 760 (Tenn. 1979); Illinois v. Nally, 575 N.E.2d 1341, 1355 (Ill. App. Ct. 1991).

116. Illinois v. Washington, 665 N.E.2d 1330, 1338 (Ill. 1996) (McMorrow, J., specially concurring); Illinois v. McCauley, 645 N.E.2d 923, 937 (Ill. 1994); Rollins v. Ellwood, 565 N.E.2d 1302, 1316 (Ill. 1990).

III. SHOULD SUBSTANTIVE DUE PROCESS EXIST?

Judges have long criticized the doctrine of substantive due process.[117] Similarly, there continues to be a school of scholars who decry as illegitimate any judicial protection of values that are not identified in the text of a constitution.[118] These critics reason that in a democracy, the people should democratically determine their fundamental rights and write them into a constitution; judges should not "find" and "declare" them. Thus, "any doctrine of implied fundamental rights arguably intrudes upon the majoritarian processes by which a democratic society governs itself."[119]

A. Criticism of Substantive Due Process

Robert Bork notes that a judge finds a fundamental right by referring to some objectively correct hierarchy of values.[120] However, Bork posits that no such system exists. To Bork, judges refer to "moral or ethical principles about which people can and do disagree."[121] Bork further notes that since disagreement is inherent, the populace votes to decide the issues and in those situations where the Constitution is silent, the "majority morality prevails."[122]

Thus, according to critics of unenumerated fundamental rights, a fundamental right does not exist unless it is expressly or implicitly identified in a constitution. According to Bork, for example, the only source that limits the power of majorities are "the liberties the Constitution specifies."[123] Constitutional liberties are not, using the words of the Declaration of Independence, "unalienable Rights" that are based on "self-evident truths."[124] Rather, constitutional provisions create specific rights.[125] Liberties

117. *See, e.g.*, Albright v. Oliver, 510 U.S. 266, 275-76 (1994) (Scalia, J., concurring); Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black, J., dissenting) (stating that the judiciary should not hold the due process clause as the instrument to invalidate laws which judges find "irrational, unreasonable, or offensive."); Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting); Illinois Psychological Ass'n v. Falk, 818 F.2d 1337, 1342 (7th Cir. 1987) (*per* Posner, J.).

118. *See, e.g.*, 2 ROTUNDA & NOWAK, *supra* note 71, § 15.7, at 431; BORK, *supra* note 4, at 318 (stating, in his resignation letter to President Reagan, a judge may not invent principles of his own).

119. Lutz v. City of York, 899 F.2d 255, 267 (3d Cir. 1990) (citing ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW, 110-26 (1990)); *accord Griswold*, 381 U.S. at 511-13 (Black, J., dissenting).

120. BORK, *supra* note 4, at 258.

121. *Id.* at 259.

122. *Id.*

123. *Id.* at 147.

124. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

125. Dronenburg v. Zech, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (*per* Bork, J.) (explaining that these specific rights include those protected for "racial, ethnic, and religious minorities.").

are created by human beings, based only on time, place, and experience. They are democratically created and democratically controlled:

> Those constitutional liberties were not produced by abstract reasoning. They arose out of historical experience with unaccountable power and out of political thought grounded in the study of history as well as in moral and religious sentiment. Attempts to frame theories that remove from democratic control areas of life our nation's Founders intended to place there can achieve power only if abstractions are regarded as legitimately able to displace the Constitution's text and structure and the history that gives our legal rights life, rootedness, and meaning. It is no small matter to discredit the foundations upon which our constitutional freedoms have always been sustained and substitute as a bulwark only the abstract propositions of moral philosophy. To do that is, in fact, to display a lightmindedness terrifying in its frivolity. Our freedoms do not ultimately depend upon the pronouncements of judges sitting in a row. They depend upon their acceptance by the American people, and a major factor in that acceptance is the belief that these liberties are inseparable from the founding of the nation. The moral systems urged as constitutional law by the theorists are not compatible with the moral beliefs of most Americans. . . . Constitutional doctrine that rests upon a parochial and class-bound version of morality, one not shared by the general American public, is certain to be resented and is unlikely to prove much of a safeguard when crisis comes.[126]

Further, according to critics of substantive due process, the judicial descriptions of fundamental rights are "evanescent," "accordion-like," or "vaporous." They are too vague and subjective to effectively control judicial power.[127]

Critics of substantive due process overlook the cornerstone on which "[t]he entire social and political structure of the United States rests."[128] Substantive due process reflects the American political reality that at the very basis of conduct or action are rights inherent to all individuals.[129] In order to maintain society's liberty,

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126. BORK, *supra* note 4, at 353-54. For example, the Ninth Amendment does not refer to unenumerated rights. Rather, it refers to rights already guaranteed by other written sources such as state constitutions, statutes, and common law. *Id.* at 183-85.

127. Rochin v. California, 342 U.S. 165, 175-77 (1951) (Black, J., concurring); *see also* Adamson v. California, 332 U.S. 46, 90-92 (1947) (Black, J., dissenting) (stating that exceeding the constitutional boundaries will effectively allow judges unchecked judicial authority); BORK, *supra* note 4, at 118, 180; GOVERNMENT BY JUDICIARY, *supra* note 4, at 258-69, 273-75; FOURTEENTH AMENDMENT, *supra* note 4, at 13-17.

128. 16A C.J.S. *Constitutional Law* § 444 at 455 (1984).

129. Butchers' Union Slaughter-House & Livestock Landing Co. v. Crescent City Live-stock Landing & Slaughter-House Co., 111 U.S. 746, 756-57 (1884)

these inherent rights must be recognized.[130]

> These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: "We hold these truths to be self-evident"—that is so plain that their truth is recognized upon their mere statement—"that all men are endowed"—not by edicts of Emperors, or decrees of Parliament, or acts of Congress, but "by their Creator with certain inalienable rights"—that is, rights which cannot be bartered away, or given away, or taken away except in punishment of crime— "and that among these are life, liberty, and the pursuit of happiness, and to secure these"— not grant them but secure them— "governments are instituted among men, deriving their just powers from the consent of the governed."[131]

Opponents of the doctrine apparently assume that the people surrendered all of their power and rights to the state in forming government. In turn, the government, by way of a constitution, grants certain expressly enumerated rights back to the people.[132] However, it would be incorrect in assuming that merely because a constitution protects individual rights, those rights originate from that document.[133] As discussed above, the people did not surrender all power and rights to government in forming a state.[134] Rather, the people endowed government with such powers, and subjected it to such limitations, as they saw fit.[135] "A Constitution is not the beginning of a community, nor does it originate and create institutions of government. Instead, it assumes the existence of an established system which is to continue in force, and is based on pre-existing rights, laws, and modes of thought."[136] The people only delegated some of their power to government, but retained sovereignty after the formation of government.[137]

Therefore, a constitution is not the source of fundamental rights; it does not create or grant fundamental rights to the people.

(Field, J., concurring).

130. *Id.* at 756.

131. *Id.* at 756-57.

132. *See, e.g.*, N.D. CONST. art. I, § 20; PA. CONST. art. I, § 25; TEX. CONST. art. I, § 29 ("[t]o guard against transgressions of the high powers which we have delegated, we declare that everything in this article [Bill of Rights] is excepted out of the general powers of government and shall forever remain inviolate."); State *ex rel.* Holt v. Denny, 21 N.E. 274, 277, 283 (Ind. 1889) (rejecting argument).

133. 1 COOLEY, *supra* note 14, at 95.

134. See *supra* notes 17-23 for a discussion of the rights retained by the people. *See also* Nunnemacher v. Wisconsin, 108 N.W. 627, 629 (Wis. 1906).

135. *Nunnemacher,* 108 N.W. at 629. In support, the court described the government as "the agent of the people" to protect rights. *Id.*

136. Washington County Election Comm'n v. City of Johnson City, 350 S.W.2d 601, 604 (Tenn. 1961).

137. *Denny*, 21 N.E. at 277.

Rather, certain fundamental rights are inherent in the people, even though a constitution does not specifically enumerate them. They originate independently of any express law.[138] A constitution recognizes, declares, or confirms fundamental rights that already and ultimately reside with the people.[139] These retained fundamental rights are embraced by the concept of "liberty" protected by the due process clause of the Fourteenth Amendment.

Critics of unenumerated fundamental rights invoke the sovereignty of the people in limiting fundamental rights to the text of a constitution.[140] They reason that since the sovereign people created specific fundamental rights in a constitution, then the concept of unenumerated rights deprives the people of their sovereignty.[141] When these critics speak of the "sovereign people," they actually mean the "sovereign majority." Based on this view, since civil liberties are democratically created and controlled, a sufficient "sovereign majority" can do anything or, more accurately, refrain from nothing, so long as the majority includes or excludes language in a written constitution. There would be no principle to prevent them from so doing because no principles exist that they did not create. Minorities would possess only the liberties that the majority chooses to create.

However, in our historical legal culture, the concept of unenumerated rights recognizes the sovereignty of all of the people: minorities as well as majorities. Again, each citizen has inherent and unalienable rights that are not specifically found in a constitution's text. In our foundational faith, "we hold these truths to be self-evident."[142]

B. The Common Law Tradition Limits Judicial Abuse of Power

The doctrine of substantive due process does not allow judges to wield uncontrollable power.[143] True, the concept of substantive due process is not final and fixed. Judges can only describe fundamental rights as, for example, rights that are "implicit in the concept of ordered liberty," or are "deeply rooted in this Nation's

138. Colorado Anti-Discrimination Comm'n v. Case, 380 P.2d 34, 39-40 (Colo. 1963).

139. *See* People *ex rel.* Wellman v. Washburn, 102 N.E.2d 124, 127-28 (Ill. 1951) (citing the Bill of Rights as a "restatement and adoption of the very principles upon which our freedom is based . . . ."); Gow v. Bingham, 107 N.Y.S. 1011, 1014 (1907).

140. Lino A. Graglia, *The Constitution and "Fundamental Rights", in* THE FRAMERS AND FUNDAMENTAL RIGHTS 97-101 (Robert A. Licht ed., 1991).

141. *Id.*

142. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

143. *See, e.g.*, Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977); Rochin v. California, 342 U.S. 165, 170-71 (1957).

history and tradition."[144] Nevertheless, the common law judicial process limits and binds judges in this area, as in the common law generally.[145]

In deciding a case under the common law, a judge operates under a duty "to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience."[146] The judge initially turns to and, if possible, applies precedent to a new combination of circumstances, thereby producing a legal result.[147] However, there regularly is no decisive precedent, or the controlling precedent repeatedly produces unjust results.[148] At that point, Justice Cardozo identified the forces that, individually or in combination, guide the judge in her decision-making and shape the progress of the law: logic, history, custom, utility, and accepted standards of right conduct.[149] The judge does not declare as law his own aspirations, beliefs, and philosophies, but rather those of the community that the judge serves.[150]

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains.[151]

Professor Llewellyn identifies several groups of factors that developed in the common law judicial tradition "in an effort to render the deciding done by our appellate courts more reckonable and stable than is the deciding done in most other phases of American life on most other types of fighting issue."[152] Judges are

144. *Rochin*, 342 U.S. at 169; Bowers v. Hardwick, 478 U.S. 186, 191-92 (1986); Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

145. *Rochin*, 342 U.S. at 170-71; COX, *supra* note 85, at 123-25. Cox discussed, in part, the historical background for this judicial limitation. *Id.* Cox mentioned that while a portion of the limits placed on judges are self-imposed, judges act as impartial interpreters of the law and of the given factual circumstance. *Id.* at 123. Accordingly, such a limitation adds to the integrity of the judiciary. *Id.*

146. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 133-34 (1921).

147. *Id.* at 19-20, 68-69. In determining this legal result, the judge not only addresses the litigants before him, but he also addresses others by potentially pronouncing the law for future litigants to use. *Id.* at 21.

148. *Id.* at 20-23.

149. *Id.* at 112-15.

150. *Id.* at 173; *see also id.* at 88-90, 105-11.

151. *Id.* at 141; *accord* Rochin v. California, 342 U.S. 165, 171-72 (1957).

152. KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 4-

materially limited by forces that relate to legal conditioning such as education, training, and experience in American law, and acceptance of legal doctrine and doctrinal techniques.[153] Other limiting factors involve the appellate process, including receiving a frozen set of facts; issues that are limited, sharpened, and articulated; adversarial argument by counsel; group decision-making; and a written opinion that explains the court's decision. Still other limiting factors involve the office of the judiciary, specifically, a feeling of responsibility for justice and judicial independence.[154]

True, judges are not inherently equipped for this task. However, the American legal tradition has placed this power of interpretation with the judiciary. The common law process does not produce certainty, but rather reasonable regularity. Judges retain lawful discretion.[155] In their hands the law has remained vigorous through the succeeding generations.[156] Requisite to the due process clause analysis is a careful, even articulate, inquest into those societal principles recognized as fundamental. "The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may by a tribunal disciplined for the task and environed by the best safeguards for disinterestedness and detachment."[157]

For example, about thirty years ago, courts disagreed on whether laws that require motorcyclists to wear helmets or automobile drivers and front-seat passengers to wear seat belts violated substantive due process.[158] Some courts initially held that such laws impermissibly restricted personal liberty.[159] However, those decisions were eventually overruled or reversed.[160] Today, courts have uniformly upheld such laws.[161]

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5 (1960).

153. *Id.* at 4-15.

154. *See generally id.* at 19-51. Justice Frankfurter suggested as an additional limiting factor specifically for the United States Supreme Court "an alert deference to the judgment of the State court under review." Adamson v. California, 332 U.S. 46, 68 (1947) (Frankfurter, J., concurring); Malinski v. New York, 324 U.S. 401, 417 (1945) (Frankfurter, J., concurring).

155. LLEWELLYN, *supra* note 152, at 215-19.

156. CARDOZO, *supra* note 146, at 135-38.

157. Bartkus v. Illinois, 359 U.S. 121, 128 (1959).

158. *See, e.g.*, Illinois v. Fries, 250 N.E.2d 149, 150 (Ill. 1969), *overrruled by* Illinois v. Kohrig, 498 N.E.2d 1158, 1166 (Ill. 1986).

159. *Fries*, 250 N.E.2d at 150.

160. *See, e.g., id.*; American Motorcycle Ass'n v. Davids, 158 N.W.2d 72 (Mich. Ct. App. 1968), *overruled by* Michigan v. Poucher, 240 N.W.2d 298 (Mich. Ct. App.).

161. Picou v. Gillum, 874 F.2d 1519, 1520 n.2 (11th Cir. 1989). In *Picou*, the appellant brought the action to contest the constitutionality of Florida's mandatory motorcycle helmet law, which stated, in part, that "[n]o person shall operate or ride upon a motorcycle unless he is properly wearing protective headgear. . . ." *Id.* at 1520. The appellant asserted his rights under the fed-

Although the "liberty" that substantive due process protects is incapable of precise definition, the common law process enables courts to describe its outermost parameters. For example, courts have recognized that the Constitution does not provide for the broad legal notion of an individual's "right to be let alone" by government action.[162] At the local, state, and federal level, almost every act by an individual is subject to a great number of regulatory procedures. Consequently, the mere declaration of a right to be let alone rarely promotes the advocated legal inquiry, although it "is an appealing rhetorical device . . . ."[163]

> [T]he "right"—to the extent it exists—has no meaning outside its application to specific activities. The Constitution does protect citizens from government interference in many areas—speech, religion, the security of the home. But the unconstrained right asserted by appellant has no discernible bounds, and bears little resemblance to the important but limited privacy rights recognized by our highest Court. As the Court has stated, "the protection of a person's general right to privacy—his right to be let alone by other people—is like the protection of his property and his very life, left largely to the law of the individual States."[164]

In upholding a mandatory seat belt law, the Illinois Supreme Court recognized its role in ascertaining unenumerated fundamental rights in a democratic society.[165] The court declined to read into the Constitution a fundamental right of privacy in deciding whether or not to use a safety belt since neither the language of the Constitution nor the legal precedent provide a clear basis for such a right.[166] The Illinois Supreme Court held that the mandatory safety belt law does not infringe upon any privacy right expressed in the Illinois Constitution or protected by the Fourteenth Amendment.[167] To hold otherwise would "place the court in a position of acting as a super-legislature, nullifying laws it does not like. That is not our proper role in a democratic society."[168]

However, the United States Supreme Court has recognized several aspects of the "liberty" protected by the doctrine of substantive due process, in addition to those enumerated in the Bill of Rights. This liberty includes the right against unreasonable police practices, such as using a confession extracted by violence and bru-

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eral Constitution's guaranty of due process, equal protection and privacy. The court also pointed to societal costs and individual safety in further support of mandatory helmet laws. *Id.* at 1522.

162. *Id.* at 1521.
163. *Id.*
164. *Id.*
165. *Kohrig*, 498 N.E.2d at 1162.
166. *Id.*
167. *Id.* at 1166.
168. *Id.*

tality,[169] and using incriminating evidence that was involuntarily pumped from a person's stomach.[170] This liberty also includes the right to make certain kinds of important decisions without unjustified government interference.[171] These decisions relate to marriage, child bearing, child rearing, education and family relationships.[172] Additionally, the Illinois Supreme Court has recognized additional aspects of liberty protected by the Illinois due process clause. For example, the liberty protected by the due process clause includes the right to a new trial to a person who presents compelling evidence of actual innocence that could not have been presented sooner in the exercise of due diligence.[173]

"[W]hile the opinions of [judges] can sometimes be the voice of the spirit reminding us of our better selves, the roots of such decisions must be already in the people."[174] Of course, there is always the risk of judicial overstepping. Judges are only human; they sometimes err in performing their judicial function of interpreting a constitution.[175] Likewise, the members of the executive and legislative departments of government are only human; they, too, sometimes err in performing their respective constitutional functions.

Fortunately, our tripartite systems of federal and state governments, with their many checks and balances, assume mistakes and worse. Also fortunately, the ultimate power in American gov-

169. Brown v. Mississippi, 297 U.S. 278, 285-86 (1936). The Court required all conduct on behalf of the state to conform with those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Id.* at 286. The Court referred to the extorted confessions as "revolting to the sense of justice . . . ." which denied the petitioners due process of law. *Id.*

170. Rochin v. California, 342 U.S. 165, 172-74 (1951).

171. Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977).

172. Bowers v. Hardwick, 478 U.S. 186, 190 (1986); Zablocki v. Redhail, 434 U.S. 374, 392-93 (1978) (Stewart, J., concurring); *Carey*, 431 U.S. at 685; Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977).

173. Illinois v. Washington, 665 N.E.2d 1330, 1338-39 (Ill. 1996) (McMorrow, J., specially concurring); Bork counters that "[t]he actual Constitution does not forbid every ghastly hypothetical law [or, presumably, practice], and once you begin to invent doctrine that does, you will create an unconfinable judicial power." BORK, *supra* note 4, at 234.

174. COX, *supra* note 85, at 377.

175. The term "substantive due process" has become "dirty words" to some ears. This is primarily because the United States Supreme Court during the first third of the Twentieth Century frequently and inconsistently invalidated economic regulation and worker protection legislation based on the doctrine of substantive due process. These cases are commonly referred to under the paradigm case of *Lochner v. New York*, 198 U.S. 45 (1905). These cases are now almost universally acknowledged to have been constitutionally improper. 2 ROTUNDA & NOWAK, *supra* note 71, § 15.3, at 389-92; Ely, *supra* note 3, at 415; COX, *supra* note 85, at 134-37.

ernment resides where it began, with the American people. Judges will make constitutional decisions that the people perceive to be erroneous. However, if perceived judicial errors sufficiently offend the people's sense of fairness and justice, the people will correct them sooner or later.[176]

The American system of government, based on the inherent fundamental rights of the citizen, requires constant vigilance and effort. A bright-line theory of constitutional interpretation that ignores or even rejects our inherent rights is an unacceptable substitute.

CONCLUSION

Archibald Cox observed that persistent judicial resort to the doctrine of substantive due process "attests the strength of our natural law inheritance in constitutional adjudication," and that it is "unwise as well as hopeless to resist it."[177] This article has attempted to expound on that observation.

Both the bench and the bar should have a working knowledge of the concept of substantive due process and how it is applied in a particular case. Such knowledge will contribute towards fulfilling the constitutional guarantee that no person shall be deprived of life, liberty, or property without due process of law.

176. *See, e.g.*, U.S. CONST. amend. XI, *overruling* Chisolm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); U.S. CONST. amends. XIII, XIV, *overruling* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); U.S. CONST. amend. XVI, *overruling* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); ILL. CONST. art. I, § 8 (amended 1994), *overruling* Illinois v. Fitzpatrick, 633 N.E.2d 685 (Ill. 1994). *See also* Thomas Conklin, Note, People v. Fitzpatrick: *The Path to Amending the Illinois Constitution to Protect Child Witnesses in Criminal Sexual Abuse Cases*, 26 LOY. U. CHI. L.J. 321, 323, 342-43 (1995).

177. ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 113 (1976).