

Substantive Due Process and Labor Law

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Substantive due process refers to a judicial policy that substantively protects, under the due process clauses of the Fifth and Fourteenth Amendments, activities that are not elsewhere secured in the Constitution. With reference to the protection of economic liberties, the doctrine is referred to as economic due process. From its earliest days the Supreme Court had protected property rights based upon natural rights and social compact doctrine. In the middle of the nineteenth century the court turned from these so-called unwritten laws to the due process clause of the Constitution as the basis for substantive protection of property rights. Prior to the 1850's the due process clause was invoked in criminal cases to ensure the procedural rights of defendants. The first Supreme Court application of substantive due process was in the 1855 *Hoboken Land* decision, in which the court determined that due process relates to civil processes at common law.¹ That made it possible for the court to invoke the due process clause as a protection of property rights and to restrain legislative infringement of those rights. State courts also turned to the due process clause in state constitutions as the basis for substantive protection of property rights. The most important of these early decisions was *Wynehamer v. People* in 1856.² The New York Court of Appeals ruled that a state law regulating the sale of intoxicating beverages was unconstitutional under the due process clause. The case was important because it extended substantive due process to the use of property as well as the ownership of property.

The due process clause was invoked by the Supreme Court in the *Dred Scott* decision. Chief Justice Taney interpreted the due process clause as precluding federal government restrictions on an individual's liberty or property, including property in slaves:

If the Constitution recognizes the right of the property of the master in a slave, and makes no distinction between that description of property and other property owned by a citizen, no tribunal, acting under the authority of the United States, whether it be legislative, executive, or judicial, has a right to draw such a distinction, or deny to it the benefit of the provisions and guarantees which have been provided for the protection of private property against the encroachments of the government.³

The Thirteenth Amendment to the Constitution ratified in 1865 prohibited

slavery and involuntary servitude. The Fourteenth Amendment secured for the emancipated Blacks the citizenship rights enjoyed by the rest of the population, and provided federal protection of those rights against infringement by the states. Section 1 of the Fourteenth Amendment reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

In the second half of the nineteenth century the doctrine of substantive due process was expanded by both the federal and state courts. Both civil as well as criminal rights were extended, bringing a broad range of economic interests within the protected area.⁴ Governments could attempt to regulate an individual's right of contract, to enter a calling or trade, and to acquire property; but the government had to justify its authority. The court attempted to evaluate the legitimacy of the acts, objectives, and means used to accomplish this. As the court explained in 1894, "the means must be reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals."⁵ That ruling became a precedent for subsequent Supreme Court decisions providing substantive due process protection to individual liberty and property.

In a series of decisions in the late-nineteenth century the Supreme Court reinterpreted the due process clause of the Constitution. The landmark case was that of *Munn v. Illinois* (1877). In that case the Supreme Court upheld an Illinois state law regulating storage rates for grain warehouses. In the majority opinion Chief Justice Waite stated:

One devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.⁶

In that case the court sustained a state regulation of grain warehouse rates on the grounds that the business was "affected with a public interest," or a "public ally." The court argued that the grain warehouse was not an ordinary business, but one of critical importance to the commerce of the country. It compared the warehouse industry to other industries subject to regulation under common law, including common carriers, ferries, grist mills, and innkeeping. The court also argued that the warehouse industry in Chicago was a "virtual" monopoly because of the absence of price competition among the nine firms operating grain elevators in that city.

The *Munn* decision opened up a wide range of economic activity subject to government regulation on the grounds that these activities were cloaked with the public interest. In *Stone v. Farmers Loan* (1886), the court upheld a state law regulating railroad rates.⁷ In order to satisfy the criterion of substantive due

process in that case the court added the proviso that regulation was not without limits. In *Chicago, Milwaukee and St. Paul Railroad Co. v. Minnesota* (1890) the court upheld state regulation of railroads with the specific proviso that such regulations had to be reasonable in order to satisfy the substantive due process criterion.

The courts' interpretation of "reasonable" government regulation vascillated considerably, resulting in different, and often conflicting, decisions. For example, the court sanctioned the regulation of working hours for women, but not for men. The court reversed its decision in several cases permitting government regulation which had been precluded. Legislation was approved providing for workmen's compensation, regulating wage rates, and rent control; regulations were created for the size and weight of loaves of bread, insurance rates, the size and character of packages in which goods are sold, the practice of medicine, and the training of practitioners. Legislatures could require smallpox vaccinations, prohibit the sale of adulterated food and drugs, and impose absolute liability without fault. The court permitted government regulations covering zoning, collusive practices by competitors, gambling, extortion, and usury. In these cases the Justices seem to apply their own criteria of the reasonableness of the legislation.⁸

In addition to regulatory activity we see a significant expansion in other government activities under the new interpretation of the due process clause. The government power to tax was expanded in several cases. In *McCray v. United States* (1904) the court upheld a differential tax on colored and uncolored margarine. This removed the constraints placed on the federal government's power to use taxes for non-revenue purposes. The police power of the state was expanded in several cases. In *Champion v. Ames* (1903) the court upheld a law forbidding shipment of lottery tickets under the guise of controlling interstate commerce. Two years later in *Swift and Co. v. United States* (1905) the court introduced the "stream of commerce" doctrine, bringing virtually every economic activity under control on the grounds that at some point it involves interstate commerce. The court sanctioned the delegation of legislative power to the executive branch of government. In *United States v. Grimaud* (1911) the court ruled that administrative rulings of a regulatory board had the force of law, greatly increasing the power of these executive bodies.

As these court decisions opened up a wider range of economic activity to government regulation, private interest groups responded by allocating more resources toward political action designed to transfer wealth through the public sector. Labor unions, business, and farmers found that under these new rules of the game the benefits of special interest legislation outweighed the costs of lobbying and other political action to effect political change. The result was a virtual explosion in state and federal laws regulating economic activity. Cases involving these laws swelled the court dockets and we find these same special interest groups attempting to influence the judicial process.

The courts' application of substantive due process in these cases appears to

reflect an arbitrary and vacillating interpretation of the rule of reason by different groups of justices. A number of writers have pointed out the inconsistencies in these more recent rulings and the contrast with earlier decisions based upon natural rights and social contract. Despite these criticisms we should recognize the thread of continuity provided by substantive due process in this period and the links to an earlier tradition of due process in common law. This is best illustrated in the courts' interpretation of substantive due process with reference to labor legislation.

Based upon substantive due process the courts negated legislation restricting entry into an occupation. The slaughterhouse cases decided in 1872 were landmarks in this application of substantive due process.⁹ The Louisiana legislature granted a monopoly privilege to a private corporation it had created to operate a regulated livestock and slaughterhouse business in New Orleans. Suit was brought by a group of adversely affected butchers on the grounds of subjection to involuntary servitude (in violation of the Thirteenth Amendment), and of violation of the plaintiffs' privileges and immunities as United States citizens in being deprived of liberty and property without due process of law, and of equal protection under the law (by the Fourteenth Amendment). The Supreme Court upheld the monopoly grant. At that time the majority was not prepared to regard a person's calling, trade, occupation, or labor as property, or the right to engage in it as liberty (or as property). However, the dissenting opinion in the slaughterhouse cases defined liberty and property in more expansive terms that eventually did become judicially acceptable. The minority justices saw the butchers' loss of occupation to be one of both liberty and property. In the words of Bradley:

This right to choose one's calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man's property and right. . . . Their [citizens'] right of choice is a portion of their liberty; their occupation is their property.¹⁰

Swayne gave a similar meaning to property in that case:

Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies to a large extent at the foundation of most other forms of property, and of all solid individual and national prosperity.¹¹

The four dissenting justices viewed the right to use one's labor in a particular occupation as a property right protected by the Fourteenth Amendment. They were willing to invoke that amendment to provide federal protection of the right of the butchers to engage in their trade free from state government regulations that violated that right. This expanded view of the protection provided by the Fourteenth Amendment to individual liberty and property would later become the foundation for substantive due process at the federal level beginning with the *Allgeyer* case in 1897.

In 1883 the Supreme Court ruled that Louisiana could limit the monopoly power granted to the slaughterhouse monopoly under the federal Constitution's contract clause. In that case Justice Bradley concurred in the result, arguing that the grant of monopoly power had not been valid. He expanded on his views in the earlier slaughterhouse case:

The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen. . . . I hold that the liberty of pursuit in the right to follow any of the ordinary callings of life is one of the privileges of a citizen in the United States.¹²

Substantive due process was first established at the federal level in *Allgeyer v. Louisiana* (1897).¹³ A Louisiana law made it illegal for a person, firm or corporation to obtain insurance from an out of state company that had not been licensed by the state. Allgeyer was charged with entering into a contract for insurance with a New York insurance company that was not licensed in Louisiana. The Supreme Court ruled in Allgeyer's favor that the state law violated his liberty of contract under the Fourteenth Amendment. Justice Peckham maintained that:

The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.¹⁴

Thus, the Allgeyer case launched an era in which the right of individuals to enter into contracts including the pursuit of an ordinary calling or trade was protected under the due process clause of the Constitution.

State court decisions also affirmed the right of individuals to enter into contracts, including the sale of one's labor, free from governmental regulations and restrictions. A Pennsylvania court in ruling against legislation regulating wage rates maintained that such an act was:

an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. . . . He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void.¹⁵

The liberty to enter any lawful occupation was affirmed by the Arkansas Supreme court:

The right to acquire and possess property necessarily includes the right to contract; for it is the principal mode of acquisition, and is the only way by which a person can rightly acquire property by his own exertion. Of all the "rights of person" it is the most essential to human happiness. . . . A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit; and as incident to this, is the right to labor and employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties, to enforce all lawful contracts, to sue and give evidence, and to inherit, purchase, lease, sell or convey property of any kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression.¹⁶

Another important application of substantive due process was with reference to laws regulating the hours and conditions of work. The case of *Lochner v. New York* (1905) dealt with a New York law establishing sanitary and other working conditions for bakeries and limiting to sixty the number of hours an employee in such establishments could be required or permitted to work each week, with a maximum of ten hours a day.¹⁷ *Lochner*, a baking establishment, was convicted of violating the law, but appealed on the grounds that the law violated his liberty under the due process clause. The Supreme Court ruled that the state must justify the law:

The act must have a . . . direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.¹⁸

The Supreme Court accepted the portions of the New York law dealing with sanitation and working conditions as a valid exercise of the police power of the state in terms of these criteria. However, the court found that the limitation on working hours failed the means-end test. The state failed to prove that a material danger to the employees or the public's health would exist if working hours were not curtailed pursuant to the legislation. Peckham, speaking for the majority, observed that the court had upheld a Utah law limiting employment in underground mines and smelters to eight hours a day except in cases of emergency. But the majority found that the New York law covered a situation that was far less perilous and which permitted no exceptions. Considerable evidence was presented that the New York law would increase worker health and well-being. However, the court ruled that such evidence is not in itself sufficient to justify legislative interference in the right of individuals to contract regarding hours of work. Justice Peckham pointed out that limitations upon hours "might seriously cripple the ability of the laborer to support himself and his family."¹⁹ Smaller bakeries in New York depended on longer working hours than those required by larger bakeries. The effect of the New York legislation in limiting hours of work would have been to increase costs for small bakeries, putting some of them out of business and reducing employment opportunities for bakery employees. On bal-

ance, the court found that any benefits in health and well-being that might accrue from restrictions on work hours would not be sufficient to offset the costs to workers in reduced earnings and lost employment opportunities; and therefore the infringement of the individual's right to contract under due process was not warranted.²⁰

Substantive due process was at issue in two famous cases involving labor unions early in the twentieth century — *Adair v. United States* (1908) and *Coppage v. Kansas* (1915).²¹ In both cases the Supreme Court set aside the conviction of a railroad agent who had fired a railroad employee for joining a union. At issue in the *Adair* case was a federal statute outlawing the so-called "yellow dog" contract; while *Coppage* involved a similar statute enacted by the Kansas legislature. Both laws were defended as promoting the growth of unionism, which, it was argued, was essential for public welfare. The majority of the court found that whatever benefits might accrue to public welfare from government support of unionism did not justify government interference in the right of the employer to contract with employees. The right of an employer to hire and fire employees was viewed as the counterpart to the right of employees to offer their labor services and to quit an employment. These cases are interesting because they apply substantive due process and explicitly reject adjudication based upon the impact of legislation on equality. In this sense these decisions, based upon substantive due process, reaffirm an entitlement theory of justice as opposed to an egalitarian theory of justice. In the *Coppage* case Justice Putney defended the antiunionism requirement as a valid exercise of the employees' right to contract:

there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. . . . This applies to all contracts, and not merely to that between employee and employer. Indeed a little reflection will show that wherever the right of private property and the right of free contract coexist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposed to give in exchange. And since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.²²

The *Adams* and *Coppage* decisions reflected an era when the courts saw no constitutional basis for government laws supporting unionism. They did not accept the paradigm of the modern era in which public policies in support of labor unions and collective bargaining are defended as benefits to public welfare. Indeed, the courts challenged many union practices as contrary to the public welfare, including strikes, pickets, threats, and violence. When union practices violated the rights of employers and nonunion employees, the courts were not

averse to applying substantive due process to protect those rights. This attitude of the courts was a major factor in the tendency for public policies in general to take a neutral approach toward unionism and collective bargaining up to the 1930's.

Conclusion

The courts' interpretation of substantive due process placed constraints on the power of government to infringe upon economic liberty in the late-nineteenth and early-twentieth centuries. Surprisingly, the role of the court in this era of substantive due process has been criticized both by writers who support constitutional limits on the expansion of government power and by writers sympathetic to a ubiquitous role for government in the economy. The former point to this period as marking the transition from a *laissez faire* economy in which incentives were biased toward productive activity increasing total wealth, toward a society in which greater incentives existed for transfer activities, and especially transfers of wealth through the public sector.²³ They point to the rapid growth of government and the more ubiquitous role of government in economic activity. They maintain that the courts' reinterpretation of the due process clause was crucial in establishing a legal environment within which this expansion in government could take place.

One approach in analyzing the effectiveness of the courts in coping with this mass of government legislation is to calculate the amount of legislation invalidated. Between 1868 and 1912 the Supreme Court struck down a little more than six percent of the cases it heard; from 1913 to 1920 the percentage rose to approximately seven percent; and from 1920 to 1928, to twenty-eight percent.²⁴ While the 1920's appears to be the high point in the Supreme Court's application of substantive due process to invalidate legislation, its role in the prior period is not insignificant. State courts also negated a great deal of legislation infringing upon individual liberty and property, based upon substantive due process.²⁵

A survey of these cases reveals a wide range of economic liberties brought under the protection of substantive due process. The legislation invalidated by the Supreme Court included artificial barriers to entry into a business created by government, laws prohibiting the operation of a particular business, regulations over prices, and regulations of the wages, hours, and working conditions for labor.²⁶ State courts negated a wide range of legislation including:

1. laws prohibiting the manufacture of products in one's home,
2. laws forbidding business from keeping their shops open on Sunday,
3. laws forbidding workers from working in excess of eight hours per day,
4. laws forbidding employers from firing workers who joined or remained in unions,
5. laws restricting entry into an occupation.²⁷

Those who are sympathetic to an expanded role for government in economic activity criticize the substantive due process justices on the grounds that their decisions were arbitrary and capricious. They maintain that the interpretation of the "rule of reason" reflected the influence of specific interest groups and the

inherent biases of a court drawn from a legal profession representing propertied interests.

The question of reasonableness or arbitrariness of a law could not be settled by reference to any specific constitutional provision or any absolute principle of law. A reasonable law was one that seemed sensible, plausible, and intelligent to the judges who passed upon it. . . .

What constituted sensible, plausible, and intelligent public policy, however, is largely a matter of the individual's economic and social philosophy — his standard of values. When the court applied the test of reasonableness to legislation, therefore, it measured the law against its own economic and social attitudes. If in the light of these attitudes the law seemed intelligent, the justices upheld it; if not, they declared it unreasonable, arbitrary, and a violation of due process of law.²⁸

Our brief survey of substantive due process with reference to labor legislation reveals that substantive due process justices believed that economic liberties should be protected under the Fifth and Fourteenth Amendments. They were willing to invoke substantive due process to negate legislative infringement on the individuals' right to enter an occupation, and on the freedom of employers and employees to contract for labor services. These economic liberties were not absolute, but before the state could infringe upon those liberties it had to show that the ends were justified and that the legislation was a reasonable means to that end. This required that the courts analyze the economic impact of the law and attempt to assess the effectiveness of that legislation in achieving those objectives. The criterion for that evaluation was the reasonableness of the legislation in the eyes of the court. The "rule of reason" left a wide scope for judicial interpretation depending upon the point of view of the justices at any point in time.

It should not be surprising that the interpretation of the "reasonableness" of legislation changed over time with changes in the composition of the court. Yet there was also a continuity in the protection of economic liberties under substantive due process, which was linked to an earlier tradition in common law protecting economic liberty and property rights. That tradition was based upon a philosophy of *laissez faire* which Professor Aaron Director has described in the following terms:

Laissez faire has never been more than a slogan in defense of the proposition that every extension of state activity should be examined under a presumption of error. The main condition of economic liberalism has always assumed a well established system of law and order designed to harness self-interest to serve the welfare of all. The institution of private property — at least since Hume — has always been defended on this ground. And, wherever it seemed that this institution might be modified without subverting the general framework of a competitive society, the tradition has shown a readiness — perhaps exaggerated — to modify this basic institution. But the tradition goes much beyond this. It has always assumed that there were some economic results which cannot be attained at all or attained only in appropriate amounts if left to the free market.²⁹

In the context of this philosophy, the courts in the era of substantive due process performed effectively as an independent judiciary protecting economic liberty under the Constitution.

NOTES

1. *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272 (1855).
2. *Wynehamer v. People*, 13 N.Y. 378 (1856).
3. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450-51 (1857).
4. See Bernard H. Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980), pt. I.
5. *Lawton v. Steele*, 152 U.S. 133, 137 (1894).
6. *Munn v. Illinois*, 94 U.S. 113 (1877).
7. *Stone v. Farmers Loan and Trust*, 116 U.S. 307 (1886).
8. Siegan, *Economic Liberties*, pp. 152-55.
9. 83 U.S. (16 Wall.) 36 (1872).
10. *Ibid.* at 116 (Bradley, J. dissenting).
11. *Ibid.* at 127 (Swayne, J. dissenting).
12. 165 U.S. at 589-90, citing *Butchers Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1883) (Bradley, J. concurring).
13. 165 U.S. 578 (1897).
14. *Ibid.* at 589.
15. *Godcharles and Co. v. Wigeman*, 113 Pa. 431, 437, 6A. 354, 356 (1886).
16. *Leep v. St. Louis, I.M. and S. Ry. Co.* 58 Ark. 407, 415, 422, 25 S.W. 75, 77, 79 (1894).
17. 198 U.S. 45 (1905).
18. *Ibid.* at 57-58.
19. *Ibid.* at 59.
20. Siegan, *Economic Liberties*, pp. 115-21.
21. 208 U.S. 161 (1908) and 236 U.S. 1 (1915).
22. 236 U.S. at 17.
23. See, for example, Terry L. Anderson and Peter J. Hill, *The Birth of a Transfer Society* (Stanford, Calif.: Hoover Institution Press, 1980).
24. Ray A. Brown, "Due Process of Law, Police Power, and the Supreme Court," *Harvard Law Review* 40 (1927): 943, 945, n. 11.
25. Siegan, *Economic Liberties*, pp. 55-59.
26. *Ibid.*, pp. 126-55.
27. *Ibid.*, pp. 55-59.
28. Alfred H. Kelly and Winfred A. Harbison, *The American Constitution*, 4th ed. (New York: W. W. Norton & Company, 1970), p. 527.
29. Aaron Director, "The Parity of the Economic Market Place," *Journal of Law and Economics* 7 (1964): 1-2.