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Inconsistent Standards of Substantive Due Process In Economic Regulations: A Result of the Federalist System of Government

Keith L. Hendricks

COMMENTS

Inconsistent Standards of Substantive Due Process in Economic Regulations: A Result of the Federalist System of Government

All citizens of the United States are guaranteed that they will not be deprived of life, liberty, or property without due process of law.[1] However, different interpretations exist as to how much protection the guarantee of due process provides. This is especially true when examining state economic regulations under the theory of substantive due process. One reason for the differing standards of substantive due process is the United States has adopted a federalist system of government. As a result of our system of government, the due process guarantee is expressed in two places in the United States Constitution[2] and in almost every state constitution.[3] Because not all state court interpretations of due process are exactly the same as the federal interpretations, a fundamental tension exists between the application of state and federal law.[4]

This comment will examine the varying standards of substantive due process analysis used by courts when examining state economic regulations. Part I will describe the history of substantive due process jurisprudence and trace its history in federal and state constitutional law. Part II will contrast the standards of substantive due process analysis that are derived from the federal constitution with the standards derived from state constitutions. Part III will compare the inconsistent results between the divergent standards for defining substantive due process. Finally, Part IV will examine some of the consequences of inconsistent standards of due process.

I. Establishment Of Due Process

The right to due process of law has been called the most basic right of our constitutional system.[5] The concept of the protection of due

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1. U.S. Const. amend. V; U.S. Const. amend. XIV, sec. 1.

2. *Id.*

3. For a discussion of states which have adopted due process clauses see *infra* note 6 and accompanying text.

4. For a discussion of inconsistent standards see *infra* text accompanying notes 63-109.

5. *See* R. Mott, Due Process of Law: A Historical and Analytical Treatise of

process of law is so basic to our society that it is codified in the U.S. Constitution and in almost every state constitution.[6]

The notion of a due process guarantee emanates from the Magna Carta.[7] In the Magna Carta, freemen were guaranteed the privilege of fair application of the laws. The historical concept of due process was simply that the executive and judicial departments of government must proceed according to the "law of the land."[8] Despite the fact that the Magna Carta only gave freemen guaranteed rights, it embodied the concept that governments should be governed by laws.[9]

When the English colonists came to America, they brought with them the fundamental principles of law which they enjoyed in England. Virginia was the first colony to draw up a Bill of Rights which contained a due process clause to protect individual rights.[10] In time, most colonies adopted a due process protection and the clause also became part of the Bill of Rights in the United States Constitution.[11]

A. Due Process in the Federal Constitution

After the ratification of the constitution, the due process clause be-

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THE PRINCIPLES AND METHODS FOLLOWED BY COURTS IN THE APPLICATION OF THE CONCEPT OF THE "LAW OF THE LAND", iii, 46, 90-95, 159-60 (1926).

6. *Id.* at 26. All but five states have due process clauses or their equivalent. Those five states, New Jersey, Ohio, Indiana, Oregon, and Kansas, have clauses that guarantee a right to life, liberty, and property, but not to due process of law. LEGISLATIVE DRAFTING RESEARCH FUND OF COLUMBIA UNIV., INDEX DIGEST OF STATE CONSTITUTIONS 691-92, supp. 132 (1959, 1965). Those states whose due process clause is identical to the Federal Constitution include ALA. CONST. art. I, cl. 7; ARIZ. CONST. art. II, cl. 4.; ARK. CONST. art. II, cl. 8; CAL. CONST. art. I, cl. 13; COLO. CONST. art. II, cl. 25; FLA. CONST. D.R. 25; GA. CONST. art. I, sec. 1, cl. 3; IDAHO CONST. art. I, cl. 13; ILL. CONST. art. II, cl. 2; IOWA CONST. art. I, cl. 9; LA. CONST. art. I, cl. 2; ME. CONST. art. I, cl. 6-a; MICH. CONST. art. I, cl. 7; MINN. CONST. art. I, cl. 6; MISS. CONST. art. III, cl. 14; MO. CONST. art. I, cl. 10; MONT. CONST. art. III, cl. 27; NEB. CONST. art. I, cl. 3; NEV. CONST. art. I, cl. 8; N.M. CONST. art. II, cl. 18; N.Y. CONST. art. I, cl. 6; N.D. CONST. I, cl. 13; OKLA. CONST. art. II, cl. 7; S.C. CONST. art. I, cl. 5; S.D. CONST. art. VI, cl. 2; UTAH CONST. art. I, cl. 7; WASH. CONST. art. I, cl. 3; WYO. CONST. art. I, cl. 6.

7. *See* MOTT, *supra* note 5, at 1-13; *See also* A. HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA, 1, 345-68 (1968).

8. Goldberg, *"Interpretation" of "Due Process of Law" — A Study in Futility,* 13 PAC. L. J. 365 (1982).

9. *See* MOTT, *supra* note 5, at 2. The actual protection found in the Magna Carta is phrased as follows: "No free-man's body shall be taken, nor imprisoned, nor disseized nor outlawed, nor banished, nor in any ways be damaged, nor shall the King send him to prison by force, excepting by judgment of his peers and *by the Law of the Land.*" B. BARRINGTON, MAGNA CARTA 220 (1900) (emphasis added).

10. MOTT, *supra* note 5, at 14. Two other colonies had framed constitutions before Virginia; however, these colonies did not contain a guarantee of individual rights. Those colonies were New Hampshire and South Carolina. G. FISHER, THE EVOLUTION OF THE CONSTITUTION OF THE UNITED STATES 70-77 (1910).

11. U.S. CONST. amend. V. The due process clause is also found in the post civil war amendments. U.S. CONST. amend. XIV, sec. 1.

came one the most frequently used checks against intrusive governmental behavior.[12] From this substantial body of case law, two concepts of due process evolved: procedural[13] and substantive due process.[14]

Of the two types of due process, substantive due process has proved the most controversial.[15] Commentators have described substantive due process "as a guarantor against certain governmental actions that have the effect of depriving persons of life, liberty, or property interests, regardless of the fairness of the procedure . . . ."[16] In other words, substantive due process limits governmental intrusion in areas which are protected. If the court finds a threat to a person's life, liberty, or property rights, then the court may strike down the regulation which threatens that interest unless the state can prove why the intrusion should be maintained. Therefore, the key to a substantive due process case is the finding of an infringement on a protected right.[17]

B. Applying Due Process to the States

Under the federalist system of government which the United States Constitution adopts, the individual states are also considered sovereign entities.[18] Because each state has its own constitution to govern its sovereign affairs, there exists a dual constitutional system in the United States.[19]

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12. MOTT, *supra* note 5, at iii.

13. Procedural due process protections mean that:

> If life, liberty, or property is at stake, the individual has a right to a fair procedure. The question then focuses on the nature of the "process" that is "due." In all instances the state must adhere to previously declared rules for adjudicating the claim or at least not deviate from them in a manner which is unfair to the individual against whom the action is to be taken. The government always has the obligation of providing a neutral decisionmaker — one who is not inherently biased against the individual or who has personal interest in the outcome.

J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 477 (1978). *See also* G. GUNTHER, CONSTITUTIONAL LAW 405-585 (1985).

For purposes of this Comment, only the theories of substantive due process review of economic regulations will be examined.

14. For a discussion of the evolution of substantive due process analysis see *infra* notes 39-56 and accompanying text.

15. *See infra* text accompanying note 43.

16. R. LEE, A LAWYER LOOKS AT THE CONSTITUTION, 161 (1983).

17. For a complete description of substantive due process see NOWAK, ROTUNDA & YOUNG, *supra* note 13, at 385 - 450.

18. *See* U.S. CONST. amend. X.

19. In the United States Constitution, the tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

Justice Abrahamson, Wisconsin Supreme Court Justice, wrote: "Our founding fathers left us with two governments, state and federal — two governments governing the same people in the same geographical territory. . . . Thus we live in a country with a dual court system, federal and

1. Fifth amendment due process and the states

Originally the Supreme Court held that the Bill of Rights did not apply to actions by the individual states because those actions were deemed to be within the domain of state constitutions. Therefore, the due process clause of the fifth amendment did not apply to the states. This proposition was established in a line of cases beginning with *Barron v. Mayor of Baltimore.*[20]

The lack of a federally enforced Bill of Rights on state action came to a heated climax during the period surrounding the Civil War.[21] After the Civil War, the fourteenth amendment was adopted to ensure that states give their citizens, including former slaves, the protection of due process and other rights.

2. Fourteenth amendment due process and the states

The fourteenth amendment specifically applied the protections of due process to citizens of the states against the operation of state laws.[22] Therefore, all state laws could be challenged in federal or state courts under the federal constitution.[23]

The adoption of the due process clause in the fourteenth amendment is important for one other reason, it also allows for most of the

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state, operating side by side." Abrahamson, *Reincarnation of State Courts,* 36 Sw. L.J. 951, 954 (1981).

20. 32 U.S. (Pet.) 243 (1833). In *Barron,* Chief Justice Marshall stated:

> The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated.

Id. at 247. *See also* Knapp v. Schweitzer, 357 U.S. 371, 378 n.5 (1958) (lists the cases which held that the Bill of Rights in the federal constitution did not apply to the states).

21. Abrahamson, *supra* note 19, at 956 ("Nationalism was the spirit of the Civil War.").

22. Section 1 of the fourteenth amendment provides:

> 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 shall any State deprive any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV. sec. 1 (emphasis added). This amendment was proposed for ratification in 1866 and adopted in 1868.

23. Under the dual constitutional system of federalism:

> the [U.S.] Constitution generally limits state powers to affect the lives and liberties of the people by requiring such governmental action to be reasonable. Thus, . . . the Due Process Clause of the Fourteenth Amendment requires state legislation affecting private interests to be reasonable, and to have a reasonable relationship to one of the legitimate governmental ends, such as public health, safety etc.

C. ANTIEAU, STATES' RIGHTS UNDER FEDERAL CONSTITUTIONS 11 (1984).

other rights in the Bill of Rights to be imposed upon the states. Since the adoption of the fourteenth amendment, the Supreme Court has used the due process clause of the fourteenth amendment to incorporate as checks on the states the freedoms of the first amendment and most, but not all, of the other rights specified in the Bill of Rights.[24]

Because of the fourteenth amendment's due process clause, state laws can be challenged in either a federal or state court under the standards of the federal constitution. Therefore, the federal standards of due process form a minimum threshold of protection for individuals against state laws.[25] However, state laws can also be challenged in state courts under their respective state constitution and the federal constitutional standards can prove to be irrelevant.[26]

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24. *See* Guminski, *The Rights, Privileges, and Immunities of the American People: A Disjunctive Theory of Selective Incorporation of the Bill of Rights,* 7 WHITTIER L. REV. 765, 766 (1985).

In considering what rights the due process clause incorporates, the Supreme Court distinguishes between rights and liberties which are fundamental, and those which are not. The due process clause incorporates only those rights and liberties specified in the Bill of Rights that are deemed by the Supreme Court to be fundamental. A fundamental right or liberty is one which "cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' " Powell v. Alabama, 287 U.S. 45, 67 (1932) (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926)).

Cases which held that specific rights have been incorporated include: Everson v. Board of Educ., 330 U.S. 1 (1947) (amend. I: no establishment); Cantwell v. Connecticut, 310 U.S. 296 (1940) (amend. I: free exercise); Gitlow v. New York, 268 U.S. 652 (1925) and Grosjean v. American Press Co., 297 U.S. 233 (1936) (amend. I: free speech, free press); De Jonge v. Oregon, 299 U.S. 353 (1937) (amend I: free assembly); Mapp v. Ohio, 367 U.S. 643 (1961) and Ker v. California, 374 U.S. 23 (1963) (amend. IV: unreasonable searches and seizures); Benton v. Maryland, 395 U.S. 784 (1969) (amend. V: double jeopardy); Malloy v. Hogan, 378 U.S. 1 (1964) (amend. V: self-incrimination); Pennsylvania Cent. Trans. Co. v. New York City, 438 U.S. 104 (1978) (amend. V: just compensation); Klopfer v. North Carolina, 386 U.S. 213 (1967) (amend. VI: speedy trial); *In re* Oliver, 333 U.S. 257 (1949) and Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (amend. VI: public trial); Duncan v. Louisiana, 391 U.S. 145 (1968) (amend. VI: jury trial); Irvin v. Dowd, 366 U.S. 717 (1961) and Parker v. Gladden, 385 U.S. 363 (1963) (amend. VI: impartial jury); Cole V. Arkansas, 333 U.S. 196 (1948) and Jackson v. Virginia, 443 U.S. 307 (1979) (amend. VI: notice of charges); Pointer v. Texas, 380 U.S. 400 (1965) (amend. VI: confrontation); Washington v. Texas, 388 U.S. 14 (1967) (amend. VI: compulsory process); Gideon v. Wainwright, 372 U.S. 335 (1963) (amend. VI: right to counsel); Schlib v. Kuebel, 404 U.S. 357 (1971) (amend. VI: excessive bail); Robinson v. California, 370 U.S. 660 (1962) and Powell v. Texas, 392 U.S. 514 (1968) (amend. VIII: cruel and unusual punishment); Presser v. Illinois, 116 U.S. 252 (1886) and Miller V. Texas, 153 U.S. 535 (1894) (amend. II: right to keep and bear arms); Hurtado v. California, 110 U.S. 516 (1884) (amend. V: grand jury); Walker v. Sauvinet, 92 U.S. 90 (1876) (amend. VII: civil jury trial); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (amend. III, the prohibition of the quartering of soldiers).

25. *See* Abrahamson, *supra* note 19, at 963.

26. Justice Stevens, writing for the majority of the U.S. Supreme Court, stated:

> [A] state court is entirely free to read its own constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982). *See also infra* note 63 and

C. *History of Substantive Due Process in State Constitutions*

The early states had 'law of the land' clauses in their constitutions instead of due process clauses.[27] Later some states adopted both law of the land clauses and due process clauses, and others adopted only due process clauses. This variation made no difference to American courts, because they treated 'law of the land' and 'due process' as synonyms.[28] The treatment of the two terms as synonymous has been attributed to the interpretation of the English Justice, Lord Coke. Justice Curtis, quoting from Lord Coke, stated, "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words 'by the law of the land,' in the Magna Carta."[29]

Even though the terms "due process of law" and the "law of the land" are commonly regarded as synonymous, not all states apply those terms in the same context. At least four separate types of due process clauses can be found in various state constitutions.[30] Because of the different contexts which surround due process clauses, different state courts interpret their respective clauses differently.

The difference in interpretation given to state due process clauses is becoming of greater importance because state constitutions and individual rights under those constitutions are receiving new attention.[31] Supreme court justices in many of the states are openly advocating greater use of state constitutional law. For example Justice Abrahamson of the Wisconsin Supreme Court expects the 1980's to be "the decade of the state courts."[32] Justice Pollock of the New Jersey Supreme Court expects a renaissance in state constitutional law and contends "that for the balance of this century state constitutions will play an

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accompanying text.

27. "[T]hat no man be deprived of his liberty except by the law of the land, or the judgment of his peers." VA. CONST. ch. I, art. VIII. *See also* MOTT, *supra* note 5, at 14.

28. Goldberg, *supra* note 8, at 366.

29. Murray v. Hoboken, 59 U.S. (18 How.) 272, 276 (1855). *See also* Greene v. Briggs, 10 F. Cas. 1135, 1140 (C.C.D.R.I. 1852); Mayo v. Wilson, 1 N.H. 53, 55 (1817). For an early reference to the similarity of the two phrases see Zylstra v. Charleston, 1 S.C.L. (1 Bay) 382, 391 (1794).

30. *See* MOTT, supra note 5, at 29.

> The four types of due process clauses are: 1) 'Law of the land' in an article dealing with criminal procedure. 2) 'Law of the land' in an independent section. 3) 'Due process' in an article dealing with criminal procedure. 4) 'Due process' in an independent section. Presently the due process clause in an independent section is the most common.

Id.

31. Clay, *Human Freedom and State Constitutional Law; Part One, The Renaissance,* 70 MASS. L. REV. 161, 163 (1986).

32. Abrahamson, *supra* note 19, at 951. "In the 1980s it may well be the state supreme court, not the United States Supreme Court, that will be the significant constitutional law court." *Id.* at 952.

increasingly important role in guaranteeing fundamental rights."[33] Justice Linde of the Oregon Supreme Court believes that the state courts will use their constitutions to decide constitutional issues that they had previously left to the U.S. Supreme Court.[34] Justice Utter, a Washington Supreme Court Justice, believes that the appellate courts in a majority of the states have interpreted provisions of their state constitutions as providing greater protection for individual rights than the federal constitution.[35] Finally, Justice Mosk of California refers to the "phoenix-like resurrection of federalism."[36] Justice Utter recognized this trend in his court when he commented, "[i]ncreasingly, Washington courts are being asked to consider our Declaration [of Rights] as an independent and effective source of protection for individual rights, including some rights not recognized or protected by the United States Supreme Court, and to give our state constitution a truly independent interpretation."[37]

Because state courts are being asked to consider the same types of questions which federal courts also consider, special attention must be paid to the relationship between federal and state judiciaries. When there are issues which may be litigated under the federal constitution or a state counterpart, questions arise regarding the deference which should be given to each document. These questions include whether the state or federal constitution should be raised first; whether and how a comparison should be made with federal and state constitutional provisions; and how to weigh federal precedents.[38]

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33. Pollock, *State Constitutions as Separate Sources of Fundamental Rights,* 35 RUTGERS L. REV. 707 (1983).

34. Linde, *E. Pluribus — Constitutional Theory and State Courts,* 18 GA. L. REV. 165, 166 (1984) ("State courts are returning to their state charters to deal with issues that for forty years they left to be debated and resolved by the national Supreme Court.").

35. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights,* 7 U. PUGET SOUND L. REV. 491, 499 n.29 (1984) (containing a list of those states).

36. Mosk, *State Constitutionalism after Warren: Avoiding the Potomac's Ebb and Flow,* in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 201 (McGraw, ed. 1985). Justice Mosk refers to the revitalization of state constitutional law as a "Phoenix-like resurrection" because state constitutional law has not been a major source of litigation since before the civil law. Prior to the civil war, state constitutional law was the only avenue of attack on state regulations because the federal constitution did not apply. Then the fourteenth amendment made the federal constitution applicable to the states and the federal constitution became more frequently used to attack state law than state constitutions. The recent revival of state constitutional law as a font for litigation is the "phoenix-like resurrection." *Id.*

37. Utter, *supra* note 35, at 492.

38. *Id. See also infra* Part IV.

II. Interpretation of Substantive Due Process

Courts have long struggled with a standard which would give substance to the limitation that rights cannot be deprived without due process. The early existence of this struggle is evidenced by the fact that a decade after the adoption of the fourteenth amendment, Justice Miller wrote, "the constitutional meaning of the phrase 'due process of law' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all other guarantees of personal rights."[39]

A. *United States Supreme Court Interpretation of Due Process*

As Justice Miller pointed out, the United States Supreme Court did not always have a clear definition in mind when it handed down decisions on due process cases.

1. *Due process as a check on legislation*

Almost since the nation began, the justices of the Supreme Court have suggested that the Court has an inherent right to review the substance of legislation and state action of Congress, state legislatures, or administrative agencies.[40] The belief that the judiciary has a right to review the substance of legislation and administrative practices springs from the pre-revolutionary war philosophers who espoused the position that certain natural rights prevailed for all men and that a governmental body could not limit or impair those rights.[41]

The constitutional provision most used to review the substance of legislation is the due process clause of the fourteenth amendment.[42] However, judicial examination of the substantive aspects of legislation and administrative practices has often met with a storm of opposition. "In no part of constitutional law has the search for legitimate ingredients of constitutional interpretation been more difficult and more controversial than in the turbulent history of substantive due process."[43]

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39. Davidson v. New Orleans, 96 U.S. 97, 101-02 (1877).

40. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). In *Calder*, the Court held that the Connecticut legislature had not violated the Constitution when it set aside a probate decree. However, Justice Chase believed that the drafters of the constitutions of the federal and state governments intended to create governments of limited powers, and that natural law, as well as the specific provisions of written constitutions, restricted and regulated governmental power. *See id.* at 386-388. Therefore Justice Chase decided that the proper role of the Supreme Court was to invalidate legislation if the justices believed that it interfered with rights vested in the people.

41. Nowak, Rotunda & Young, *supra* note 13, at 385.

42. *See* Comment, *Substantive Due Process Challenges: Are They Creeping into Education under a New Standard of Review?*, 2 B.Y.U. J. of Pub. L. 307, 309 (1988).

43. Gunther, *supra* note 13 at 441.

In the early 1800's, state courts held that the due process clause did not embody a restriction on the substance of legislation. This point is clearly stated in the state court opinion of *Trustees of Dartmouth College v. Woodward.*[44] The state court held that legislative acts "if not repugnant to any other constitutional provision, are 'the law of the land' within the sense of the constitution."[45] However, when *Dartmouth College*[46] reached the Supreme Court, the argument supporting a constitutional limit on legislatures was successful.[47] The Court, in reaching their *Dartmouth College* decision, adopted a blend of what we now call procedural due process, substantive due process, equal protection, and separation of powers.[48]

After *Dartmouth College,* the High Court vacillated several times on whether the due process clause restricted the legislature from passing certain types of legislation. The Supreme Court stated in two separate opinions that historically due process was not intended as a check on legislation.[49] However, by the mid 1800's the Court seemed to accept the argument that due process could be used to place a restraint on legislatures. Justice Curtis wrote of the fifth amendment:

> The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will.[50]

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44. 1 N.H. 111, 64 N.H. 473 (1817).

45. *Id.* at 132, 64 N.H. at 639.

46. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 581-82 (1819).

47. *See* Goldberg, *supra* note 8, at 369.

48. *Id. Dartmouth College* held that permission by the Court for the legislature to make any act the law of the land "would render constitutional provisions of the highest importance completely inoperative and void." *Dartmouth College,* 17 U.S. (4 Wheat.) at 581-82. According to Cooley, this was the most quoted definition of due process. In addition to being the most quoted, it was "apt and suitable," and "entirely correct." T. COOLEY, CONSTITUTIONAL LIMITATIONS 353, 354 (1868).

49. In 1877, the Court noted that the English barons who coerced the Magna Carta from King John did not intend "to protect themselves against the enactment of laws by the Parliament," in which "those barons were a controlling element." Davidson v. New Orleans, 96 U.S. 97, 102 (1877). Again in 1884, the Court stated that:

> It did not enter into the minds of the barons to provide security against their own body or in favor of the Commons by limiting the power of Parliament. . . . The actual and practical security for English liberty against legislative tyranny was the power of a free public opinion represented by the Commons.

Hurtado v. California, 110 U.S. 516, 531 (1884).

50. Murray v. Hoboken, 59 U.S. (18 How.) 272, 276 (1855). The Supreme Court's statement follows several state court opinions which adopt this position. Judge Catron, who later became a justice on the U.S. Supreme Court, said of due process:

> Its infraction was a leading cause why we separated from that country [England], and its value as a fundamental rule for the protection of the citizen against legislative usurpation was the reason for its adoption as part of our [Tennessee] constitution.

The trend toward the use of substantive due process analysis by the federal bench to invalidate economic legislation reached its apex during the early part of the twentieth century. This time period became known as the *Lochner* era.[51] During this period, the United States Supreme Court struck down many economic regulations on the grounds of substantive due process. One such example is where the Court held that the District of Columbia Minimum Wage law, which authorized the establishment of a minimum wage for women, was unconstitutional interference with liberty to contract.[52]

2. *The end of substantive due process review of economic regulations in federal courts*

During the 40 years of the Lochner era, the Supreme Court applied substantive due process to invalidate economic regulations enacted by Congress and state legislatures. The Supreme Court's adamant refusal to defer to the judgment of state legislatures in the area of economic regulation has been regarded by many as a woeful display of judicial activism.[53]

The Supreme Court ended its use of substantive due process as a check against economic regulation in the 1930's. In *Nebbia v. New York,*[54] the Court did more than uphold New York's Milk Control Law, it signalled the end of the use of substantive due process to strike down economic regulation in federal courts. The *Nebbia* Court articulated the test which has since become the standard for substantive due process review of economic regulations under the federal constitution: "If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary or discriminatory, the re-

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Vanzant v. Waddel, 10 Tenn. (2 Yer.) 259, 271 (1829).

51. The *Lochner* era is so named because in the case, Lochner v. New York, 198 U.S. 45 (1905), the Supreme Court adopted a substantive due process interpretation of economic regulations. In this case, the Justices "unabashedly read their philosophy [of laissez-faire economics from the teachings of Adam Smith] into the Constitution." F. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 95 (1986). Walton Hamilton characterized the majority opinion as professing, "with little qualification, an economic creed; and the empty receptacle of 'due process' and the age-old vitality of 'the common right' enabled them to read 'free competition' into the Constitution." Hamilton, *Common Right, Due Process and Antitrust,* Law & Contemp. Probs. 24, 31-32 (1940). In *Lochner*, the Court struck down a state law restricting the hours which bakers could work. The Court held that for the law to be valid it must have "a more direct relation, as a means to an end" in its provisions. *Lochner,* 198 U.S. at 70.

52. Adkins v. Children's Hosp., 261 U.S. 525 (1923), *overruled,* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

53. *See* Kirby, *Expansive Judicial Review of Economic Regulation under State Constitutions: The Case for Realism,* 48 TENN. L. REV. 241, 247 (1981).

54. 291 U.S. 502 (1934).

quirements of due process are satisfied."[55]

Justice Black explained the reasons why the High Court abandoned substantive due process review of economic regulations:

> The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . Legislative bodies have broad scope to experiment with economic problems. . . .
>
> We refuse to sit as a "superlegislature to weigh the wisdom of legislation," . . . .[56]

3. The current standard of review for substantive due process in federal courts

After the Supreme Court decision in *Nebbia v. New York,*[57] the use of substantive due process was discredited.[58] In recent years, however, the use of substantive due process has flourished as a haven for the protection of fundamental values.[59] Because the Supreme Court has

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55. Nebbia, 291 U.S. at 537; *See also* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) ("[R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.").

56. Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963).

57. 291 U.S. 502 (1934).

58. *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (sustaining the constitutionality of Washington state's minimum wage law for women over the plaintiff's allegation that the law violated substantive due process); United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (upholding legislation which prohibited the interstate shipment of "filled milk" by stating that the statute must be sustained if any state of facts either known or which could reasonably be assumed supports the legislation); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (stating that the Court will not only presume that a legislature has a reasonable basis for enacting a particular economic measure, but the Court will hypothesize reasons for the law's enactment if the legislature fails to state explicitly the reasons behind its judgment).

From the decisions in *Parrish, Carolene Products* and *Lee Optical,* it is clear that the Supreme Court will not closely scrutinize legislative or administrative acts under substantive due process theories if the rights involved are subject to regulation under the police powers of the state. In fact, the Court's deference to the state in these matters is so great that even if the legislature does not find a legitimate state interest on which to premise its regulations, the Court will hypothesize such an interest.

59. *See*, Griswold v. Connecticut, 381 U.S. 479 (1965) (finding that several general constitutional theories combined to create a zone of constitutionally protected privacy which required a compelling state interest and a closely tailored statute before the fundamental right of privacy could be regulated by the state); Roe v. Wade, 410 U.S. 113 (1973) (invalidating a Texas anti-abortion statute on the grounds that the statute violated the due process clause of the fourteenth amendment as an unjustified deprivation of liberty in that it unnecessarily infringed on a woman's right to privacy). *See also* Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process,* 23 UCLA L. REV. 689 (1976); Epstein, *Substantive Due*

applied two different standards of review in substantive due process cases a dichotomy in analysis exists. Generally, the Court merely requires that there be a rational relation between the statute and a legitimate state objective.[60] However, where the Court finds that a fundamental right is impaired by a statute or practice, the Court has applied a scrutiny that is stricter in two respects. First, the state's objective must be compelling, not merely legitimate, and second, the relation between that objective and the means must be very close, so that the means can be said to be necessary to achieve the end.[61] These two standards of review are the two classic standards under substantive due process analysis.

Therefore, the classic substantive due process analysis involves just two standards of review — strict judicial scrutiny under the compelling state interest test and minimal judicial scrutiny under rational basis analysis. In practice this means that absent a fundamental right, legislators and administrators enjoy great deference, but if a fundamental right is found, any infringement on that right is rarely justified.[62]

In summary, federal courts have long struggled with the idea of substantive due process review of legislation. The federal bench for a time supported substantive due process challenges to economic regulations under the theory that the regulations were unconstitutional invasions of the right to contract. That position was discarded by the United States Supreme Court in the 1930's. Now the Court holds that substantive due process will only invalidate legislation which infringes on fundamental rights. For all other rights, the legislature need only have a rational basis for passing the legislation.

Process by Any Other Name: The Abortion Cases, 1973 SUP. CT. REV. 159.

The genesis of the special protection for fundamental rights may be traced to the now famous footnote 4 in *Carolene Products,* 304 U.S. at 152-53 n.4, where Justice Stone, after finding no substantive due process protection for an economic right, left the question open concerning "whether prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry." *Id.*

60. *See* Nebbia v. New York, 291 U.S. 502, 537 (1934) ("[A] state is free to adopt whatever economic policy may *reasonably* be deemed to promote public welfare.") (emphasis added); *Carolene Products,* 304 U.S. at 152 ("[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character *as to preclude the assumption that it rests on some rational basis.* . . .") (emphasis added); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) ("[W]e refuse to sit as a 'superlegislature to weigh the wisdom of legislation' . . . .") (footnotes omitted).

61. *See, e.g.,* Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

62. *See* GUNTHER, *supra* note 13, at 454 ("It is only when the 'liberty' allegedly infringed is thought to be 'fundamental' deserving of special protection, and thus imposing on the state especially high burdens of justification for the infringement, that due process turns into an interventionist tool.").

B. State Court Interpretation of Due Process

Because the United States has adopted a federalist system, state laws may also be challenged under state constitutions. The United States Supreme Court has consistently held that courts may interpret state constitutions to be more protective of individual rights than the United States Constitution.[63] This means that states could construe their respective due process clauses in such a way as to protect against economic regulations. Three reasons why state court interpretations of due process do not need to consistently follow federal court interpretation include 1) the autonomy which state courts enjoy in interpreting their constitutions, 2) the varied legislative history behind the adoption of the different state constitutions, and 3) the independent standards which state courts have developed to test due process.

1. State courts may interpret their respective constitutions

The highest court in every state is the final arbiter of its own constitution.[64] Even if the clause has an identical counterpart in the federal constitution, the state court may construe the words differently than would the U.S. Supreme Court.[65] However, the independent authority of the state courts in this regard is consistent with federalism.[66] In fact, Justice Linde of the Oregon Supreme Court and several other commentators have urged state courts to consider state constitutions before turning to the United States Bill of Rights and the federal cases construing those amendments.[67] Under this approach, if a state court rules as a matter of state law that a right has been violated and must be redressed, it becomes unnecessary to reach a federal constitutional question.

The independent authority of state courts to decide constitutional questions is borne out by the early constitutional history of the United States. Most of the early states had declarations of rights some years

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63. *See, e.g.,* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980) ("Our reasoning . . . does not . . . limit the authority of the State to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution."); Oregon v. Hass, 420 U.S. 714, 719 n.4 (1975). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977).

64. Pruneyard Shopping Center, 447 U.S. at 81; *See also* Wainwright v. Stone, 414 U.S. 21, 22-23 (1973); New York v. Ferber, 458 U.S. 747, 767 (1982).

65. *See supra* notes 25-26 and accompanying text.

66. Brennan, *supra* note 63, at 501-03; *See* Linde, *First Things First: Rediscovering the States' Bills of Rights,* 9 U. BALT. L. REV. 379 (1980); Pollock, *supra* note 33 at 708 ("Recent decisions from across the country have looked not just at the United States Constitution, but at state constitutions, for protection of basic liberties. This trend is well-founded in history, logic and the theory underlying our federalist society.").

67. *See, e.g.*, Linde, *supra* note 66, at 380.

before the United States Bill of Rights was finally adopted. This history leaves no doubt that state "declarations of rights" were never intended to be dependent on or interpreted in light of the United States Bill of Rights. In fact, a strong argument can be made that the Bill of Rights was added to meet demands for the same guarantees against the federal government that people enjoyed against their state governments.[68] Perhaps this is why state courts have led the United States Supreme Court in developing techniques for protection of individual rights[69] that the Supreme Court has later adopted and read into the United States Constitution.[70]

2. *Legislative intent behind state constitutions has been varied*

For most constitutional litigation, the intent of the framers of a constitution is a significant touchstone for determining the appropriate interpretation of the constitution. Therefore, the legislative history behind a state constitution is of great importance for state judges deciding how to apply state due process clauses. The legislative history behind the adoption of the 50 state constitutions is not the same as the legislative history behind the Bill of Rights. State constitutions adopted due process protections long before the federal constitution and also long after the adoption of the fourteenth amendment.[71]

Even if a state adopted a due process clause which is identical to the fifth amendment, the concept behind due process might have been understood differently by the state constitutional convention which adopted the clause. Justice Utter noted:

> Given the vast difference in culture, politics, experience, education, and economic status between the Northwestern framers of the 1889 [Washington state constitution] and the Eastern framers of the United States Bill of Rights in 1789, and the enormous differences of history and local conditions that separated the two conventions, it is unlikely that the two documents were written by men with much more in common than a shared language and a similar, if vague, democratic philosophy. Thus even in the relatively few cases where the two docu-

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68. Linde, *supra* note 66, at 379.

69. *See, e.g.,* State v. Sheridan, 121 Iowa 164, 166, 96 N.W. 730, 731 (1903) (exclusionary rule); Carpenter v. County of Dane, 9 Wisc. 249, 250-51 (1859) (right to counsel); Coleman v. MacLennan, 78 Kan. 711, 712-13, 98 P. 281, 281-82 (1908) (freedom of the press); City of Chicago v. Tribune Co., 307 Ill. 595, 608-09, 139 N.E. 86, 90-91 (1923) (freedom of the press).

70. Gideon v. Wainwright, 372 U.S. 335, 345 (1963) (noted that 22 states had acknowledged that a fair trial included right to counsel); New York Times v. Sullivan, 376 U.S. 254, 280 (1964) (cited state court opinions which used the "actual malice" standard in libel cases). *See also* Blanchard, *Filling in the Void: Speech and Press in State Courts Prior to Gitlow,* in FIRST AMENDMENT RECONSIDERED 14-59 (B. Chamberlin & C. Brown eds. 1982).

71. *See supra* note 6.

> ments used identical language, the intent could be quite different. Although it is difficult to say just what phrases like . . ."due process" meant to a Northwestern pioneer in 1889, it is probably safe to say that they did not mean exactly the same thing that they meant to an aristocratic Virginia plantation owner and slaveholder of 1789.[72]

3. State courts use independent standards to interpret their respective due process clauses

Some states have adopted alternative standards by which to decide substantive due process issues. The classic substantive due process analysis in federal courts involves just two standards of review — strict judicial scrutiny under the compelling state interest test and minimal judicial scrutiny under the rational basis analysis. However, substantive due process analysis in state courts can involve other factors. For example, one alternative standard used in some state courts is the "affected with a public interest" test.[73] This sort of a test is one of the variations of substantive due process analysis because it balances public interest policy considerations against the need for the legislation rather than merely employing one of the two standards of review used by federal courts.[74]

The use of variant standards of review has many ramifications, one of which is the greater use of substantive due process analysis. The variant standards of review employed by many states are more likely to lead to increased substantive due process analysis of state legislative acts because the state standards are more receptive of the policy considerations behind substantive due process arguments.[75]

C. Justifications for State Courts to Uphold Substantive Due Process Challenges to Economic Regulations

Commentators have given several justifications for the states to endorse substantive due process challenges to economic regulations when the federal courts have specifically rejected those challenges. These justifications include the nature of state constitutions, other state constitu-

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72. Utter, *supra* note 35, at 496; *See* Linde, *supra* note 66, at 383.

73. *E.g.,* Estell v. City of Birmingham, 291 Ala. 680, 286 So. 2d 872 (1973); *See* Note, *Rediscovering Means Analysis in State Economic Substantive Due Process,* 34 ALA. L. REV. 161, 163 (1983).

74. Justice Linde wrote that some states adopted alternate tests for substantive due process "as a way to apply prudential and ethical tests to legislation and . . . . [the] resolution of constitutional issues consists in 'balancing competing interests.' " Linde, *supra* note 34, at 186.

75. *See also* Comment, *Developments In the Law: The Interpretation of State Constitutional Rights,* 95 HARV. L. REV. 1324, 1463-93 (1982). For a more complete discussion of states which endorse substantive due process challenges see *infra* Part III.

tional directives, and local factors which are peculiar to state courts.

1. The nature of state constitutions

Substantive due process review is fundamentally an exercise in constitutional interpretation. "When a state court invalidates a legislative enactment because it impermissibly violates the property rights of its citizens, it does so by relying entirely or in part on its own state constitution, so the state constitution is really the touchstone in these matters."[76] Thus, the first justification for the persistence of substantive due process outside of federal courts is analogous to the basic proposition that a state has the "sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution."[77]

2. Other state constitutional directives

The second justification for states adopting substantive due process challenges to economic regulation lies in the other directives of a particular state constitution. The text of a particular state constitution may contain language which, unlike the federal constitution, essentially directs the judiciary to engage in a substantive review of legislative enactments affecting property rights.[78] For example, when the Ohio Constitution pronounces, "Private property shall ever be held inviolate, but subservient to the public welfare,"[79] an Ohio court is probably justified in scrutinizing state-enacted economic regulations for evidence that the regulations do in fact benefit the public welfare.

3. Local factors

The final justification for the greater indulgence in substantive due process review by state courts could be called the "local factors" rationale. Several commentators have suggested that certain factors better justify economic review at the state than at the federal level.[80] According to this rationale, the relationship between the legislature, the constitution, and the judiciary may be such that closer judicial scrutiny is not onerous because of particular checks and balances in a state government. For example, Professor Hetherington suggested that state courts

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76. PRACTISING LAW INSTITUTE, RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW, LITIGATION ADMINISTRATIVE PRACTICE SERIES LITIGATION HANDBOOK SERIES NUMBER 277, 111 (1985) [*hereinafter* RECENT DEVELOPMENTS].

77. Pruneyard Shopping Center v. Robbins, 447 U.S. 74, 81 (1980).

78. *See* Brennan, *supra* note 63, at 1479-80.

79. OHIO CONST. art I, sec. 19.

80. *See infra* note 86.

are more attuned to local economic conditions than federal courts, and therefore more trustworthy in the application of substantive due process.[81]

Another local factor is that many state constitutions are easier to amend,[82] and thus, mistakes made by the judiciary in interpreting state constitutions can be more easily corrected.[83] Commentators who adopt this justification contend that the use of substantive due process by the courts is arguably less dangerous if the legislature can quickly respond to judicial intrusion via a constitutional amendment.[84]

An additional local factor invoked by state courts is the anti-democratic effect of lobbying groups on state legislatures which, it is implied, can only be remedied by the judiciary.[85] According to this rationale, state legislatures, being small and poorly staffed, are more susceptible to the lobbying efforts of special interest groups and more likely to pass economic regulations which infringe on the public good. While this argument contains more than a grain of truth, it smacks of the sort of condescension towards elected officials and disrespect for their judgment which the United States Supreme Court rejected when it rejected substantive due process.[86]

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81. *See* Hetherington, *State Economic Regulation and Substantive Due Process of Law: Part 2,* 53 NW. U. L. REV. 226, 248-51 (1958).

82. Linde, *supra* note 34, at 192 ("[S]tate constitutions, like state laws, are easily amended. When a court demonstrates in the most eloquent terms that the death penalty is a relic of barbaric vengeance contrary to the ideals of humane society, what is the court to say when the people immediately amend their constitution to reinstate capital punishment.").

83. *See* Note, *Counterrevolution in State Constitutional Law,* 15 STAN. L. REV. 309, 326-30 (1963).

84. *Id.* ("Because state constitutions are easier to amend, judicial review can be more effectively checked."). For example, the highest courts in Massachusetts and California declared that the death penalty violated their state constitutional bans against cruel and inhumane punishment. *See* District Attorney v. Watson, 381 Mass. 648, 664-65, 411 N.E.2d 1274, 1283 (1980); People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied* 406 U.S. 958 (1972). However, initiative measures were adopted to reinstate the death penalty. MASS. CONST. pt. I, art. XVI; CAL. CONST. art I, § 27 (1879, amend. 1982).

85. *See, e.g.,* State v. Cromwell, 72 N.D. 565, 580, 9 N.W.2d 914, 922 (1943) ("[I]t is a matter of common knowledge that pressure groups are frequently able to bring about legislative action they believe will be to their advantage by their argument that it is needed for the protection of the public.").

86. *See* Hetherington, *supra* note 81, at 248-51 (ability of state courts to tailor decisions to local conditions and needs); Paulsen, *The Persistence of Substantive Due Process in the States,* 34 MINN. L. REV. 91, 117-18 (1950) (shorter legislative sessions and concentrated special interest lobbying justify increased judicial review of state legislation); Note, *State Views on Economic Due Process: 1937-1953,* 53 COLUM. L. REV. 827, 843-45 (1953) (shorter legislative sessions and legislative pay justify review).

However, Not all commentators agree on this point. *See* Carpenter, *Our Constitutional Heritage: Economic Due Process and the State Courts,* 45 A.B.A. J. 1027 (1959); Kirby, *Expansive Judicial Review of Economic Regulation Under State Constitutions: The Case for Realism,* 48 TENN. L. REV. 241 (1981); Comment, *Substantive Due Process in the States Revisited,* 18 OHIO

III. Inconsistencies in Defining Due Process

As Part II indicated, substantive due process in the states can be measured by different standards than substantive due process under the federal constitution. Because of these differing standards, cases with similar facts can result in dissimilar outcomes.

A. Inconsistencies Between the Due Process of the Federal Constitution and the Due Process of State Constitutions

One of the starkest examples of inconsistent outcomes in cases involving similar facts can be seen in the regulation of milk prices. In *Nebbia v. New York,*[87] the U.S. Supreme Court held that a law passed by the New York legislature establishing a Milk Control Board, with the right to set minimum and maximum resale prices for milk, did not violate the due process clause of the fourteenth amendment.[88] Despite the fact that the U.S. Supreme Court held that regulation of milk prices did not violate the due process clause of the federal constitution, forty years later, a state court reached a directly contrary result based on its state due process clause.[89]

In *Gillette Dairy, Inc. v. Nebraska Dairy Products Board,*[90] the Nebraska Supreme Court held that a milk price regulation scheme was unconstitutional as an invasion of the property rights of the individual protected by the due process clause of the Nebraska state Constitution.[91] The dissent in *Gillette Dairy* recognized that the regulations in question would not violate the due process clause of the fourteenth amendment and bitterly complained that "[r]egulations and statutes similar to those involved here have long been upheld as being constitutional."[92] The disparity of results in *Gillette Dairy* and *Nebbia* illus-

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ST. L. J. 384 (1957).

87. 291 U.S. at 502. For a more complete discussion of *Nebbia* see *supra* notes 53-58 and accompanying text.

88. *Id.* at 539 ("So far as the requirement of due process is concerned, . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.").

89. Gillette Dairy, Inc. v. Nebraska Dairy Prods. Bd., 192 Neb. 89, 219 N.W.2d 214 (1974).

90. 192 Neb. 89, 219 N.W.2d 214 (1974).

91. *Gillette Dairy,* 219 N.W.2d at 218, 220 ("This court cannot give judicial approval to legislation that violates . . . . Article I, section 3 of the Constitution of this state, commonly referred to as the due process clause.").

92. *Gillette Dairy,* 219 N.W.2d at 224 (Clinton, J., dissenting, citing Nebbia v. New York, 291 U.S. 502 (1933)). The dissent went on to quote *Nebbia* and its declaration that under the fourteenth amendment, "[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, . . ." *Id.* at 225. The dissent concludes that "the majority opinion judges not the

trate that substantive due process arguments based on state constitutional clauses remain an effective way to strike down economic regulations which would survive an attack under the federal constitution.[93]

Another example of this type of inconsistency is found in the legislative limitations on the funding of abortions. The U.S. Supreme Court has upheld congressional restrictions on government funding for abortions and rejected due process arguments for invalidating those funding restrictions.[94] However, under their state due process clauses, many state courts have refused to allow state legislatures to restrict state funding of abortion. For example, courts in California, Connecticut, and Massachusetts have relied upon their own constitutions to hold that state health insurance programs must subsidize both pregnancy and abortion expenses on equal terms.[95] "Colorado, New Jersey, and Oregon also require state subsidization of abortion expenses pursuant to their own constitutions."[96]

B. Inconsistent Outcomes When Similar Statutes Are Challenged in the States

When a state court conducts a substantive due process inquiry into the validity of government imposed price regulations, "the results can be unpredictable and remarkable."[97] For example, the Alabama Supreme Court has struck down an "anti-scalping" ordinance as an unconstitutional price fixing regulation which violated the ticket-holder's property rights.[98] However, other state courts have expressly rejected the Alabama court's interpretation of the scalper's due process rights.[99]

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constitutionality of the legislation, but its wisdom." *Id.* at 222.

93. RECENT DEVELOPMENTS, *supra* note 76, at 107-08.

94. Harris v. McRae, 448 U.S. 297, 326-27 (1980) (upholding the "Hyde Amendment," Pub. L. No. 94-439, sec. 209, 90 Stat. 1418 (1976)).

95. Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981) (*relying on* CAL. CONST. art. I, sec. 1); Doe v. Maher, 515 A.2d 134, 40 Conn. Supp. 394 (1986); Moe v. Secretary of Admin. & Fin., 17 N.E.2d 387 (1981) (*relying on* MASS CONST. pt. 1, art. X; pt 2, ch.1, arts. I-III).

96. Utter, *supra* note 35, at 504.

97. RECENT DEVELOPMENTS, *supra* note 76, at 118.

98. *In re* Extell v. City of Birmingham, 291 Ala. 680, 286 So. 2d 872, 875 (1973) ("These are arbitrary and unreasonable interferences with the rights of the individuals concerned . . . and is offensive to the declarations and guarantees of [Alabama's] Bill of Rights, . . .").

99. *See* State v. Major, 243 Ga. 255, 253 S.E.2d 724 (1979) (holding that the government may restrict a scalper's property right in his tickets without violating due process). *Accord* State v. Spann, 623 S.W.2d 272 (Tenn. 1981); State v. Youker, 36 Or. App. 609, 585 P.2d 43, 44 (1978). *Cf.* Gold v. DiCarlo, 235 F. Supp. 817, 821 (S.D.N.Y 1964), *aff'd without opinion,* 380 U.S. 520 (1965) (holding that New York General Business Law which sets a maximum resale price for tickets to public places does not violate the federal constitution's due process clause).

Inconsistent results have also been reached in the area of legislative restrictions to business practices. Typically, state courts have followed the Supreme Court's reasoning in upholding or rejecting challenges to business regulations. However, this is not always the case.

One such example is in the case of weight and size limitations on trucks traveling public roads. The Supreme Court has held that when a state imposes weight and size limitations on trucks, it acts within the scope of its police power and does not offend the due process clause of the federal constitution.[100] State courts usually have followed the Supreme Court and upheld weight and size limitations as constitutional.[101] However, some state courts have found that restrictions on weight and size "do not . . . bear a reasonable relationship to the declared objective of public safety and, therefore, deny due process."[102] Whether a given weight or size limitation will withstand substantive due process analysis is difficult to predict in states which allow such challenges to economic regulations. Results vary even within a single jurisdiction, because the reasonable relationship test, as applied by state courts, is inherently flexible.[103]

Another example of departures by the states from the standards of due process set by the United States Supreme Court is found in the regulation of entry into a business or profession. When a state legislature sets standards in an industry or profession, it inevitably excludes some potential entrants.[104] Furthermore, the process is subject to abuse,

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100. Sproles v. Binford, 286 U.S. 374, 388-89 (1932); *cf.* National Tank Truck Carriers, Inc. v. City of New York, 677 F.2d 270, 273 (2d Cir. 1982) (holding that city regulations on transporting hazardous gases by trucks does not violate the constitution).

101. *E.g.,* Alexander v. State, 228 Ga. 179, 184 S.E.2d 450 (1971); *See generally* Annotation, *Power to Limit Weight of Vehicle or its Load with Respect to Use of Streets or Highways,* 75 A.L.R.2D 376 (1961).

102. *In re* Application of Martin, 88 Nev. 666, 504 P.2d 14, 16 (1972) ("The ordinance may not be justified as traffic safety measures since they were not enacted for that purpose."); *See also* Red River Constr. Co. v. City of Norman, 624 P.2d 1064, 1067 (Okla. 1981) (holding a weight restriction on trucks carrying riverbed sand on a particular city street was found to be beyond the legitimate police power of the state because such a restriction only increased traffic density and the risk to citizens).

103. *Compare* Bakery Salvage Corp. v. City of Lackawanna, 24 N.Y.2d 643, 249 N.E.2d 438, 439, 301 N.Y.S.2d 581, *modified*, 24 N.Y.2d 1025, 250 N.E.2d 247, 302 N.Y.S.2d 581 (1969) (holding that a traffic ordinance limiting truck weight to five tons was reasonable and did not deprive plaintiff of property rights without due process of law) *with* Peconic Ave. Businessmens' Ass'n v. Town of Brookhaven, 98 A.D.2d 772, 469 N.Y.S.2d 483, 486 (1983) (holding that an ordinance prohibiting trucks over 5,000 pounds from using a residential street was found unconstitutional because the street was so wide and well-paved that it could easily withstand the passage of trucks).

104. By its very nature, when a state institutes a requirement which must be met before a person can enter a business field, all those who fail to meet the requirement are excluded. Examples of these type of requirements include denial of permission to practice law to those people who have not passed the bar exam. The same is true of doctors, dentists, etc. An example of a challenge

particularly since those with vested interests in the business being standardized will often attempt to influence the elected officials who set the standards.[105] Despite all the arguments against the wisdom of legislatures to regulate business entry requirements, under the federal constitution such regulations do not violate the due process clause if there is any rational basis for the regulation. The Supreme Court held that the legislature's police power includes the power to "regulate a business in such manner as to abate evils deemed to arise from its pursuit" or even to forbid the practice of a particular type of business which is "inimical to the public welfare."[106] The Supreme Court defers to the legislatures to decide what evils must be abated and to define what is inimical to public welfare. However, state courts do not always defer to the judgment of the legislature in deciding these issues. The Georgia Supreme Court's treatment of its state's franchising regulation is a good example of a state court's refusal to defer to the judgment of its legislature. The Georgia Supreme Court rejected several versions of the Franchise Practices Act and finally disposed of the act as violative of substantive due process.[107] The court decided that a simple substantive due process analysis based on the state constitution was "the surest and safest way to give the Franchise Practices Act its final burial."[108]

Other states have not followed Georgia's lead in using substantive due process challenges to attack franchising statutes. In fact, Georgia has remained alone in this posture because other state courts have rejected due process attacks on franchise licensing statutes.[109] Even the

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to a business entry regulation is the case of Kotch v. Board of River Pilots, 330 U.S. 552 (1947).

105. *See* State v. Cromwell, 72 N.D. 565, 9 N.W.2d 914, 922 (1943) (holding that a statute which authorized the licensing of photographers by a board of photographers was held to violate due process under the state constitution).

106. Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 426 (1937).

107. Georgia Franchise Practices Comm'n v. Massey-Ferguson, Inc., 244 Ga. 800, 262 S.E.2d 106, 108 (1979) ("The cited sections violate due process by seeking to regulate an industry not affected with a public interest, . . .").

108. RECENT DEVELOPMENTS, *supra* note 76, at 129.

109. *See, e.g.*, Tober Foreign Motors, Inc. v. Reiter Oldsmobile, Inc., 376 Mass. 313, 381 N.E.2d 908 (1978); *see generally* Annotation, *Validity and Construction of State Regulating Dealing Between Automobile Manufacturers, Distributors, and Dealers*, 7 A.L.R.3D 1173, § 17[a] (1966 & supp. 1984).

Besides franchise licensing statutes, different state business regulation laws in general have met with inconsistent results when challenged under state due process clauses. *Compare In re* Certificate of Need for Aston Park Hosp., Inc., 282 N.C. 542, 193 S.E.2d 729, 734 (1973) (holding that certificate-of-need requirements violate due process and anti-monopoly provisions of North Carolina Constitution) *with* Mount Royal Towers Inc. v. Alabama Bd. of Health, 388 So. 2d 1209, 1215 (Ala. 1980) (holding that the Certificate-of-need Act, which reduces medical costs from duplicated services, does not deprive plaintiff of property or contract rights without due process of law under the Alabama Constitution).

Other regulations which state courts have struck down by developing independent standards

United States Supreme Court rejected the basic position taken by the Georgia court.[110]

In summary, state courts have not always followed the federal courts' standards for substantive due process challenges to economic regulations. Some state courts have adopted substantive due process attacks and struck down economic regulations while other states have upheld similar regulations under the same attacks. Therefore, it is difficult to determine if a state will uphold or reject a substantive due process attack on an economic regulation because courts in different states interpret state due process clauses differently.

IV. Consequences of Allowing Inconsistent Standards for Substantive Due Process Attacks

Because we have two independent systems of government, state and federal, there are going to be inconsistent outcomes in similar cases tried in different jurisdictions.[111] Therefore, it must be recognized that this inconsistency has some important consequences. Consequences of the inconsistent outcomes can include manipulation by the state courts to avoid federal review, balancing of federal and state rights, and maintaining the proper respect for the separate judicial systems.

A. State Court Manipulation to Avoid Federal Review

In order to merit immunity from review and reversal by the United States Supreme Court, the state court opinion must contain an explicit statement that the decision is "alternatively based on bona fide separate, adequate, and independent [state] grounds."[112] This is especially true in cases where federal law is also discussed. This means that when a substantive due process attack is used to invalidate a law, the state court must make certain that the analysis used is grounded in state constitutional law and not in federal constitutional law. Where

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for due process include education regulations. For a summary of substantive due process in education see Comment, *Substantive Due Process Challenges: Are They Creeping into Education under a New Standard of Review,* 2 B.Y.U. J. OF PUB. L. 307 (1988).

110. New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96 (1978). The Court held that "California's [l]egislature was . . . constitutionally empowered to enact a general scheme of business regulation that imposed reasonable restrictions upon the exercise of the right [to franchise]" *Id.* at 106.

111. Oregon Supreme Court Justice Linde wrote: "Federalism divides our laws along state lines . . . . This decentralized system of laws displays some divergent legal rights among homogeneous societies . . ." Linde, *supra* note 34, at 195. Justice Abrahamson of the Wisconsin Supreme Court wrote: "[W]e live in a country with a dual court system, . . . Conflict is endemic in the system." Abrahamson, *supra* note 19, at 954.

112. Michigan v. Long, 463 U.S. 1032, 1041 (1983).

federal cases are cited, the opinion must expressly state that they are considered as guidance only and do not "compel the result."[113]

Because reliance on federal cases may cause a state court decision to be overturned, even if it is ruling on its own constitution, the large body of federal due process law cannot be relied upon. This creates the need for a precise balancing act between the state and federal due process clauses when the two interpretations are inconsistent with each other. Therefore, since the state constitution is not the highest law of the land,[114] every provision must be construed to provide at least as much protection as the United States Constitution, any applicable federal laws, and the Enabling Act which authorized the state constitutional convention.[115] "This means in part that the [state] Constitution cannot affirmatively impair rights protected by the United States Constitution."[116]

B. Balancing of Federal and State Rights

Because state constitutional interpretations cannot directly contravene any federal constitutional right, a state due process clause can only be invoked if it gives a greater protection to individual rights than its federal counterpart would.[117] This has both positive and negative aspects. One positive aspect is that states can tailor the protection they offer to local concerns without falling below a federal constitutional minimum. On the other hand, the power to second guess state legislatures can lead to abuse and inequitable results. Additionally, many state court decisions, and the analysis in those decisions, have to be manipulated so as to avoid a state-federal conflict.[118]

As state courts continue to apply the due process clauses of their state constitution expansively, they can provide their citizens with unusually strong constitutional protection against arbitrary economic reg-

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113. *Id.*

114. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . , shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby, any Thing in the Constitution or Law of any State to the Contrary notwithstanding.*" U.S. CONST. art. VI, cl. 2 (emphasis added).

115. Utter, *supra* note 37, at 510.

116. *Id. See also supra* notes 25-26 and accompanying text.

117. Justice Pollock of the New Jersey Supreme Court wrote:

> Generally speaking, the first ten amendments to the United States Constitution set a minimum level of fundamental liberty for the citizens of the United States. Through the fourteenth amendment, most rights guaranteed by the Bill of Rights are protected against interference by the states. A state may add to those rights, but may not subtract from them.

Pollock, *supra* note 19, at 709.

118. *See supra* notes 110-16 and accompanying text.

ulation. Substantive due process challenges to certain regulations give state courts a powerful check against the legislative branch of government, and a powerful tool for protecting individual rights. However, promoting a constitutional doctrine which sanctions the second-guessing of legislative judgment is a risk. The risk is that an entrenched judiciary will not recognize the value of innovative legislation, and will reject new laws whenever the slightest infringement on individual rights exists. In short, the use of substantive due process in the economic arena is a danger that may exalt the imagined rights of a few over the legitimate needs of many. Such danger notwithstanding, economic due process in state courts is a modern reality.

Under our federalist system, that state courts and federal courts will not always interpret their respective constitutions in the same manner is expected, even if those constitutions contain phrases with similar language or intent. However, a price must be paid for allowing two interpretations of the same principle.

Even if the manipulation of federal case law by state courts is not onerous, for "federalism to work, the United States Supreme Court and the state courts must maintain a healthy respect for the role each plays."[119] While it is not crucial to have one uniform constitution or constitutional standard for each state, radical departures from federal precedent makes a national economy and society less cohesive.

CONCLUSION

Due process is a fundamental freedom in American society. It protects us against arbitrary actions from the government. However, a consensus does not exist as to whether substantive due process should allow the judiciary to examine economic regulations. For the most part, the federal courts have held that economic regulations do not violate substantive due process under the federal constitution. However, state courts have not always agreed with the federal courts' interpretation of substantive due process.

State courts feel that they have several justifications for using substantive due process to examine state-passed economic regulations. Because states do not always follow the interpretation of substantive due process developed by the United States Supreme Court, inconsistent results occur in cases involving similar facts. One state may uphold an economic regulation, while a neighboring state may strike it down.

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119. Abrahamson, *supra* note 21, at 970. Abrahamson refers to a "new federalism" which he calls the resurgence of state constitutional law as a font for individual rights. *See supra* notes 30-37 and accompanying text.

Consequences of these inconsistent results are widespread but expected in a society which has adopted a dual sovereignty concept. If we want to maintain the notion of independent states with substantially independent constitutions, then we must accept that inconsistent outcomes in cases involving substantive due process challenges are likely to occur. While one standard of substantive due process review is not necessary or even desirable under our federalist system, large inconsistencies and flat contradictions arising from varying standards make it difficult to determine the requirements of due process.

Keith L. Hendricks