Substantive Due Process: The Power to Grant Monopolies in the Federalist Marketplace of State Experimentation

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ABSTRACT

Substantive due process is a controversial doctrine due to its lack of a limiting principle that prevents courts from creating or extending rights beyond the text of the Constitution. This Comment suggests that the effects of substantive due process should be evaluated from a perspective of their likely effect on the federalist marketplace of state experimentation. From this perspective, the application of substantive due process should be limited to natural rights, which are the equivalent of natural monopolies in economic marketplaces. The remaining rights should be allowed to develop through state experimentation.

I. INTRODUCTION

Substantive due process is one of the most controversial doctrines currently applied by the Supreme Court. The doctrine is so controversial that its very name has been called a "contradiction in terms," an "oxymoron," and even "a momentous sham." The root of the controversy surrounding the application of substantive due process is not that it protects substantive rights through a provision requiring procedure, but that it allows the Court to expand the protections of the Constitution based on judicial discretion with no clear limits. Although substantive due process has been the

1. Rosalie Berger Levinson, Reining in Abuses of Executive Power Through Substantive Due Process, 60 FLA. L. REV. 519, 521 (2008) ("Substantive due process is one of the most confusing and most controversial areas of constitutional law."); Stewart M. Weiner, Comment, Substantive Due Process in the Twilight Zone: Protecting Property Interests from Arbitrary Land Use Decisions, 69 TEMP. L. REV. 1467, 1473 (1996) ("Even when limited to undisputed fundamental rights, substantive due process remains a controversial doctrine on which the Supreme Court is bitterly divided.").


3. Mays v. City of E. St. Louis, 123 F.3d 999, 1001 (7th Cir. 1997).


5. Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion) ("Substantive due process has at times been a treacherous field for this Court. There are risks
vehicle for applying the Bill of Rights to the states through the process of incorporation, the most controversial applications of substantive due process have been those that, rather than being limited by the text of the Constitution, have developed from general abstract concepts such as "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty."

The search for limitations on substantive due process has generated significant scholarship. For example, Thomas W. Merrill argues that substantive due process should be limited by general principles in the Rules of Decision Act and the Constitution, such as separation of powers, federalism, and electoral accountability. Supreme Court Justices Scalia and Thomas have argued that "deeply rooted in this Nation's history and tradition" should be strictly interpreted and should involve a searching inquiry into practices in place at the time that the Fifth and Fourteenth Amendments were ratified.

This Comment will argue for similar limits on the application of substantive due process by reframing the issue from a concern with fundamental rights to a concern with interference on a federalist marketplace of state experimentation. Specifically, the marketplace of state experimentation should generally be allowed to determine the extent of fundamental rights by allowing policies to compete for acceptance among the states, unless the rights are natural. Although this Comment will address some of the normative concerns surrounding the doctrine, the main goal of this Comment is to provide an economic framework and economic terminology that can be used to discuss the normative effects of substantive due process.

Substantive due process affects the interaction of the state and federal governments in the federalist system. In general, the federalist system gives states the ability to experiment with different

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policies and to protect different rights or to protect the same rights at different levels. The importance of this feature of federalism has been recognized by the United States Supreme Court, as has the seriousness of interfering with it:

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.

In a more recent case, the Supreme Court quoted this language with approval on its way to concluding that "the states must be free to experiment. . . . [O]nly when the state action infringes fundamental guarantees [is the Supreme Court] authorized to intervene."

This ability to experiment creates a marketplace of state policies, similar to the marketplace of ideas, in which state policies compete for acceptance by other states. Like the marketplace of ideas, the federalist marketplace of state experimentation provides a test for truth as policies emerge from the federalist marketplace by gaining the greatest acceptance among the states. One of the most eloquent descriptions of the marketplace of ideas came in a dissenting opinion from Justice Oliver Wendell Holmes:

[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge.

11. Philip J. Weiser, Chevron, Cooperative Federalism, and Telecommunications Reform, 52 Vand. L. Rev. 1, 3 (1999) ("Moreover, such deference serves an important goal of cooperative federalism: it allows for and encourages state experimentation and interstate competition.").
15. Id. at 6.
While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.\textsuperscript{16}

Just as truth is best achieved through the competition of opinion experiments within the marketplace of ideas, truth in the form of policies is best achieved through the competition of policy experiments within the federalist marketplace of state experimentation.

As the United States Supreme Court applies the doctrine of substantive due process by declaring that certain rights are fundamental, it interferes in the federalist marketplace of state experimentation. Once a right is declared to be fundamental, that right becomes a "federally protected right beyond any state regulation whatever,"\textsuperscript{17} and, therefore, states may not experiment with policies in that area. In other words, rights protected under the doctrine of substantive due process are granted monopoly status within the federalist marketplace of state experimentation. This Comment will explore this monopoly-granting power of the United States Supreme Court to determine (1) whether that power was intended to be given to the Supreme Court by the drafters and ratifiers of the Constitution and its amendments and (2) whether the Supreme Court's current use of that power is appropriate from the perspective of its effect on the federalist marketplace of state experimentation. This Comment will conclude that, although the drafters and ratifiers of the Constitution and its amendments originally intended the Supreme Court to have the power to grant monopolies to rights in the federalist marketplace, that power was originally intended to be limited to natural rights. In addition, allowing the Supreme Court to exercise its monopoly-granting power beyond natural rights is inappropriate when considered from the perspective of its effect on the development of policies within the federalist marketplace.

\textsuperscript{16} Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

\textsuperscript{17} WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 10 (1988).
Part II of this Comment will provide background information on economic marketplaces, specifically addressing economic monopolies, natural monopolies, and the legal standard for when economic monopolies are acceptable to society. Part III will apply this economic background to the federalist marketplace of state experimentation and will provide corresponding descriptions of a federalist marketplace monopoly, natural rights, and the legal standard for when a federalist marketplace monopoly should be acceptable to society. Part IV will then seek to determine whether the ability to grant monopolies to rights within the federalist marketplace was intended under the Due Process Clauses of the Fifth or Fourteenth Amendments. Part V will discuss the normative implications of substantive due process that are highlighted by the use of this economic terminology, and Part VI will conclude.

II. ECONOMIC TERMINOLOGY AND LEGAL DOCTRINE

A. Economic Monopoly

In an economic marketplace, a monopoly is a business organization with the "power to control prices or exclude competition." This can occur when either a single organization produces all of the output demanded in the market, or when an organization, despite competition from smaller organizations, is so large that it has market, or price-setting, power. In either case, the distinguishing characteristics of an economic monopoly are its ability to "control prices and exclude competition.

As the only competitor in a market or the most significant competitor, a monopoly can affect the price of a product in the market by changing its output of the product into the market. Specifically, monopolies tend to decrease the output of a product into the market in order to make the product scarcer and to raise the product's price. Although firms in a completely competitive market also have the ability to change their output, the existence of

21. Id. at 571 (quoting E I. du Pont de Nemours, 351 U.S. at 391).
22. KEARL, supra note 19, at 227.
23. Id. at 230.
comparable competition prevents their output changes from affecting the price of the product in the market. Monopolies can use this ability to affect the price of a product in the market to maximize profits.

In addition to having the power to control prices, an economic monopoly also has the power to exclude competition. A monopoly excludes competition by erecting or benefiting from barriers that prevent other firms from entering the market. The sources of these barriers to entry include "exclusive ownership of a scarce resource," "specialized knowledge," "legal restrictions that limit entry by new firms," or "business practices" or "cost advantages" of a firm that makes entry by other firms unprofitable. Hence, if a firm controls all of the resources or specialized knowledge needed to make a specific product, competing firms will be prevented from entering the market due to their lack of access to the necessary resources. DeBeers of South Africa, for example, has a monopoly in the diamond market because it "owns much of the land on which gem-grade diamonds are easily mined." In addition, competitors may face legal hurdles that make it unprofitable or overly difficult to enter the market. These legal hurdles include patents, copyrights, and exclusive government licenses, such as the one granted to the U.S. Postal service. Finally, some monopolies arise because the business practices of the firm or the nature of the product that they offer gives large or existing firms an advantage over entering firms. These monopolies are called natural monopolies and will be discussed in more detail below.

Economic monopolies are disfavored in a free-market system. In a perfectly competitive economic market, prices and quantities are

24. Id. at 227.
25. Id. at 227, 237.
27. KEARL, supra note 19, at 234–35.
28. Id. at 235.
29. Id. at 235–36.
30. Id. at 235.
31. Id. at 236.
32. Id.
33. Id. at 237–240.
34. See infra Part II.B.
35. KEARL, supra note 19, at 231–33.
determined by the interplay between supply and demand. Specifically, at a given price, buyers will be willing to buy a specific quantity of product and suppliers will be willing to sell a specific quantity of product. When those prices and quantities are equal, the market is said to be in equilibrium and the result is economically efficient. But when a monopoly exists within an economic market, the monopoly will restrict output in order to make the product scarcer and raise prices. Although the price of the product in the market is still dependent on the demand for the product, the monopoly has power to control the price to a significant degree by controlling the level of output. In this way, the monopoly maximizes its profits. Because the result produces less output into the market than would be produced in the absence of a monopoly, the market is not in equilibrium and the result is not efficient. Therefore, monopolies introduce inefficiencies into the market due to insufficient supply and higher prices for consumers.

B. Natural Monopoly

As mentioned above, natural monopolies arise because the product or service that they offer gives large or existing firms a natural advantage over entering firms. In other words, natural monopolies "can produce all of the output for the market at a cost lower than a group of smaller competitive firms can." Although several characteristics of a firm may cause it to be a natural monopoly, the most significant, for the purposes of this Comment, is that the initial start-up costs for the firm are high compared to the marginal cost of providing the product or service to one additional person once the start-up costs have been invested.

36. Id. at 63.
37. Id.
38. Id. at 65, 167.
39. Id. at 232–33.
40. Id. at 230–31.
41. Id. at 233.
42. Id. at 232.
43. See supra text accompanying notes 33–34.
45. KEARL, supra note 19, at 762.
46. Id. at 239–40.
Currently, the most common types of natural monopolies are public utilities such as “electrical power, local telephone service, water, natural gas, and sewage disposal companies.” However, because “[t]he underlying reason for natural monopol[ies] is technological,” the industries that include natural monopolies have the potential to change over time as technology changes. Considering sewer services as an example, the initial investment for a sewer company of installing main sewer lines is substantial. But once the initial investment has been made, the cost of providing sewer services to one additional person within the service area is much less substantial, involving only the hook-up from the already-existing line in the street. Therefore, the first firm to lay sewer lines throughout a community is naturally at an advantage compared to later firms that may attempt to compete with it because the first firm can offer the same services with less cost to new customers and can spread the cost over more customers. The establishment of a natural monopoly within a community makes competition against it irrational because the likelihood of success is small.

C. Acceptable Economic Monopolies

Even though they are disfavored, economic monopolies are not per se illegal in the United States. For example, natural monopolies are often unavoidable, so their existence does not constitute a punishable offense. However, because natural monopolies still produce market inefficiencies and higher prices for

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47. Id.
49. KEARL, supra note 19, at 240.
50. Id.
51. Id.
52. Id. at 239.
54. Ghosh, supra note 44, at 1152 (“A natural monopoly is a construct used to identify certain market conditions that support only one supplier in order to promote efficiency. This construct is used to recognize that in some situations, the norm of competition may not lead to the most socially desirable result from the perspective of efficiency. In the case of natural monopoly, market competition may even be destructive to social goals. As a result, some correction is needed to protect society from the consequences of unchecked natural monopoly.”).
consumers, they are generally publicly owned and subject to significant regulation, including price regulation.\textsuperscript{55}

In addition to natural monopolies, other monopolies can legally exist in the market if they achieved their monopoly status through effective competition within the economic marketplace.\textsuperscript{56} When a business organization is accused of operating as an economic monopoly, a court will determine whether the organization's monopoly status was achieved through illegal methods, such as collusion or price discrimination, or through legal methods, such as "superior skill, foresight, and industry"\textsuperscript{57} or "as a consequence of a superior product, business acumen, or historic accident."\textsuperscript{58} These monopolies produced through successful competition are not protected and regulated like natural monopolies; rather, these monopolies are simply tolerated within economic markets. In other words, monopolies are legal or acceptable to society if they are regulated natural monopolies or if they achieved their monopoly status by competing effectively within the economic marketplace.

III. INCORPORATING ECONOMIC TERMINOLOGY INTO THE FEDERALIST MARKETPLACE

Economic monopoly concepts illuminate the effects of protecting fundamental rights under the doctrine of substantive due process on the federalist marketplace of state experimentation. Although the economic marketplace and the federalist marketplace have significant differences,\textsuperscript{59} the reliance on competition to produce the most efficient or effective result is evident in both marketplaces and is useful for evaluating consequences in the federalist marketplace.\textsuperscript{60}

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\textsuperscript{55} KEARL, supra note 19, at 267–69.
\textsuperscript{56} United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.").
\textsuperscript{57} Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 712 (7th Cir. 1977) (quoting Aluminum Co. of Am., 148 F.2d at 430) (internal quotation marks omitted).
\textsuperscript{59} For a summary of scholarship comparing and contrasting the marketplace of ideas with the economic marketplace, see Kathleen M. Sullivan, Free Speech and Unfree Markets, 42 UCLA L. REV. 949 (1995).
\textsuperscript{60} See R. H. Coase, The Economics of the First Amendment: The Market for Goods and the Market for Ideas, 64 AM. ECON. REV. 384, 389 (1974) ("There is no fundamental difference between [the market for goods and the market for ideas] and, in deciding on public policy with regard to them, we need to take into account the same considerations.").
\end{flushleft}
A. Federalist Marketplace Monopoly

A monopoly in the federalist marketplace is different from an economic monopoly in several ways. The federalist marketplace is not dependent on the prices of products, so price control is irrelevant to a federalist marketplace monopoly. Similarly, because policies are accepted or rejected politically instead of bought and sold, a right in the federalist marketplace successfully competes by maximizing acceptance, not profits. In addition, the inefficiency of a monopoly in the federalist marketplace is not high prices and low supply but is instead the failure of the policy to develop into its most acceptable and effective form.

Both economic and federalist monopolies have power to exclude competition. Although an economic monopoly may rely on several different sources of power to exclude, such as control of resources or a favorable production process, federalist marketplace monopolies exclude competitors through societal and legal—notably constitutional—barriers to entry. Societal barriers to entry are societal or institutional norms that are so well-founded within the society that competing policies are at a significant disadvantage in terms of gaining acceptance. Legal barriers to entry are constitutional text or court decisions that protect a right so completely as to make infringement of that right illegal. Both of these barriers prevent competing policies from entering the federalist marketplace.

B. Natural Rights: Natural Monopolies in the Federalist Marketplace

The exact definition of natural rights, and especially which rights qualify as natural rights, is a source of wide disagreement among scholars. For the purposes of this Comment, natural rights are

61. KEARL, supra note 19, at 235.
62. See, e.g., John Godard, The Exceptional Decline of the American Labor Movement, 63 INDUS.
& LAB. REL. REV. 82, 87 (2009) ("Dominant institutional norms and the mobilization biases they generated ensured that . . . challenges would have little chance of succeeding . . ."); Colleen Sheppard, Equality Rights and Institutional Change: Insights from Canada and the United States, 15 ARIZ. J. INT'L & COMP. L. 143, 161 (1998) (commenting that "traditional institutional norms . . . may well be resistant to change").
63. NELSON, supra note 17, at 199 (discussing the "authority for the federal courts to immunize fundamental rights from all legislative regulation").
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defined as those rights within the federalist marketplace that coincide with natural monopolies within economic marketplaces. Under this definition, natural rights have two significant properties. First, natural rights are so entrenched within society that competing ideas have significant societal barriers to overcome in order to enter the federalist marketplace to sufficiently compete with the natural rights. This property suggests that natural rights can be identified by the existence of two major characteristics: (1) strong social or political foundations, and (2) essentially no viable competing policies within the federalist marketplace. Second, just as the industries that include natural monopolies may change as technology changes, the rights that qualify as natural rights may change as the foundational ideas and policies within society change, although the bar to become a natural right remains high. Therefore, natural rights always constitute a finite, definable set of rights at any given time, although the rights that qualify as natural rights may change slightly over time.

C. Acceptable Federalist Marketplace Monopolies

As in the economic marketplace, monopolies in the federalist marketplace are not per se unacceptable. Natural rights, like natural monopolies, are inevitable within a society because some rights attain wide acceptance or are naturally inherent within a free society. Because these rights have established strong foundations within society, they naturally have an advantage over new and competing ideas. Like economic natural monopolies, these rights should be brought under government control and regulated by the government. For several of the natural rights within the United States, this has been accomplished by including the rights within the United States Constitution and by regulating them in federal and

such as 'liberty,' 'power,' and 'natural rights' escape simple definition.


66. Andrew C. Spiropoulos, Rights Done Right: A Critique of Libertarian Originalism, 78 UMKC L. Rev. 661, 666 (2010) ("[T]he Framers never intended, unless they were reduced to a written, positive legal protection, that natural rights be treated as directly enforceable legal rights.")
Because many of these natural rights are essential to the United States' system of government, such as the right to vote or otherwise participate in the political process, protecting them fosters competition in the federalist marketplace instead of inhibiting it. In addition to natural rights, rights can achieve monopoly status in the federalist marketplace in a way acceptable to society by successfully competing within that marketplace. These rights, although not initially commonly accepted or inherent in the structures of the government, emerge from the federalist marketplace by being accepted by many more states than their competitors. These successful competitors are sometimes added to the Constitution through amendment, such as the voting rights for blacks and women. At other times, these rights are recognized by the courts, though not expressly enumerated in the Constitution. However, like successful competitors in economic markets, even though these monopolies are appropriately recognized within the federalist marketplace, they should not be constitutionally entrenched by the courts. They should instead be subject to competition in the federalist marketplace.

IV. ORIGINAL INTENT REGARDING GRANTING RIGHTS A MONOPOLY IN THE FEDERALIST MARKETPLACE

The fact that federalist marketplace monopolies exist does not answer the question of whether the power to grant monopoly status to specific rights was originally intended by the drafters and ratifiers of the Constitution and its amendments. Furthermore, recognizing that the federal government has granted monopoly status to rights within the federalist marketplace also does not answer the question whether those monopolies are good or bad for society. This Part will

68. ANDREW KARCH, DEMOCRATIC LABORATORIES: POLICY DIFFUSION AMONG THE AMERICAN STATES 14 (2007) ("The notion that the states are laboratories of democracy posits that innovative policies can be implemented in individual states and then disseminated if they prove successful.").
69. See U.S. CONST. amend. XV.
70. See U.S. CONST. amend. XIX.
71. See Smith v. Turner, 48 U.S. 283, 492 (1849) (recognizing a "right to pass and repass through every part of [the United States] without interruption").
address whether the original intent of the Framers of the Constitution and its amendments envisioned the federal government's use of its monopoly-granting power in the federalist marketplace. The following Part will address the normative implications of that use.

This Part will begin by addressing the original intent manifest by the drafting and ratification of the Bill of Rights. The Part will then address the additional light on original intent obtained by looking at the courts' use of general constitutional law in the years leading up to the drafting and ratification of the Fourteenth Amendment. Next, this Part will address the original intent regarding granting monopolies in the federalist marketplace evidenced by the history surrounding the Fourteenth Amendment. Finally, this Part will look at the Court's use of substantive due process and seek to determine whether that use is consistent with the original intentions of the drafters and ratifiers of the Constitution and its subsequent amendments.

A. Bill of Rights

The drafting and ratification of the Bill of Rights provides clear evidence that the drafters and ratifiers of the Constitution intended certain rights to be granted monopoly status in the federalist marketplace, at least with respect to competing regulations by the federal government. However, the rights to which this status could be granted were limited to natural rights. The need for a Bill of Rights was debated by the Federalists and the Anti-Federalists during the state ratification debates. The Anti-Federalists argued that the Constitution was incomplete without "the most express and full declaration of rights," which would "expressly reserv[e] to the people such of their essential rights as are not necessary to be parted with."72 The Federalist response generally included two arguments. First, the design of the federal Constitution was such that "Congress can have no right to exercise any power but what is contained" in the Constitution, and, therefore, a bill of rights was unnecessary.73 Second, attempting to create a bill of rights would be "dangerous"
because "it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one." All of these arguments, those made by the Anti-Federalists and those made by the Federalists, assume "that natural and customary rights existed independently of the federal Constitution or any other text" and that adding a list of rights to the federal Constitution would simply "declare the existence of these rights in a textual enumeration," rather than create them.

Given that a Bill of Rights would simply declare, and not create, rights, James Madison's speech to Congress introducing the Bill of Rights suggests which rights were considered to exist, and, therefore, which were considered natural rights as this Comment has defined them. In that speech, Madison, by using phrases such as "a declaration of the rights of the people" and "fortify the rights of the people," showed that he agreed with the general assumption that listing rights to be protected in the Constitution was recognizing, but not creating, those rights. In addition, Madison described the rights to be protected as either "those rights which are retained when particular powers are given up to be exercised by the legislature," which Madison's notes impliedly refer to "natural rights" such as the freedom of speech, or those rights "which may seem to result from the nature of the compact," which Madison said included "[t]rial by jury." Due to the fears that enumerating rights might imply that other rights do not exist, Madison suggested adding the following language as part of one of the amendments: "The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people," which served as the basis for the eventual Ninth Amendment.

These comments from the Anti-Federalists, the Federalists, and Madison's speech imply two important concepts relating to the

74. Id.
76. James Madison, Madison's Speech to the House Introducing a Bill of Rights (June 8, 1789), in BARNETT, supra note 72, at 43-44.
77. Id. at 40.
78. Id. at 38.
79. See U.S. CONST. amend. IX.
intended extent of the federal government’s power to grant monopolies to specific rights. First, there was a known, finite group of rights with strong social or political foundations that were deserving of protection and only part of which were enumerated in the Bill of Rights. Second, these rights had no viable competitors because they were either naturally retained by the people or essential to the system of government formed by the Constitution. Therefore, they qualified as natural rights as this Comment has defined them.

Despite these important concepts, the Bill of Rights says little about the intended extent of the federal government’s power to grant monopolies in the federalist marketplace because the amendments only applied to the federal government and not to the states. In his speech, Madison proposed broad language for several of the rights and specifically suggested some of the rights should be applied to the states, including “the equal rights of conscience,” “the freedom of the press,” and “the trial by jury.” However, Madison’s proposed language was changed to apply only to Congress, and the Supreme Court, in *Barron v. Baltimore*, interpreted these amendments to only apply to the federal government. Given the changes to Madison’s proposals, “[m]ost scholars have concluded that [Chief Justice] Marshall’s reading of the intent of the framers of the Bill of Rights [in *Barron v. Baltimore*] was correct” and that the case “was correctly decided.”

Therefore, the original drafters and ratifiers of the Bill of Rights recognized a finite category of natural rights deserving of monopoly status, but that monopoly status only prevented competing policies and regulations from the federal government and not from the states.

**B. General Constitutional Law**

Even though the original drafters and ratifiers of the Bill of Rights apparently did not intend it to apply to the states, state supreme courts and the United States Supreme Court would still apply principles embodied within that instrument to the states.

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81. See U.S. CONST. amend. I (“Congress shall make no law . . . .”).
through the application of general constitutional law.\textsuperscript{84} Section 25 of the Judiciary Act of 1789 only gave the United States Supreme Court appellate jurisdiction over state supreme court decisions if those decisions held that a federal right was denied by the Constitution.\textsuperscript{85} Therefore, a robust development of general constitutional law, sometimes with specific references to the Bill of Rights, existed that was beyond the supervision of the United States Supreme Court.\textsuperscript{86} However, \textit{Swift v. Tyson}, interpreting Section 34 of the Judiciary Act, known as the Rules of Decision Act, held that federal courts acting under diversity jurisdiction could apply general constitutional law, instead of strictly adhering to positive state law, to decide its cases.\textsuperscript{87} Therefore, between the time of the ratification of the Bill of Rights and the ratification of the Fourteenth Amendment, both state supreme courts and the United States Supreme Court recognized and protected unenumerated rights in diversity cases through the application of general constitutional law.

Even though unenumerated rights were recognized and protected during this period, the rights that were protected still largely fell within a finite set of rights that this Comment has defined as natural rights, those with strong social or political foundations and no viable competitors within the federalist marketplace. The classic statement, recognized in much of the Fourteenth Amendment literature,\textsuperscript{88} of unenumerated rights encompassed within general constitutional law is the list provided by Justice Bushrod Washington in \textit{Corfield v. Coryell}.\textsuperscript{89} In that case, Justice Washington was interpreting the rights that fell within the "privileges and immunities of citizens in the several states."\textsuperscript{90} In doing so, Justice Washington felt

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no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which
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\item \textsuperscript{84} Jason Mazzone, \textit{The Bill of Rights in the Early State Courts}, 92 MINN. L. REV. 1, 59–60 (2007).
\item \textsuperscript{85} Id. at 19.
\item \textsuperscript{86} Id. at 21.
\item \textsuperscript{87} 41 U.S. 1, 19 (1842).
\item \textsuperscript{88} See CURTIS, supra note 83, at 66–67; NELSON, supra note 17, at 24–25.
\item \textsuperscript{89} Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).
\item \textsuperscript{90} U.S. CONST. art. IV, § 2.
\end{itemize}
compose this Union, from the time of their becoming free, independent, and sovereign.\textsuperscript{91}

He further suggested that all of the rights are known and within a finite set by stating that it would be "more tedious than difficult to enumerate" them.\textsuperscript{92} Justice Washington then provided a list of general categories under which "all" of the fundamental principles would reside:\textsuperscript{93}

Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.\textsuperscript{94}

Therefore, although general constitutional law allowed the federal courts to grant monopolies to rights in the federalist marketplace in diversity cases, the use of that power was generally limited in those cases to granting monopolies to rights that had strong social foundations and that were recognized in all states. That doctrine was only used to protect rights that could be described as "fundamental laws of every free government,"\textsuperscript{95} "fundamental principle[s] of a republican government,"\textsuperscript{96} "common principles of justice and civil liberty,"\textsuperscript{97} and "settled principle[s] of universal

\textsuperscript{91} Corfield, 6 F. Cas. at 551 (emphasis added).
\textsuperscript{92} Id.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 551–52.
\textsuperscript{95} Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 592 n.12 (1819).
\textsuperscript{96} Terrett v. Taylor, 13 U.S. 43, 50–51 (1815).
\textsuperscript{97} Legal Tender Cases, 79 U.S. 457, 671 (1870).
In other words, this power was limited to protecting natural rights, as this Comment has defined them.

C. Fourteenth Amendment

Even though general constitutional law allowed some unenumerated rights to be protected by the federal government in a limited amount of circumstances, the Republicans within the Thirty-Ninth Congress, after the Civil War, wanted to ensure that certain rights would be protected, especially for the newly freed slaves. Therefore, they proposed, drafted, and ratified constitutional amendments, including the Fourteenth Amendment. However, despite the general consensus that the Fourteenth Amendment was meant to secure certain rights for the newly freed slaves, even against the states, the extent of those rights has been a source of nearly constant debate since the Amendment's ratification. Scholars argue whether the Fourteenth Amendment was intended to apply the Bill of Rights to the states and over the extent of the rights covered by the language of this Amendment. However, even scholars like Michael Kent Curtis, who propose an "expansive reading of the Fourteenth Amendment's framing and ratification," generally agree that the reach of the Fourteenth Amendment was not intended to extend beyond the category of rights referred to by this Comment as natural rights.

Michael Kent Curtis, in his work on the history, drafting, ratification, and subsequent interpretation of the Fourteenth Amendment, argues forcefully that "the Fourteenth Amendment was intended to change things so that states could no longer violate rights in the federal Bill of Rights." Justice Hugo Black shared this view of the intent of the Fourteenth Amendment, as revealed in his dissenting opinion in *Adamson v. California*, which was joined by three other Justices. Pulling extensively from the congressional debates surrounding the drafting and ratification of the Fourteenth Amendment.

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99. CURTIS, supra note 83, at 57–58.
100. Id.
101. For a review of the major literature surrounding this debate, see NELSON, supra note 17, at 1–4.
102. Id. at 3.
103. CURTIS, supra note 83, at 2.
Amendment, Curtis argues that the amendment was intended to “protect[] fundamental rights from violation by the states," including “rights not explicitly listed in the Constitution." 

However, Curtis also mentions that “fundamental” was frequently used at that time as a synonym for “constitutional.” Although Curtis states that “there was no consensus on what these [unenumerated] rights were,” they were understood as rights with “which all Republican writers of authority agree in declaring fundamental and essential to citizenship” and which can be found in “the Declaration of American Independence” and “every scrap of American history.” Therefore, although a complete consensus on the rights protected by the Fourteenth Amendment may not have existed, the rights were still viewed as “fixed and absolute” and as “existing rights” that were simply “given additional protection.”

Despite Curtis’s evidence that the Fourteenth Amendment was meant to apply the Bill of Rights and other fundamental rights within a finite set to the states, the Supreme Court made that intended meaning “of only academic interest” when it limited the reach of the Fourteenth Amendment in the Slaughter-House Cases, United States v. Cruikshank, and Walker v. Sauvinet.

In contrast to Curtis, William E. Nelson argues that the Fourteenth Amendment was not meant to apply the Bill of Rights to the states. This theory was also argued by many other scholars, including Charles Fairman and Raoul Berger. Nelson’s main point is that the Fourteenth Amendment sought to constitutionalize general principles such as “the sanctity of rights, the maintenance of equality, and the preservation of state and local power,” but those principles did not require the application of one, specific legal doctrine. In fact, “as it emerged from congressional and state

105. CURTIS, supra note 83, at 82, 112.
106. Id. at 112–14.
107. Id. at 82.
108. Id. at 162, 165 (internal quotation marks omitted).
109. Id. at 167 (internal quotation marks omitted).
110. Id. at 170.
111. 83 U.S. 36 (1872).
112. 92 U.S. 542 (1875).
113. 92 U.S. 90 (1875).
114. NELSON, supra note 17.
115. Id. at 3.
116. Id. at 8–9.
ratification debates," Nelson argues that the Fourteenth Amendment "had at least two possible meanings." The Amendment could be used to protect "either equal rights or absolute rights." According to Nelson, the Court initially chose to follow the equal rights interpretation, "that the Fourteenth Amendment would not, in and of itself, create rights, but would leave that task to state law; the amendment's sole restriction on state legislative freedom would lie in its requirement that the states confer equal rights on all." However, even the absolute rights interpretation was limited in its extent. According to Nelson, those who adhered to the absolute rights interpretation consider the Amendment to "protect[] absolutely certain fundamental rights such as those specified in the Bill of Rights and those given by common law to enter contracts and to own property," but, even under this interpretation, "states would remain free to regulate those rights for the public good in a reasonable fashion."

Therefore, even though scholars argue over the intended extent of the Fourteenth Amendment, especially about whether or not the amendment was intended to apply the Bill of Rights to the states, scholars on both sides of the issue generally agree that the Fourteenth Amendment was not intended to protect rights beyond those that this Comment defines as natural rights. Even those scholars who argue for the more broad interpretation of the Fourteenth Amendment's coverage confine that coverage to a finite set of rights with strong foundations within society and with few competing policies among the states.

D. Substantive Due Process

Although the Fourteenth Amendment was arguably intended to allow the federal courts to constitutionally protect a significant amount of rights, even against action by the states, unenumerated rights were still generally only protected by federal courts in

117. Id. at 151.
118. Id.
119. Id. at 150.
120. Id.
121. Kermit Roosevelt III, Forget the Fundamentals: Fixing Substantive Due Process, 8 U. PA. J. CONST. L 983, 986 n.14 (2006) ("The Due Process Clause of the Fourteenth Amendment was understood to federalize the general constitutional law, making it a resource courts could use to strike down state laws in the exercise of federal question jurisdiction.").
Substantive Due Process

diversity cases through the application of general constitutional law. This was largely due to the narrow reading of the language within the Fourteenth Amendment given by the Supreme Court in cases such as The Slaughter-House Cases and United States v. Cruikshank. Even after the creation of general federal question jurisdiction in 1875, giving federal courts the authority to hear cases related to federal law in contexts other than diversity, the Rules of Decision Act still limited the application of general constitutional law to diversity cases.

Eventually, the Supreme Court did level the playing field between diversity and federal question cases by applying the principles of general constitutional law through the due process clause, a doctrine that has come to be known as substantive due process. The first major case to apply general constitutional principles through the due process clause was Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago. That case applied the principle of just compensation found within the Fifth Amendment, though it did not specifically mention that amendment in its decision. In general, substantive due process cases that followed this initial case similarly applied principles within the Bill of Rights or other commonly accepted or essential principles, those referred to as natural rights as defined within this Comment.

Although this doctrine of substantive due process was initially only used by the courts to grant monopolies to natural rights within the federalist marketplace, the doctrine eventually expanded to grant monopolies to other rights that do not fit this Comment’s definition of natural rights. Some scholars, such as William E. Nelson, argue that this expansion of substantive due process outside the realm of natural rights began with Lochner v. New York. Although Lochner arguably involved the natural right of freedom of contract, the opinion began the Court’s journey into “uncharted directions

123. 83 U.S. 36 (1873).
124. 92 U.S. 542 (1876).
125. Collins, supra note 122, at 1311.
126. 166 U.S. 226 (1897).
127. Id.
128. See Nelson, supra note 17, at 198.
129. 198 U.S. 45 (1905).
authorized neither by a uniformly shared original understanding of the Fourteenth Amendment nor by the three decades of case law following it.\textsuperscript{130} According to Nelson, this uncharted direction was a shift from using the Fourteenth Amendment as a "bar to arbitrary and unequal state action" to using it as a "charter identifying fundamental rights and immunizing them from all legislative regulation."\textsuperscript{131} This shift was significant because it went from instituting general and reasonable regulations on the competition within the federalist marketplace to granting monopolies within that marketplace to specific policies by virtually eliminating all competing policies through legal barriers.

Although the Supreme Court's use of substantive due process to invalidate state economic regulations essentially ended with \textit{West Coast Hotel Co. v. Parrish},\textsuperscript{132} the Court, through footnote four in \textit{United States v. Carolene Products Co.},\textsuperscript{133} gave itself significant power over noneconomic rights at the expense of state power to regulate those rights.\textsuperscript{134} The noneconomic rights constitutionally protected by the Court after \textit{Carolene Products} were not necessarily natural rights and, at times, were declared to be fundamental in the face of significant state regulation of those rights. Therefore, these rights provide an example of inappropriate interference in the federalist marketplace of state experimentation because the Court is constitutionally protecting rights that are not natural monopolies in the federalist marketplace and that are, at times, not even successful competitors within that marketplace. A significant group of these rights are progeny of the Court's recognition of a general right of privacy.

The Court first recognized the modern version of a right of privacy in \textit{Griswold v. Connecticut} when it held that a married couple has a constitutional right to use contraceptives.\textsuperscript{135} In recognizing a "zone of privacy created by several fundamental constitutional guarantees,"\textsuperscript{136} the Court was using substantive due process to extend constitutional protection to an unenumerated right. Although

\textsuperscript{130} NELSON, \textit{supra} note 17, at 198.
\textsuperscript{131} \textit{Id.} at 199.
\textsuperscript{132} 300 U.S. 379 (1937).
\textsuperscript{133} 304 U.S. 144, 152 n.4 (1938).
\textsuperscript{134} NELSON, \textit{supra} note 17, at 200.
\textsuperscript{135} 381 U.S. 479 (1965).
\textsuperscript{136} \textit{Id.} at 485.
the Court described the "right of privacy" as being "older than the Bill of Rights—older than our political parties, older than our school system." The right did not necessarily have strong social or political foundations at the time the case was decided and, therefore, state prohibition of that right was a viable competitor within the federalist marketplace.

Regardless of the appropriateness of the Supreme Court's use of its monopoly-granting power in *Griswold*, the Court's subsequent extensions of the right of privacy are almost certainly inappropriate uses of the Court's power when viewed from the perspective of their effect on the federalist marketplace of state experimentation. Several years after the *Griswold* decision, the Court extended the right to use contraceptives to unmarried couples based on that same right of privacy. "If the right of privacy means anything," the Court stated, "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." The following year, in *Roe v. Wade*, the Court used the right of privacy to establish a pregnant woman's right to terminate her pregnancy. According to the Court, the right to decide "whether or not to bear or beget a child... necessarily includes the right of a woman to decide whether or not to terminate her pregnancy." Finally, in *Lawrence v. Texas*, the Court "in effect asserted a broad constitutional right to sexual privacy" by invalidating a "Texas ban on consensual sodomy." The Court in *Lawrence* concluded that the "right to liberty under the Due Process Clause" includes the right to "engage[] in sexual practices common to a homosexual lifestyle."

*Eisenstadt*, *Roe*, and *Lawrence* are all examples of the Court's inappropriate use of substantive due process to constitutionally protect rights that are not natural rights, as this Comment has defined them, those with strong social or political foundations and

137. *Id.* at 486.
139. *Id.* at 453.
140. 410 U.S. 113 (1973).
141. *Id.* at 169–70 (quoting *Eisenstadt*, 405 U.S. at 453).
144. *Lawrence*, 539 U.S. at 578.
no viable competitors within the federalist marketplace. In addition, the rights recognized in those cases had not even proven themselves through competition in the federalist marketplace, in which case they should only be recognized and not constitutionally entrenched. For example, the Court readily admits in \textit{Roe} that statutes similar to Texas’s criminal abortion law “are in existence in a majority of the States,”\textsuperscript{145} and the Court’s description of the right protected in \textit{Lawrence} as an “emerging awareness”\textsuperscript{146} suggests that the right cannot be described as so entrenched in our society that competing ideas are at a natural disadvantage.

\textbf{V. ECONOMIC INSIGHTS ABOUT SUBSTANTIVE DUE PROCESS}

Monopolies are disfavored in both economic markets, due to the inefficient effects of higher prices and lower availability,\textsuperscript{147} and in the federalist market of state experimentation, due to the effect of less-developed policies.\textsuperscript{148} Despite their disfavored status, some monopolies are inevitable in both markets and should be controlled.\textsuperscript{149} Natural monopolies in economic markets are generally controlled through public ownership and regulation.\textsuperscript{150} Natural rights in the federalist marketplace are best controlled through enumeration and subsequent regulation by the courts.\textsuperscript{151}

Monopolies other than natural monopolies are only tolerated within economic marketplaces if they have successfully competed in those marketplaces through “superior skill, foresight, and industry,”\textsuperscript{152} or “as a consequence of a superior product, business acumen, or historic accident.”\textsuperscript{153} In a like manner, monopolies for other than natural rights within the federalist marketplace should only be tolerated if those policies have successfully competed in that

\begin{footnotes}
\item[145.] \textit{Roe}, 410 U.S. at 118.
\item[146.] \textit{Lawrence}, 539 U.S. at 572.
\item[147.] \textit{Kearl, supra note 19, at 231–33}.
\item[148.] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
\item[149.] \textit{Kearl, supra note 19, at 238–40; see also United States v. Cruikshank, 92 U.S. 542, 554 (1875) (noting the existence of “fundamental rights which belong to every citizen as a member of society” and the need to protect those rights against encroachment).}
\item[150.] \textit{Kearl, supra note 19, at 267–69.}
\item[151.] \textit{Spiropoulos, supra note 66, at 666.}
\item[152.] Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 712 (7th Cir. 1977) (quoting \textit{United States v. Aluminum Co. of Am.}, 148 F.2d 416, 430 (2d Cir. 1945)) (internal quotation marks omitted).
\end{footnotes}
marketplace as evidenced by widespread state acceptance.\textsuperscript{154} Despite being tolerated, economic monopolies that have successfully competed do not receive protection from subsequent competition after being recognized, and, therefore, policies that successfully compete in the federalist marketplace should not receive constitutional protection upon recognition.

In the absence of widespread and continuing state acceptance, monopolies should not be granted to rights, judicially or otherwise, and the federalist marketplace should be allowed to continue to operate without barriers. Prematurely granting a right a monopoly within the federalist marketplace is the equivalent of granting an up-and-coming company a monopoly in the economic marketplace because it is emerging or beginning to gain greater acceptance. The optimal situation would be to let the right, or the company, compete in the marketplace until a clear victor emerges and then to appropriately recognize, but not necessarily protect, that victor. Under this standard, cases like \textit{Lochner}, \textit{Roe}, and \textit{Lawrence} were arguably wrongly decided.\textsuperscript{155}

\textbf{VI. Conclusion}

Limiting the Supreme Court's ability to declare fundamental rights through the application of substantive due process to those rights which this Comment calls natural rights may seem excessively restrictive given "the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."\textsuperscript{156} The danger in putting too much emphasis on tradition is that "the law on occasion adheres to doctrinal concepts long after the reasons which gave them birth have disappeared and after experience suggests the need for change,"\textsuperscript{157} and too heavy a focus on tradition may "render [the law] incapable of progress or improvement."\textsuperscript{158} Slavery is so glaring an example of

\textsuperscript{154} See KARCH, supra note 68, at 14.

\textsuperscript{155} See McDonald v. City of Chi., 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring) (citing \textit{Lochner}, \textit{Roe}, and \textit{Lawrence} as examples of protecting unenumerated rights beyond the original intent of the Due Process Clause).


\textsuperscript{158} Hurtado v. California, 110 U.S. 516, 529 (1884).
the dangers of adherence to inappropriate tradition that there is almost no need to mention it here. At the same time, a privilege with a "long history . . . ought not to be casually cast aside,"\textsuperscript{159} nor should "arrangements [that] are of too recent an origin" be able to claim protection as easily as those sanctioned by tradition.\textsuperscript{160}

In order to give tradition its due deference while still allowing for the law to progress and improve, the federalist marketplace of state experimentation should be allowed to function without significant federal government interference, except in the case of natural rights. The Supreme Court has recognized the importance of letting the political process function unfettered in several different opinions. For example, the Court had described "the right of the people to make their own laws, and alter them at their pleasure" as "the greatest security" for the "fundamental principles of liberty and justice."\textsuperscript{161} Carolene Products's footnote four, in addition to describing a finite set of categories which should receive the highest level of scrutiny, also mentions the political process as the process normally to be relied upon to secure the rights of minorities.\textsuperscript{162} The increasingly common use of the courts, instead of the political process, to secure minority rights has caused some to question whether Carolene Products has been misapplied to the point of losing sight of the principle that "minorities are supposed to lose in a democratic system."\textsuperscript{163}

Allowing the Supreme Court to protect rights only because they have gained widespread acceptance among the states also inhibits the democratic system because it assumes that state experimentation achieves the preferred policy the first time. According to John Stuart Mill, assuming that the currently accepted idea is infallible removes it from the beneficial process of being solidified, improved, or replaced, depending on its degree of truthfulness, through competition with opposing ideas.\textsuperscript{164} In addition to preventing the currently preferred policy from being beneficially developed, granting a monopoly to that policy also prevents the pendulum from swinging

\textsuperscript{159} Trammel, 445 U.S. at 48.
\textsuperscript{160} Johnson v. Calvert, 851 P.2d 776, 786 (Cal. 1993).
\textsuperscript{161} Hurtado, 110 U.S. at 535.
\textsuperscript{163} Bruce A. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 719 (1985).
\textsuperscript{164} SULLIVAN & GUNTHER, supra note 14, at 5-6 (quoting JOHN STUART MILL, ON LIBERTY (1859)).
back in response to an overly ambitious, but popular, policy.\textsuperscript{165} For example, the trend in the late 1970s and 1980s in adoption policy was "toward protecting parental rights and preventing their premature termination."\textsuperscript{166} However, more recently "the pendulum has swung back" to limiting the time that natural parents have to become fit before their rights in their children are terminated.\textsuperscript{167}

Despite preventing change and development in policies, the argument could be made that a policy should be able to receive constitutional protection through the courts when three-fourths of the states have adopted it because that is the constitutional standard for ratifying an amendment to the constitution.\textsuperscript{168} However, state acceptance of a policy within the federalist marketplace should not be made the equivalent of state ratification of a constitutional amendment. Court recognition of a fundamental right removes the recognition of that right from state power to a greater extent than ratifying a constitutional amendment because a constitutional amendment can still be repealed by the states.\textsuperscript{169}

Despite the negative effects of granting monopolies to rights in the federalist marketplace, court recognition of natural rights is still appropriate because natural rights help to preserve the integrity of the federalist marketplace of state experimentation. Since the introduction of the Bill of Rights to Congress, natural rights have been limited to "those rights which are retained when particular powers are given up to be exercised by the legislature," such as the freedom of speech, and to those rights "which . . . result from the nature of the compact," such as "[t]rial by jury."\textsuperscript{170} These rights, in addition to other natural rights such as participation in the political process, should be protected because they ensure that competition in the federalist marketplace of state experimentation will continue without significant interference.

However, even widely accepted state policies should be allowed to remain subject to future competition within the federalist marketplace, without the protection of the legal barriers that are

\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} See, e.g., Merrill, supra note 9, at 27.
\textsuperscript{169} See U.S. CONST. amend. XXI, § 1 (repealing the eighteenth amendment).
\textsuperscript{170} Madison, supra note 76, at 40.
established when courts provide the policy with constitutional protection, until those policies become part of the social foundations of society. Limiting this monopoly-granting power of the federal courts to natural rights would allow the necessary, foundational rights to remain free from government regulation and, at the same time, would allow the law to improve and change in response to experience and changed circumstances. This solution to the seemingly unlimited power of the Supreme Court to declare fundamental rights under the doctrine of substantive due process makes sense from an economic perspective and is consistent with the original intent behind the Bill of Rights and the Fourteenth Amendment.

*Curtis Thomas*