A House Divided: Substantive Due Process in the Twentieth Century

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Comment

A House Divided: Substantive Due Process in the Twentieth Century

Each society reveals through its law the innermost secrets of the manner in which it holds men together.1

I. INTRODUCTION

The lines drawn to separate and distinguish the social sciences of economics, politics, and law are both real and imaginary. They are real in the sense that the areas they divide are inhabited by discrete ways of ordering a vision of life. They are imaginary in that the society they describe exists in all its intricacy and harmony separate and distinct from its descriptions.

This Comment presents the hypothesis that a certain political theory has as natural cotenants in the house of coherence a certain economic and legal philosophy. For example, a society that embraces an economic theory that requires goods and services to be equally distributed among society’s members will also have a political structure that leaves little room for individual liberty or property rights. It will also have a legal theory allowing the judiciary little or no role in determining whether an edict of the state is a proper one. On the other extreme, a society which in establishing the political relationship between the state and individual members of the society expresses a strong deference to individual liberty and property rights will have as its necessary accomplices a free market economy and a legal system which requires the judiciary to nullify governmental excursions into the realm of liberty left to the individual members of society.

In order to explain and expand this hypothesis two separate inquiries will be focused upon. First, can a belief that government has a limited, or perhaps a nonexistent, role in policing what individuals speak, with whom they associate, or what system of religious beliefs they embrace coherently exist in the same framework

1. R. Unger, Law in Modern Society 47 (1976) [hereinafter cited as Unger].

Law in Modern Society is a comparative study of the place of law in society and also a criticism of social theory building on an earlier work, Unger, Knowledge and Politics (1975). Robert Unger teaches at Harvard Law School.
of knowledge which also has as one of its elements the belief that
the value one places upon his labor, the products available in the
marketplace, and the extent that one individual's wealth can be
taken and distributed to another are subjects wide open to govern-
ment regulation?

The twentieth century has seen the United States Supreme
Court struggle with the task of defining the substance of individual
liberty and property rights protected by the due process clauses of
the fifth2 and fourteenth3 amendments. Today, the result of that
struggle is a two-tiered definition of that liberty. If a government
regulation is one that can be colored by the Court as a regulation of
the economic environment of society it will surely withstand judi-
cial scrutiny.4 On the other hand, if the Court characterizes the
regulation as one touching upon what has been characterized as a
fundamental liberty, it will be subject to a much more exacting in-
spection.5 With this in mind, the second major inquiry of this
Comment is one which focuses upon the Court's decisions under
the due process clause and whether they reflect a coherent mix-
ture of political, economic, and legal theory.

II. A PRELIMINARY EXAMINATION.

The further a society is from the ideal, the less one can frame a coher-
ent view of its order, because the less of a coherent order does it possess.6

A. Coherence and the Dialectic

Before the hypothesis that economic, political, and legal theo-
ries are chained to each other in a lock-step fashion can be given
support, it is necessary to have an understanding of the methods
used herein to support it.

The use of coherence theory and its formulation into a jurispru-
dential technique is not new to this endeavor.7 To coherence theo-

2. U.S. CONST. amend. V provides in relevant part: "No person shall be . . . de-
prived of life, liberty, or property, without due process of law."
3. U.S. CONST. amend XIV provides in relevant part: "[N]or shall any State de-
prive any person of life, liberty, or property, without due process of law."
4. See infra notes 51-59.
5. See infra notes 60-65.
6. UNGER, supra note 1, at 265.
7. The theory of coherence presented here has multiple sources. W. BISHIN & C.
STONE, LAW, LANGUAGE, AND ETHICS 321-45 (1972) [hereinafter cited as BISHIN
& STONE], have gathered a sampling of the works of two eminent coherence
theorists, W. Quine and Brand Blanshand. The adaptation of their theories
into a jurisprudential method labeled "Holistic Jurisprudence" is the
achievement of Professor John Snowden of the University of Nebraska Col-
lege of Law. The result of his adaptation and its application can be found in A
rists all of our knowledge is arranged in a house of cards style—each card representing a piece of knowledge, each piece of knowledge supporting others. The only limit on which cards can be incorporated in the house, which represents an individual’s total scheme of knowledge, is that an idea and its negation cannot exist in the same scheme. If one wishes to incorporate a piece of information into his “house of cards” which is a negation of one of the other cards, the conflicting piece of information must be removed along with all it necessarily supports. This results in a remodeling of that house.

To a coherence theorist, an individual judges the truth or falsity of an idea depending upon whether that idea has been incorporated into his house of cards. If it fits and all negations are expunged, it is true. If it does not fit into the house because a negation exists, it is false. For example, within one’s knowledge of traffic signals is a belief that red means stop. But, the color red also has other meanings. Red is the color of clothing the University of Nebraska football teams and its fans wear to football games. A further complication is that what is red to one may not be so to another. Suppose within one’s personal knowledge, the conglomeration of things one accepts as true, there is the idea that blue is the predominant color of a member of the group of birds labeled as cardinals. Suppose further that a friend is a respected ornithologist and one day points out a red hued bird and says, “That is a cardinal.” Immediately, the previous field of coherence is disturbed because the declaration that a cardinal is a red hued bird is in conflict with the previously held belief that cardinals are blue. One’s house of cards begins to tremble.

In order to still the tremor it then becomes necessary to reconcile the conflicting pieces of information. There are various alternatives. One can reject the friend’s statement and refuse to incorporate it into the field of knowledge. Or, one could substitute the previously held belief that cardinals are blue with a new belief that they are red. Or further, one could redefine ideas of redness or blueness. Most likely one will replace the piece of information which holds that cardinals are blue in color. After all, you have never seen a cardinal before, and the other information in your scheme of knowledge is most likely not heavily built upon that belief. To reject the friend’s statement, unless you dismiss it as a joke, is to call into question his reputation as an ornithologist, the notion that ornithologists should know the color of birds, and a whole range of other beliefs about that friend. To reformulate one’s ideas of redness and blueness is also unlikely, as it calls into

8. The use of a cardinal to illustrate the coherence theory was inspired by B. Blanshand’s excerpted work in BISHIN & STONE, supra note 7, at 333.
question a whole variety of beliefs and moves closer to the foundation of the house of cards.

This example is designed to demonstrate what seems to be two main tenets of coherence theory. The reformulating of ideas to avoid negation will occur at the level of the scheme of knowledge that will result in the least reordering of that scheme. A corollary of this tenet is that attacks near the foundation of the framework will more likely than not fail to result in the incorporation of the "attacking" idea.

The second major tenet of coherence theory is contained in the notion of the dialectic. Essentially, dialecticism involves the notion that the most durable scheme of knowledge is based upon a foundation of broad ideas not easily open to negation. Every idea is defined by its negation. A double negative illustrates the point. When a person believes that a cardinal is red he also accepts as true the statement that no cardinal is not red. His idea is defined by its opposite. Light is meaningless without darkness. What is good but the absence of evil? An idea of slavery cannot exist without a notion of freedom. Unless a recognition of this unity of opposites is incorporated at the foundation of one's scheme of knowledge, that scheme will be easily shattered. For example, a child who does not learn early about death, will have more difficulty in dealing with death later in life.

Thus it seems that at the base of any scheme of knowledge is the unity of opposites, the recognition of negations. How else can one gauge if a certain idea is coherent? It seems that to go forth in the world one must accept that along with good there is evil in the world. To embrace the light one must turn from the darkness. To do either he must be able to tell the difference.

B. Political Theory

Political science is the study of the manner and the reasons that the legitimate use of power is allocated to the state to coerce individuals to do what they are otherwise unwilling to do. All political philosophies can be placed upon a broad continuum.

<table>
<thead>
<tr>
<th>Anarchy</th>
<th>Monolithic State</th>
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<tbody>
<tr>
<td>(state has no power)</td>
<td>(government has unlimited power)</td>
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As the diagram shows, at the two extremes of the political con-

9. The dialectic method of UNGER, supra note 1, and to some extent the method of G. HEGEL, NATURAL LAW (T. Knox trans. 1975), are the sources for the dialectic scheme used.
10. R. NOZICK, ANARCHY, STATE, AND UTOPIA 3-9 (1974) [hereinafter cited as NOZICK]. For a modern day Machiavellian approach to the study of power and its dispersion in a political system, see A. BERLE, POWER (1967).
tinuum are ideas that are the negation of each other. These two extremes can be labeled as ideals in the sense that no society has embraced either extreme as the paradigm of the political relationship in that society. Even in a prison, the state through its agents cannot control all the human conduct. But regardless of where one is, government exercises some influence on individual choice.

To define the political relationship present in any society is to find a place upon the continuum, not at either end point. At any place on the continuum there is a balance between the powers allowed to the state and the rights reserved to the individual. Determination of the point of which society is located along the political continuum is the task each individual must make in order to develop and maintain a coherent vision of that society.

A definition of any point along the continuum then is an exercise in balancing the negations at each end of the continuum. All that is attempted here is a definition of the extremes of anarchy and the monolithic state, the boundaries of the arena in which we dwell.

1. Anarchy

Anarchism as a political philosophy denies that the exercise of coercive power by the abstract entity of the state is in any way legitimate. The basis for this political philosophy is a notion of natural law.11

The natural law embraced by anarchist followers has its source in the theories of John Locke12 and Jean Rousseau.13 This natural law has at its core the maxim that “no one ought to harm another in his life, health, liberty or possessions.”14 Natural law is not the same as human law in that it is neither public nor positive.15 Like god, it is ubiquitous. It is the song of the universe. To those who hear the music, the lyric is a chant that each individual is sacred and has given no other individual the right to dictate his actions. If all hear the song of natural law everything proceeds smoothly. Everyone will relate to his neighbor in a voluntary, mutually beneficial manner. Paradise is achieved.

But what of those who are deaf to the music; who do not respect other individuals; who persist in coercing others? The anarchist

15. The concepts of publicness and positiveness are defined in Unger, supra note 1, at 50.
theoreticians answer in two ways. First a society that has no institutionalized agent of force, such as a police force or army, at its beckon will not create individuals who are not in tune with the natural law. The second response is that when an individual is aggrieved by someone who has violated the natural law he is then individually entitled to redress the wrong. Of course this leads to many problems. Who determines when the law has been violated? What is the proper response?

2. The Monolithic State

The seeds of the monolithic state theory of political science lie in a notion of natural law as well. To the monolithic state no power of coercion over the individual is denied. How could this theory arise let alone be embraced? The answer lies in a concept of natural law radically different from the one presented by the proponents of anarchy.

This concept of natural law has as its main proponent Thomas Hobbes. In the Hobbesian state of nature, the individual is free to do anything his mind can conceive and his body can perform. The natural condition of mankind is a state of war. But to Hobbes the fundamental law of nature is “to seek peace and follow it.” The natural condition combined with this fundamental law led Hobbes to the conclusion that when a person enters into society he surrenders his right to do anything he desires to a coercive power, the commonwealth. This commonwealth is responsible for doling out rights and obligations. Justice is the result of the coercive power enforcing its scheme of rights and duties. Since all natural rights are surrendered to a coercive agent, the state assumes all power; the monolithic state is complete.

The Hobbesian political theory has at its heart the belief that
mankind is inherently evil, that individuals left free of the state will engage in continual warfare with each other. To achieve peace among the evil all natural rights must be surrendered. As a result the only right an individual has to do anything is dependent upon the state approving the exercise of it.

As one now looks at the continuum of modern day political science it becomes apparent that at one end of the continuum is a theory that humans must remain free of the coercive power of the state in order to achieve peace and harmony. Humans are naturally good. At the other end is a theory that if humans are free of coercive power their natural evil will prevail. The middle ground is left to those who recognize that in the natural state of affairs there is both good and evil in men’s hearts. Their task is to recognize the difference.

C. Economic Theories

Economics is the social science of markets or exchange institutions. Seemingly, the science of economics resulted as a split of the science of political economy whose father was Adam Smith. This split resulted in what are today the social sciences of economics and political science.

Wealth can be created only by an exchange among individuals. For example, A has a book of poetry and B has a pair of Mexican sandals. They voluntarily exchange. As a result of the exchange they are both wealthier. The book and whatever good feelings B obtained by the exchange were worth more than the sandals. The sandals were likewise worth more to A. If this is not the case why would they trade? To the extent that individuals are free to engage in such exchanges, society is wealthier as a result. To the extent that coercion enters into the exchange, such as theft, there is not this mutual gain in wealth.

The question of how a person obtains property rights in an object and what is the best environment for the maximization of wealth in a society is the subject of this section of the Comment.

Economic theories, like political theories, also can be laid out upon a continuum.

Free Market Government Monopoly

24. The anarchist vision of society is not to be confused with tribal society as that idea is presented by Unger, supra note 1. Anarchist society is made up of individuals who have seen the state in all its coerciveness and then rejected it.
25. Buchanan, supra note 19, at 19.
26. Id. at 195 n.4.
27. Buchanan presented an exhaustive economic analysis of exchange transactions. Id.
At each end of the continuum the answers to the questions of how property rights arise and the best economic environment for their exchange are radically different.

1. **Free Market Economy**

Free market economists argue that the most efficient manner to allocate goods and services in a society is through a system of voluntary exchanges. Through this system of exchange, products will end up in the hands of persons who value them the most. This belief that the best economic order of society will result if people are only left to their own decisions is closely related to the political theory of anarchism.

Under the anarchistic scheme, property rights arise by the investment of an individual's labor into an object. Imagine a village surrounded by open land, land never tilled, mined, or used for dwellings. An individual could obtain a property right in a piece of that land by investing his labor in that piece by farming or other use. Anyone else wanting to use that land would then have to deal with the farmer because the farmer had made the land more valuable and made the society more wealthy by growing food.

The free market economy works quite well in a society where the necessities of life are not scarce. But say that outside the anarchistic village conjured up earlier, Pierre Proudhon goes onto a piece of open land and drills a well for water. Shortly thereafter a severe drought occurs and Proudhon's well is the only source of water. In a free market economy, Proudhon has the potential to increase his wealth dramatically with a concomitant increase in the other villagers' wealth. Without water there can be no life. Society is in turn wealthier with Proudhon supplying water. But suppose Proudhon refuses to exchange his water for his neighbors' property? In the anarchist free market theory there is no room for coercion. An individual must watch his children die of thirst. Who is to say the coercion of Proudhon would not or should not occur? The fact that some objects in the world are scarce is the seed for the breakdown of the free market. The belief that some will hoard their wealth and not trade, that there is evil along with good in the world, is a rejection of the ideal presented by the free market.

2. **The Government Monopoly Economy**

At the root of the belief that government control of the distribu-
tion of goods and services in a society is the ideal, is the Hobbesian notion that we are at war with each other and need a peacekeeper.30

In order to achieve peace in a society each individual's natural right to possess anything he can hold onto must be surrendered to the coercive agent, the state. The state is then charged with the distribution of entitlements of property to the individuals. Since humans are naturally motivated by greed, avarice, and insecurity, the coercive power should try to achieve a distribution of property that is the most equal among the individuals in the society. In order to achieve this goal the state will have to involve itself heavily in the exchange process, making sure no individual is more wealthy than the next lest warfare break out.

To the extent that a state can never exert complete control over all exchanges between individuals, private wealth creation exchanges will occur and as a result society will grow wealthier. Since it is impossible for a state to completely extinguish the desires of individuals to make each other wealthier, and since this is not a world of unlimited resources, the two ideals of a free market economy and the government monopoly are not realizable. Once again the economic theory prevalent in a society is found somewhere between the extremes offered at the end points of the continuum. Once again the point embraced on the continuum is a result of how one views his fellow beings. Are they predominantly motivated by greed or are they predominantly concerned with the mutual creation of wealth?

D. Legal Theories—The Role of the Judiciary

To give a judge the duty and power to solve disputes, a society must recognize the need for coercing individuals to do what they are unwilling to do. A society marked by an anarchist-free market theory has no use for such a creature. All relations in that society are voluntary and if coercion slips in it can only be avenged by the coerced party. The placement of power in a judge is to deny the ubiquitousness of the natural law.

On the other extreme of the continuum, marked by the Hobbesian view of natural law, there is likewise no need of a judge for his role would not differ from the enforcement agents of the state.

It is only when a society has embraced a non-absolutist philosophy that the need for a judge arises. Disputes in a society marked by the political-economic theory which holds that the government has the right to coerce individuals in some situations but not all, need for their resolution an entity with the duty to define the re-

30. HALL, supra note 20, at 53.
spective realms of power. The continuum in its final form, embracing the political, economic, and legal philosophies of a society can be shown as follows:

| Anarchy- | Monolithic state- |
| free market; | government monopoly; |
| Judge has a role | No need for |
| No need for a judge | |

To the extent that one accepts the framework established to this point, an answer to the first inquiry presented can be attempted. When one views the possible political arrangements of a society and opines that the best political theory for the society is that the state not concern itself with what persons speak, what they believe, or who they associate with, one is embracing the continuum near the anarchist end. One is saying people should be left to arrange their affairs voluntarily. People are good and should be left alone. To the extent that one expresses the belief that government should be active in distributing wealth through the society, that the free interaction among individuals leads to inequity in wealth distribution, one has entered the Hobbesian jungle where people are greedy and life is mean, brutish, and short. Here lies the incoherence. A person who believes both has at the foundation of his knowledge that people, if left to their own, will act voluntarily and to everyone’s benefit; but also the contradictory notion that people, if left to their own, will cheat, hoard, and steal. The two cannot coherently exist together in a scheme of knowledge. A coherent notion is one that accepts that there is either all good or all evil or a mixture of the two, not one that posits at the same time people are predominantly good and predominantly evil.

Placing the first inquiry behind, the balance of this Comment will discuss the judges’ role in a society that recognizes that individuals are both good and evil; a society which has created a government to control the evil but wishes its individuals to be free to pursue the good.

### III. THE UNITED STATES SUPREME COURT, SUBSTANTIVE DUE PROCESS, AND THE SEARCH FOR COHERENCE.

The role of the judiciary in a society which has created a state is a morer or less crucial one depending on the political-economic philosophy it accepts. The judiciary serves two basic functions in such a society. The first is to mediate disputes between individuals. Here the judge acts more like an agent of the state, able to impose his will upon the parties to the dispute. The second function of the judiciary, the one to be focused on in the balance of this Comment, is to solve disputes between an individual and the state.
When a judge is faced with a decision involving such a dispute the judge cannot be viewed as an agent of the state but as a neutral. In our society the judiciary is both a part of the state as well as the only institution that is allowed to nullify government action. This paradoxical nature of the judiciary may have a large role in contributing to the tension inherent in its role as arbitrator.

A society that has embraced neither extreme of the political-economic continuum is marked by tension. The tension is a struggle for power. Should the state be allowed to decide the appropriateness of a certain activity or should that decision be left to the individual? The judge must decide. In the constitutional system embraced in the United States, to a large extent, that decision is an exercise in substantive due process.

A basic tenet of our law is that no person should be denied life, liberty, or property without due process of law. Due process of law has been defined as having procedural elements as well as substantive ones. The substantive element inquires into what is the limit of state power. The procedural question involves an assumption that the state has the power to coerce an individual but that power can be exercised only after certain formalities have been observed. As must be apparent by now this Comment is not focused on the formalities.

In order to focus more clearly on the role of the judiciary in a society which embraces a limited state political theory, a broad outline of the twentieth century United States Supreme Court's encounter with substantive due process will be presented. This will be followed by a discussion of some of the individual members of the Court and the coherence of their political, economic, and legal theories.

31. The federal judiciary was created as part of the government by article III of the Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
32. The ability of the Congress to control the jurisdiction of the Court is one example of this tension. See Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953).
34. See supra notes 2-3.
35. This quote from Gilmore places procedural due process in an interesting light:

Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.

A. The Contours of Substantive Due Process in the Twentieth Century United States Supreme Court.

The dispute that would erupt among the members of the twentieth century Court was foreshadowed in the late eighteenth century opinion of Calder v. Bull. This case involved a challenge to a Connecticut legislative action which resulted in the probate of a will that had previously been refused probate by the Connecticut courts. Holding that the ex post facto clause did not preclude such legislative action, Justice Chase responded to the argument that the legislation violated basic principles of government:

I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State. There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established.

Justice Iredell responded with some thunderbolts of his own:

It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any court of Justice would possess a power to declare it so. The ideas of natural justice are regulated by no fixed standard: The ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

In 1868 the fourteenth amendment was enacted and the dispute erupted anew. The Slaughter House Cases gave the Court the opportunity to give some substance to the due process clause of the new amendment by striking a Louisiana statute that granted an exclusive monopoly to slaughter livestock in New Orleans. The Court rejected this chance. In Munn v. Illinois the Court again refused to find a due process clause violation in a state statute fixing the maximum prices of grain storage services.

By the turn of the twentieth century the due process clause was beginning to be given some substance. The flowering of the notion

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36. 3 U.S. (3 Dall.) 386 (1798).
37. Id. at 387-88.
38. Id. at 398-89.
39. 83 U.S. (16 Wall.) 36 (1873).
40. Id.
41. 94 U.S. 113 (1877).
42. Munn is most famous for its creation of the public interest rationale to justify regulation of the marketing of certain products.
of substantive due process as a tool to be used by the judiciary to restrain government can be seen in this excerpt from *Allgeyer v. Louisiana*, a case that struck down a state criminal statute forbidding a Louisiana resident to enter into a contract with an insurance company not licensed to do business in Louisiana.

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

The expansive notion of liberty expressed in *Allgeyer* was to give great substance to the due process clause. Shortly after *Allgeyer* the leading case of *Lochner v. New York* set the tone for nearly thirty years of Supreme Court cases striking down regulations of the economic environment. In *Lochner* the Court struck down, on due process grounds, a New York statute regulating the number of hours that could be worked by bakers. The Court in *Lochner* had become comfortable with the role of judging the fairness of challenged legislation.  

It could be hypothesized that the Court in its economic decisions was using the substantive due process tool to embody their economic theory preference. But this theory can be given little support in light of further developments in the history of substantive due process. In *Meyer v. Nebraska* the non-economic branch of substantive due process was firmly established. In *Meyer*, the Court struck down a statute forbidding the teaching of a non-English language in the public grade schools. Along the way the Court reiterated its expansive notion of the substance of the due process clause protection:

> Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recog-

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43. 165 U.S. 578 (1897).
44. *Id.* at 589.
45. 198 U.S. 45 (1905).
46. “In every case that comes before this court . . . the question necessarily arises: is this a fair, reasonable, and appropriate exercise of the police power of the State . . . ?” *Id.* at 56.
47. This was the gist of Holmes’ famous dissent in *Lochner*. *Id.* at 74-76.
nized at common law as essential to the orderly pursuit of happiness by free men.49

This expansive definition of the content of the due process clause, a definition which drew no distinction between economic and non-economic liberty, held until the 1930's.

The worldwide depression of the 1930's was greeted by the American people with the demand that government do something to remedy the economic situation.50 State legislatures, along with the Congress, reacted by passing legislation which was in direct conflict with the substantive due process cases of the earlier part of the century.

Not always using the substantive due process tool, the Court struck down many of these economic regulations.51 Whether due to public pressure,52 the court packing scheme of the Roosevelt administration,53 or a change in the membership of the Court, a distinction between economic substantive due process and non-economic substantive due process developed. Beginning with *Nebbia v. New York*,54 in which the Court upheld legislative price fixing of milk, gaining steam in *West Coast Hotel v. Parrish*,55 a case upholding the establishment of a minimum wage law, and becoming explicit in *United States v. Caroleine Products Co.*,56 the development of an economic branch of substantive due process was swift, sure, and never really supported by rational argument. In *Caroleine Products* the Court upheld an act of Congress forbidding the shipment in interstate commerce of a milk substitute. The due process test that comes out of *Caroleine Products* is one that gives a great presumption of constitutionality to regulations of an economic nature. Ignoring the liberty issue and concentrating on whether a legislature had some rational basis to justify the regulation, the Court continued:

Even in the absence of such aids, (legislative histories), the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pro-

49. *Id.* at 399.
50. For a short insightful piece describing the economic base in the Depression-struck midwest, see HALL, supra note 20, at 1006.
52. *See supra* note 50.
55. 300 U.S. 379 (1937).
56. 304 U.S. 144 (1938).
nounced unconstitutional unless in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon a rational basis . . . 57

In footnote four to the opinion58 the distinction between economic and non-economic regulation judicial review standards is described more fully. The Court seemed to say that it will consider non-economic regulations of human activity without the same presumption. By 1955 the Court was committed to the notion that it would no longer use the due process clause to overturn economic regulations: "For protection against abuses by legislatures the people must resort to the polls, not to the courts."59

The minimizing of the economic substance of the due process clause did not affect the use of substantive due process in the non-economic regulation cases, like Meyer v. Nebraska. Beginning in the late 1930's and continuing to the present, the substance of the protection offered by the due process clause of the fourteenth amendment to protect individuals from non-economic intrusions into their liberty has been vastly expanded. The due process clause has incorporated nearly all of the protections of the Bill of Rights.60 The Court has found lurking in the concept of due process the fundamental right to be free from state imposed sterilization,61 the right to marry interracially,62 the right to decide on the appropriateness of the use of contraceptives,63 the right to have an abortion,64 and the right to possess pornography in the home.65

As was argued earlier, the liberty to free economic choices cannot be coherently distinguished from the right to be free from state coercion in non-economic areas of life. Without attempting to coherently expound the distinction between the two, the Court has become apparently solidly committed to the role of bystander in judging the appropriateness of economic legislation. This incoherence has created much tension to the Court's role in injecting itself

57. Id. at 152.
58. Id. at 152-3 n.4.
60. For a capsule summary of the present state of the incorporation of the Bill of Rights, the first ten amendments to the Constitution, see E. Barrett, Constitutional Law 646-47 (5th ed. 1977).
into the struggle between individuals and the state on non-economic fronts.\textsuperscript{66} For example, in \textit{Griswold v. Connecticut},\textsuperscript{67} a substantive due process case, the protest of Justice William O. Douglas notwithstanding,\textsuperscript{68} the Court overturned state statutes prohibiting the dissemination of information about and the instrumentalities of contraception. The Court's decision involved six separate opinions, each one reflecting a different theory of the substance of the due process clause of the fourteenth amendment. The same disagreement is likewise illustrated in the landmark abortion case of \textit{Roe v. Wade} \textsuperscript{69} in which again the Court divided into six different camps. With the retirement of those justices who have embraced the split wholeheartedly,\textsuperscript{70} it is only speculation as to what the result will be when they are replaced. The split may heal itself; the house may unify.

B. Individual Supreme Court Justices and Substantive Due Process

The use of coherence theory to explain the system of beliefs held by an abstract entity such as the Supreme Court is not very useful. While it is true that in most of the Court's opinions, precedents are examined, and interpreted or rejected in order to fit the present opinion, the task is usually performed by one individual. Thus an opinion delivered as an opinion of the Court is usually the result of one of the Justices making the result cohere with his personal system of beliefs. As such this section of the Comment will deal with the individual views of substantive due process held by various members of the twentieth century Court.

The early twentieth century Court was marked by individuals who held basically two competing views of the use of substantive due process to strike down legislative actions.

The first view is reflected in the opinions of Justice Oliver Wendell Holmes.\textsuperscript{71} Holmes' dissent in \textit{Lochner v. New York} is perhaps

\begin{itemize}
  \item \textsuperscript{66} See \textit{Roe v. Wade}, 410 U.S. 113, 212 n.4 (1973) (concurring opinion of Justice Douglas).
  \item \textsuperscript{67} 381 U.S. 479 (1965).
  \item \textsuperscript{68} Justice Douglas denies that his opinion in \textit{Griswold v. Connecticut} was based upon the due process clause of the fourteenth amendment instead relying on the ninth amendment. \textit{Roe v. Wade}, 410 U.S. 113, 187 n.4 (1973). The ninth amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. Justice Douglas does not explain how he arrives at the conclusion that a right retained by the people under the Bill of Rights is protected from state violation without the traditional resort to incorporation of it into the substance of the due process clause of the fourteenth amendment.
  \item \textsuperscript{69} 410 U.S. 113 (1973).
  \item \textsuperscript{70} See infra notes 80-92 and accompanying text.
  \item \textsuperscript{71} Justice Holmes' term on the Court spanned the years between 1902 and 1932.
\end{itemize}
the most eloquent damnation of substantive due process in any of the Court's opinions. Disagreeing with the majority's striking down of the New York Statute regulating bakers' working hours, Holmes stated:

This case is decided upon an economic theory which a large part of this country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract.72

In his willingness to defer to majority rule, Holmes was also inclined to allow non-economic legislation infringing upon fundamental rights to stand. This can be seen in his dissent without opinion in Meyer v. Nebraska73 and in his upholding of a state statute allowing involuntary sterilization of mental patients in Buck v. Bell.74 Holmes' views can be seen as a recognition that the state's potential to exercise power over the life of an individual, not just the economic aspects of such life, is indeed immense. Holmes was unwilling to perform the function of arbitrator between the state and the individual that substantive due process requires.

The Holmesian view was obviously not dominant in the early twentieth century Court. It was at this time that the notion of substantive due process in its undivided sense reached its zenith. The main proponents of this use of substantive due process were Justice McReynolds75 and Justice Sutherland.76

McReynolds' notion of the protection offered by the due process clause has already been shown in the portion of Meyer v. Nebraska previously quoted.77 Even with the public and other types of pressure placed upon members of the Court in the mid-1930's, McReynolds along with Sutherland held firm in their resolve to hold substantive due process together.78

The Sutherland-McReynolds coherence can be illustrated by

72. 198 U.S. at 75.
73. 262 U.S. 390, 403 (1923) (Holmes, J., dissenting).
74. 274 U.S. 200 (1927).
75. Justice McReynolds sat on the U.S. Supreme Court from 1914 to 1941.
76. Justice Sutherland sat on the Court from 1922 to 1938.
77. See supra note 49 and accompanying text.
78. McReynolds and Sutherland dissented in West Coast Hotel Co. v. Parrish and after Sutherland retired in 1938, McReynolds dissented on his own in United States v. Carolene Products. Sutherland and McReynolds both dissented in Nebbia v. New York, the case initially signaling the end of economic substantive due process.
this quotation from then Senator Sutherland's address to the New York State Bar Association in 1921.

[The individual . . . has three great rights, equally sacred from arbitrary interference: The right to his life, the right to his liberty, the right to his property . . . . To give a man his life but deny him his liberty, is to take from him all that makes life worth living. To give him his liberty but take from him the property which is the fruit and badge of his liberty, is still to leave him a slave . . . . If the time shall ever come in this country, as it has already come in poor distracted Russia, when the property of rich or poor may be taken by the hand of arbitrary authority, liberty and property will depart together, and the rule of law, so far as these rights are concerned, will have ceased to be.]

As opposed to the views of Holmes, McReynolds, and Sutherland which could be broken into coherent, albeit competing, schemes of knowledge, the notions of substantive due process to arise after the *West Coast Hotel* decision and to dominate into the 1970's are exemplified in the views of Justice Douglas. Douglas, a Roosevelt appointee, was never happy with the label, "substantive due process," and seemed to equate the whole notion of substantive due process with the invalidation of economic regulations. But his rejection of the label did not hamper his desire to impose the judiciary between the individual and the state. Justice Douglas is well known for his championing of individual rights. According to Douglas the state was absolutely forbidden from interfering with a person's autonomous control over the development and expression of one's interest, intellect, tastes, and personality. In other areas the state could interfere only upon a showing of a compelling state interest. These areas include marriage, divorce, procreation, contraception, education of children, the choice of health care, the freedom from bodily restraint or compulsion. Douglas used Holmes' dissent in *Lochner* to support his belief that the state could control the economic affairs of individuals with relative impunity. Holmes also dissented in *Meyer*, a case Douglas, nevertheless, approved wholeheartedly. Douglas seemed to have taken the broad notion of liberty expressed by McReynolds and Sutherland and mixed it with Holmes' dissent in *Lochner* to arrive at his notion of substantive due process.

It is difficult to tell the direction of the Court in the 1980's in regard to the use of substantive due process. Most of those Jus-

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80. Justice Douglas served as a Supreme Court member from 1939 to 1975.
81. See supra note 66.
84. Id.
85. Id.
86. See id. at 212 n.4.
tices who wholeheartedly embrace the split are older members of the Court and will soon retire. The reinstatement of economic substantive due process seems unlikely for now. The use of substantive due process to protect non-economic liberty may be under attack.

The house divided in the mid-1930's looks as if it is beginning to pull back together but this time with Holmes as its architect. Witness the opinion of Justice Rehnquist dissenting to the Court's opinion in *Roe v. Wade*:

> While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York* . . . the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies . . . [which] partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.

Echoing Holmes' *Lochner* dissent, Justice White's dissent to *Roe*, concurred in by Justice Rehnquist, stated: "I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier . . . This issue, for the most part, should be left with the people [as opposed to the individual] and to the political processes the people have devised to govern their affairs." And so the circle closes.

**IV. CONCLUSION**

And the Lord God said, "Behold, the man is become as one of us, to know good and evil: and now, lest he put forth his hand, and take also of the tree of life and eat and live forever: Therefore the Lord God sent him forth from the garden of Eden . . . and he placed at the east of the garden of Eden Cher-u-bim, and a flaming sword which turned every way, to keep the way of the tree of life." The struggle for coherence is essentially a personal endeavor. As such it is for each individual to view the last eighty years of legal history embodied in the Court's opinions concerning substantive due process and incorporate it into a scheme of knowledge. At the root of this struggle is a recognition that all of the truths one accepts are connected together; the lines drawn between them are both imaginary and real.

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87. Justice Brennan, age 76; Justice Marshall, age 74; Justice Blackmun, age 74; Justice Powell, age 75; Chief Justice Burger, age 75.  
88. Justice Rehnquist was appointed to the Court in 1971.  
89. 410 U.S. at 174.  
90. Justice White was appointed to the Court in 1962.  
91. *Id.* at 222.  
There are those who would have the angels placed at the gate to the garden sheathe their swords. They feel that we no longer need a “bevy of Platonic Guardians”93 to distinguish good from evil. They are gaining strength in the Court. And so it comes down to us, we the people, the state. The task is still the same. The existence of liberty still the stake.

Glen R. Anstine '83

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93. For myself it would be most irksome to be ruled by a bevy of Platonic Guardians even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course, I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.