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THE FUTURE OF SUBSTANTIVE DUE PROCESS: WHAT ARE THE STAKES?

Erwin Chemerinsky*

Substantive due process is very much under attack.¹ In *Dobbs v. Jackson Women's Health Organization*, the Court overruled *Roe v. Wade* and took away a constitutional right that existed for 49 years.² Rarely in American history has the Supreme Court taken away constitutional rights. The Court's approach puts in jeopardy other constitutional rights that have been safeguarded under the liberty of the Due Process Clause.

Conservative justices expressly argue that substantive due process is illegitimate. Justice Thomas has repeatedly said this, including in his concurring opinion in *Dobbs*. In other opinions, he referred to substantive due process as, quote, an oxymoron. And he also expressed his view that precedent deserves no weight in constitutional law. In May 2022, in a speech in Atlanta, Georgia, Justice Thomas said, "We use stare decisis as a mantra when we don't want to think."³ He said that in every instance, the Supreme Court should find the original meaning of a constitutional provision and follow that.⁴

Though Justice Thomas's approach to substantive due process and to precedent may be more extreme than others, certainly, many other conservatives would attack substantive process as well. Justice Scalia also referred to substantive due process as an oxymoron.⁵ At one point he called it "babble."⁶ And if you look at the writing of many conservative constitutional law professors, they speak of substantive due process with disdain. That is what I want to respond to in my remarks this afternoon. I want to

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1. This Article is based on Erwin Chemerinsky's oral remarks at the National Civil Justice Institute 2023 Symposium, *The Future of Substantive Due Process: What Are the Stakes?*, delivered on March 31, 2023.

2. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

3. Justice Clarence Thomas, Remarks at the 11th Circuit Judicial Conference (May 6, 2022).

4. *Id.*

5. Josh Blackman & Ilya Shapiro, *Is Justice Scalia Abandoning Originalism?*, CATO INST. (Mar. 9, 2010), <https://www.cato.org/commentary/justice-scalia-abandoning-originalism> [<https://perma.cc/QV9C-GPNU>].

6. *Id.*

suggest to you that the attack on substantive due process is misguided, that it is disingenuous, and that it is dangerous.

In terms of it being misguided, I have always defined substantive due process as the requirement that the government have an adequate justification when it takes away a person's life, liberty, or property.⁷ That is distinct from procedural due process—the requirement that the government follow adequate procedures when it takes away somebody's life, liberty, or property.⁸ When I teach my students, I give examples. The Supreme Court has said that, under the liberty of the Due Process Clause, parents have a right to custody of their children.⁹ Procedural due process refers to the procedures that the government must follow—notice and a hearing, with clear and convincing evidence justifying terminating parental custody. Substantive due process requires that the government have a compelling reason for terminating custody, like parental abuse or neglect. Or consider an example from a very different area: punitive damages. The Supreme Court has said that procedural due process requires instructions to a jury to guide its exercise of discretion in imposing punitive damages and judicial review to make sure the award is reasonable.¹⁰ Substantive due process, the Court has said, means that grossly excessive punitive damages are unconstitutional.¹¹

What I want to suggest to you this afternoon is having both of these concepts is not novel. Quite the contrary, both concepts are well-entrenched in American law, and in law even before that. If you come to my office, both at home and at school, I have posters up that have in both Hebrew and English the quote from Deuteronomy: "Justice, justice, thou shalt pursue."¹² And there are biblical commentators who ask, "why does it use the word justice twice?" One answer is that justice requires both procedural fairness and substantively just outcomes. If you look at the Magna Carta, it certainly talks about the need for procedures, but it also explicitly says there are things that the King cannot do to people in taking away their rights.¹³ Irrespective of procedures, there are limits on what the government can do in depriving someone of what we call now life, liberty, or property.

Sir Edward Coke, in famous commentaries on the law in England, said that the law of the land spoken of in the Magna Carta requires that there be an adequate justification for what the government is doing, as well as what we regard as fair procedures.¹⁴ Early in American history, in

7. Erwin Chemerinsky, *Substantive Due Process*, 15 *Touro L. Rev.* 1501, 1501 (1999).

8. *Id.*

9. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925).

10. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19–20 (1991).

11. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996).

12. *Deuteronomy* 16:20.

13. See John R. Vile, *Magna Carta*, *FIRST AMEND. ENCYCLOPEDIA*, <https://www.mtsu.edu/first-amendment/article/867/magna-carda> [<https://perma.cc/T7LP-MXQP>].

14. See *Sir Edward Coke Explains One of the Key Sections of Magna Carta on English Liberties (1642)*, *ONLINE LIBR. OF LIBERTY*, <https://oll.libertyfund.org/quote/sir-edward-coke-explains-one-of-the-key-sections-of-magna-carda-on-english-liberties-1642> [<https://perma.cc/Y4GX-XT8Q>].

Calder v. Bull, the Supreme Court articulated these themes.¹⁵ The first questioning of substantive due process occurred in *The Slaughter-House Cases* in 1873.¹⁶ We remember *The Slaughter-House Cases* for burying the Privileges or Immunities Clause of the Fourteenth Amendment. There is only one case in the entire history of the Privileges and Immunities Clause that has not been overruled, where the Court used it to strike down state government action.¹⁷ In *The Slaughter-House Cases*, the Court took the view that equal protection was limited to dealing with race discrimination. In fact, the Supreme Court said it was unthinkable to it that the Equal Protection Clause would ever be used for anything other than protecting those of African descent.¹⁸ And the majority opinion also said that due process is just about procedures, not about a substantive limit on what the government can do.¹⁹ It is often forgotten that *The Slaughter-House Cases* was a 5-4 decision, and there were powerful dissents, including by Justice Stephen Field and Justice Joseph Bradley, both of whom defended the concept of substantive due process.²⁰ And relatively soon, within a few decades, the dissenting position with regard to substantive due process became the law. In *Allgeyer v. Louisiana*, in 1897, the Supreme Court spoke of how the Due Process Clause protects rights from arbitrary government deprivation.²¹ One of the rights—in fact the first mentioned in *Allgeyer*—is protection from arbitrary government confinement.²² What, after all, protects us from being civilly committed by the government arbitrarily, and even from being criminally punished and confined arbitrarily?

It has always been thought that it is substantive due process—that the government cannot take away somebody's liberty by incarceration, by commitment, without having an adequate justification. *Allgeyer* is most famous for also finding freedom of contract under the liberty of the Due Process Clause. But the Court followed up in 1905 with *Lochner v. New York*,²³ and so many other cases in the *Lochner* era that used substantive due process to strike down state laws protecting workers and consumers. There is no doubt that the discrediting of freedom of contract under substantive due process also led to undermining the whole idea of substantive due process.

But I think that guilt by association is a mistake. In 1923, in *Meyer v. Nebraska*, the Supreme Court said that under the liberty of the Due Process Clause, parents have the right to control the upbringing of their children, and that the government can only interfere with that right with a sufficient justification.²⁴ Two years later, in *Pierce v. Society of Sisters*, the Supreme

15. See *Calder v. Bull*, 3 U.S. 386 (1798).

16. *The Slaughter-House Cases*, 83 U.S. 36 (1872).

17. See *Saenz v. Roe*, 526 U.S. 489 (1999).

18. See *The Slaughter-House Cases*, 83 U.S. at 37.

19. See *id.* at 80–83.

20. See *id.* at 83, 111 (Field & Bradley, JJ., dissenting).

21. See *Allgeyer v. Louisiana*, 165 U.S. 578, 589–90 (1897).

22. See *id.* at 589.

23. *Lochner v. New York*, 198 U.S. 45 (1905).

24. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

Court reaffirmed that right.²⁵ That involved an Oregon law that prohibited religious school education. Today, that would be struck down as violating the Free Exercise Clause.²⁶ But the Free Exercise Clause was not incorporated and applied to the states until 1940, and the Supreme Court in *Pierce*, like in *Meyer*, very much relied on substantive due process.²⁷ In the same era, in the later nineteenth and early twentieth century, the Supreme Court began incorporating the Bill of Rights into the liberty of the Due Process Clause.

It is often forgotten in discussions of substantive due process that incorporation was very much exactly that. When we talk about, say, incorporating free speech, or the Second Amendment right to bear arms against state and local governments, we are saying that they cannot infringe free speech or infringe the right to bear arms without an adequate substantive justification. That is substantive due process.

In the years that followed, the Supreme Court used substantive due process to protect many liberties. And I can easily tick them off. There is the right to marry. In *Loving v. Virginia*, in 1967, the Supreme Court, in addition to focusing on equal protection, also discussed how the right to marry is protected under the liberty of the Due Process Clause.²⁸ Justice Kennedy's majority opinion in *Obergefell v. Hodges*, striking down laws prohibiting same-sex marriage, very much focused on the liberty of the Due Process Clause safeguarding the right to marry.²⁹

There is the right to procreate. *Skinner v. Oklahoma* in 1942 implicitly, though not explicitly, overruled the tragic decision in *Buck v. Bell*.³⁰ Justice Douglas wrote his opinion in terms of equal protection.³¹ For Justice Douglas, who lived the *Lochner* era, he wanted to stay away from anything that looked like substantive due process. But what the Court was saying is that it was protecting under the Constitution the right to procreate, and the government could interfere with it only with a sufficient justification.³² That is substantive due process, regardless of the pigeonhole the Court used.

Then there is the fundamental right to custody of one's children. *Stanley v. Illinois* found this to be protected under the Fourteenth Amendment.³³ There is also the right to keep the family together.³⁴ In *Moore v. City of East Cleveland*, Justice Louis Powell's opinion was expressly based on substantive due process, invoking an opinion that Justice John Marshall Harlan wrote in *Poe v. Ullman* in 1961.³⁵ The Court has reaffirmed the right of

25. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

26. *Id.* at 529–30.

27. Compare *id.* at 534–35, with *Meyer*, 262 U.S. at 399.

28. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

29. See *Obergefell v. Hodges*, 576 U.S. 644, 663–64 (2015).

30. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Buck v. Bell*, 274 U.S. 200 (1927).

31. *Skinner*, 316 U.S. at 536–43.

32. *Id.*

33. *Stanley v. Illinois*, 405 U.S. 645, 657–58 (1972).

34. *Moore v. City of E. Cleveland*, 431 U.S. 494, 498 (1977).

35. *Id.* at 499 (citing *Poe v. Ullman*, 367 U.S. 497, 542–44 (1961) (Harlan, J., dissenting)).

parents to control the upbringing of their children under the liberty of the Due Process Clause. In 2000, Justice O'Connor's opinion in *Troxel v. Granville* overturned a lower court order protecting grandparent rights over the objections of the parent, focusing on how the liberty of the Due Process Clause is a right that parents possess.³⁶

There is the right to purchase and use contraceptives.³⁷ Though Justice Douglas tried to avoid substantive due process in *Griswold v. Connecticut*, he did not actually succeed in doing that.³⁸ Justice Douglas said that the right to privacy is protected under the penumbra of the Bill of Rights—the emanations from it.³⁹ And he rattled off all the Bill of Rights provisions that have something to do with privacy.⁴⁰ But how are those Bill of Rights provisions applied to state and local governments? It is through the Due Process Clause of the Fourteenth Amendment. And so, Justice Douglas was not avoiding substantive due process at all.

Subsequently the Supreme Court acknowledged this in *Carey v. Population Services International*, where the Court made clear that the right to purchase and use contraceptives is a fundamental right under the liberty of the Due Process Clause.⁴¹

There is the right for individuals—competent adults—to refuse life-saving medical treatment.⁴² At least five Justices in *Cruzan v. Director of Health Services* found this to be protected under the liberty of the Due Process Clause.⁴³ In *Lawrence v. Texas* in 2003, the Supreme Court held that the states cannot prohibit private, consensual, adult, same-sex sexual activity based on substantive due process.⁴⁴

I recite all of this to suggest that substantive due process is not new, and it should not be suspect. It is deeply entrenched in American law. My conclusion is that to eliminate substantive due process would truly be a radical change in constitutional law. If nothing else, it requires taking the position that *stare decisis* should have no weight in constitutional decision making. And so far, among those who served on the high court, only Justice Clarence Thomas has taken that position.⁴⁵ So that is what I wanted to start with by saying—that the attack on substantive due process is misguided because it is so deeply enmeshed in American constitutional law.

But second, I want to suggest to you that the attack on substantive due process is disingenuous. That those who criticize substantive due process are not really attacking the concept, but rather, something else is going on. Start with going back to Justice Thomas. He says that due process should

36. *Troxel v. Granville*, 530 U.S. 57, 60–75 (2000).

37. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

38. *See id.* at 480–86.

39. *Id.* at 484.

40. *See id.* at 484–86.

41. *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977).

42. *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990).

43. *Id.*

44. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003).

45. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2301 (2022) (“[T]he Due Process Clause at most guarantees *process*.” (Thomas, J., concurring) (emphasis in original)).

just be about procedures; it should not be about whether there is an adequate justification.⁴⁶ But why not? Why shouldn't both of these be seen as part of due process? Now, obviously, it is a matter of definition. We can define due process like we define any phrase to mean anything we want. But why shouldn't we say that before the government takes away life, liberty, or property, it needs to follow adequate procedures, and it also needs to have an adequate, substantive justification?

I think what is really going on here are two interrelated objections that conservatives have. One is to the content of the rights protected under substantive due process. And the other is to the lack of originalism in protecting these rights. Let me address each of these in turn.

Take, for example, abortion in *Dobbs*. I do not think that the objection on the part of the conservative Justices who overruled *Roe* was whether substantive due process exists. Their objection was to constitutional protection of abortion rights.⁴⁷ It was their opposition to abortion rights that animated the decision. I think I can show you this by focusing on Justice Alito's majority opinion in *Dobbs*. He began by saying that a right should be protected under the Constitution only if it is clearly stated in the original text, part of the original meaning, or there is a long, unbroken historical tradition.⁴⁸ Justice Thomas said in his concurrence that, in light of this, we should overrule *Griswold*, *Lawrence*, and *Obergefell*.⁴⁹ Justice Alito responded and said that none of those other rights are in jeopardy because none involve "potential life."⁵⁰ That statement is telling because it says it is permissible for the Court to protect rights even when they are not part of the text, part of the original meaning, or unbroken tradition, so long as they do not involve potential life. In other words, what was really animating *Dobbs* was not the objection to substantive due process. It was the Court's believing that states have a sufficient interest in protecting potential life to allow them to prohibit all abortions. That should not surprise us. In our society, conservatives generally are strongly opposed to abortion rights, and we have five very conservative Justices on the Supreme Court.

With regard to contraception, I naively believed that fights over access to contraception are a thing of the past. And yet, if you listen to conservatives, if you look at laws that are being proposed in states, if you look at recent decisions of conservative judges, you see very much this objection to access of contraceptives. In Texas, in December 2022, a federal district court judge said that it was unconstitutional under a federal program, Title X, to give contraceptives to minors without parental consent.⁵¹ This puts in jeopardy a law that has been so crucial in making contraceptives available.

46. See *id.* at 2300–01.

47. See *id.* at 2240–42 (Alito, J., majority opinion).

48. See *id.* at 2242.

49. *Id.* at 2301 (Thomas, J., concurring).

50. *Id.* at 2277–78 (Alito, J., majority opinion).

51. See *Deanda v. Becerra*, No. 2:20-cv-092, 2022 WL 17572093, at *17 (N.D. Tex. Dec. 8, 2022), judgment entered, No. 2:20-cv-092, 2022 WL 17843038 (N.D. Tex. Dec. 20, 2022).

I would like to believe that the issue of gay and lesbian rights—and the thought of states making it illegal to engage in private, consensual, same-sex sexual activity—is a thing of the past. But again, if you look at the popular rhetoric today concerning gay, lesbian, and transgender rights, what you really see is a Court that would not decide *Lawrence v. Texas* the same way. It certainly is not a Court that would decide *Obergefell v. Hodges* the same way. Think about *Obergefell*. Chief Justice Roberts, along with Justices Thomas and Alito, sharply dissented.⁵² The only dissent that John Roberts has read from the bench since coming onto the Court in 2005 was that in *Obergefell*. Justice Alito and Justice Thomas left no doubt as to where they stood in their dissents in *Obergefell*. I do not think there is any doubt as to where Justice Gorsuch stands either. In his dissenting opinion in *Pavan v. Smith* in 2017, he mocked Justice Kennedy's opinion in *Obergefell*.⁵³ Amy Coney Barrett, as a law professor in 2016, was sharply critical of *Obergefell*.⁵⁴ My point is that I do not think the debate over substantive due process is really over whether it is a concept that is justified. Instead, it is a way for the conservative Justices and conservative critics to attack rights that they do not believe should exist in the Constitution at all. It is about their desire to restrict abortion, to restrict contraceptives, to restrict private sexual activity, and to outlaw same-sex marriage.

Related to this, I think that those who oppose these rights do so because they are not originalist rights. It should not be surprising that Justices Thomas and Scalia—the foremost originalists who served on the Supreme Court—would be critical of all these rights. And if you look at scholarly literature, the professors who are most critical of substantive due process are the originalists. I think a strong originalist case can be made for substantive due process. It is why I even begin looking at the Magna Carta in English law and *Calder v. Bull* in American law. But I also think it is crucial, in responding to Justice Thomas, and those like Justice Scalia, to explain that originalism is a terribly undesirable way of interpreting the Constitution.

It is undesirable because it leads to abhorrent results. *Brown v. Board of Education*⁵⁵ would not be decided the same way in an original approach to the Constitution. The same Congress that voted to ratify the Fourteenth Amendment also voted to segregate the District of Columbia public schools. There is not a shred of evidence that the Congress that ratified the Fourteenth Amendment meant to outlaw segregation. *Loving v. Virginia* cannot be justified from an originalist perspective. At the time the Fourteenth Amendment was ratified, most states had laws that prohibited

52. *Obergefell v. Hodges*, 576 U.S. 644, 686–713 (2015) (Roberts, J., dissenting); *id.* at 721–36 (Thomas, J., dissenting); *id.* at 736–42 (Alito, J., dissenting).

53. See *Pavan v. Smith*, 582 U.S. 563, 568–70 (2017) (Gorsuch, J., dissenting).

54. Cf. Jim Obergefell & Alphonso David, *Amy Coney Barrett's Confirmation Would be an LGBTQ Rights Emergency*, WASH. POST (Oct. 8, 2020, 11:59 AM), https://www.washingtonpost.com/opinions/jim-obergefell-alphonso-david-amy-coney-barrett-lgbtq-rights/2020/10/08/41cde2c8-08cd-11eb-9be6-cf25fb429f1a_story.html [https://perma.cc/U2MU-5AU6].

55. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

interracial marriage.⁵⁶ California had a law that prohibited interracial marriage until 1948, when *Perez v. Sharp* was decided.⁵⁷ In 1967 when *Loving* was handed down, sixteen states still had laws that prohibited interracial marriage.⁵⁸

The constitutional limits on discrimination based on sex or sexual orientation cannot be justified from an originalist perspective. Justice Scalia said on many occasions that he believed that the Constitution did not apply to stop sex discrimination because it was not part of the original intent behind the Fourteenth Amendment.⁵⁹ Robert Bork had said that—it was one of the reasons he was overwhelmingly rejected for confirmation to the Supreme Court back in 1987.⁶⁰ Any theory that makes illegitimate *Brown v. Board of Education*, *Loving v. Virginia*, or the prohibition of sex and sexual orientation discrimination, is one that we should surely reject.

There is also a huge problem with originalism in terms of its incoherence. There is strong evidence to suggest that those who wrote the Constitution did not mean for their intent to be controlling. Duke Law professor, Jeff Powell, wrote a law review article forty years ago in the Harvard Law Review, titled *The Original Understanding of Original Intent*.⁶¹ And in it, he argues, I think compellingly, that the Framers of the Constitution meant for the document to be adapted and enduring.⁶² In 1819, Chief Justice John Marshall, in *M'Culloch v. Maryland*, said, “[W]e must never forget that it is a *constitution* we are expounding”⁶³—a Constitution meant to be adapted and endured for ages to come. And of course, the problem with asking the question, “What did the Framers think about the method of constitutional interpretation in judicial review,” is that there is no mention of judicial review in the Constitution itself. There was no discussion of judicial review at the Constitutional Convention in Philadelphia in 1787. So, how can it be said that the Framers intended originalism as the way of approaching constitutional interpretation? The elegance of Jeff Powell’s argument is that if you are an originalist, and you really want to follow the Framers’ views, then you have to abandon originalism because that was not their intent for the Constitution to be interpreted.

But there is also an enormous modernity problem with originalism. About a decade ago, the Supreme Court decided *Brown v. Entertainment*

56. See Brief and Appendix on Behalf of Appellee at 6, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395).

57. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

58. *Loving v. Virginia*, Hist. (Dec. 14, 2022), <https://www.history.com/topics/black-history/loving-v-virginia> [<https://perma.cc/MXR2-XCJ3>].

59. See, e.g., Stephanie Condon, *Scalia: Constitution Doesn't Protect Women or Gays from Discrimination*, CBS NEWS (Jan. 4, 2011, 5:33 PM), <https://www.cbsnews.com/news/scalia-constitution-doesnt-protect-women-or-gays-from-discrimination> [<https://perma.cc/85HX-2CDT>].

60. See Stuart Taylor Jr., *The Bork Hearings; Bork Backs Away from his Stances on Rights Issues*, N.Y. TIMES (Sep. 17, 1987), <https://www.nytimes.com/1987/09/17/us/the-bork-hearings-bork-backs-away-from-his-stances-on-rights-issues.html> [<https://perma.cc/56ST-VQ7P>].

61. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

62. See *id.* at 885.

63. *M'Culloch v. Maryland*, 17 U.S. 316, 407 (1819) (emphasis in original).

Merchants,⁶⁴ which involved a California law that prohibited the sale and rental of violent video games to minors under eighteen without parental consent.⁶⁵ Justice Scalia was grilling the lawyers, and at one point, Justice Alito interrupted and said, “What Justice Scalia wants to know is what James Madison thought about video games?”⁶⁶ We saw an example of this last June from the Supreme Court in a case called *Kennedy v. Bremerton School District*.⁶⁷ It involved whether a high school football coach had the right to go on the field after the game and kneel and pray.⁶⁸ Justice Gorsuch, writing for the majority, ruled in his favor.⁶⁹ He said restricting the coach’s prayer violated his free exercise of religion and free speech.⁷⁰ But what about the Establishment Clause of the First Amendment? For sixty years, the Supreme Court has said that the Establishment Clause limits prayer in school in all of its forms. The test for the Establishment Clause was announced by the Supreme Court in 1971, in *Lemon v. Kurtzman*.⁷¹ Justice Gorsuch said that the *Lemon* test had been overruled.⁷² What replaced it? Justice Gorsuch said that in deciding what violates the Establishment Clause, we have to look at the views of the Founding Fathers.⁷³ But then here’s the question: what did the Founding Fathers in 1791 think about high school football coaches at public schools going on to the field and praying after games? Just to ask the question shows the absurdity of originalism.

Think of *Citizens United v. Federal Election Commission*, where the Supreme Court, in 2010, held that corporations had the right to spend unlimited sums out of their corporate treasuries to get candidates elected or defeated.⁷⁴ There is no way to justify that decision from an originalist perspective. Corporations, as we think of them today, did not exist then. And more important, campaign spending of the sort that happens now simply did not exist then. I think it shows how willing the conservatives are to abandon originalism when it does not get the results they want.

So, I think what is really going on when conservatives attack substantive due process is they are objecting to the content of the rights, and they are objecting to the non-originalism of the decisions. What is crucial in response is to defend the contents of the rights, and to argue, as I have today, how misguided a way originalism is of approaching the Constitution.

Third and finally, I want to talk about why I regard the attack on substantive due process as dangerous. Where can the Court look to protect rights that are not enumerated in the text of the Constitution? One place would be the Privileges or Immunities Clause of the Fourteenth Amendment.

64. *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011).

65. *Id.* at 788–90.

66. Oral Argument at 16:05, *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786 (2011) (No. 08-1448), <https://www.oyez.org/cases/2010/08-1448>.

67. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

68. *Id.* at 2415.

69. *Id.* at 2433.

70. *Id.*

71. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

72. *Kennedy*, 142 S. Ct. at 2427.

73. *See id.* at 2428.

74. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 365 (2010).

But as I said, and as you know, the Privileges or Immunities Clause of the Fourteenth Amendment was buried by the Supreme Court in 1873 by *The Slaughter-House Cases*.⁷⁵ Other than *Saenz v. Roe* in 1999,⁷⁶ there is no Supreme Court Case that has used the Privileges or Immunities Clause and has not been overruled. Justice Thomas has tried on some occasions to revive the Privileges or Immunities Clause. He did so explicitly in *McDonald v. City of Chicago* in 2010 but got no traction from the other Justices.⁷⁷ And even Justice Thomas's attempt to revive the Privileges or Immunities Clause was very limited. He was quite explicit that the only rights that should be protected under it are those that can be justified from an originalist perspective.⁷⁸

It is possible that the Ninth Amendment could be used to protect rights that are not enumerated in the Constitution. The Ninth Amendment, of course, majestically says that enumeration of some rights in the Constitution shall not be taken to deny or disparage the existence of other rights.⁷⁹ But there are very few Supreme Court cases in history that ever mentioned the Ninth Amendment. When the Court has done so, it has been clear that the Ninth Amendment is not itself a repository of rights.⁸⁰ Rather, the Ninth Amendment is a justification for protecting non-textual rights in other places, like under the liberty of the Due Process Clause. The most important discussion of the Ninth Amendment was in Justice Goldberg's concurring opinion in *Griswold v. Connecticut*.⁸¹ There, he said that the Ninth Amendment is not a repository of rights—it is not where rights are protected—but rather, it is a textual authorization for protecting non-textual rights.⁸² It is possible that the Privileges or Immunities Clause and the Ninth Amendment could be revived in the future, but it is hard to imagine this Court using them to protect the rights that Justice Thomas wants to overrule, or the other rights protected under substantive due process.

So that leaves substantive due process as the *only* avenue to protect non-textual rights. Then the attack on substantive due process becomes dangerous because of the liberties that it would cause to be eliminated. Consider examples where the attack on substantive due process has already had an effect and then consider what it could mean in the future.

I want to give three examples where the Supreme Court tragically failed to recognize rights that it likely would have protected if it had a more robust sense of substantive due process. The first example is *San Antonino Board of Education v. Rodriguez*.⁸³ If you were to ask me, "What is among the worst decisions handed down by the Supreme Court in my lifetime," I would put *San Antonino Board of Education v. Rodriguez* high on the list.

75. *The Slaughter-House Cases*, 83 U.S. 36 (1872).

76. *Saenz v. Roe*, 526 U.S. 489 (1999).

77. *See McDonald v. City of Chicago*, 561 U.S. 742, 820–22 (2010) (Thomas, J., concurring).

78. *See id.*

79. *See* U.S. CONST. amend. IX.

80. *See, e.g., United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 89–94 (1947).

81. *Griswold v. Connecticut*, 381 U.S. 479, 486–99 (1965) (Goldberg, J., concurring).

82. *See id.*

83. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

This involved a challenge to disparities in school funding among school districts in the San Antonino area.⁸⁴ The Supreme Court, five to four, held that education is not a fundamental right under the Constitution.⁸⁵ The Court also said that discrimination on the basis of wealth does not get heightened scrutiny.⁸⁶ Once the Supreme Court said that education is not a fundamental right, it makes it very difficult for the Supreme Court to protect other rights, especially that that involve an affirmative duty to provide government services. If you go back to *Brown v. Board of Education*, there is such ringing language in Chief Justice Warren's majority opinion about the importance of education.⁸⁷ He discussed how if we are ever going to be an equal society, it has to be through education.⁸⁸ The Court has said this in other places, like in *Plyler v. Doe* in 1982.⁸⁹ Nonetheless, *Rodriguez* rejects the right to education.⁹⁰ The Supreme Court has subsequently reaffirmed that there is no constitutional right to education. But if the Court had been willing to go down the path of substantive due process and safeguard non-textual rights, shouldn't education be high on the list?

My second example where the Supreme Court has failed to protect rights because of a lack of sense of substantive due process is in the failure to provide protection from the government. Consider two tragic decisions. One is *DeShaney v. Winnebago County Department of Social Services* from 1989.⁹¹ This involved Joshua DeShaney, a four-year-old boy who was severely beaten by his father and suffered irreversible brain damage.⁹² Joshua's guardian sued the Department of Social Services for its failure to provide protection and respond to complaints of child abuse over a two-year period.⁹³ And Chief Justice Rehnquist, writing for the Court, said the government had no duty to protect Joshua from his father; the Court held that the government has no duty to protect people from privately inflicted harms under the Due Process Clause of the Fourteenth Amendment.⁹⁴

The Court followed that up in *Town of Castlerock v. Gonzalez* in 2005.⁹⁵ It involved a mother of three young girls who was very worried when the father had taken the girls in violation of a restraining order.⁹⁶ She repeatedly called the police.⁹⁷ She went to the police station that night.⁹⁸ They did nothing.⁹⁹ The father killed the three girls.¹⁰⁰ She sued and said this violated

84. *Id.* at 4–5.

85. *See id.* at 18–20, 35–40.

86. *See id.* at 18–20, 54–55.

87. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954).

88. *See id.*

89. *See Plyler v. Doe*, 457 U.S. 202, 221–22 (1982).

90. *See Rodriguez*, 411 U.S. at 18–20, 35–40.

91. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

92. *Id.* at 191–93.

93. *See id.* at 193.

94. *Id.* at 201–02.

95. *Town of Castlerock v. Gonzales*, 545 U.S. 748 (2005).

96. *Id.* at 751–53.

97. *Id.* at 753.

98. *Id.*

99. *Id.*

100. *Id.* at 754.

due process.¹⁰¹ And yet, the Supreme Court, based on *DeShaney*, said that the government had no duty to protect the girls from their father.¹⁰² I think if the Court was willing to embrace the idea of substantive due process, it would say, especially in these state-created, dangerous situations, there is an obligation to provide protection.

A third area that I regard as misguided because of the failure to recognize substantive due process is *Washington v. Glucksberg* in 1997.¹⁰³ The issue was whether the right to privacy under the liberty of the Due Process Clause includes the right to physician's death.¹⁰⁴ The case was brought by terminally ill patients in the state of Washington, challenging the law that prohibited aiding and abetting suicide.¹⁰⁵ The Supreme Court, in an opinion by Chief Justice Rehnquist, said that a right should be protected by the Constitution only if it is in the text, part of the original meaning, or part of a long, unbroken tradition.¹⁰⁶ This is the language Justice Alito cited to in his majority opinion in *Dobbs*.¹⁰⁷ Chief Justice Rehnquist said the right to physician's death does not fit in those categories.¹⁰⁸ And yet, if there is a right to privacy under the Constitution, shouldn't, as the Ninth Circuit said in an en banc decision, it include a right to death with dignity?¹⁰⁹ What interest does the state of Washington have in keeping a terminally ill patient alive when the person has decided it is time to end his or her life?

My point in these examples is what I see as the harms of the Court having rejected using substantive due process to protect additional rights. But I think the danger goes beyond that. The rejection of substantive due process very much can put existing rights—rights that have already been recognized—in jeopardy. Here, I will go back to Justice Thomas's opinion in *Dobbs* and Justice Alito's response. Justice Thomas says, we now should overrule *Griswold*, *Lawrence*, and *Obergefell*.¹¹⁰ And Justice Alito, in his opinion, says those rights are not in jeopardy.¹¹¹ Justice Kavanaugh says those rights are not in jeopardy.¹¹² The dissent says, the majority tells: "Scout's honor," those rights are not in jeopardy.¹¹³ But if the court rejects substantive due process, why aren't those rights in jeopardy? If the court adheres to what Justice Alito says in the majority opinion, that the only rights to be recognized are those in the text, those that are part of the original meaning, or in a long, unbroken tradition, then I do not see how the right to interracial marriage, or gay and lesbian marriage, or the right to

101. *Id.*

102. *See id.* at 755–69.

103. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

104. *Id.* at 705–07.

105. *Id.* 707–08.

106. *See id.* at 720–22.

107. *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

108. *See Glucksberg*, 521 U.S. at 723.

109. *Compassion in Dying v. Washington*, 79 F.3d 790, 798 (9th Cir. 1996), *rev'd*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

110. *Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

111. *Id.* at 2277–78 (Alito, J., majority opinion).

112. *Id.* at 2309 (Kavanaugh, J., concurring).

113. *Id.* at 2332 (Breyer, J., dissenting).

procreate, or the right to custody of children, or the right to keep the family together, or the right of parents to bring up their children, or the right to purchase and use contraceptives, or the right to engage in private, consensual sexual activity, or the right to refuse medical care can be protected. The danger in rejecting substantive due process is not just the rights that have not already been recognized, but the rights that have been recognized being put into jeopardy. So, what do we need to do now?

I think it is essential that we provide a full-throated defense of substantive due process. I think it is essential that we explain why substantive due process has existed throughout American history and going back to English history. The government should not be able to take away someone's life, liberty, or property, without an adequate justification. I think it is essential that we defend the non-textual rights on their own merits. I think it is crucial that we respond to originalism and show that it is a misguided and terrible form of constitutional interpretation. And it is essential that we develop a progressive vision of the Constitution and explain why all of these liberties and more should be protected under it. In that sense, I think we should take our inspiration from the phrase "Justice, justice thou shall pursue," and commit ourselves to doing that. Justice requires both procedural *and* substantive due process.

