Real Due Process or Charades Due Process for Economic Regulation? A Simple Textual Interpretation of the Due Process Clause

By Dustin Romney*

INTRODUCTION

Standard Supreme Court doctrine has it that when an economic regulation is challenged under the Due Process Clause of either the Fifth or Fourteenth Amendments, the Court will apply its lowest level of scrutiny, rational basis.[1] But rational basis allows for a subjective range of scrutiny to be applied in a given case. Since the New Deal, the Court has essentially applied *no* scrutiny to economic regulations, or what has been called "weak rational basis."[2]

In recent months, the country has been subjected to a slew of lockdown orders intended to slow the spread of COVID-19. These economic shutdowns have contributed to a massive economic slowdown.[3] Many businesses have brought suits challenging the constitutionality of the lock down orders, alleging a violation of due process.[4] Without commenting on the strength of these suits, the situation highlights the dangers of forfeiting meaningful judicial review of arbitrary government actions that cripple economic activity, even in the face of a public health emergency.[5]

In addition, as the nation roils from protests over racial inequalities, the issue of economic freedom is a pertinent one. Due process challenges to economic regulations often involve occupational licensing laws, which in turn often present particularly heavy burdens to poor

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[1] *See, e.g.*, Allison B. Kingsmill, *Of Butchers, Bakers, and Casket Makers: St. Joseph Abbey v. Castille and the Fifth Circuit's Rejection of Pure Economic Protectionism as A Legitimate State Interest*, 75 LA. L. REV. 933, 942–43 (2015).

[2] *E.g.*, Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 492 (2011).

[3] *See The Economic Lockdown Catastrophe*, WALL ST. J. (May 8, 2020), https://www.wsj.com/articles/the-economic-lockdown-catastrophe-11588978716.

[4] *E.g.*, *Connecticut Nail Salon Owner Fights for Fair Treatment Under "Shutdown" Orders*, PACIFIC LEGAL FOUNDATION, https://pacificlegal.org/case/ramirez-et-al-v-lamont-et-al/ (accessed June 12, 2020).

[5] *See* Bayley's Campground Inc. v. Mills, No. 2:20-CV-00176-LEW, 2020 WL 2791797, at 7–8 (D. Me. May 29, 2020) (discussing the importance of meaningful judicial review of government lockdown orders).

communities of color.[6] One important way the judiciary can contribute to the economic liberation of these communities is to more carefully scrutinize arbitrary economic regulations.[7]

The Due Process Clause of the Fourteenth Amendment declares that "[no] State [shall] deprive any person of life, liberty, or property, without due process of law."[8] At first reading, it should be fairly apparent that refusing to apply *any* scrutiny to the government's process is a suspect way of enforcing this guarantee. Interpreting the Constitution's text according to the plain meaning of its words often reveals considerable insight. Decades of relying on court-developed interpretive methodologies have a way of obscuring the text so that fairly obvious deductions are lost.[9] Thus, in this paper, I will focus on the due process language rather than the rational basis language as the touchstone for what the Due Process Clause ("DPC") requires of the government. My goal is to demonstrate that a simple textual interpretation of the DPC shows that it requires meaningful scrutiny of *all* legislation. I will then use these conclusions to address the two best arguments for applying weak rational basis to economic regulations.

BACKGROUND

In the early 20th century, the DPC was at the heart of a monumental constitutional struggle. On one side were progressives[10] seeking to expand the power of government to regulate the

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[6] *See, e.g.*, Ndioba Niang v. Carroll, 879 F.3d 870, 872 (8th Cir.) (upholding licensing requirements for African style hair braiders), *cert. granted, judgment vacated sub nom*. Niang v. Tomblinson, 139 S. Ct. 319, 202 L. Ed. 2d 212 (2018).

[7] This may also help to decrease police brutality. For example, in 2013, Las Vegas police were videoed placing a young black man in a choke hold because he was selling water on the streets. Arijeta Lajka, *Video Shows Las Vegas Police Using a Chokehold on Water Vendor in 2013*, ASSOCIATED PRESS (July 30, 2019), https://apnews.com/afs:Content:6528840031. And in a more famous case, Eric Garner was killed after police put him in a chokehold for selling cigarettes on the street. Jacob Sullum, *It Wasn't Just a Chokehold That Killed Eric Garner*, REASON (August 21, 2019), https://reason.com/2019/08/21/it-wasnt-just-a-chokehold-that-killed-eric-garner/. If economic regulations were more carefully scrutinized by the courts, then such confrontations may become less frequent.

[8] U.S. CONST. amend. XIV, § 1.

[9] *See* Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 719-21 (1994) (discussing the problems with rigid adherence to judicial tests at the expense of the text) (Justice O'Connor concurring).

[10] I define progressive as one who: 1) believes that the Constitution should be interpreted differently by each generation depending on the particular needs of the time (or as one who adheres to the so-called "living Constitution"

economy. On the other side were constitutional traditionalists[11] who understood the Constitution to prohibit at least some regulatory experiments. Progressive intellectuals, such as Louise Brandeis, argued vociferously that the Constitution was not a barrier to legislative experiments with economic regulation.[12] These arguments eventually revolutionized constitutional law during the New Deal.

While it cannot be claimed that there was a general agreement on the meaning of these clauses before the Progressive era, there was a great deal of common ground at least by the time the Fourteenth Amendment was ratified. First, it was generally accepted that the DPC provided some form of substantive protections of rights.[13] Prior to the New Deal revolution, American courts meaningfully reviewed, and occasionally struck down, economic regulations pursuant to the DPC (both state and federal versions).[14] More than simply guaranteeing a formal process, the DPC guarantees that laws depriving persons of life, liberty, or property must comply with some minimum threshold of reasonableness and objectivity. This requires the Court to meaningfully assess the purpose and effect of a challenged law. I will refer to this approach as "real due process."

Second, it was generally understood that real due process was based, at least in part, on natural rights principles. For example, the Supreme Court declared in 1898:

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doctrine); 2) believes that the primary principle behind the Constitution is democracy and that therefore, when interpreting the Constitution, democratic majorities should be given substantial deference and; 3) displays a high degree of faith in government and a high degree of suspicion of freedom, particularly economic freedom.

[11] I define "constitutional traditionalist" as one who: 1) believes that the Constitution has a fixed meaning that judges are to discover and apply to new circumstances; 2) believes that the fixed meaning of the Constitution positivizes at least some natural rights; 3) believes that the primary principles behind the Constitution are separation of powers and federalism, the main purpose of which are to diffuse and limit power in order to protect rights and; 4) displays a high degree of faith in freedom and a high degree of suspicion of government.

[12] *E.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, passim (1932) (Brandeis, J. dissenting).

[13] *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010) (demonstrating that a strong majority of 19th century courts adopted some form of "substantive due process").

[14] *See, e.g.*, Wynehamer v. People, 13 N.Y. 378 (1856) (invalidating state law forbidding the possession of alcoholic beverages on grounds that it was a deprivation of property without due process). For an excellent survey of the cases see EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT, 58-115 (1948).

> This court has never attempted to define with precision the words 'due process of law,' nor is it necessary in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard.[15]

Several years later, in *Lochner v. New York*, the Court struck down a state labor law limiting the number of hours that bakers could work as being inconsistent with the fundamental liberties protected by the DPC, namely the liberty to contract for labor.[16]

The *Lochner* case became the lightning rod of progressive rhetoric against traditional constitutional interpretation. Progressive intellectuals such as James Thayer laid the groundwork for so-called judicial restraint. Thayer and others sought to emphasize that judges should strike down laws only when they are certain as to its unconstitutionality.[17] Since natural rights and economics are nebulous topics, and since new economic realities brought about by industrialization required legislative experimentation, the courts should afford wide deference to the legislature.

But on the surface, the progressives did not seem to be saying anything new. When progressives took over the Supreme Court in the 1930s, they relied on essentially the same legal standards as traditional constitutionalists when interpreting the DPC only with a slightly different

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[15] Holden v. Hardy, 169 U.S. 366, 389 (1898).
[16] Lochner v. New York, 198 U.S. 45 (1905), overruled in part by Day-Brite Lighting Inc. v. State of Mo., 342 U.S. 421 (1952), and overruled in part by Ferguson v. Skrupa, 372 U.S. 726 (1963), and abrogated by W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
[17] James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

emphasis.[18] To this day, the Supreme Court has never expressly disclaimed real due process.[19] So what actually changed?

For starters, the standard was relaxed from one of "reasonableness" to one of "rationality"[20] (though the difference between the two is quite subjective). But the more important change was simply that an exception to real due process was carved out for economic regulation.[21] The Court then subsequently gutted the rational basis standard of all meaning in *Williamson v. Lee Optical*.[22] In that case, instead of checking for an *actual* rational basis behind the regulation, the Court made it clear that it would uphold any regulation if there was any conceivable rational basis that the legislature *might* have used to justify the law.[23] I will call this approach "charades due process." This remains the Supreme Court's DPC doctrine to this day.

A SIMPLE TEXTUAL INTERPRETATION

It seems odd to describe constitutional interpretation as "textual." What else is interpretation supposed to be based on? But when it comes to the Constitution, broad language often fails to reveal satisfactory answers in concrete cases. It is clear that one needs more than just a copy of the Constitution and a dictionary. Courts must often turn to the maxim that text cannot be properly understood without *con*text.[24]

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[18] *Compare Lochner*, 198 U.S. at 53, *with* Nebbia v. People of New York, 291 U.S. 502, 523 (1934).

[19] *See* Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 284 (1987).

[20] *Compare Lochner*, 198 U.S. at 56 ("[W]here the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, *reasonable*, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate . . . . ?") (emphasis added), *with* United States v. Carolene Prod. Co., 304 U.S. 144, 152 (1938) ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis . . . .").

[21] United States v. Carolene Prod. Co., 304 U.S. 144, 152 (1938).

[22] 348 U.S. 483 (1955) (upholding a restriction on the practice of fitting eyeglasses without a license).

[23] *Id*. at 490.

[24] United States v. Balsys, 524 U.S. 666, 673 (1998) (referring to the idea of interpreting constitutional provisions in context as a "cardinal rule").

That context begins with the fact that most of the Framers (including those of the Fourteenth Amendment) were deeply concerned with protecting natural rights.[25] This should be clear from a cursory review of the Declaration of Independence and the many state constitutions drafted thereafter.[26] The Framers understood the Constitution to protect negative liberties including property, the very essence of economic activity.[27] They generally understood liberty and property rights as natural, moral rights which government did not invent but is supposed to protect.[28] The language of the Constitution could hardly make this clearer. It does not speak of grants of rights to citizens from government. It speaks of securing and protecting liberty and property against government encroachment.[29] It even declares that rights not discussed in the Constitution are to be protected.[30] Clearly then, the Constitution was designed to protect rights pre-existing the government. What can these be? The only answer is natural rights. This is even more salient when interpreting the DPC because both the Fifth and Fourteenth Amendment versions were written in response to demands for more stringent protection of individual rights. Thus, faithfully interpreting key words in the DPC must be informed by reference to natural rights.

We begin with "due process." It remains a point of sharp controversy that due process protects substantive rights. I will not dwell much on this because today's progressives mostly accept a substantive interpretation of due process in one form or another. I say today's progressives

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[25] Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 910 (1993) ("Natural law was understood [by the Framers] to explain the necessity of written constitutions . . . [and] was assumed to have a role in constitutional analysis.").

[26] For example, the preamble to the Pennsylvania Constitution declares: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property . . ." PA. CONST. art. I, § 1.

[27] Hamburger, *supra* note 25.

[28] *Id*.

[29] For example, the preamble declares that the Constitution is ordained to "secure the blessings of liberty . . ." not to create liberty. Furthermore, the Bill of Rights protects against abridgement of the freedoms of speech and religion. U.S. CONST. amend. I. It does not confer these rights.

[30] U.S. CONST., amend. IX.

because those of the early 20th century seemed to oppose the idea that judges could rely on the DPC to strike down *any* democratically enacted law, economic or otherwise.[31] When the progressives took over the Supreme Court, they were quick to reverse a precedent of real due process as it concerned economic regulation.[32] But they quickly realized that a more meaningful review was essential to redeeming its promise in the context of laws or activities they preferred to protect.[33] Thus, it is widely, though certainly not universally, accepted that due process protects at least some substantive rights.[34]

But what is the substance? The text of the DPC does not seem to deal with substantive rights. Thus, I sympathize with Justice Scalia's textual position that the DPC is about *process*.[35] In fact, I fully accept the position that this is primarily, even exclusively, what the DPC guarantees. But there is a logical absurdity underpinning an interpretation of the DPC that would disclaim any judicial role for ensuring the *substance* of the process guaranteed. Only one (or even a half) inferential step is necessary to see that process without substance is meaningless.[36] A defendant would not take comfort in being provided a judge and jury (process) if the judge and jury were in the tank (substance). Nor should a voter seeking to ply his trade take comfort in his vote if the legislature is in the tank with his competitors, or especially if they *are* his competitors sitting on a regulatory board.

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[31] *See* Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through the Lens of Lee Optical*, 19 GEO. MASON L. REV. 845, 850 (2012) (arguing that early progressive opposition to judicial review under the DPC was about the proper burden of proof rather than the activity in question).

[32] *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state minimum wage law and ostensibly ending the so-called "Lochner era").

[33] *See* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (sustaining a First Amendment challenge – as incorporated against the states via the DPC – against a public-school requirement to salute the American flag).

[34] *See, e.g.*, Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 276–77 (1855); Nebbia v. People of New York, 291 U.S. 502, 525, (1934); United States v. Windsor, 570 U.S. 744, 774 (2013).

[35] *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598–99 (1996) (Scalia, J. dissenting).

[36] *See* N.L.R.B. v. Townsend, 185 F.2d 378, 382 ("Due process deals with substance, not with form.").

The rise of "substantive due process" as distinguished from "procedural due process" is an unfortunate development if for only pedagogical reasons. There is no need to strain ourselves to find hidden rights that have supposedly been snuck into the DPC. We only need to deduce that the DPC guarantees a process not for the sake of a process, but because we expect that a process of substance, one with reason and impartiality, will actually protect our life, liberty, and property when there is no reasoned or objective basis to be deprived of them. The process that is due to persons in a free society is not a hollow sham that blindly checks the boxes of trial and jury or "democratic vote." Rather, the process due is one that comports with some basic level of reason and objectivity. *This* is the substance protected by the DPC. The only legitimate debate is how to *apply* the "rational basis" standard.[37] Is a theoretical rational basis sufficient to satisfy due process or must there *really be* a rational basis?

On the one hand, a textual interpretation of the DPC strongly indicates that the judiciary should defer to the legislature. The clause clearly infers that citizens can be deprived of life, liberty, and property so long as due process is given. Thus, there is a range of legislation that may deprive people of life, liberty or property but still be rational enough to pass muster as due process.[38] But this must be countered by the equally strong inference that some deprivations are so arbitrary or unreasonable that they cannot be considered due process. The fulcrum between these two inferences is a proper definition of the terms liberty and property.

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[37] From an originalist perspective, another possible point of controversy is the contention that the DPC should not apply to legislative processes. But American courts with judges from across the spectrum have established and reaffirmed that the DPC applies to all branches of the government. *See* Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 946–47 (1927); *See also* United States v. Windsor, 570 U.S. 744, 774, (2013).

[38] This indicates that the DPC has an extremely narrow role in reviewing and invalidating legislative enactments. This is why the best arguments against charades rational basis for economic regulation should actually rely on the Privileges or Immunities Clause. Unfortunately, the Supreme Court struck that clause from the Constitution in the Slaughterhouse cases. 83 U.S. 36 (1872). Since that time, judicial review of legislation for reasonableness or rationality has been somewhat awkwardly forced into the DPC.

The Supreme Court claims that liberty cannot be precisely defined.[39] Instead of attempting to define it, the Court resolves DPC cases by determining whether the regulated *activity* is "deeply rooted in this nation's history and tradition."[40] It is said that this approach diminishes subjectivity.[41] The result is that liberty is parsed into distinct activities with varying degrees of protection depending on the Court's interpretation of history or its ability to manipulate it. Thus, we find the Supreme Court bizarrely debating the traditional value of gay sex when prohibitions on that activity were challenged under the DPC.[42] In spite of the history, which suffice it to say was not favorable to gay sex, the prohibitions were struck down.[43] Contrast this with the undeniable fact that freedom of contract and property rights were virtual royalty in America's history and traditions, at least until the New Deal. Yet, economic regulations are universally approved. Far from decreasing subjectivity, the Court's approach enhances it. There is a better way.

It begins with a simple textual interpretation of liberty combined with a bit of deduction.[44] Liberty is not the same thing as the activities people choose to engage in. It is a state in which one has the capacity to engage in all activities that do not violate the personal integrity or property

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[39] Washington v. Glucksberg, 521 U.S. 702, 722 (1997).
[40] *See, e.g.*, *Id*. at 720–21.
[41] *Id*. at 722.
[42] *Compare* Bowers v. Hardwick, 478 U.S. 186 (1986), *with* Lawrence v. Texas, 539 U.S. 558 (2003). Another example of the court's misguided approach is Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach. 495 F.3d 695, 697 (D.C. Cir. 2007). There the court framed the right at issue as whether the plaintiff had a right, deeply rooted in the nation's history and tradition, to access experimental drugs. The right is not to access experimental drugs but to act in a manner that has no bearing whatsoever on the rights or even the interests of others. Taking an experimental drug has no effect on the *public* health or safety. Such strictly personal decisions should be part of the liberty protected by the DPC.
[43] Lawrence, 539 U.S. at 558.
[44] From here I essentially treat liberty and property the same, for as Justice Stewart said, "The dichotomy between personal and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972).

rights of another.[45] Liberty is a presumption that the individual chooses his activities based on *his* values. Thus, the very process of singling out activities for protection based on extraneously supplied criteria violates a basic premise of liberty. The substance of liberty is a presumption of choice, not a qualification on choice. It is not liberty at all to say, "You're free so long as I approve of your choices." This cuts against a strong presumption that the legislature can deprive citizens of liberty without meaningful restraint.

This understanding also undermines the platitudes often used to justify regulations, such as that the right to contract is not absolute,[46] or that when we "enter society," we give up a certain portion of our liberty.[47] Under a proper understanding of liberty, we can see that no portion of it is surrendered when we "enter society." The rights to life, liberty and property are unalienable.[48] When we choose to live in close proximity to others, we give up certain *choices* that we might have made if we lived in isolation. But we should not confuse available options for the right to liberty. Moreover, rights are indeed absolute. That is why they are called rights and it is why they appear in the Constitution.

The task for judges when interpreting liberty is not to assess historical national traditions in order to decide which activities the DPC protects. Rather, the task is to discover (yes, *discover*, not *invent*), the line where one person's liberty ends, and another's begins. Every person's liberty must count. Fortunately, and here is the key deduction, there is a readily available natural law that provides a much better criterion that can justly be applied to all. It is the millennia-old maxim: sic

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[45] *See* Allgeyer v. State of La., 165 U.S. 578, 589 (1897) (explaining that liberty, as used in the 14th Amendment, means more than freedom from incarceration and incudes the right to earn a living).

[46] *E.g.*, Knoxville Iron Co. v. Harbison, 183 U.S. 13, 22 (1901) (sustaining a Tennessee statute requiring corporations to make all payments to employees redeemable in cash); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[47] *See, e.g.*, Goddard v. President, etc., of Town of Jacksonville, 15 Ill. 588, 590 (1854) ("Some of our natural rights we must and do surrender or modify in entering into the social state, and in like manner a part of both our natural and social rights in entering into the political state.").

[48] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

utere tuo ut alienum non laedas (hereinafter "sic utere") or "use your property [and liberty] so as not to injure another." Sic utere provides a much more objective and just tool for courts to use in judging due process. If the government chooses to regulate an activity, the due process protection of liberty and property demands that there be some *meaningful* potential harm from the activity to justify the regulation.[49]

Of course, some activities are more dangerous than others and thus, regulation in some areas will be more constitutionally tolerable. Thus, it may seem that this approach arrives at the same point as judging legislative enactments depending on the regulated activity. But the key difference is that sic utere demands a focus on the harm of the activity and an evaluation of everyone's rights rather than an evaluation of tradition and history. This will produce more consistent results.

The advocates of charades due process are apt to paint the advocates of real due process as proponents of "lazzie-faire."[50] This intended pejorative misses the mark. Mr. Herbert Spencer's social statics[51] would have nothing to do with the Lochner-era court which upheld the vast majority of economic regulations that came before it.[52] The sic utere approach to due process would be a much more moderate change (restoration) to constitutional law than its opponents advertise.

Finally, we must interpret the word "law" in the phrase "due process of law." To what law is it referring? There are only two options, positive law or natural law. It would be absurd to conclude that it refers only to the positive law. The clause itself is a check on the legislatures'

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[49] Craigmiles v. Giles, 312 F.3d 220, 225–26 (6th Cir. 2002) (striking down license requirements to sell caskets because the state offered no plausible health or safety justifications for the requirements).

[50] *See, e.g.*, Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 WIS. L. REV. 265, 266 (1987).

[51] This refers to Justice Homes' quip in his Lochner dissent that "The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J. dissenting).

[52] *See* Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 943–45 (1927) (demonstrating that only a small percentage of regulations were struck down by the Supreme Court during the Lochner era).

authority to enact statutes.[53] If "law" refers to statutes then the clause would be saying that the legislatures cannot take away life, liberty or property unless the legislatures pass a statute that takes away life, liberty or property.[54] This absurd result would render the clause meaningless. The only remaining option for the meaning of "law" is the natural law.[55] As Justice Chase told us long ago, an act that is void of a legitimate purpose or is arbitrary cannot be called a "law."[56]

Of course, much of what the DPC requires of government is not itself part of the natural law. A democratically enacted statute, a criminal proceeding with a judge and jury, or other common law procedures are not natural law. But these processes are either derived from, or are explained by their utility to accomplish, natural law objectives, namely preventing the government from purposelessly or arbitrarily depriving citizens of their natural rights to life, liberty or property.[57] Thus, to ignore the foundational natural law/rights purposes of the DPC is to concede to the legislature the power to decide due process rather than the Constitution and the judiciary. The legislature has a range of flexibility but the DPC keeps the range limited within a framework of objective rationality based on sic utere. In a government of, by and for the people, the government can have no rights greater than those held by the people themselves. None of us has a

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[53] *See, e.g.*, Schlesinger v. Wisconsin, 270 U.S. 230, 240 (1926) ("The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever.").

[54] Den ex dem. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 276–77 (1855) ("[The DPC] cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will.").

[55] This was endorsed by Representative John Bingham, the author of Section 1 of the 14th Amendment. In a speech arguing for the Amendment given on the floor of the House he said: "Your Constitution provides that no man . . . shall be deprived of life or liberty or property without due process of law—law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal, exact justice . . ." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866) (quoted in Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 480 (2010)).

[56] Calder v. Bull, 3 U.S. 386, 388–89 (1798) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.").

[57] The more philosophically inclined will notice my treatment of natural law and natural rights as essentially the same thing. Natural law and rights are two sides of the same coin. The laws are intuitive prohibitions on human conduct, don't hurt people and don't take their stuff. The rights are the corresponding protections of person and property from those who are obliged to follow the law.

right to intervene in another's affairs except to prevent force. The same moral rule applies to government.

With a proper interpretation of the DPC in mind, I proceed to address the two main arguments for charades due process for economic rights.

Judicial Realism

Unfortunately, sic utere does not get us very far when analyzing complex economic legislation for constitutionality. What exactly constitutes a sufficient harm? What are the appropriate means of addressing a harm? These questions lie at the core of all political debate and they will not be decided here (or ever). It is unsurprising then that a chief criticism of real due process for economic regulation is that it is too standardless for judges to consistently decide cases.[58] Therefore, it is argued, judges should bow to social interests so as not to disrupt what might turn out to be important public policies.

In my first year of law school, after discussing the Supreme Court case of *Ashcroft v. Iqbal* and related cases, my Civil Procedure professor asked the class to articulate the pleading standard necessary to survive a motion to dismiss. I raised my hand and, in an attempt to be humorous (which usually fails as it did in this case), I shouted, "Who knows!" My professor gently chided me by responding, "Ok, rather than punt, who wants to really take a stab at it?" That experience taught me a great lesson about the law that has been amplified countless times since. The law is hard! If there were always clear standards, we wouldn't need judges.

A real rational basis standard based on sic utere is very difficult to apply in practice. But it is no more difficult to apply than "reasonableness" in tort, obscenity in free speech ("I know it

[58] Patel v. Texas Dep't of Licensing & Regulation, 469 S.W.3d 69, 132 (Tex. 2015) (Hecht, J. dissenting) ("Subsequent cases proved true [Justice] Holmes' warning [in Lochner] that a mere reasonableness standard for substantive due process was unworkable . . .").

when I see it"[59]), or the Supreme Court's new-found "dignity" standard apparently relied on in *Obergefell v. Hodges*.[60] Free speech is a particularly good example because in this area, the Supreme Court has taken the only logical approach that can be taken to determine the scope of the right: apply the doctrine of sic utere (albeit roughly) to distinguish between protected and unprotected speech.[61]

As another example, when Justice Breyer wanted to apply real due process to a state court's punitive damages award, concerns about the lack of a clear standard were not enough to dissuade him from invalidating the award.[62] How much is too much for a punitive damages award to violate real due process? Justice Breyer apparently knows it when he sees it.[63] And why shouldn't he? He is a rational human being. No one knows exactly at what point a punitive damages award is so high that its absurdity and disproportionality to the evil at hand violates due process. *But that point exists*. Neither can anyone predict exactly when a legislature's (or a regulatory board's) attempt to regulate the economy crosses the line between a sloppy, ill-conceived law that passes muster as rational, and one that clearly is meant to favor special interests and whose rational relation to a legitimate government purpose, while perhaps theoretically sound, is in *reality* too anemic to be considered *due* process.

We all have a natural understanding that if a person acts in harmless ways, there is no rational basis for restraining his behavior. When a law's burden on liberty is so disproportionate to the harm supposedly addressed, a judge has a duty to determine that due process is not satisfied.

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[59] Jacobellis v. State of Ohio, 378 U.S. 184, 197 (1964) (Stewart, J. concurring).

[60] 576 U.S. 644, 663 (2015) ("[14th Amendment] liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.").

[61] *See* RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION, 395-405 (2014).

[62] BMW of North America, Inc. v. Gore, 517 U.S. 559, 593-96 (1996) (Breyer, J. concurring).

[63] Justice Breyer sought to justify a weaker standard of review for the legislature by explaining that it is controlled by the ballot box. BMW of North America, 517 U.S. at 594. Yet, he apparently overlooked the fact that the Alabama judges whose decision he voted to overturn were popularly elected!

The DPC was written to provide more than a judicial rubber stamp of government actions. It was written to ensure a meaningful process and meaning means there is at least a chance the process can be struck down as an unconstitutional deprivation of life, liberty or property. There is nearly always room to attack judicial standards interpreting general constitutional provisions as amorphous. But generality or ambiguity does not weaken the demand to protect the right.

Separation of Powers

Eventually, the judicial realism track merges with a separation of powers argument in one form or another. It is usually articulated as a need to defer to democratic majorities.[64] As the Court said in *Lee Optical*, "For protection against abuses by legislatures the people must resort to the polls, not to the courts."[65] These arguments are often premised on the belief that the Constitution's core principle is democracy.[66] But the Constitution is to democracy what a dam is to a river. It presumes its flow but was built to control it. It has little to do with its structure, particularly when it comes to protecting individual rights.

The separation of powers is the Constitution's primary feature and, as originally envisioned, protector of individual rights.[67] Many Framers viewed the Bill of Rights as a redundancy.[68] It is thus ironic that separation of powers is invoked as the basis for a doctrine that allows for individual rights to be trampled by democratic majorities. The separation of powers acts as a protection because it is founded on the assumption that each branch will jealously check, not submissively defer to, the other branches. As ambition counteracts ambition, no branch

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[64] *See, e.g.*, Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV. 2348 (2017) (surveying Thayer's, Holmes's, and Brandeis's – three of the most notable progressive thinkers – philosophies on deference to legislatures).

[65] Williamson v. Lee Optical of Oklahoma Inc., 348 U.S. 483, 488 (1955).

[66] *See generally* STEPHEN BREYER, ACTIVE LIBERTY (2007).

[67] *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 450–52 (1998) (Kennedy, J. concurring).

[68] *See* THE FEDERALIST NO. 84 (Alexander Hamilton).

accumulates enough power to seriously abuse rights.[69] But it appears the Framers overlooked the fact that the urge for power is equaled by a desire to avoid accountability. Thus, the legislature defers to the executive (a situation which itself was accommodated by judicial deference run amuck) and the judiciary defers to both with each proclaiming, "It's not my job" in the face of one irrational policy after another. This is not what separation of powers is supposed to look like.

The notion that democracy is the core principle behind the Constitution, and thus deserving of special deference, is hopelessly flawed. For starters, if this is so, then why should *any* fundamental right require that democratically enacted laws be subjected to strict scrutiny? All should admit that the Constitution's protections of individual rights, including the DPC, are written precisely to place them beyond the reach of democratic decision-making.[70] In contrast, according to the progressives, popular consensus, not the Constitution or the courts tasked with interpreting it, determines what rights are fundamental.[71] At least, that is, so long as the popular consensus is correct. When the majority is wrong, democracy suddenly becomes less romantic. And where do they turn? The judiciary of course! The clearest example of this was the switch from state votes over gay marriage to litigation.[72]

The Constitution is so clearly *un-democratic*. Even some progressives are willing to admit it.[73] As originally written, three out of the four bodies created by the Constitution were not popularly elected. The Framers were careful to insulate government bodies from democratic control because they knew that popular passions were apt to override individual rights. Witness

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[69] THE FEDERALIST NO. 51 (James Madison).
[70] *See* W. Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.").
[71] McDonald v. City of Chicago, Ill., 561 U.S. 742, 920 (2010) ("Further, there is no popular consensus that the private self-defense right described in Heller [to keep and bear arms] is fundamental.") (Breyer, J. dissenting).
[72] *See* Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662 (2017).
[73] *See generally*, SANDY LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006).

for example, the gun ban at issue in *McDonald v. City of Chicago*.[74] Justice Breyer, in dissent, lamented that the gun ban struck down in the case was enacted after the community, in response to a shooting death in a courtroom, had gathered 6,000 signatures in support of the ban.[75] According to Justice Breyer, the people have spoken, the unmistakable text of the Second Amendment (as incorporated by the DPC against the states) be damned. Popular consensus determines what rights are fundamental.[76]

No branch was designed to be more insulated from majoritarian mobs than the judiciary. And yet, oddly enough, this insulation itself is often invoked as a reason why judges should defer to the democratic branches rather than checking them.[77] Insulation from the democratic process was designed to embolden the courts to strike down unconstitutional laws, not to instruct them to roll over.[78]

Of course, a proper understanding of separation of powers has an important place for judicial deference. Certain powers are enumerated for Congress and the states have broad police powers. But deference to the level of charades due process has no place in interpreting a provision meant to protect individual rights and check the power of states. Less so given that the Court is assigned the task of deciding cases and controversies arising under the Constitution,[79] a task that cannot be accomplished without saying what the law is,[80] and without declaring void those acts of

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[74] 561 U.S. 742 (2010).
[75] *Id*. at 928 (Breyer, J. dissenting).
[76] *Id*. at 920 ("Further, there is no popular consensus that the private self-defense right described in Heller [to keep and bear arms] is fundamental.") (Breyer, J. dissenting).
[77] *See, e.g.*, Adam Lamparello, *Taking the "Substance" Out of Substantive Due Process and Returning Lawmaking Power to the Federal and State Legislatures*, 63 S.C. L. REV. 285, 312 (2011) ("[I]t is the states' prerogative to determine the meaning and value of [rights], not nine unelected and unaccountable judges.").
[78] THE FEDERALIST NO. 78 (Alexander Hamilton) ("[Life tenure in the judiciary] in a republic . . . is a no less excellent barrier to the encroachments and oppressions of the representative body.").
[79] U.S. CONST. art. III, § 2, cl. 1.
[80] Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012) ("At least since Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803), we have recognized that when an Act of Congress is alleged to conflict with the Constitution, "[i]t is emphatically the province and duty of the judicial department to say what the law is.") (quoting Marbury v. Madison, 1 Cranch 137, 177 (1803)).

the legislature that are inconsistent with it. The Court, not the legislature or "the people," is to determine the meaning of liberty, property, and the process due for their protection.

Going back centuries, it has been a fundamental tenet of due process that "no man may be a judge in his own case." [81] Neither can the legislature be its own judge as to liberty, property or due process.[82] Thus, the Court itself violates due process (and the separation of powers) by giving extreme deference to the legislature to weigh constitutional rights.[83] Often when deciding due process cases, the Court says it is not supposed to be a super-legislature.[84] But the practical reality which this truism seeks to justify makes the *legislature* into a super-legislature, free from constitutional restraints and endowed with the judicial power to say what the law is. This is no separation of powers. It is an affront to it.

CONCLUSION

Much has been written and debated about due process. In my view, most of the literature looks past the simple deductions arising from the text; that due process must have reason and objectivity; that liberty and property are best defined by sic utere; that the word "law" in the DPC cannot logically mean any statute the legislature passes; and finally, that the separation of powers demands that judges, not legislatures, make and enforce these determinations. Even more simply, since the Court has never officially abandoned rational basis, it should stop using the phrase as a prop in a game of charades. If the Court continues to advertise the rational basis shell corporation, then it should once again start conducting business.

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[81] *See, e.g.*, Dr. Bonham's Case, 8 Coke's Rep. 226, 235 (1610) (quoted in John V. Orth, *Taking from A and Giving to b: Substantive Due Process and the Case of the Shifting Paradigm*, 14 Const. Comment. 337, 345 (1997)).

[82] Randy E. Barnett, *Why Popular Sovereignty Requires the Due Process of Law to Challenge "Irrational or Arbitrary" Statutes*, 14 GEO. J.L. & PUB. POL'Y 355, 363 (2016).

[83] For an example of this kind of deference see Justice Steven's dissent in *McDonald v. City of Chicago*. 561 U.S. 742, 880 (2010) ("If a particular liberty interest is already being given careful consideration in, and subjected to ongoing calibration by, the States, judicial enforcement may not be appropriate.") (Stevens, J. dissenting).

[84] Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.").