

THE PROBLEMS INHERENT IN THE COURT'S BROAD CONSTRUCTION OF THE 14TH AMENDMENT

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ABSTRACT: Since Duncan v. Louisiana in 1968, the courts have interpreted the text of the Fourteenth Amendment to assert a single form of due process that all lower courts and state courts must follow. Prior to that case, the amendment was interpreted to mean that states could determine the rights of their citizens as well as by what process those rights could be stripped. The federal government only had authority to intervene when a state violated its own due process procedures for one of their own citizens. This paper will examine how, when reinterpreting the amendment, the Supreme Court assumed the authority to not only prescribe a single form of due process to which all states must abide, but also to determine which rights must be protected by that form. Further, this paper will assert that such assumption of judicial power following the reinterpretation of the text grants the judicial branch more legislative abilities than originally intended by the founders.

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In 2015, the Supreme Court of the United States released its decision regarding *Obergefell v. Hodges*. The Court's examination of *Obergefell v. Hodges* prompted a re-evaluation of states' authority to restrict marriage, particularly between a man and a woman. The Court's decision held that the states lack any authority to define marriage as a legal arrangement which may only obtain between a man and a woman, and thus ruled that state bans on same-sex marriage were unconstitutional. The basis of this decision stemmed from the court's determination that marriage is a fundamental right of citizens of the United States.¹ However, some critics regard this basis as inadequate and, consequently, question many aspects of the *Obergefell* decision. How has our constitutional structure changed such that rights of citizens of the United States limit not only the federal government, but state governments as well? From where did the Court draw a right to marriage? What establishes a right as absolute?

In addressing these queries, the court refers to its interpretation of the Fourteenth Amendment to the United

1 *Obergefell v. Hodges*, 576 U. S. 14-556, (2015).

States Constitution. This amendment ensures that state action adheres to principles of due process and equal protection under the law.² At its inception, the amendment only authorized the federal government to ensure that each state both applied its laws and granted its privileges equally amongst citizens, as well as to ensure that states did not deprive a citizen of any state-given right without due process. The court recognized this interpretation of the text for over fifty years following the amendment's ratification. Over time, the court has broadened its reading of the text and conception of due process. Under its current construction of the Fourteenth Amendment, the federal government assumes authority to ensure that state laws do not infringe on selected federally-granted rights of citizens. This paper will argue that such an interpretation of the Fourteenth Amendment is improper. Support for this argument rests on two principal consequences that arise from the Court's application of a broad interpretation. The first consequence of such an interpretation is federal infringement on state power. The second consequence of this interpretation is its

2 U.S. CONST. amend. XIV, § 1.

justification of substantive due process, which establishes certain, arbitrarily determined rights as absolute. In order to prevent the judiciary from overstepping its role in the American constitutional system, the Court should narrow its construction of the Fourteenth Amendment

The Court applied a narrow construction of the Fourteenth Amendment in cases closely following the amendment's ratification. In order to understand this narrow construction, one must look to the historical context in which Congress adopted the amendment—one of two immediately following the Civil War. The conflict over the asserted rights of state governments to allow slavery resulted in precedent-setting legislative measures. The aftermath of the Civil War saw slavery abolished throughout the nation. Congress ensured such abolition through its ratification of the Thirteenth Amendment, which states that “neither slavery nor involuntary servitude...shall exist within the United States.”³ However, southern states quickly proved the Thirteenth Amendment inadequate to protect the emancipation of freedmen. Many southern states passed

3 U.S. CONST. amend. XIII, § 1.

“Black Codes”, which allowed state governments to convict black citizens of crime more easily than white citizens, and then enforce punishment that rendered these men dependent on white plantation owners—effectively reinstating them as slaves.⁴ Congress responded to this development by ratifying the Fourteenth Amendment, which prevents states from “depriv[ing] any person of life, liberty, or property, without due process of law.”⁵ This clause of the amendment protects freedmen from state attempts, such as through “Black Codes,” to deprive them of their freedom without following the due processes established for all other citizens of the state.⁶ Supreme Court Justices kept this historical context in mind when citizens later presented cases regarding the Fourteenth Amendment. Proper context allowed the court to construe the amendment narrowly and provided a standard the court could use to determine whether a state action had violated the due process clause.

Two early Supreme Court cases address the original

4 Eric Foner, *Freedom's Dream Deferred*, 50 AMERICAN HISTORY 41, 42-51 (2015).

5 U.S. CONST. amend. XIV, § 1, cl 3.

6 Eric Foner, *Freedom's Dream Deferred*, 50 AMERICAN HISTORY 41, 42-51 (2015).

intention of the Fourteenth Amendment. The first of these, the *Slaughter-House Cases*, occurred in 1873. In this case, butchers from Louisiana contended that an act of state legislation effectively deprives them of the right to exercise their trade, and thus violates the due process clause of the Fourteenth Amendment. The legislation consolidated all slaughter-house operations in New Orleans under a single corporation, forcing every other slaughterhouse in the city to close, and preventing butchers from establishing their own, new slaughterhouses. Justice Miller denies any intention of the amendment to broadly protect citizens of a state from the legislative powers of that state, concluding that the amendment only authorizes the federal government to ensure that, once a state establishes some principle as a right of its citizens, granted in its constitution, that state does not then deny that right to any particular citizen without following due process. Therefore, the court ruled that the state of Louisiana, by democratically passing a law regulating the slaughter of animals, did not violate the due process clause.⁷

In 1908, *Twining v. New Jersey* emerged as another

⁷ Association of New Orleans v. The Crescent City Live-Stock Landing and Slaughter-House Company, 83 U.S. 36 (1873).

notable case informing interpretations of the Fourteenth Amendment. In his decision, Justice Moody agrees that the Fourteenth Amendment protects citizens of a state from arbitrary government deprivation of state-given rights. In order to guarantee such protection, the amendment grants the federal government authority to ensure that states apply due process. Moody asserts that this power does not authorize the federal government to prescribe any particular form of due process. Instead, states retain the ability to determine what procedures they adopt, so long as those procedures apply equally to all citizens. Moody further states that the Fourteenth Amendment's grant of federal power does not authorize the federal government to determine what legal rights the state must assert. As long as rights are granted to all citizens equally, state governments retain the ability to determine the rights of their citizens through the democratic legislative process. In summary, Moody ruled that, under the due process clause, states may constitutionally enforce different procedures and grant different rights.⁸ Under this interpretation of the amendment, the federal government has

8 Twining v. New Jersey, 211 U.S. 78 (1908).

no jurisdiction to enforce any particular form of due process or set of rights in the states simply because it believes that form or right to be “of great value.”⁹ Should the elected legislative body of a state agree to a due process procedure or citizenship right, then that legislative body would adopt it into their own system.

However, the court did not long uphold the sovereign authority of states to determine their own due process procedures. In 1968, the court reinterpreted the Fourteenth Amendment, empowering the federal government to compel state recognition of particular citizenship rights. In his *Duncan v. Louisiana* opinion, Justice White argues that some rights are inherent to due process. Therefore, states must recognize these rights to carry out due process properly. Consequently, for a state to deny an inherent right would violate the Constitution. Justice White goes on to establish rights inherent to due process as those principles that “are fundamental to the American scheme of liberty, justice, and fairness.”¹⁰ Justice White’s interpretation of the Fourteenth

9 *Id.*

10 *Duncan v. Louisiana*, 391 U.S. 145 (1968).

Amendment, and its expansion of federal authority, proved influential in future cases.

The Court's application of this interpretation carries several implications regarding judicial review. This is because it implies that states must conform their laws to and treat their citizens in accordance with a national standard of fairness. The Court determines this national standard by its recognition of different rights as fundamental to justice. No explicit boundaries, however, determine which rights the Court recognizes. Under the standard of fundamentality, the Court can selectively incorporate rights listed in the Bill of Rights while refusing to incorporate others. The Court can also enforce rights that are not explicit in the Bill of Rights, so long as it connects that right to a fundamental principle. When conducting judicial review, the Court now has a larger platform from which it can strike down democratic state laws. The expanded jurisdiction implied by a broad constructing of the Fourteenth Amendment results in the two problematic consequences aforementioned: infringement on state power and the justification of substantive due process.

The first consequence of a broad

construction of the Fourteenth Amendment is the infringement on state power. In his 1833 *Barron v. Mayor and City Council of Baltimore* decision, Chief Justice Marshall explained the intended role of federal rights. According to Marshall, the Constitution grants rights to American citizens as a safeguard against the abuse of federal power. Responding to Anti-Federalist critiques, the founders established these rights as a way to limit the scope of federal authority. However, the founders did not intend for these rights to also limit state power. Marshall assert that

each state establishe[s] a constitution for itself, and in that constitution provide[s] such limitations and restrictions on the powers of its particular government as its judgement dictated.¹¹

According to Marshall, the founders intended that state legislatures would retain the power to determine the limitations on state power. Ideally, legislatures could decide these limitations democratically, in a manner based on local interests. As Justice Moody echoes in his *Twining v. New Jersey* decision, Marshall recognizes the state legislatures’

11 *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243 (1833).

authority to replicate certain federal rights within their own constitutions should they see the need.¹²

By forcing states to recognize particular rights, the court's construction of the Fourteenth Amendment inhibits the people's ability to restrict and empower their state governments according to local needs. In his *Duncan v. Louisiana* dissent, Justice Harlan notes that such selective incorporation of rights "radically redefines federalism" within our governmental system.¹³ The federalist structure of our government delegates certain enumerated powers to the federal government and distributes remaining powers to either the states or individuals citizens. Courts have consistently questioned or overridden state authority over police powers. Historically, federal courts would review state legislation and strike down laws that exceeded the state's police powers and interfered with federal interests, such as in the 1830 case *Craig v. Missouri*. In *Craig*, the United States Supreme Court declared a Missouri law unconstitutional due to its interference with the federal government's sovereignty

12 *Id.*

13 *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Harlan, J. M., dissenting).

over the emission of bills of credit, pursuant to Article I Section 10 clause 10 of the U.S. Constitution.¹⁴ Now that courts have incorporated particular rights to the states, the Court can also strike down laws that fall within state police powers so long as the Court can prove that the law violates an incorporated right. This incorporation allows the federal government to assert jurisdiction over issues previously reserved for the states.

The *Obergefell v. Hodges* decision illustrates the crippling effect that selective incorporation has on state power. As Justice Scalia notes in his dissent, the federal government had previously deferred marriage policies to the domain of state authority. On this basis, many states had democratically chosen to require that marriage consist only of a man and a woman. The people of these states had determined that empowering their governments with the authority to restrict marriage best protected their interests. On the other hand, a few states democratically chose to “expand the traditional definition of marriage.”¹⁵ The people

14 U.S. CONST. art. I, § 10, cl. 10.

15 *Obergefell v. Hodges*, 576 U. S. 14-556, (2015) (Scalia, A.G., dissenting).

of these states had determined that extending the right of marriage to same-sex couples best protected their interests.¹⁶ The *Obergefell* decision subverts the autonomy of states to determine policy based on local interest. In this way, the Court assumes the authority to reverse state action with regard to rights that the founders originally intended to leave to state discretion.

The second consequence of selective incorporation stems from the ambiguity of the Court's standard of fundamental fairness. Establishing fundamental fairness as a standard for incorporation empowers the Court to determine both the uniform rights that states must recognize and the uniform procedures that states must follow to legitimately deprive an individual of those rights. Both aspects of empowerment allow the Court to assert its own will, thus overstepping its original function in the American governmental system.

The first form of empowerment—the power to incorporate selective rights based on fundamental principles of justice—allows the Court to act as a policy-making body.

¹⁶ *Id.*

The ambiguity of the “fundamental principles of justice” standard does not restrict the Court to the incorporation of those rights that are granted within the Bill of Rights. Instead, the Court may grant a right of its own creation as long as the right in question is connected to a fundamental principle of justice. Justice Black, in his *Duncan v. Louisiana* concurrence, criticizes the ambiguity of the fundamental fairness standard, arguing that it allows the court to inflict individual justices’ political will on the people.¹⁷ Justice Holmes later agrees with Justice Black, stating in his *Lochner v. New York* dissent that the court uses the vague principle of fundamental fairness as an “opportunity to justify its own political ideologies.”¹⁸ Legal scholar Robert Bork agrees with this criticism and presents another problem with the court’s assertions. Bork writes, “When the judiciary creates new rights not found in the Constitution, it substitutes the courts’ own conception of morality for the moral judgements of society as embodied in laws enacted by the people’s elected representatives.”¹⁹ The Court deprives the people of

17 *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Black, H. L. concurring).

18 *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, O.W., dissenting).

19 ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (COLLIER MACMILLIAN eds. 1990).

the ability to debate, through their elected representatives, whether the government should recognize a principle as a right of the people.

In the case of *Obergefell*, the Court wills that the nation recognize the principle of marriage as a right of the people. In order to enforce such recognition, the Court connects the principle of marriage to fundamental principles of justice, thus rendering it incorporated under the current interpretation of the Fourteenth Amendment. Scalia notes in his *Obergefell* dissent that such incorporation represents “social transformation without representation,” as the Court made the decision to expand the definition of marriage without considering the will of the constituency.²⁰ Consequently, the Court overrides the ability of the legislature to debate the expansion of marriage as a faithful representation of the people’s interests. The Court’s usurpation of the elected legislative body’s authority leaves the construction of policy in the hands of the unrepresentative and unelected justices. Such usurpation of legislative power subverts the founders’ originally-intended role of the Court, which Alexander

20 *Obergefell v. Hodges*, 576 U. S. 14-556, (2015) (Scalia, A.G., dissenting).

Hamilton discussed in *Federalist Paper* #78. Hamilton writes in this essay that the court should exercise neither “force, nor will. Only judgement.”²¹ Thus, the Court’s assertion of authority to establish new rights defies its original role.

The second form of empowerment—the power to enforce uniform due process procedures—allows the Court to render absolute those rights that align with its current philosophical perspective. The determination of certain rights as absolute is called substantive due process.²² Once the Court declares a right absolute, neither the federal nor the state governments can deploy practical due process procedures to restrict that right. In justifying the implementation of substantive due process, the Court’s broad interpretation of the Fourteenth Amendment creates an expanded platform for bench legislation. The Court appropriates authority to determine which rights require the protection of substantive due process and strikes down any legislative attempt to limit those rights, even if Congress enacted the limitation by legitimate constitutional processes. This assumption of

21 THE FEDERALIST NO. 78 (Alexander Hamilton).

22 PETER STRAUSS, DUE PROCESS, LEGAL INFORMATION INSTITUTE.

judicial authority justifies further assertion of the Court's will and subjects the nation to arbitrary interference with legislation depending on the zeitgeist in the Court.

The substantive due process claims made by the Court during the *Lochner* era of federal jurisprudence highlight the arbitrariness of such claims. The 1905 case of *Lochner v. New York* regarded the indictment of a bakery owner that had violated a state law that limiting bakers' maximum weekly work hours. After the owner appealed to the Supreme Court, the Court ruled the New York law unconstitutional based on a claim of substantive due process. Justice Peckham wrote in his majority opinion that the case presents "a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract."²³ The Court examined this question and determined that the individual's freedom of contract contained a substantive element that placed it above the ordinary due process of state legislation. In his dissent, Justice Oliver Holmes accuses the majority of using the "guise of constitutional interpretation" to advance its

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

political agenda.²⁴ Robert Bork argues that the majority of the justices made their substantive due process claim on the basis of an ideological preference for *laissez-faire* economics, rather than any substantial aspect of the Constitution.²⁵ Over the following thirty years, the Court upheld *Lochner* and struck down numerous economic regulations. That is, the Court did so until the nation fell subject to the economic suffering of the Great Depression and the Court's political priorities changed. The 1937 case *West Coast Hotel Co. v. Parrish* provided the Court an opportunity to assert its new agenda. In the opinion of the Court, Justice Hughes revoked the substantive status of the right to contract.²⁶ From that point on, the Court assumed the rationality of the legislature in passing economic regulations, and seldom reversed any such regulation so long as the legislature enacted it through practical due process. The revocation of the substantive status of contract rights illustrates the Court's arbitrary promotion of political ideologies. Under a substantive due process

24 *Lochner v. New York*, 198 U.S. 45 (1905) (Holmes, O. W., dissenting).

25 ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (COLLIER MACMILLAN eds. 1990).

26 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

philosophy, the Court reserves the power to determine what rights deserve substantive due process.

The Court bases this determination not on any explicit interpretation of Constitutional text, but rather the needs associated with its own political agenda. As the political agenda of the Court changes, so does its evaluation of rights and substantive due process. Due to absence of a standard in such determinations, the people have to adapt their understandings of rights to the political agendas of the Court; they have been rendered incapable of predicting the Court's arbitrary assessments that some rights deserve greater protection than others. Ultimately, the broad interpretation of the Fourteenth Amendment's due process clause not only allows the Court to assert its will by creating rights to advance political ideologies: it also allows the court to further advance those ideologies by affording some rights greater protection than others. In the case of *Obergefell*, the Court advanced its political preference for social progress and life-style tolerance first by establishing marriage as a fundamental right and second by granting this right a substantive property that insulates it from democratic

legislative restrictions. This assumption of power by the Court opposes the founders' intended role of the judiciary as a mere body of judgement.

The decision in *Obergefell* illustrates the problems inherent in the Court's broad interpretation of the Fourteenth Amendment. Construing the amendment broadly, as the Court has done since its reinterpretation of the text in *Duncan v. Louisiana*, has allowed the Court to assert the existence of a singular, proper form of due process. The existence of proper due process requires not only state adherence to that form, but also state recognition of rights inherent in that form. Traditionally based on "fundamental principles of justice," the Court assumes authority to determine the structure of proper due process, as well as the rights inherent in this structure. This permits federal infringement on state authority; the state no longer retains power to determine which rights best protect the local interests of its people. Following its conception of fundamental principles of justice, the Court also assumes the authority to legislate. Therefore, the rights courts obligate states to protect depend not on the Constitution but on the political preferences of

individual justices. Due to the fickle nature of these political preferences, rights are legislated arbitrarily, rendering the people powerless to determine which rights they truly want and which rights they do not. The Court's assumption of such power both violates its intended role of legal review and usurps the legislative power of the elected Congress. Reverting to a more narrow interpretation of the Fourteenth Amendment would defer policy-making authority to the elected legislature, observe the sovereign autonomy of states in determining necessary procedure to protect local interests, and preserve the intended neutral nature of the Court.

