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Substantive Due Process

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Substantive Due Process

The Bill of Rights begins with the great words, “Congress shall make no law”. Americans feared that the national government would repeat the abuses experienced under the Crown. As early as Barron v. Baltimore 1833 John Marshal ruled that the Supreme Court had no jurisdiction under the Fifth Amendment’s just compensation clause against the city of Baltimore. Just compensation in the federal constitution could only be used against the federal government. To claim compensation against the city of Baltimore, Barron had file under Maryland’s constitution.

After the Thirteenth Amendment abolished slavery several southern States responded with discriminatory Black Codes to maintain white superiority. To rectify this, the Fourteenth Amendment was ratified. Congress was not specific, perhaps so it could be used in any case of racism without resort to legal technicalities. The Amendment used broad terms such as Privileges and Immunities, Due Process, and Equal Protection. Due process was long understood to mean that only through the normative legal procedure could someone be punished.

In Twitchell v. Pennsylvania 1869 Twitchell, a black man, hanged after claiming that Pennsylvania denied him fifth and sixth amendment rights by moving his trial to a distant area. The Court found that his trial was no different from the trial of any other accused in the State. The State did not specifically exclude black men from jury duty, even though no blacks served on the distant jury. The State did not have to conduct trial in the district of the crime or any of the other requirements that the Bill of Rights put on the federal government.

By contrast, in Strauder v. West Virginia 1880, the conviction of a black man was overturned because State law specifically excluded black men from jury duty. The Court held that the purpose of the Fourteenth Amendment was to exempt colored people from unfriendly legislation and discrimination implying inferiority in civil society. The cases were heard by justices who lived through the Civil War era and the passage of the Fourteenth Amendment.

In 1895, the “Laissez-faire” Court began denying blacks equal access as long as they had separate public facilities provided for them of equal quality (which rarely was factual). The Court began using the due process clause of the Fourteenth Amendment and of the Fifth Amendment to overturn a series of regulations under the doctrine that government cannot deny a business owner the right of property through legislation passed to restrict the usage of that property. In Lochner v. New York, a sixty-hour workweek law was overturned. State laws banning the firing of union workers, minimum wages, maximum hours, child labor were overturned. Finally in 1937 after overruling much of the federal New Deal legislation unconstitutional under the due process clauses of the Fifth Amendment and Fourteenth Amendments, the Court reversed itself seemingly to abandon the use of the Fifth and Fourteenth amendment to prevent the federal and State governments from regulating business.

Early in the twentieth century, the Supreme Court applied the restrictions of the First Amendment to the States through the Fourteenth amendment. As Justice Holmes wrote in one of his great dissents, that the Court has stretched the Fourteenth amendment too far in denying States the right to make laws as they see fit. He asked that the Court apply a new test on the constitutionality of State laws. If a right be fundamentally rooted in democracy then no State can deny that right. However, if any reasonable man can approve of the legislation or if any free county would pass the legislation, the Supreme Court could not rule it unconstitutional because they simply disagreed with the law.

In Pallo v Connecticut 1937 a defendant was sentence to death after the State appealed his life imprisonment sentence. He claimed a denial of the double-jeopardy clause of the Fifth Amendment. Justice Cardozo wrote that the protections of the Fifth Amendment are not directed towards the States. In Wolf v. Colorado 1949 Justice Frankfurter wrote the unlike the specific
requirements placed in the Bill of Rights on the federal government the Fourteenth Amendment did not subject the States to specific limitations.

However Justice Frankfurter did recognize a fundamental right against a State, such as the right that even a State cannot affirmatively authorize officers to barge into one’s home. He quoted Weeks v. United States 1914 where the Supreme Court created the exclusionary rule prohibiting evidence gathered by federal officers without a warrant. Such a rule cannot be put to the States because not only is the exclusionary rule not fundamental to democracy, but most of the English speaking word does not use it.

In Mapp v. Ohio, the Court reversed Frankfurter. It applied the exclusionary rule to the States. After all, the Court ruled, if the State cannot illegally come into your house, it certainly cannot use evidence so gathered. In Duncan v. Louisiana th1968 the Court ruled that Louisiana must modify its centuries old justice system to allow for jury trial as required by the Sixth Amendment.

In Powell v. Alabama 1932 the Court overturned the Scottsboro Boys conviction noting the gross injustice in that infamous case. The Court noted that its ruling was only due to the particulars of that case and that the appointment of counsel is not a fundamental right essential to a fair trial. The Court overturned that in Gideon v. Wainwright1963.

So the Supreme Court returned to substantive due process in the 1960’s. In Ferguson v Skrupa 1963 the Court said that the substantive due process of the Laissez-fair court has long been abandoned (sic). “We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pas laws.” However, just two years later, in Griswold v. Connecticut the court did the opposite. The Court cited the Third Amendments ban on quartering of troops and the Fourth Amendment security against search and seizure. The Court ruled that the specific guarantees in the Bill of Rights had “penumbras formed by emanation from those guarantees that help give them life and substance. Various guarantees create zones of privacy.” The court 1) created the right of privacy and 2) forced it upon the States. Out of that right of privacy the Court overturned a Texas law banning abortion in Roe v. Wade 1973.

What has happened to American federalism? The Fourteenth amendment was to force the States to treat all its citizens equal, but has ultimately taken away their sovereignty. Can the Supreme Court create new rights? If so, why is there an amendment process? What if people of one State have a different understanding of rights as people of another State? In the words of Holmes in his great dissents, “the sky is the limit.”