

# SUBSTANTIVE DUE PROCESS

*Erwin Chemerinsky\**

*Honorable George C. Pratt:*

Professor Erwin Chemerinsky is one of the leading scholars on constitutional law. We are delighted to have you here. Erwin, you have the floor.

*Professor Erwin Chemerinsky:*

There is no concept in American law that is more elusive or more controversial than substantive due process. Substantive due process has been used in this century to protect some of our most precious liberties. Still, there are now and have always been Justices of the Supreme Court who believe there is no such thing as substantive due process.

During my time this morning, I would like to address four questions. First, what is substantive due process? Second, what is the history of substantive due process? Third, when does substantive due process apply and fourth, what are the elements of a substantive due process claim?

I start briefly with the first question, what is substantive due process, because, strangely enough, if you look through Supreme Court opinions you will never find a definition. Substantive due process asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose. Procedural due process, by contrast, asks whether the government has followed the proper procedures when it takes away life, liberty or property. Substantive due process looks to whether there is a sufficient substantive justification, a good enough reason for such a deprivation.

Consider this simple illustration. The Supreme Court has said that under the word liberty in the due process clause, parents have a fundamental right to the custody of their children.<sup>1</sup>

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Procedural due process means that the government must give notice and a hearing before it can permanently terminate custody.<sup>2</sup> Substantive means the government must show a compelling reason that would demonstrate an adequate justification for terminating custody.<sup>3</sup>

With this definition in mind, I want to address, briefly, the second question – what is the history of substantive due process? The reality is if you are a plaintiff in court and you are asserting a substantive due process claim, you have an uphill battle. Why? The answer is historical.

Substantive due process was used, as you know, in the first third of this century to aggressively protect economic liberties from government interference. *Lochner v. New York*<sup>4</sup> is the quintessential case from that era. In *Lochner*, the Supreme Court

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remarks given at the Practicing Law Institute program on the Supreme Court, November, 1998. I am grateful to Patricia Rooney for all her hard work in preparing this article for publication.

<sup>1</sup> *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). In *Santosky*, the Supreme Court explained that a parent's "fundamental liberty interest" with regard to the "care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Id.* The Court stated:

Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

*Id.* at 753-54.

<sup>2</sup> *Id.* at 758-59 (quoting *Lassiter v. Department of Soc. Svcs.*, 452 U.S. 18, 27 (1981) (stating that a "parent's 'desire for and right to the companionship, care, custody, and management of his or her children' is an interest far more precious than any property right.") (internal quotation citation omitted).

<sup>3</sup> *Id.* at 762 (noting "[p]ermanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge.").

<sup>4</sup> 198 U.S. 45 (1905), *overruled in part*, *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

struck down a New York law that limited the maximum number of hours that bakers could work.<sup>5</sup> The Supreme Court held, to use modern language, that freedom of contract was a fundamental right under the liberty of the due process clause<sup>6</sup> and used strict scrutiny to evaluate this law.<sup>7</sup>

In the first third of this century, until 1937, over two hundred laws were struck down for economic regulations.<sup>8</sup> Since 1937, the Court has repudiated economic substantive due process.<sup>9</sup> In

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<sup>5</sup> *Id.* at 58 (holding that “the limit of the police power has been reached and passed in this case,” as there is “no reasonable foundation for holding this [law] to be necessary . . . to safeguard the public health, or the health of the individuals who are following the trade of a baker.”). The New York statute in *Lochner* prevented an employee from “work[ing] in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day.” *Id.* at 45 n.1. The purported purpose of this law was to protect the health of the bakers. *Id.* at 59. The Court made note of the fact that the “trade of a baker,” has never been “regarded as an unhealthy [trade],” certainly not “unhealthy” enough to allow “the legislature to supervise and control the hours” the bakers worked. *Id.*

<sup>6</sup> *Id.* at 53 (citing *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (noting that “[t]he general right to make a contract . . . is part of the liberty of the individual protected by the [Fourteenth] Amendment”)).

<sup>7</sup> *Id.* (noting that such regulation would be permissible only if it “relate[d] to the safety, health, morals, and general welfare of the public.”).

<sup>8</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES & POLICIES* 482 (1997) (citing BENJAMIN WRIGHT, *THE GROWTH OF AMERICAN CONSTITUTIONAL LAW* 154 (1942) (further citations omitted) (noting that from 1905-1937 “almost 200 state laws were declared unconstitutional [in violation of] the due process clause of the Fourteenth Amendment.”)).

<sup>9</sup> *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). In *Parrish*, the Supreme Court emphatically rejected *Lochner’s* principles. *Id.* at 391. Chief Justice Hughes, writing for the Court, explained that:

The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due

fact, since 1937, not one federal, state, or local economic regulation has been invalidated on substantive due process grounds. This is important to keep in mind for a case that we just spoke of a few minutes ago, *Gabbert v. Conn.*<sup>10</sup> where the Ninth Circuit found a substantive due process right for lawyers to practice their profession.<sup>11</sup> *Gabbert* is inconsistent with all of the

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process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

*Id.* at 391; *see also* *United States v. Caroline Prods. Co.*, 304 U.S. 144 (1938). In *Caroline*, the Court articulated its newfound policy of judicial deference to economic regulations stating:

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory regulations 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 within the knowledge and experience of the legislators.

*Id.* at 152. In footnote four, the Court made certain to note that the rational basis review would not be the test for all laws stating:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. (citations omitted). It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . . Nor need we inquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operations of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* at 152-53 n.4.

<sup>10</sup> 131 F.3d 793 (9th Cir. 1997), *cert. granted in part*, 119 S. Ct. 39 (U.S. Oct. 5, 1998) (No. 97-1802).

<sup>11</sup> *Id.* at 800 (finding the Fourteenth Amendment "protects an individual's right to practice a profession"). The Ninth Circuit specifically found that

Supreme Court's economic due process cases from 1937 on. In the first third of the century, the Court did not use substantive due process only in the economic area, it also used it to protect civil liberties<sup>12</sup> and these cases continue to this day.

In *Meyer v. Nebraska*,<sup>13</sup> the Plaintiff claimed that, under the liberty of the due process clause, parents have a fundamental right to control the upbringing of their children.<sup>14</sup> In *Meyer*, the Supreme Court declared a Nebraska law that prohibited the teaching of the German language unconstitutional.<sup>15</sup> The Court did not attack the law on First Amendment grounds, because the First Amendment had yet to be incorporated by the Fourteenth

Gabbert was entitled to practice his profession "in privacy," free "from unreasonable intrusion" by the government. *Id.* at 802.

<sup>12</sup> See *Gitlow v. New York*, 268 U.S. 652, 630 (1925) (stating "freedom of speech and of the press – which are protected by the First Amendment from abridgement by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment").

<sup>13</sup> 262 U.S. 390 (1923).

<sup>14</sup> *Id.* at 399. The *Meyer* Court noted that liberty:

[D]enotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

*Id.* at 398 (citing *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62 (1872)).

<sup>15</sup> *Id.* at 403 (holding "the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.").

Justice Reynolds, writing for the Court, explained:

[T]he state may do much . . . in order to improve the quality of its citizens, physically, mentally and morally . . . but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution – a desirable and [sic] cannot be promoted by prohibited means.

*Id.* at 401.

Amendment and thus was not yet applied to the states.<sup>16</sup> The court did so expressly on substantive due process grounds.<sup>17</sup>

In *Pierce v. Society of Sisters*,<sup>18</sup> the Supreme Court declared unconstitutional an Oregon law that prohibited parochial school education.<sup>19</sup> Once again, the Court did not do so on First Amendment grounds since the Free Exercise Clause had not yet been applied to the states. The Court did so on substantive due process grounds,<sup>20</sup> and yet, after 1937, the Court backed away from substantive due process in all of its forms, economic and otherwise.

The best illustration of the avoidance of substantive due process is Justice Douglas's majority opinion in *Griswold v. Connecticut*.<sup>21</sup> *Griswold* declared unconstitutional a Connecticut law that prohibited the sale, distribution, and use of contraceptives.<sup>22</sup> Justice Douglas, at the beginning of the majority opinion stated:

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<sup>16</sup> See *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968) (holding the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States).

<sup>17</sup> *Meyer*, 262 U.S. 390, 399 (1923).

<sup>18</sup> 268 U.S. 510 (1925).

<sup>19</sup> *Id.* at 535. The Court noted that:

The fundamental theory of liberty upon which all governments in this union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for his additional obligations.

*Id.*

<sup>20</sup> *Pierce*, 258 U.S. at 535 (explaining "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.").

<sup>21</sup> 381 U.S. 479 (1965).

<sup>22</sup> *Id.* at 485. The statute stated in pertinent part that "[a]ny person who uses any drug, medicinal article, or instrument for the purpose of preventing contraception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Id.* at 480 (further citation quotation omitted). The Court held that this "law [could] not stand" since a "governmental purpose to control or prevent activities constitutionally subject to regulation may not be achieved by means

Overtones of some arguments suggest that *Lochner v. State of New York* . . . should be our guide. But we decline that invitation as we did in [other cases] . . . . 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. This law however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.<sup>23</sup>

Douglas then proceeded to find privacy in the "penumbras" of the Bill of Rights.<sup>24</sup>

One commentator<sup>25</sup> said Douglas was like a cheerleader skipping through the Bill of Rights saying -- give me a "P," give me an "R," give me an "I," ultimately all the way to "privacy"

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which swing unnecessarily broadly and thereby invade the area of protected freedoms." *Id.* (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)). Justice Douglas stated that the idea of allowing "the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives . . . is repulsive to the notions of privacy surrounding the marriage relationship." *Id.* at 485-86.

<sup>23</sup> *Id.* at 481-82. Justice Douglas noted that the Court was faced with "a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment" since certain arguments before the Court suggest the application of *Lochner v. State of New York*. *Id.* See also *Lincoln Fed. Labor Union v. Northwest Iron & Metal Co.*, 335 U.S. 525, 536-37 (1949) (explaining the "due process clause is no longer to be so broadly construed that the Congress and state legislators are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as injurious to the public welfare."); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (noting "[t]he day is gone when this Court uses the Due Process Clause . . . to strike down . . . laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought"); *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (stating we abandon "the use of the vague contours of the Due Process Clause to nullify laws which a majority of the Court believe[ ] to be economically unwise.").

<sup>24</sup> *Id.* at 484. Justice Douglas most eloquently stated that "specific guarantees in the Bill of Rights have penumbras, formed by the emanations from those guarantees that help give them life and substance. (internal citation omitted). Various guarantees create zones of privacy." *Id.*

<sup>25</sup> See Robert G. Dixon, *The New Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 84.

under the Bill of Rights.<sup>26</sup> I think some of the questionable foundation concerning the protection of privacy stems from the way in which Douglas found privacy to protect privacy.

How, was the Bill of Rights applied to state and local governments? Through the due process clause of the Fourteenth Amendment. Justice Douglas used substantive due process even though at the time he denied that was what he was doing.<sup>27</sup>

Eight years later in *Roe v. Wade*,<sup>28</sup> the Supreme Court expressly declared that the right to privacy is safeguarded through the due process clause of the Fourteenth and Ninth Amendments.<sup>29</sup> *Roe* was unquestionably a substantive due process case.<sup>30</sup> The controversy surrounding *Roe* really illustrates just how controversial substantive due process is as a concept.

With this history in mind, I will spend most of my time on the third question --when is substantive due process used? When is it available to you as lawyers? The reality is that substantive due process can be used any time the government takes away life, liberty or property.

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<sup>26</sup> *Id.*

<sup>27</sup> *Griswold*, 381 U.S. at 481-82. Justice Douglas stated:

Coming to the merits [of the issue in *Griswold*], we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. State of New York*, (citation omitted), should be our guide. But we decline that invitation as we did in [other cases].

*Id.*

<sup>28</sup> 410 U.S. 113 (1973), *reh'g denied*, 410 U.S. 959 (1973).

<sup>29</sup> *Id.* at 153. Justice Blackmun explained that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.*

<sup>30</sup> *Id.* at 164 (holding a statute "that excepts from criminality only a life-saving procedure on behalf of the mother without regard to her pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment").



Any time the government deprives a person of life, liberty or property, the government must provide a sufficient justification.<sup>31</sup> So, for example, a couple of years ago, in a case called *BMW of North America, Inc. v. Gore*,<sup>32</sup> the United States Supreme Court said that excessive punitive damages violate the due process clause.<sup>33</sup> It was very much a substantive due process decision, for the Court was saying that the government was taking away property without an excuse and for that they had to have sufficient justification.<sup>34</sup>

There are two main areas where courts use substantive due process. The first is in the protection of unenumerated constitutional rights. The origin of this is the *Lochner*<sup>35</sup> era substantive due process decisions. *Lochner* proclaimed freedom of contract to be a fundamental right under the due process clause.<sup>36</sup> *Meyer*<sup>37</sup> and *Pierce*<sup>38</sup> proclaimed the right to control the upbringing of children to be a fundamental right.<sup>39</sup>

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<sup>31</sup> See, e.g., *Davidson v. Cannon*, 474 U.S. 344, 353 (1986); *Sacramento v. Lewis*, 118 S. Ct. 1708, 1716 (1996) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (noting “[t]he touchstone of due process is protection of the individual against the arbitrary action of government.”); see also *Fockaert v. Humboldt*, No. C-98-2662, 1999 WL 30537, at \*3 (N.D. Cal. Jan. 15, 1999).

<sup>32</sup> 517 U.S. 559 (1996). In *BMW*, the Court explained that “[o]nly when an award can fairly be categorized as ‘grossly excessive’ in relation to” the “[State’s] legitimate interests in punishing [the Defendant] and deterring it from future misconduct,” does the award “enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.” *Id.* at 568.

<sup>33</sup> *Id.* at 562 (quoting *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) (further citation omitted) (explaining the “Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a grossly excessive punishment on a tortfeasor.”).

<sup>34</sup> *Id.* at 588 (explaining the Alabama statute imposing punitive damages defined the offending conduct in rather broad terms, thus making far more actions subject to its prohibitions than otherwise might first be expected).

<sup>35</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>36</sup> *Id.* at 53 (citing *Allgeyer v. Louisiana*, 165 U.S. 578, 579 (1897)). See also *supra* notes 4-7 and accompanying text.

<sup>37</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>38</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>39</sup> *Meyer*, 262 U.S. at 399; *Pierce*, 268 U.S. at 535. The *Pierce* Court noted :

So courts have continued throughout the century, even with substantive due process being discredited, to use substantive due process to safeguard rights that are not otherwise enumerated in the constitution.<sup>40</sup> *Gabbert v. Conn.*,<sup>41</sup> a case now pending before the Supreme Court, is a Ninth Circuit decision saying lawyers have a right to practice their profession even though that right is nowhere mentioned in the Constitution.<sup>42</sup>

It is important to take a moment to look at those areas where the Court has found rights under substantive due process and also to look at the more recent cases that reject such protection. For example, the Supreme Court has expressly said that the right to marry is a fundamental right protected under the liberty of the due process clause<sup>43</sup> and that in order to show a substantive justification that is adequate, the government must meet strict scrutiny.<sup>44</sup> *Zablocki v. Redhail*<sup>45</sup> is illustrative.

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The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

*Id.*

<sup>40</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also *supra* notes 21-27 and accompanying text.

<sup>41</sup> 131 F.3d 793 (9th Cir. 1997).

<sup>42</sup> *Id.* at 801-02 (citing *Newell v. Sauser*, 79 F.3d 115, 117 (9th Cir. 1996) (explaining that the "Fourteenth Amendment protects an individual's right to practice a profession," and this "constitutional right may be clearly established both by common law and by precedent.")).

<sup>43</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down a Virginia statute prohibiting persons of the white race from intermarrying noting "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the ordinary pursuit of happiness by free men.").

<sup>44</sup> *Id.* at 11. Chief Justice Warren noted that racial classifications:

[M]ust be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate. Indeed, two members of this Court have already stated that they 'cannot conceive of a valid

Wisconsin had a law that said before a parent with minor children not in their custody could get a marriage license, the parent had to prove that all support payments were up to date.<sup>45</sup> The Court relied on substantive due process since the right to marry is a fundamental right under the liberty of the due process clause.<sup>47</sup> The Court said to show an adequate justification, the government must meet strict scrutiny and that it had failed to do so.<sup>48</sup>

Another example is the right to custody of one's children. The Supreme Court has, in many cases, proclaimed the importance of the right to custody. In 1973, in *Stanley v. Illinois*,<sup>49</sup> the Supreme Court said that unmarried fathers have a right to custody of their children.<sup>50</sup>

*Stanley v. Illinois* involved an Illinois law that said that if an unmarried mother was no longer able to have custody, if, for example, she put the children up for adoption or she died, then the children automatically would be put up for adoption.<sup>51</sup> In

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legislative purpose . . . which makes the color of a person's skin the test of whether his conduct is a criminal offense.'

*Id.* (citing *McLaughlin v. Florida*, 379 U.S. 184, 198 (1964) (Stewart, J., concurring)).

<sup>45</sup> 434 U.S. 374 (1978).

<sup>46</sup> *Id.* at 375 (further citation omitted) (stating the marriage applicant also had to "demonstrate that the children covered by the support order" were not now, or "likely thereafter to become public charges").

<sup>47</sup> *Id.* at 384 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (noting that "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause").

<sup>48</sup> *Id.* at 386 (noting that although not every statute "which relates in any way to the incidents or prerequisites for marriage must be subject to rigorous scrutiny," this statute "clearly does interfere directly and substantially with the right to marry").

<sup>49</sup> 405 U.S. 645 (1972).

<sup>50</sup> *Id.* at 646-47 (citing *In re Stanley*, 256 N.E.2d 814, 815-16 (Ill. 1970)).

<sup>51</sup> *Id.* at 646 (noting that the Illinois statute in issue provided that "children of unwed fathers [would] become wards of the State upon the death of [their] mother.").

*Stanley*, the Illinois Supreme Court said that the unmarried father had no rights at all.<sup>52</sup>

The United States Supreme Court declared this unconstitutional.<sup>53</sup> They said that unmarried fathers, like mothers, have a fundamental right to custody of their children and the government is going to be able to terminate that only by meeting the heightened proof of requirement.<sup>54</sup>

With regard to substantive due process, and specifically with the right to custody, *Michael H. v. Gerald D.*<sup>55</sup> was an extremely important decision. *Michael H.* had facts that a made for TV movie could be made from.

A married woman had a child resulting from an affair.<sup>56</sup> Biological evidence showed that the father was not her husband, but the man she had the affair with.<sup>57</sup> She did not divorce her husband, but moved in with the biological father and they lived together for almost eighteen months.<sup>58</sup> She then rejoined her husband Gerald,<sup>59</sup> and Michael, the biological father sued for visitation rights.<sup>60</sup> California law, however, provided that if a

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<sup>52</sup> *Id.* at 646-47 (noting the highest court in Illinois has rejected the claim that the unmarried father "could properly be separated from his children" simply because he had not been married to their now deceased mother).

<sup>53</sup> *Id.* at 657-58 (explaining that the Due Process Clause mandates that the States interest here is "not sufficient to justify refusing a father a hearing when the issue at stake is the dismemberment of his family.").

<sup>54</sup> *Id.* at 656-57. The Court explained that it would always be cheaper and easier to make parental fitness determinations by "presumptions" as opposed to "individualized determination." *Id.* The Court held that when "procedure forecloses the determinative issues of competence and care . . . it needlessly risks running roughshod over the important interests of both parent and child" and as such, it "cannot stand." *Id.* at 657.

<sup>55</sup> 491 U.S. 110 (1989), *reh'g denied*, 492 U.S. 937 (Aug. 30, 1989).

<sup>56</sup> *Id.* at 113-14.

<sup>57</sup> *Id.* at 114.

<sup>58</sup> *Id.* at 114-15.

<sup>59</sup> *Id.* at 115.

<sup>60</sup> *Id.*

married woman had a child, there was an irrebuttable presumption that the husband was the father of the child.<sup>61</sup>

The California court used this law to deny the biological father all visitation rights, all parental rights.<sup>62</sup> The United States Supreme Court in a 5 to 4 decision upheld the California law in its application and ruled against the biological father.<sup>63</sup> Justice Scalia wrote the opinion that was in part for the majority and in part for the plurality. The majority opinion said there is no tradition of protecting a biological father's rights when the mother is married to someone else.<sup>64</sup>

Justice Scalia noted that all of the cases about an unmarried father's rights never dealt with children resulting from an affair.<sup>65</sup> Then, in a part of the opinion that was only for the plurality, Justice Scalia stated that when the Court considers whether to create rights under substantive due process, such rights should be established only if there is a tradition of protecting them, with the tradition stated at the most specific level of abstraction.<sup>66</sup> In other words, it is not enough to show a tradition protecting a father's, even underrated father's, rights.

Justice Scalia said that in order to protect a right under substantive due process, that right has to be traditionally protected when stated at the most specific level of abstraction.<sup>67</sup> It has to be a tradition of protecting the unmarried father's rights

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<sup>61</sup> *Id.* (further citation omitted) (stating "the issue of a wife cohabiting with her husband, who is neither impotent or sterile, is conclusively presumed to be a child of the marriage.").

<sup>62</sup> *Id.* at 116 (citing 191 Cal. App. 3d 995, 1013 (Cal. Ct. App. 1987)). The California Court explained that "court-ordered visitation would be detrimental to the best interests of the child." 119 Cal. App. 3d at 1013.

<sup>63</sup> 491 U.S. at 130.

<sup>64</sup> *Id.* at 124 (further citation omitted) (noting "[t]he presumption of legitimacy was a fundamental principle of the common law.").

<sup>65</sup> *Id.* at 125 (stating "[w]e have found nothing in the older sources nor in the older cases, addressing . . . the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man.").

<sup>66</sup> *Id.* at 127 n.6.

<sup>67</sup> *Id.*

when the mother is married to someone else.<sup>68</sup> This way of defining liberty interests shows that virtually no rights were protected under substantive due process, because if a right was already protected, there would be no reason to have the Court do it. The fact the right is not protected shows there is no tradition of protecting the right stated at the most specific level of abstraction. The plurality opinion in *Michael H. v. Gerald D.* shows there are several Justices on the Court who are likely to reject any substantive due process claim.

A third example, in another particularly important case with regard to substantive due process, is *Moore v. City of East Cleveland*.<sup>69</sup> In *Moore*, there was an East Cleveland zoning ordinance that limited the number of unrelated individuals who could share a home.<sup>70</sup> A grandmother and her two grandchildren, who happened to be first cousins, were prevented from living together because of the way “unrelated” was defined by the ordinance.<sup>71</sup>

The United States Supreme Court declared the ordinance unconstitutional.<sup>72</sup> Justice Powell, writing for the majority, expressly relied on substantive due process.<sup>73</sup> He especially

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<sup>68</sup> *Id.*

<sup>69</sup> 431 U.S. 494 (1977).

<sup>70</sup> *Id.* at 496. The definitional section of the zoning ordinance in *Moore* provided that a family could not include “more than one dependent married or unmarried child of the nominal head of the household or the spouse of the nominal head of the household and the spouse and dependent children of such dependent child.” *Id.* n.2 (further citation omitted).

<sup>71</sup> *Id.* (further citation omitted) (stating that “family means a number of individuals related to the nominal head of the household or to the spouse of the nominal head of the household living as a single housekeeping unit in a single dwelling unit.”); see also *supra* note 76.

<sup>72</sup> *Id.* at 506 (holding the “Constitution prevents East Cleveland from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns.”).

<sup>73</sup> *Id.* at 499-501. Justice Powell explained that unless the Court “close[s] [its] eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment’s Due Process Clause, [the Court] cannot avoid applying the force and rationale of these precedents to the family choice involved in this case.” *Id.* at 501. Justice Powell continued, stating that “[s]ubstantive due process has at times been a

depended on an earlier opinion by Justice Harlan written as a dissent in *Poe v. Ullman*.<sup>74</sup>

In *Poe*, Harlan said that although substantive due process has been discredited, it still remains and courts can protect under such rights so long as there is a tradition of such protection.<sup>75</sup> Justice Powell used that reasoning in *Moore* to find the right to keep the family together.<sup>76</sup> If you are a plaintiff's lawyer, you want to rely on *Moore* if you are trying to use substantive due process to create a new unenumerated right.

A fourth example where the courts used substantive due process is the right to abortion. *Roe v. Wade*<sup>77</sup> was unequivocally

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treacherous field for this Court. *Id.* at 502. He explained that “[t]here are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights.” *Id.* He noted that although “history counsels caution and restraint, . . . it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary – the boundary of the nuclear family.” *Id.*

<sup>74</sup> 367 U.S. 497 (1961).

<sup>75</sup> *Id.* at 542 (Harlan, J. dissenting). Justice Harlan most eloquently stated:

Due process has not been reduced to any formula . . . .  
[T]hrough the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area for judgment and restraint.

*Id.* (Harlan, J., dissenting).

<sup>76</sup> *Moore*, 431 U.S. at 501-503 (citing *Poe v. Ullman*, 367 U.S. at 542 (Harlan, J. dissenting)).

<sup>77</sup> 410 U.S. 113 (1973).

a substantive due process decision.<sup>78</sup> The most recent case, *Planned Parenthood v. Casey*,<sup>79</sup> decided in 1992, reaffirms *Roe v. Wade*.<sup>80</sup> Although the Court, for the first time, found abortion rights under equal protection,<sup>81</sup> *Casey* is still very much substantive due process.<sup>82</sup> All of those examples involve rights safeguarded under substantive due process.

In contrast, consider two other examples that point in the opposite direction. One of course is *Bowers v. Hardwick*,<sup>83</sup> a 1986 decision. *Bowers* was a challenge to a Georgia law that prohibited oral-genital or anal-genital contact.<sup>84</sup> It was brought by

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<sup>78</sup> *Id.* at 167 (Stewart, J., concurring). Justice Stewart noted, in his concurrence, that although *Ferguson v. Skrupa*, 372 U.S. 726 (1963) “purport[s] to sound the death knell for the doctrine of substantive due process,” it is clear that the decision in *Griswold* “can be rationally understood only as a holding that the . . . statute substantively invaded the ‘liberty’ that is protected by the Due Process Clause of the Fourteenth Amendment.” *Id.* at 167-68 (internal quotation omitted).

<sup>79</sup> 505 U.S. 833 (1992).

<sup>80</sup> *Id.* at 846 (stating “the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.”).

<sup>81</sup> *Id.* at 849-52. In *Casey*, the Court explained:

Men and women of good conscience can disagree, and we suppose some shall always disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own health, or is the result of rape or incest.

*Id.* at 850-51.

<sup>82</sup> *Id.* at 849-51 (explaining that the “boundaries” of substantive due process “are not susceptible of expression as a simple rule,” since the Constitution recognizes such choices as deciding “whether to bear or beget a child” as a liberty interest protected by the Fourteenth Amendment.).

<sup>83</sup> 478 U.S. 186 (1986).

<sup>84</sup> *Id.* at 188 n.1 (further citation omitted) (stating that sodomy is committed when a person “performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another”).



a gay man who argued the state did not have the ability or authority to regulate the behavior of consenting adults in the privacy of their own bedrooms.<sup>85</sup> I would certainly think if the right to privacy means anything, it applies to the behavior of consenting adults in their own bedrooms, but the Supreme Court, in a 5 to 4 decision, upheld the application of the Georgia law to private consensual homosexual activities.<sup>86</sup>

Justice White's majority opinion is important in substantive due process litigation. Justice White states rights should be protected under substantive due process only if they are enumerated in the text, clearly intended by the framers, or there is a tradition of protecting such rights.<sup>87</sup>

Justice White then surveyed the history of our country and noted that, throughout much of American history, there have been laws that prohibit private consensual homosexuality.<sup>88</sup> For example, up until 1961, all fifty states outlawed private homosexual activity,<sup>89</sup> Justice White concluded that the Court should be reluctant to recognize unenumerated substantive due process, recognizing such rights only if there is an unequivocal

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<sup>85</sup> *Id.* at 195. The plaintiff, in *Bowers*, relied on *Stanley v. Georgia*, 394 U.S. 557 (1969), to assert the claim that homosexual conduct should be protected when it occurs "in the privacy of the home." *Id.* (citing *Stanley*, 394 U.S. at 565). The Court, in *Stanley*, an obscenity case, held that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch." *Stanley*, 394 U.S. at 565.

<sup>86</sup> *Id.* at 196. The Court noted that the Georgia law was "based on notions of morality," and explained that "if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts [would] be very busy indeed." *Id.* The Court stated that, although the respondent "insists that majority sentiments about the morality of homosexuality should be declared inadequate," the Court was not persuaded "that the sodomy laws of some 25 States should be invalidated" for this reason. *Id.*

<sup>87</sup> *Id.* at 194 (noting "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.>").

<sup>88</sup> *Id.* at 192 (explaining "[p]roscriptions against [homosexual] conduct have ancient roots.>").

<sup>89</sup> *Id.* at 193 n.7.

tradition for their protection.<sup>90</sup> Since there is not such a right in *Bowers*, it is very difficult to persuade the Court that other such rights should exist and this idea has been affirmed in recent Supreme Court cases.<sup>91</sup>

The sixth example I want to talk about is the right to refuse medical care and the right to physician assisted suicide. In 1990, in *Cruzan v. Director Missouri Department of Health*,<sup>92</sup> the Supreme Court held that competent adults have the right to refuse even lifesaving medical care.<sup>93</sup> Of eight of the nine Justices then sitting on the Court,<sup>94</sup> all but Justice Scalia recognized that competent adults have the right, under the word "liberty" of the due process clause, to terminate food, water, or other medical care.<sup>95</sup>

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<sup>90</sup> *Id.* at 194 (explaining that "[a]gainst this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.>").

<sup>91</sup> *See, e.g.,* *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992) (holding "the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimal levels of safety and security in the workplace"); *see also* *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225-26 (1985). In *Ewing*, Justice Stevens explained:

'[A]lthough the Court regularly proceeds on the assumption that the Due Process Clause has more than a procedural dimension, we must always bear in mind that the substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments. [T]he Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable.'

*Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 543-44 (1977) (White, J., dissenting)).

<sup>92</sup> 497 U.S. 261 (1990).

<sup>93</sup> *Id.* at 279 (noting "for purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.").

<sup>94</sup> The eight Justices referred to by the author are Justices Rehnquist, White, O'Connor, Kennedy, Brennan, Marshall, Blackmun and Stevens. *Cruzan*, 497 U.S. at 263-64.

<sup>95</sup> *Id.* at 293 (Scalia, J., concurring) (explaining "I would have preferred that we announce, clearly and promptly, that the federal courts have no

The majority opinion of Chief Justice Rehnquist is particularly striking for it did not adopt or articulate a level of scrutiny. The Court stated that there was a liberty interest in refusing medical care,<sup>96</sup> but never said that such an interest would trigger strict scrutiny or, for that matter, any form of heightened scrutiny.

The Supreme Court turned to related questions just a year ago when it resolved the issue of whether there is a constitutional right to physician-assisted suicide. In that term, the Court had two cases before it concerning this issue, *Washington v. Glucksberg*<sup>97</sup> and *Vacco v. Quill*.<sup>98</sup>

*Washington v. Glucksberg* was a substantive due process case. *Glucksberg* was a challenge by terminally ill patients to a Washington law that prohibited aiding or abetting suicide.<sup>99</sup> The United States Court of Appeals for the Ninth Circuit held that just as individuals have a right to abortion and to terminate medical care, so do they have a liberty interest in physician-assisted suicide.<sup>100</sup> Justice Reinhardt, writing for the Ninth Circuit, said that strict scrutiny was to be applied and that the Washington law prohibiting physician-assisted suicide failed strict scrutiny.<sup>101</sup>

*Vacco v. Quill*<sup>102</sup> was a Second Circuit case that was an equal protection challenge to a New York law prohibiting physician-assisted suicide. The United States Court of Appeals for the

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business in this field; that American law has always accorded the State the power to prevent, by force if necessary, suicide – including suicide by refusing to take appropriate measures necessary to preserve one’s life.”).

<sup>96</sup> *Id.* at 278 (stating “[t]he principal that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.”).

<sup>97</sup> 521 U.S. 702, 117 S. Ct. 2258 (1997).

<sup>98</sup> 521 U.S. 702, 117 S. Ct. 2293 (1997).

<sup>99</sup> *Glucksberg*, 117 S. Ct. at 2261.

<sup>100</sup> *Compassion in Dying v. State of Washington*, 79 F.3d 790, 794 (9th Cir. 1996) (en banc), *rev’d sub nom*, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997) (explaining “the Constitution encompasses a due process liberty interest in controlling the time and manner of one’s death – that there is, in short, a constitutionally recognized ‘right to die.’”).

<sup>101</sup> *Id.* at 838 (holding that “a liberty interest exists in the choice of how and when one dies.”).

<sup>102</sup> 80 F.3d 716, 727, 729 (2d Cir. 1996), *rev’d sub nom*, *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997).

Second Circuit held that prohibiting physician-assisted suicide denied equal protection.<sup>103</sup> The court noted that those who are using artificial life-support devices, such as respirators, already have the right to physician-assisted suicide, because under *Cruzan*,<sup>104</sup> they can order that the devices be terminated.<sup>105</sup> The court further noted that those who are not on artificial life-support devices are discriminated against and are denied physician-assisted suicide.<sup>106</sup>

The Supreme Court reversed both the Ninth Circuit and the Second Circuit in unanimous decisions<sup>107</sup>-- not a single Justice found a constitutional right to physician assisted-suicide. Chief Justice Rehnquist wrote the majority opinion in both cases.

In *Washington v. Glucksberg*, Chief Justice Rehnquist said courts should protect rights under the liberty of the due process clause only if they are enumerated in the text, intended by the framers or there is a clear tradition of safeguarding such a right.<sup>108</sup> Rehnquist noted that forty-nine of the fifty states have laws that prohibit physician-assisted suicide, and thus concluded that there is no such right.<sup>109</sup>

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<sup>103</sup> *Id.* at 719 (explaining “[t]hose in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering the prescribed drugs.”).

<sup>104</sup> *Cruzan v. Director Missouri Dep’t of Health*, 497 U.S. 261 (1990). See *supra* notes 92-96 and accompanying text.

<sup>105</sup> *Vacco*, 80 F.3d at 728-29 (quoting *Cruzan*, 497 U.S. at 278-79) (explaining “[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred” from prior Supreme Court decisions, and thus such a “person [has] a constitutionally protected right to refuse lifesaving hydration and nutrition.”).

<sup>106</sup> *Id.* at 729 (quoting *Vacco*, 80 F. Supp. 78, 84 (S.D.N.Y. 1994) (explaining that the New York statute at issue treats terminally ill patients who are on life-support systems differently than those who are not thus creating a “difference between allowing nature to take its course . . . and intentionally using an artificial death-producing device.”).

<sup>107</sup> *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 2275 (1997); *Vacco v. Quill*, 521 U.S. 702, 117 S. Ct. 2293, 2302 (1997).

<sup>108</sup> *Glucksberg*, 117 S. Ct. at 2263-67.

<sup>109</sup> *Id.* at 2266, 2271.

In *Vacco v. Quill*,<sup>110</sup> Justice Rehnquist, writing once again for the majority, held that under equal protection analysis, heightened scrutiny is used only if a suspect class is discriminated against or if discrimination acts to deny a fundamental right.<sup>111</sup> If the represented party is merely denied some other right, rational basis review applies and the government wins.<sup>112</sup>

Four Justices concurred in the judgment and left open the possibility of an “as applied” challenge.<sup>113</sup> Justice Breyer, in his concurrence, noted that the state has no interest in prolonging suffering.<sup>114</sup> Should a person show an inability to get pain medication to work adequately, then there is a possibility of an “as applied” challenge.<sup>115</sup>

However, all nine Justices objected to the facial challenge and rejected the substantive due process claim.<sup>116</sup> The reason I stress this is I think that when you read *Bowers v. Hardwick*<sup>117</sup> and *Washington v. Glucksberg*<sup>118</sup> together, it becomes extremely difficult for plaintiffs to persuade courts to recognize any

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<sup>110</sup> *Vacco*, 521 U.S. 702, 117 S. Ct. 2293 (1997).

<sup>111</sup> *Id.* at 2297 (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996) (noting “[i]f a legislative classification or distinction ‘neither burdens a fundamental right nor targets a suspect class, we will uphold [it] so long as it bears rational relation to some legitimate end.’”).

<sup>112</sup> *Id.* at 2297-2298.

<sup>113</sup> *Id.* at 2312 (Breyer, J., concurring) (noting “were state law to prevent the position of palliative care, including administration of drugs as needed to avoid pain at the end of life – then the law’s impact upon serious and otherwise unavoidable physical pain (accompanying death) would be more directly at issue.”).

<sup>114</sup> *Id.* at 2311 (Breyer, J., concurring) (explaining the state laws before the Court “do not force a dying person to undergo [severe physical] pain.”).

<sup>115</sup> *Id.* at 2312 (Breyer, J., concurring) (noting that if the laws were different “the Court might have to revisit its conclusion[ ]”).

<sup>116</sup> *Id.* at 2275. The Court held that the Washington statute at issue “does not violate the Fourteenth Amendment, either on its face or ‘as applied to competent terminally ill adults who wish to hasten their deaths by obtaining medication prescribed by their doctors.’” *Id.* (quoting *Compassion in Dying v. State of Washington*, 79 F.3d 790, 794 (9th Cir. 1996) (en banc)).

<sup>117</sup> 478 U.S. 186 (1986). See also *supra* notes 83-90 and accompanying text.

<sup>118</sup> *Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258 (1997). See also *supra* notes 107-109 and accompanying text.

additional unenumerated rights, given the importance of the interests involved in those cases and the fact that they were not recognized.

There is a second line of cases where the Supreme Court has considered and used substantive due process. This concerns challenges to police behavior. Recall my initial definition of substantive due process -- when the government deprives a person of life, liberty or property, is its actions justified by adequate reason.<sup>119</sup> This means that if the government takes away somebody's liberty in an arbitrary or capricious manner, it is a violation of substantive due process.

In *Rochin v. California*,<sup>120</sup> the Court said that since police officers are obviously government officials, their actions too are limited by substantive due process.<sup>121</sup> In *Rochin*, the police forcibly pumped a person's stomach to recover drugs.<sup>122</sup> The United States Supreme Court held that the police's action shocked the conscious and therefore it violated substantive due process.<sup>123</sup>

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<sup>119</sup> See *supra* notes 1-3 and accompanying text.

<sup>120</sup> 342 U.S. 165 (1952).

<sup>121</sup> *Id.* at 174.

<sup>122</sup> *Id.* at 166. In *Rochin*, the defendant, a suspected narcotics dealer, swallowed several capsules to prevent the police from examining the capsules to determine whether they were narcotics. *Id.* The police officers then took the suspect to the hospital where a "doctor forced an emetic solution through a tube into [the defendant's] stomach against his will." *Id.* This so-called "stomach pumping" forced the defendant to vomit. *Id.* A subsequent drug analysis revealed that the capsules contained morphine. *Id.*

<sup>123</sup> *Id.* at 172. The Court stated that the police officers conduct was "conduct that shock[ed] the conscience. *Id.* The Court went on to note:

Illegally breaking into the privacy of the [defendant], the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents - this course of proceeding by agents of the government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

*Id.*

It was an arbitrary deprivation of liberty and thus a denial of due process.<sup>124</sup>

The United States Court of Appeals for the Second Circuit in an opinion by Judge Friendly, in *Johnson v. Glick*,<sup>125</sup> held that the excessive use of force is a denial of due process if the police's behavior shocks the conscious.<sup>126</sup> Circuits all over the country cited to and copied the Friendly opinion in *Johnson v. Glick*.<sup>127</sup> The "shocks the conscious test" became the controlling standard in excessive force cases, at least until 1989,<sup>128</sup> and was very much a substantive due process notion. What Judge Friendly is saying is when the police are using excessive force so as to "shock the conscious," they are depriving people of their liberty in an arbitrary and capricious manner thus violating due process.<sup>129</sup>

However, in 1989, in *Graham v. Connor*,<sup>130</sup> the Supreme Court rejected the "shocks the conscious test" with regard to excessive police force.<sup>131</sup> The Supreme Court held that excessive force cases against police officers must be brought under the Fourth

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<sup>124</sup> *Id.* at 173 (citing *Brown v. Mississippi*, 297 U.S. 278, 285-86 (1936) (holding "[d]ue process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'").

<sup>125</sup> 481 F.2d 1028 (1973), *rev'd sub nom*, *Employee-Officer John v. Johnson*, 414 U.S. 1033 (1973).

<sup>126</sup> *Id.* at 1033 (stating that although the shocks the conscience test used in *Rochin* "is not one that can be applied by a computer, it at least points the way.").

<sup>127</sup> See R. Wilson Freyermuth, Comment, *Rethinking Excessive Force*, 1987 DUKE L. J. 692, 694-96 nn. 16-23 (explaining "[t]he circuits excessive force standard originated in the 1973 Second Circuit decision in *Johnson v. Glick*").

<sup>128</sup> *Graham v. Connor*, 490 U.S. 386 (1989).

<sup>129</sup> *Glick*, 481 F.2d at 1032.

<sup>130</sup> 490 U.S. 386 (1989).

<sup>131</sup> *Id.* at 393 (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (stating "we reject this notion that all excessive force claims brought under § 1983 are governed by a single generic standard," since "§ 1983 is not a source of substantive rights," but merely provides 'a method for vindicating federal rights elsewhere conferred.'").

Amendment<sup>132</sup> and not under due process.<sup>133</sup> I think this case is indicative of the Rehnquist Court's hostility to substantive due process indicated by an unwillingness to use the due process clause as the basis for police claims, instead turning to the Fourth Amendment, another constitutional provision.

In 1994, in *Albright v. Oliver*,<sup>134</sup> the Supreme Court considered whether police could be sued for malicious arrest and prosecution under substantive due process.<sup>135</sup> In a plurality opinion, four Justices rejected substantive due process noting that malicious arrest cases must be brought under the Fourth Amendment.<sup>136</sup>

It is in this context that *Sacramento v. Lewis*<sup>137</sup> becomes important. Professor Schwartz provided an excellent recitation of the facts of *Sacramento v. Lewis*<sup>138</sup> and although I am not going to repeat what he covered, I do want to highlight additional points concerning the case.

The first point is that the Court did not reject substantive due process. The Court held that there is a substantive due process claim available with regard to high speed chases,<sup>139</sup> although the

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<sup>132</sup> U.S. CONST. amend. IV. The Fourth Amendment states, in pertinent part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." *Id.*

<sup>133</sup> *Graham*, 490 U.S. at 388 (holding that petitioner's claim against law enforcement officials alleging the excessive use of force during an investigatory stop is "properly analyzed under the Fourth Amendment [ ] . . . rather than under [ ] substantive due process").

<sup>134</sup> 510 U.S. 266 (1994), *reh'g denied*, 510 U.S. 1215 (1994).

<sup>135</sup> *Id.* at 268 (noting "[p]etitioner asks us to recognize a substantive right under the Due Process Clause of the Fourteenth Amendment to be free from criminal prosecution except upon probable cause.").

<sup>136</sup> *Id.* at 271 (holding "it is the Fourth Amendment, and not substantive due process, under which petitioner Albright's claim must be judged").

<sup>137</sup> 118 S. Ct. 1708 (1998).

<sup>138</sup> *See Schwartz, supra.*

<sup>139</sup> *Sacramento*, 118 S. Ct. at 1715. Justice Souter stated that the Court was "presented . . . with the threshold issue . . . [of] whether facts involving a police chase aimed at apprehending suspects can ever support a due process claim." *Id.* at 1714-15. Justice Souter continued explaining that "substantive due process analysis" is appropriate in the present case. *Id.* at 1715.



Court, as Professor Schwartz pointed out,<sup>140</sup> sets a standard that is almost impossible to meet. Here is why I think that this is important.

In *Sacramento v. Lewis*, had the Court followed *Graham v. Connor*<sup>141</sup> and *Albright v. Oliver*<sup>142</sup> and said you can not bring a substantive due process claim, you must bring your claim under the Fourth Amendment, there would have been no constitutional claim at all. In *California v. Hodari D.*,<sup>143</sup> the United States Supreme Court said a chase is not a seizure within the meaning of the Fourth Amendment.<sup>144</sup> So if there had been a Fourth Amendment claim in *Sacramento v. Lewis*, nothing would have come of it as a constitutional matter.

As a matter of fact, Justice Scalia and Justice Thomas, concurring in the judgment, took exactly that position.<sup>145</sup> Justice Scalia said there is no such thing as substantive due process so the claim should either be brought under other constitutional provisions or brought in State Court.<sup>145</sup>

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<sup>140</sup> See Schwartz, *supra*.

<sup>141</sup> 490 U.S. 386, 388 (1989).

<sup>142</sup> 510 U.S. 266 (1994).

<sup>143</sup> 499 U.S. 621 (1991).

<sup>144</sup> *Id.* at 626. The Court stated that “[t]he language of the Fourth Amendment . . . cannot sustain respondent’s contention” explaining that “[t]he word ‘seizure’ readily bears the meaning of a laying on of hands or application of physical force to restrain movement,” and therefore the word cannot possibly encompass the situation where a “policeman yell[s] ‘Stop, in the name of the law!’ at a fleeing form that continues to flee.” *Id.*

<sup>145</sup> *Sacramento v. Lewis*, 118 S. Ct. 1708, 1723 (Scalia, J., and Thomas, J., concurring).

<sup>146</sup> *Id.* at 1725 (Scalia, J., and Thomas, J., concurring). Justice Scalia, in his concurrence, stated that “[t]o hold . . . that all government conduct deliberately indifferent to life, liberty, or property, violates the Due Process Clause would make the ‘the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.’” *Id.* (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986) (further citation omitted)). Justice Scalia continued, noting that “[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.” *Id.* (quoting *Daniels*, 474 U.S. at 332). Justice Scalia emphatically stated that the Court has held, on many occasions, that “the Due Process Clause of the

Justice Souter, writing for the majority, did however, recognize substantive due process as a viable claim.<sup>147</sup> Justice Souter held that the requirement for substantive due process is “shocks the conscious,”<sup>148</sup> which requires showing that the law enforcement personnel had the purpose of causing harm.<sup>149</sup> This is a very difficult standard to meet, but it does preserve substantive due process, perhaps in other areas.

The only other thing I want to add to what Professor Schwartz said about *Sacramento v. Lewis*, is that the Court draws a distinction between situations where government officers have a chance to deliberate and reflect as opposed to emergency situations.<sup>150</sup>

The Supreme Court has held that government negligence is insufficient for a claim under the due process clause.<sup>151</sup> The question then becomes what exactly is enough and the Supreme Court has never answered that directly, but I think *Sacramento v. Lewis* shows what the majority of the Court thinks.

Justice Souter says emergency situations have to be distinguished from non-emergency situations.<sup>152</sup> In emergency situations, like high-speed chases, there is no opportunity for deliberation, so deliberate indifference is an inappropriate

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Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation.” *Id.* (quoting *Deshaney v. Winnebago Dep’t of Soc. Servs.*, 489 U.S. 189, 202 (1989)).

<sup>147</sup> *Id.* at 1715.

<sup>148</sup> *Sacramento*, 118 S. Ct at 1717 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 128 (1992)) (stating “the substantive component of the Due Process Clause is violated by executive action only when it ‘can properly be characterized as arbitrary, or conscience shocking in a constitutional sense.’”).

<sup>149</sup> *Id.* at 1720 (holding that “high-speed chases with intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment”).

<sup>150</sup> *Id.* at 1720 (distinguishing situations where public officers have the “time to make unhurried judgments” from situations where “unforeseen circumstances demand an officer’s instant judgment”).

<sup>151</sup> *Davidson v. Cannon*, 474 U.S. 344, 348 (1986) (noting “the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care”).

<sup>152</sup> *Sacramento*, 118 S. Ct. at 1720.

standard.<sup>153</sup> Thus, the Court chooses the “shocks the conscious” standard. However, by implication, in other situations where there is the opportunity for deliberation and reflection, deliberate indifference should be enough for substantive due process violation. Thus, *Sacramento v. Lewis* offers plaintiffs an additional tool in lower courts clarifying when due process claims are available.

Let me then turn to a fourth and final question. What are the elements of a substantive due process claim? I suggest to you that there are three elements that must be met. First, there must be a deprivation, second, it must be of life, liberty or property, and third, it must be shown that the government did not have an adequate justification for its action.<sup>154</sup> If the plaintiff can show a deprivation of life, liberty or property without an adequate justification, the plaintiff has then set out a substantive due process claim.

There are a couple of contexts in which the Supreme Court has had to consider what is a deprivation. One context has been whether or not a negligent government action is sufficient for a deprivation. The 1986 case of *Daniels v. Williams*<sup>155</sup> and its companion case *Davidson v. Cannon*<sup>156</sup> are the leading decisions in this area.

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<sup>153</sup> *Id.*

<sup>154</sup> *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews*, the Court set forth three factors that must be considered in a due process analysis. *Id.* at 334. The Court explained:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used; and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.*

<sup>155</sup> 474 U.S. 327 (1986).

<sup>156</sup> 474 U.S. 344 (1986).

*Daniels* involved a prisoner who slipped on a pillow that was negligently left on a prison step.<sup>157</sup> The prisoner sued the prison saying that its negligence cost him his liberty, his bodily safety without due process.<sup>158</sup> The companion case, *Davidson v. Cannon*,<sup>159</sup> involved a prison inmate who was threatened by another and informed the warden.<sup>160</sup> The warden did nothing and the prisoner was attacked and suffered serious injuries.<sup>161</sup> The prisoner sued saying the warden's negligence cost him his liberty, his bodily safety without due process.<sup>162</sup>

In both of the these cases, the Supreme Court said that government negligence is not enough for deprivation under the due process clause<sup>163</sup> leaving open the question of what is enough. Certainly, intentional government action is enough. Most of the circuits have held that either reckless government action or deliberate indifference by the government is sufficient.<sup>164</sup>

*Sacramento v. Lewis*<sup>165</sup> is important is because it implies that, apart from emergency situations, deliberate indifference is sufficient for deprivation.<sup>166</sup>

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<sup>157</sup> *Daniels*, 474 U.S. at 328.

<sup>158</sup> *Id.* (further citation quotation omitted) (arguing prison's negligence "deprived petitioner of his liberty interest in freedom from bodily injury").

<sup>159</sup> 474 U.S. 344.

<sup>160</sup> 474 U.S. at 345.

<sup>161</sup> *Id.* at 346.

<sup>162</sup> *Id.*

<sup>163</sup> *Daniels*, 474 U.S. at 346; *Davidson*, 474 U.S. at 348 (holding mere negligence is not enough to trigger the protections of either substantive or procedural due process).

<sup>164</sup> *M.B. v. Reish*, 119 F.3d 230, 232 (2d Cir. 1997) (citing *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (finding inmate's claim "insufficient as a matter of law," since he failed to show "deliberate indifference" on the part of prison officials.); *Bagola v. Kindt*, 131 F.3d 632, 646 (7th Cir. 1997) (explaining "courts must scrutinize whether prison officials acted or failed to act with a sufficiently culpable state of mind"); *Keeper v. King*, 130 F.3d 1309, 1314 (8th Cir. 1997) (quoting *Coleman v. Rahija*, 114 F.3d 778, 784 (8th Cir. 1997) (explaining that plaintiff-prisoner must "'show that the prison official[s] w[ere] deliberately indifferent to [his] serious medical needs.'").

<sup>165</sup> 118 S. Ct. 1708 (1998).

<sup>166</sup> *Id.* at 1719.

The other line of cases in this area is the *Parratt v. Taylor*<sup>167</sup> line that Professor Schwartz also referred to.<sup>168</sup> In 1981, the Supreme Court, in *Parratt*, held that there is no due process claim if all a person is seeking is a post-deprivation remedy for loss of property and the state provides such a remedy.<sup>169</sup>

*Parratt* involved a prisoner in the Nebraska prison system whose hobby kit got lost.<sup>170</sup> He sued and said that the government's negligence cost him his property without due process.<sup>171</sup> The Supreme Court ruled that negligence was sufficient for deprivation of due process.<sup>172</sup> The Court later expressly overruled that aspect of *Parratt*, *Daniels*, and *Davidson*,<sup>173</sup> but the other aspect of the *Parratt* decision was left untouched by the Court.

The Supreme Court, in *Parratt*, noted that the prisoner was only seeking a post-deprivation remedy for his loss of property.<sup>174</sup> He wants the twenty-three dollars back.<sup>175</sup> The Supreme Court held that Nebraska provides an adequate post-deprivation remedy

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<sup>167</sup> 451 U.S. 527 (1981), *overruled by Daniels v. Williams*, 474 U.S. 327 (1986).

<sup>168</sup> *See Schwartz, supra*.

<sup>169</sup> *Parratt*, 451 U.S. at 543-44 (holding the prisoner "has not alleged a violation of the Due Process Clause").

<sup>170</sup> *Id.* at 529. The prisoner's mail-order hobby kit was valued at \$23.50. *Id.*

<sup>171</sup> *Id.* (claiming that prisoner's property "was negligently lost by prison officials in violation of his rights under the Fourteenth Amendment to the United States Constitution," thus depriving him of his "property without due process of law. ").

<sup>172</sup> *Id.* at 533-34. The prisoner's claim was brought under 42 U.S.C. Section 1983. *Id.* at 529. The Court, in discussing the applicable standard for the statute, noted that there was "[n]othing in the language" of the statute that would limit it "solely to intentional deprivations of constitutional rights," and that, since there was no "express requirement of a particular state of mind," negligence would suffice. *Id.* at 533-35.

<sup>173</sup> *See Zinermon v. Burch*, 494 U.S. 113 (1990). *See infra* notes 184-195 and accompanying text.

<sup>174</sup> *Parratt*, 451 U.S. at 453.

<sup>175</sup> *Id.* at 529.

and the prisoner could go to Nebraska and get it.<sup>176</sup> Therefore, the Supreme Court concluded, a person could not say the state was against due process.<sup>177</sup>

Immediately, commentators and the lower courts recognized the potential broad implications of *Parratt v. Taylor*.<sup>178</sup> All of the Bill of Rights is applied to the states through the due process clause.<sup>179</sup> In almost all instances, people are seeking post-deprivation remedies for their loss of rights, *Parratt* might then mean that any time there is a claim against a state or local government for violating anybody's rights, so long as all the person is seeking is a post-deprivation remedy, there is no federal constitutional claim, no Section 1983 claim, no due process claim.

The Supreme Court initially extended *Parratt v. Taylor*, in *Hudson v. Palmer*.<sup>180</sup> The Supreme Court held *Parratt* applies not only to the negligent deprivation of property, but the intentional deprivation of property as well.<sup>181</sup> In *Hudson*, prison officials allegedly intentionally destroyed some property of a

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<sup>176</sup> *Id.* at 543 (explaining that Nebraska provided the prisoner "with the means to redress [his] deprivation," since, by utilizing the State's tort claim procedure, the prisoner could have had his case heard and paid for by the State, though he chose not to pursue this opportunity).

<sup>177</sup> *Id.* at 544 (holding that the remedies provided by the State "could have fully compensated the respondent for the property loss he suffered," and thus they were "sufficient to satisfy the requirements of due process.").

<sup>178</sup> See *Nika Corp. v. City of Kansas City*, 582 F. Supp. 343, 360 (W.D. Mo. 1983) (noting "[t]he decision in *Parratt* has led to debate in the lower federal courts, as well as amongst legal scholars, as all concerned attempted to assess its basic rationale and implication.").

<sup>179</sup> *Albright v. Oliver*, 510 U.S. 266, 272 (1994), *reh'g denied*, 510 U.S. 1215 (1994) (further citation omitted) (explaining that "the Court has concluded that a number of the procedural protections contained in the Bill of Rights were made applicable to the states by the Fourteenth Amendment.").

<sup>180</sup> 468 U.S. 517, 533 (1984) (explaining that "[w]hile *Parratt* is necessarily limited by its facts to negligent deprivations of property . . . its reasoning applies as well to intentional deprivations of property.").

<sup>181</sup> *Id.*

prisoner.<sup>182</sup> The Supreme Court noted that all the prisoner was seeking was a post-deprivation remedy and that the state provided one.<sup>183</sup>

The key case limiting *Parratt v. Taylor* is *Zinerman v. Burch*.<sup>184</sup> *Zinerman v. Burch* involved an individual who claimed that he was wrongly institutionalized, wrongly civilly committed.<sup>185</sup> He brought a lawsuit for money damages.<sup>185</sup> The Supreme Court said that *Parratt v. Taylor* applies only under limited circumstances.<sup>187</sup>

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<sup>182</sup> *Id.* at 520. The prisoner claimed that a prison officer intentionally destroyed some of his personal property while looking for contraband during a “shakedown” search of his prison cell and locker. *Id.* at 519-20.

<sup>183</sup> *Id.* at 533 (holding “an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the . . . Due Process Clause of the Fourteenth Amendment when a meaningful post-deprivation remedy for the loss is available.”).

<sup>184</sup> 494 U.S. 113 (1990).

<sup>185</sup> *Id.* at 114-15. The respondent, in *Zinerman*, claimed that employees of a state hospital “deprived him of his liberty, without due process of law,” when they admitted him to the hospital as a voluntary mental patient, without obtaining his informed consent, at a time when he was not competent enough to give such consent. *Id.*

<sup>186</sup> *Id.* at 120-22.

<sup>187</sup> *Id.* at 136. The Court explained that:

[W]hen [state] officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of liberty, the state officials cannot then escape liability by invoking *Parratt* . . . . It is immaterial whether the due process violation [respondent] alleges is best described as arising from petitioners’ failure to comply with state procedures for admitting involuntary patients, or from the absence of a specific requirement that petitioners determine whether a patient is competent to voluntary admission. [The respondent’s] suit is neither an action challenging the facial adequacy of a State’s statutory procedures, nor an action based only on state officials’ random and unauthorized violation of state laws. [Respondent] is not simply attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue.

*Id.* at 136-37.

First, it applies only if it is a procedural due process claim, not if it is a substantive due process claim.<sup>188</sup> If all the person is saying is that there are no adequate procedures and the state has adequate procedures, then *Parratt* applies. If it is a claim of a substantive right, *Parratt* is inapplicable.<sup>189</sup>

Second, courts hold that *Parratt v. Taylor* applies only if there is a claim that the acts of government officials are random and unauthorized.<sup>190</sup> *Parratt* does not apply if there is a claim that this is a policy of the government in general.<sup>191</sup>

Third, *Parratt* applies only if all the prisoner is seeking is a post-deprivation remedy.<sup>192</sup> If what the prisoner is saying is that there was no adequate procedure before the deprivation, then *Parratt* is inapplicable.<sup>193</sup>

Fourth, *Parratt* applies only in a situation where the state provides adequate remedies.<sup>194</sup> However, the Supreme Court has never had the occasion to determine what are adequate remedies for purpose of *Parratt*.

*Zinermon* is extremely important in clarifying and limiting *Parratt*. However, Justice Kennedy has suggested that *Parratt*

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<sup>188</sup> *Id.* at 137.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 138. The Court explained that the petitioners conduct was not "unauthorized" in the same "sense the term [was] used in *Parratt* and *Hudson*," since "[t]he State delegated to them the power and authority to effect . . . [respondent's] confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by the state law to guard against unlawful confinement." *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 128. The *Zinermon* Court explained that "the *Parratt* rules comes into play in a due process analysis where post-deprivation "tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide." *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 136-37. The Court noted that "[i]n *Parratt*, the very nature of the deprivation made predeprivation process 'impossible,'" *id.* at 137 (quoting *Parratt v. Taylor*, 451 U.S. 527, 541 (1981)), but that in the present case, the Court was unable to find that predeprivation process was impossible since the state "already [had] an established procedure for involuntary placement." *Id.*



should be revisited and expanded and *Zinerman* should be reconsidered.<sup>195</sup>

Just a sentence each about the latter two questions. There has to be a deprivation of life, liberty or property to put an interest within the meaning of due process clause, but the current Court is taking a very narrow view.<sup>196</sup> And finally, if there is to be a showing that there is no adequate justification for the government's action when the government takes away life, liberty or property, it always must meet at least a rational basis review.<sup>197</sup>

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<sup>195</sup> *Id.* at 138 (Kennedy, J., dissenting) (explaining this opinion “unnecessarily transforms well established procedural due process doctrine and departs from controlling precedent,” because *Parratt* and *Hudson* “should govern this case.”).

<sup>196</sup> *See, e.g.,* *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, (1992)). In *Glucksberg*, the Court explained its general reluctance “to expand the concept of substantive due process [since] guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” *Id.* (citing *Harker Heights*, 503 U.S. at 125). The Court continued, stating that it is necessary to “‘exercise the utmost care’” when “‘break[ing] new ground’ in the due process area,” *id.* (quoting *Harker Heights*, 503 U.S. at 125), “lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court.” *Id.* (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977)).

<sup>197</sup> *See* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW PRINCIPLES & POLICIES 415 n.3 (1997) (citing *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *U.S. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980); *Allied Stores v. Bowers*, 358 U.S. 522 (1959); *Williamson v. Lee Optical*, 348 U.S. 483 (1955), *reh'g denied*, 349 U.S. 925 (1955); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952), *reh'g denied*, 343 U.S. 921 (1952)). In *Williamson v. Lee Optical*, Justice Douglas stated that the Oklahoma law in question “may exact a needless, wasteful requirement in many cases,” but “it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.” 348 U.S. at 487. *See also* *Ferguson v. Skrupa*, 372 U.S. 726 (1963). In *Ferguson*, Justice Black explained:

Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy . . . . [That doctrine] has long since been

If a government action is arbitrary or capricious, even if it is not a fundamental right, the government loses. This is rare,<sup>198</sup> though, because under rational basis review, the government virtually always wins. Therefore, substantive due process has its most profound impact in instances where the claim is a fundamental right because then, in order to show an adequate justification, the government must meet strict scrutiny.<sup>199</sup> This is a quick history of substantive due process and also points to the future showing, at least with the current Supreme Court, substantive due process claims are unlikely to prevail.

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discarded. It is now settled that States have power to legislate against what are found to be injurious commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or some valid federal law.

*Id.* at 729.

<sup>198</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 626, 635 (1996) (explaining that the objective of the Colorado law, to repeal existing laws and “policies of state and local governments that barred discrimination based on sexual orientation,” bore no “rational relationship to legitimate governmental purposes.”).

<sup>199</sup> *Stanley v. Illinois*, 405 U.S. 645 (1982); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).