

Substantive Due Process

Substantive Due Process is a Legal Doctrine created by the Supreme Court of the United States (SCOTUS) to allow it to proclaim and enforce civil rights that are not 'enumerated' in the US Constitution. These include the right to contraception, abortion, miscegenation, sodomy and same sex marriage. This paper explains the history and state of the law.

The Bill of Rights

The US Constitution created the US government and came into force in 1787. The thirteen independent states were afraid that the new federal government would seize their powers and the citizens of those states were afraid that the new government would infringe on their rights and freedom. So, in addition to the constitution, the voters of all thirteen states ratified the first ten amendments which are now known as the Bill of Rights.

The Bill of Rights was intended to limit the power of the federal government and protect the rights of the thirteen states and their individual citizens. As a result, it only applied to the new federal government and not to the states themselves. So, the First Amendment provides that the Congress cannot abridge the freedom of the press. However, the states could enforce any censorship laws as they were not subject to the Bill of Rights.

Selective Incorporation

This was so up until 1925 when SCOTUS began the process of 'selective incorporation.' Mr Gitlow ¹ was handing out pamphlets calling for the violent overthrow of the US government so that it could be replaced by a communist regime. He was charged and convicted of sedition. SCOTUS held that the free speech clause of the First Amendment now applied to the state of New York such that state law could not censor political speech.

In the following years, SCOTUS selectively incorporated other rights so that by 1960, all the rights enumerated in the Bill of Rights had been incorporated and applied to the states as well as the federal government. They did this by relying on one word in the Fourteenth Amendment.

The Due Process Clause

The Fourteenth Amendment was ratified in 1868 after the War Between the States. It intentionally bound the states and provided that they could not:

'... deprive any person of life, liberty, or property, without due process of law ...'

In Gitlow, SCOTUS held that the word 'liberty' incorporates the free speech clause in the First Amendment. They subsequently held that 'liberty' incorporates all the rights enumerated in the Bill of Rights - freedom of / from religion, right to bear arms etc.

¹ *Gitlow v. New York*, 268 U.S. 652 (1925)

Unenumerated Rights

So much is uncontroversial. Most American jurists agree that the Fourteenth Amendment applies to the states and so they must respect the rights enumerated in the Bill of Rights. However, since 1965, SCOTUS has incorporated rights that are not enumerated in the Bill of Rights or anywhere else in the constitution. These rights are found in the 'penumbra' (area between light and dark) of the shadow cast by the Bill of Rights.

The Right to Privacy

In *Griswold*,¹ SCOTUS held that a law banning contraception was invalid. While the Constitution did not explicitly protect a general right to privacy, taken together, the First, Third, Fourth, and Ninth Amendments created the right to privacy in marital relations. Neither the legislature nor the executive could regulate relations between husband and wife. This right to privacy would subsequently be extended to other situations.

In *Roe v Wade*,² SCOTUS held that the right to privacy established in *Griswold* extended to medical treatment. A woman's right to choose to have an abortion fell within that right to privacy and the legislature and the executive had limited power to regulate it. Although, SCOTUS did acknowledge that the state had an interest in the health of pregnant women and the 'potentiality of human life'.

Fundamental Rights

In *Loving v Virginia*,³ SCOTUS held that Virginia's anti-miscegenation law violated the Equal Protection Clause of the Fourteenth Amendment. They found that it had no legitimate purpose "independent of invidious racial discrimination." Chief Justice Earl Warren wrote: "the freedom to marry, or not marry, a person of another race resides with the individual, and cannot be infringed by the State."

In *Lawrence v Texas*,⁴ Mr Lawrence was convicted of deviant sexual intercourse. SCOTUS quashed the conviction and held that "Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government," and "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

Obergefell v Hodges

In 2015 SCOTUS took Substantive Due Process to its extreme limit when it found that same sex marriage was an unenumerated right protected by the constitution. Applying the ratio from *Loving v Virginia*, they held that marriage is a fundamental right and the burden fell on the government to show both a compelling government interest and that the law against same sex marriage was narrowly tailored to achieve that interest.

¹ *Griswold v Connecticut* 381 US 479 (1965)

² 410 U.S. 113 (1973)

³ 388 US 1 (1967)

⁴ 539 US 558 (2003)

The government was unable to do that, so same sex marriage became legal in all 50 states and all state governments were compelled to recognize them. That one word 'liberty' does a lot of heavy lifting.

The Future

In 2022, SCOTUS started to roll back the doctrine of Substantive Due Process. In *Dobbs v Jackson Women's Health Centre*,¹ the court overturned both *Roe v Wade* and *Planned Parenthood v Casey*² and held that the US constitution does not confer a right to abortion. In fact, the Chief Justice held that *Roe* was 'egregiously wrong' and had to be overturned.

The court held that the Constitution does not mention abortion and the right is neither deeply rooted in the nation's history nor an essential component of "ordered liberty." The court went on to cite five factors to be considered when the court overturns long standing precedent. They found that both *Roe* and *Casey*:

1. "short-circuited the democratic process,"
2. lacked grounding in constitutional text, history, or precedent,
3. the tests they established were not "workable,"
4. they caused distortion of law in other areas, and
5. overruling them would not upend concrete reliance interests.

The conservative majority were foreshadowing that they are going to reconsider other cases based on the doctrine of Substantive Due Process. In his concurring opinion, Justice Clarence Thomas stated that any substantive due process decision is "demonstrably erroneous" and that the court has a duty to "correct the error" established in those precedents. He specifically named *Griswold*, *Lawrence* and *Obergefell*.

It is now highly likely that other unenumerated constitutional rights based on substantive due process will disappear and regulation of those areas will be returned to state and local government.

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¹ 597 U.S. 215 (2022)

² *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)