

The Rise and Fall of Economic Substantive Due Process: Overview

Long before the passage of the 14th Amendment, the Due Process Clause of the Fifth Amendment was recognized as a restraint upon the Federal Government, but only in the narrow sense that a legislature needed to provide procedural “due process” for the enforcement of law.⁶⁰ Although individual Justices suggested early on that particular legislation could be so in conflict with precepts of natural law as to render it wholly unconstitutional,⁶¹ the potential of the Due Process Clause of the 14th Amendment as a substantive restraint on state action appears to have been grossly underestimated in the years immediately following its adoption.⁶²

Thus, early invocations of “substantive” due process were unsuccessful. In the *Slaughter-House Cases*,⁶³ discussed previously in the context of the Privileges or Immunities Clause,⁶⁴ a group of butchers challenged a Louisiana statute conferring the exclusive privilege of butchering cattle in New Orleans to one corporation. In reviewing the validity of this monopoly, the Court noted that the

due process-liberty analysis. *Cf.* *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). For more recent cases, *see* *DeShaney v. Winnebago County Social Servs. Dep’t*, 489 U.S. 189 (1989) (no due process violation for failure of state to protect an abused child from his parent, even though abuse had been detected by social service agency); *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) (failure of city to warn its employees about workplace hazards does not violate due process; the due process clause does not impose a duty on the city to provide employees with a safe working environment); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (high-speed automobile chase by police officer causing death through deliberate or reckless indifference to life would not violate the Fourteenth Amendment’s guarantee of substantive due process). *But see* *Chavez v. Martinez*, 538 U.S. 760 (2003) (case remanded to federal circuit court to determine whether coercive questioning of severely injured suspect gave rise to a compensable violation of due process).

⁶⁰ The conspicuous exception to this was the holding in the *Dred Scott* case that former slaves, as non-citizens, could not claim the protections of the clause. 60 U.S. (19 How.) 393, 450 (1857).

⁶¹ *See, e.g.,* *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (“An act of the legislature (for I cannot call it a law), contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority”) (Chase, J.).

⁶² In the years following the ratification of the 14th Amendment, the Court often observed that the Due Process Clause “operates to extend . . . the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment,” *Hibben v. Smith*, 191 U.S. 310, 325 (1903), and that “ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth,” *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 410 (1905). *See also* *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 328 (1901). There is support for the notion, however, that the proponents of the 14th Amendment envisioned a more expansive substantive interpretation of that Amendment than had developed under the Fifth Amendment. *See* AKHIL REED AMAR, *THE BILL OF RIGHTS* 181–197 (1998).

⁶³ 83 U.S. (16 Wall.) 36 (1873).

⁶⁴ *See* Privileges or Immunities Clause.