17.245 The Supreme Court, Civil Liberties, and Civil Rights
Fall 2006

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Discussion 10: Economic Liberties and Substantive Due Process

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The Bill of Rights originally placed no restrictions on the states. It was only in 1868 with the passage of the 14th Amendment that it became possible to apply the Bill of Rights to the state governments, and not until the 1940s-1960s that most of the Bill of Rights were actually applied to the states by the Supreme Court.

There are 3 important clauses in section 1 of the 14th Amendment

- Privileges and Immunities clause: *"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"*

- Due process clause: "nor shall any State deprive any person of life, liberty, or property, without due process of law…"

- Equal protection clause: "nor deny to any person within its jurisdiction the equal protection of the laws."

It typically has not been the privileges and immunities clause of the 14th Amendment that the Court has interpreted to apply the Bill of Rights to the states. Instead, the equal protection and due process clauses have been the main provisions cited in cases protecting citizens' rights from the actions of their states.

Discussion of Slaughterhouse Cases, 1873
These cases were the first time the Court took the opportunity to create 14th Amendment jurisprudence. They come only five years after the amendment's passage.

Background:
The city of New Orleans granted a monopoly to one slaughterhouse in a defined urban zone, and competitors sued. The law required the company with the monopoly to allow any butchers outside the company to practice their profession at the monopoly slaughterhouse, but the outside butchers had to pay a fee for each animal butchered.

Constitutional Claims:
Outside butchers sue for their right to practice, making a number of Constitutional claims:

- Involuntary servitude: the laws prohibit the butchers from practicing their profession, denying their right to support their families and benefit from their labor
- The law abridges the privileges and immunities of citizens of the US: the law denies them the privilege of practicing their profession
- Equal protection violation: not ruled on by the court
- Deprives them of property without due process: the law essentially seizes their property

Decision:
The privileges and immunities of citizens of the US are separate from the privileges and immunities of citizens of individual states. The state of Louisiana can abridge rights using its police power. Anything the states do to regulate citizens' behavior is inherent to the states' police powers. The federal government may not restrict the states' police powers unless there is a conflict between the way the states exercise their police power and the Constitution.

"The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may now be questioned in some of its details.

> *'Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,' says chancellor Kent,13 'be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.'*

This is called the police power; and it is declared by Chief Justice Shaw14 that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise. This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." (Slaughterhouse Cases, Findlaw.com)

The Supreme Court found for the state, reasoning that deference to its police power was required. The decision finds that if the Court were to rule in favor of the plaintiffs, then it would open the doors to any number of challenges to state laws and actions under the privileges and immunities clause. The rationale is spelled out in the majority opinion:

*"All this and more must follow, if the proposition of the [83 U.S. 36, 78] plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further**, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States**, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment." (Slaughterhouse Cases, Findlaw.com)*

Summary and Implications:
The Supreme Court believed at the time that the 13th, 14th, and 15th Amendments were passed only for the purpose of protecting the rights of the freed slaves, which influenced how they would interpret these Amendments in circumstances unrelated to the protection of the rights of slaves.

A recent book by Charles Black entitled "A New Birth of Freedom" argues that the Supreme Court should revisit this case and overturn the precedent it created.

2 Major Takeaways from Slaughterhouse Cases:

- Privileges and immunities clause of the 14th Amendment (not to be confused with the privileges and immunities clause of Article IV, Sect. 2) essentially dies with the Slaughterhouse cases. After it was established that this clause was unavailable to raise further constitutional claims, litigants and their lawyers turned to the due process clause as a way of applying the provisions of the Bill of Rights to the states.

- Slaughterhouse cases say that 13th, 14th, and 15th Amendments only applied to the protection of the freed slaves, but later cases establish that they have a more general application.

Disucssion of Lochner vs. New York, 1904

Background

New York passed a number of building and health restrictions intended to promote healthy bakeries. Part of this law prohibited bakeries from permitting or requiring bakers to work an average of more than 10 hours per day and a sum of more than 60 hours per week.

Constitutional Claim:

Lochner sues the state saying that the law prohibits him from entering freely into a contract with his employees. The ground for this claim is the 14th Amendment due process clause (and in particular the prohibition on deprivation of "liberty" without due process).

Decision:

The court rules in favor of Lochner that the right of an individual to freely contract a labor agreement for himself is protected by the substantive component of the 14th Amendment:
"The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U.S. 578 , 41 L. ed. 832, 17 Sup. Ct. Rep. 427. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right." (Peckham, Lochner v. New York, Findlaw.com)

Any regulation by the government has the potential to infringe on liberty. Per the majority opinion:
"There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere." (Lochner v. New York, Findlaw.com)

Justice Holmes offers a famous dissent saying that there are many examples where the states can regulate labor and effectively legislate against laissez-faire capitalism:
"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the

Postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics." (Lochner v. New York, Findlaw.com)

There is a distinction to be made between outlawing employers from requiring work versus permitting work. Another way the court could have framed the decision would be to rule that the state may prohibit employers from requiring work, but may not prohibit the voluntary decision to work extended hours. One argument against this is that employers may coerce workers to stay beyond the required time if they are permitted to work more that 60 hours.

This case launches a host of substantive due process cases. This is distinct from procedural due process, which has to do largely but not exclusively with criminal procedure. Substantive due process requires further reading into the due process clause, but is put to rest in 1938 principally because of the backlash against the Supreme Court's striking down of New Deal social and economic regulations of the 1930s. In the later reversal of Lochner, the Court shifts to an interpretation of the word "liberty" that does not entail the protection of economic rights.

Class debate of United States v. Carolene Products Co.

Background

Plaintiff challenges a congressional statute banning the shipment of filled milk in inter-state commerce under the 5th Amendment due process guarantees to liberty and property, the 14th amendment equal protection guarantee, and the 10th Amendment protections of state power.

Carolene Products Co. Arguments

Constitutional basis for the Filled milk act comes from the commerce clause. When we attempt to determine constitutionality we must ask 2 questions:

1. What is the meaning of the term regulate in the commerce clause?
2. What is the scope of power given to Congress under the commerce clause?

In this case, Congress has decided that filled milk is inferior to milk fat and Congress has used the interstate commerce clause as a constitutional basis for forcing a decision upon the consumer. With an interpretation that allows Congress to regulate filled milk, Congress may then make any law imaginable that regulates commerce.

United States Arguments

- Filled milk is injurious to the public health
- Process of producing milk removes butter fat from the milk, making it less nutritious, and lowering the price of butter
- The Congress should be able to legislate against specific evils

Supreme Court says that the standard of review for economic regulations is the rational basis test. So long as there is a rational basis for the regulation, then it must be allowed, which effectively ends the Lochner era.

In Footnote 4, Justice Stone contrasts the rational basis test with more stringent forms of review the Supreme Court will apply to future cases:

"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. See Stromberg v. California, 283 U.S. 359, 369 , 370 S., 51 S.Ct. 532, 535, 536, 73 A.L.R. 1484; Lovell v. Griffin, 303 U.S. 444 , 58 S.Ct. 666, decided March 28, 1938. 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 than are most other types of legislation. On restrictions upon the right to vote, see Nixon v. Herndon, 273 U.S. 536 , 47 S.Ct. 446; Nixon v. Condon, 286 U.S. 73 , 52 S.Ct. 484, 88 A.L. R. 458; on restraints upon the dissemination of information, see Near v. Minnesota, 283 U.S. 697 , 713-714, 718-720, 722, 51 S.Ct. 625, 630, 632, 633; Grosjean v. American Press Co., 297 U.S. 233 , 56 S.Ct. 444; Lovell v. Griffin, supra; on interferences with political organizations, see Stromberg v. California, supra, 283 U.S. 359, 369 , 51 S.Ct. 532, 535, 73 A.L.R. 1484; Fiske v. Kansas, 274 U.S. 380 , 47 S.Ct. 655; Whitney v. California, 274 U.S. 357 , 373-378, 47 S.Ct. 641, 647, 649; Herndon v. Lowry, 301 U.S. 242 , 57 S.Ct. 732; and see Holmes, J., in Gitlow v. New York, 268 U.S. 652, 673 , 45 S.Ct. 625; as to prohibition of peaceable assembly, see De Jonge v. Oregon, 299 U.S. 353, 365 , 57 S.Ct. 255, 260. Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, Pierce v. Society of Sisters, 268 U.S. 510 , 45 S.Ct. 571, 39 A.L.R. 468, or national, Meyer v. Nebraska, 262 U.S. 390 , 43 S.Ct. 625, 29 A.L.R. 1446; Bartels v. Iowa, 262 U.S. 404 , 43 S.Ct. 628; Farrington v. Tokushige, 273 U.S. 284 , 47 S.Ct. 406, or racial minorities. Nixon v. Herndon, supra; Nixon v. Condon, supra; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Compare McCulloch v. Maryland, 4 Wheat. 316, 428; South Carolina State Highway Department v. Barnwell Bros., 303 U.S. 177 , 58 S.Ct. 510, decided February 14, 1938, note 2, and cases cited." (Stone, United States v. Carolene Products, Findlaw.com)