

Florida A & M University Law Review

Volume 8

Number 1 *The Rule of Law in an Age of Constitutional
Uncertainty*

Article 5

Fall 2012

Liberty over Death: Seeking Due Process Dimensions for Freedom of Contract

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Recommended Citation

Michael Pillow, *Liberty over Death: Seeking Due Process Dimensions for Freedom of Contract*, 8 Fla. A&M U. L. Rev. (2012).
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LIBERTY OVER DEATH: SEEKING DUE PROCESS DIMENSIONS FOR FREEDOM OF CONTRACT

*Michael Pillow**

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INTRODUCTION

Presumably there is widespread acceptance for the notion of freedom of contract as a fundamental part of our legal, government and economic systems.¹ In at least a general way, the freedom of, or liberty to, contract is enshrined as a right.² Likewise, few would question that this freedom is subject to certain limitations under common law as well as modern constitutional jurisprudence.³ Questions revolve around the contours of this right and particularly the extent to

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1. See, e.g., *Rowe v. Great Atlantic & Pacific Tea Co.*, 385 N.E.2d 566, 569 (N.Y. 1978). See generally JAMES E. MURRAY, JR., *MURRAY ON CONTRACTS*, § 350, at 735-736 (2d ed. 1974) [hereinafter MURRAY]. Numerous articles have delved into both the history of, and more modern approaches to, freedom of contract. See generally Carolyn Edwards, *Freedom Of Contract And Fundamental Fairness For Individual Parties: The Tug Of War Continues*, 77 *UMKC L. REV.* 647 (2009) [hereinafter Edwards].

2. *Muller v. Oregon*, 208 U.S. 412, 421 (1908). See also *Washington v. Glucksberg*, 521 U.S. 702, 760 (1997) (Souter, J. concurring), quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

3. *Frisbee v. United States*, 157 U.S. 160, 165-66 (1895). As to common law limits, see, e.g., Edwards, *supra* note 1, at 655-657. The constitutional limits were clearly explicated in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). See also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 958-961 (1992) (Rehnquist, J. concurring in part and dissenting in part).

which this right emanates from or is protected under the United States Constitution.

This article reconsiders the constitutional dimensions of freedom of contract as applied to potential decisions, regulations or restrictions by states under the Fourteenth Amendment's Due Process Clause.⁴ This article's essential premise is that freedom of contract merits some degree of constitutional due process protection. In some contexts, this protection may only be procedural. Case law lends some support to this premise.⁵ In other contexts, this seemingly precious freedom should be considered so integral that substantive due process applies.

The author does not propose an expansion of due process rights for breaches of contract. That topic has been explored in considerable detail elsewhere.⁶ The article also does not advocate resurrection of the approaches used during what constitutional scholars have long dubbed "the *Lochner* era."⁷ The principal concern here is to ensure a sufficient bulwark against laws, doctrines or policies, including judicial decisions that hamper parties, especially businesses and other sophisticated parties, from freely negotiating commercial contract provisions.

I. COMMON LAW CONTRACT RIGHTS

Common law generally intends to enforce contracts freely entered by competent persons.⁸ This general rule is subject to traditional common law exceptions, such as illegality, duress, fraud and mistake.⁹ Freedom of contract derives from philosophical perspectives that un-

4. The principal concern here is with state rather than federal actions with respect to contracts; hence the Fifth Amendment's Due Process Clause is not addressed.

5. See *infra* notes 42-73 and accompanying text.

6. See, e.g., Leonard Kreynin, *Breach of Contract as a Due Process Violation: Can the Constitution be a Font of Contract Law?*, 90 COLUM. L. REV. 1098 (1990).

7. The name of this era derives from the famous or infamous case of *Lochner v. New York*, 198 U.S. 45 (1905); see also *Adkins v. Children's Hospital*, 298 U.S. 525 (1923). Countless thorough and provocative articles have been written concerning the history and current treatment of *Lochner*. See, e.g., Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751 (June 2009) [hereinafter Nourse]; David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and The Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003). Scholars dispute the exact time period of the "Lochner era," but generally place it from the 1890s to 1937. See Nourse, 97 CAL. L. REV. at 754, n.16.

8. MURRAY, *supra* note 1, at 735-736; see also, JAMES J. WHITE & ROBERT S. SUMMERS, PRINCIPLES OF SALES LAW § 5-1, at 253 (2009).

9. *Id.*

derpin the common law.¹⁰ American courts have normally refrained from refusing to enforce even “bad” deals absent one of these defenses. “This reluctance can be explained by the widespread acceptance of a view of contractual freedom that was predicated on an expansive conception of individual rights. This conception of freedom attempted to demarcate a sphere within which the individual could act without interference by the state. The laissez-faire policies of the nineteenth and early twentieth centuries reflect this concept of freedom.”¹¹

The rule of general enforceability is also limited by the more modern doctrine of unconscionability, as most famously delineated in Article 2 of the Uniform Commercial Code (“UCC”).¹² This doctrine has roots in the equity or chancery courts, where equitable concepts of unfairness carried more weight.¹³ The vagueness of this provision has been much discussed and often criticized.¹⁴ Fortunately, courts have taken a restrictive approach to the amorphous doctrine of unconscionability. Consistent with the historical origins of the UCC provision, most courts require a finding of both procedural unconscionability (absence of meaningful choice) and substantive unconscionability (unfair or adhesive terms).¹⁵ In upholding a ruling against a claim of unconscionability, Judge Posner aptly summarized the concerns in *Amoco Oil Company v. Ashcraft*:¹⁶

There can be no objection to using the one-sidedness of a transaction as evidence of deception, lack of agreement, or compulsion, none of which has been shown here. The problem with unconscionability as a legal doctrine comes in making sense out of lack of “meaningful choice” in a situation where the promisor was not deceived or compelled and really did agree to the provision that he contends was unconscionable. Suppose that for reasons unrelated to any conduct by the promisee the promisor has very restricted opportunities. Maybe he is so poor that he can be induced to sell the clothes off his back for a pittance, or is such a poor credit risk that he can be made (in the absence of usury laws) to pay an extraordinarily high interest rate to borrow money that he wants

10. Philip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70 U. CHI. L. REV. 1513, 1518 (2003).

11. *Id.* at 1518, 1519.

12. U.C.C. § 2-302.

13. See Arthur Allen Leff, *Unconscionability and the Code - The Emperor's New Clause*, 115 U. PA. L. REV. 485, 528-529 (1967).

14. *Id.* at 488. See also M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L. J. 757 (1969); Symposium, *Unconscionability: An Attempt at Definition*, 31 U. PITT. L. REV. 333 (1970).

15. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); see also, Leff, *supra* note 13.

16. *Amoco Oil Company v. Ashcraft*, 791 F. 2d 519 (7th Cir. 1986).

desperately. Does he have a “meaningful choice” in such circumstances? If not he may actually be made worse off by a rule of nonenforcement of hard bargains; for, knowing that a contract with him will not be enforced, merchants may be unwilling to buy his clothes or lend him money. Since the law of contracts cannot compel the making of contracts on terms favorable to one party, but can only refuse to enforce contracts with unfavorable terms, it is not an institution well designed to rectify inequalities in wealth . . . This may be why Indiana is so unfriendly to the defense of unconscionability.¹⁷

Additional common law exceptions to enforceability have evolved through case-by-case adjudication, especially during the twentieth and twenty-first centuries. Some contract clauses may be considered unenforceable on the ground that they violate public policy or the public interest.¹⁸ These standards may not be easy to ascertain and are certainly subject to variation. In addition, statutes ranging from antitrust laws to consumer protection laws set restraints on absolute freedom of contract.¹⁹ Inasmuch as they are codified, statutory restrictions should at least be easy to discern, even if not always easy to interpret.

Certain types of contract clauses invite stricter scrutiny than others. For example, forum selection clauses are often contested as a means for obtaining personal jurisdiction over a defendant where it otherwise might not exist.²⁰ The enforceability of forum selection clauses confronts arguments that courts lack personal jurisdiction over the defendant consistent with due process.²¹ Federal courts tend to favor enforcement of such clauses, provided that the clauses are sufficiently clear, and no other reason for non-enforcement is established.²²

The Supreme Court has opined that forum selection clauses should be invalidated only if they violate “fundamental fairness.”²³ As one federal appellate court stated, “[f]reedom of contract requires no less.”²⁴ State court decisions may tend more toward striking forum se-

17. *Id.* at 522 (citation omitted).

18. *See, e.g.,* Kalisch-Jarcho v. City of N.Y., 448 N.E.2d 413, 417-18 (1983). *Md. Nat'l Cap. P. & P. v. Wash. Nat'l Arena*, 386 A.2d 1216 (1978). *See generally* MURRAY, *supra* note 1, §334 at 703; RESTATEMENT (SECOND) OF CONTRACTS § 195.

19. Examples include the Sherman Act, 15 USC §1 et seq. (2012) and the Magnuson-Moss Warranty Act, 15 USC §2301 et seq. (2011).

20. *See, e.g.,* Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988); *M/S Bremen v. Zapata Off-shore Co.*, 407 U.S. 1 (1972); *IFC Credit Corp. v. Allano Bros. General Contractors*, 437 F.3d 606 (7th Cir. 2006).

21. *See, e.g.,* *IFC Credit Corp.*, 437 F.3d at 608.

22. *M/S Bremen*, 407 U.S. at 9.

23. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991).

24. *IFC Credit Corp.*, 437 F.3d at 610.

lection clauses, especially in circumstances involving form contracts or inexperienced parties.²⁵

Arbitration provisions are often contested, especially in the employment context.²⁶ Federal law and policy endorse the use of arbitration as a means to relieve court congestion.²⁷ In commercial contracts, arbitration and other alternative dispute resolution provisions are typically enforceable.²⁸ Courts have expressed some reluctance, however, to extend the policy to situations where one contracting party is essentially forced to accept an unfair provision, such as in many employment contracts.²⁹ These situations are analogous to the concerns underlying the unconscionability doctrine.

Exculpatory clauses may also receive heightened scrutiny. Under the common law, courts often refuse to enforce exculpatory clauses in contracts where enforcement would violate public policy.³⁰ Section 195 of the Restatement (Second) of Contracts addresses such exemptions from liability.³¹ Under that section, terms exempting a party from tort liability caused by intentional or reckless conduct (and in some cases negligent conduct) are unenforceable on public policy grounds.³² Typically, public policy grounds may include actions that are considered willful or even grossly negligent.³³ Other courts have added a related exception for contracts that are intrinsically tied to the public interest.³⁴

These “public policy” or “public interest” concepts are often applied to limitation of liability provisions, as opposed to clauses that exempt or exculpate a party from any liability.³⁵ Although conceptually different, in many cases, exculpation and limitation can

25. See, e.g., *Preferred Capital, Inc. v. Power Eng'g Group, Inc.*, 860 N.E. 2d 741 (Ohio 2007); *Calanca v. D & S Mfg. Co.*, 510 N.E. 2d 21, 23 (Ill. 1987).

26. See, e.g., *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

27. Federal Arbitration Act, 9 USC § 2; *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

28. *Id.*

29. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court held that an Age Discrimination in Employment Act claim was subject to arbitration pursuant to a clause in a stock registration agreement. One must look to the particular state or federal claim to ascertain whether an arbitration clause will be upheld.

30. See, e.g., *Kalisch-Jarcho v. City of N.Y.*, 448 N.E.2d 413 (N.Y. 1983); *Wolf v. Ford*, 335 Md. 525, 644 A.2d 522 (1994).

31. RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981).

32. *Id.*

33. See, e.g., *Kalisch-Jarcho*, 448 N.E.2d at 417-18.

34. See *Md. Nat'l Capital Park & Planning Comm'n v. Wash. Nat'l Arena*, 386 A.2d 1216 (Md. 1978); *Wolf v. Ford*, 644 A. 2d 522 (Mass. 1994).

35. See, e.g., *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365 (N.Y. 1992).

accomplish similar objectives or results.³⁶ As with unconscionability, courts generally show restraint in striking down provisions on such grounds.³⁷ This is especially true with respect to limitations that are not truly exculpatory, such as consequential damages disclaimers.³⁸ The context, whether it be commercial or consumer, influences the outcome inasmuch as the parties' relative bargaining power represents an important factor for courts to consider.³⁹ This is explicitly true under the Uniform Commercial Code.⁴⁰

In short, the common law emphasizes freedom of contract with some limitations. The common law evolution reflected prevailing philosophical and economic approaches. This evolution paralleled Supreme Court results striking down various legislative acts on substantive due process grounds.⁴¹

II. SUPREME COURT JURISPRUDENCE

The concept of liberty of contract as a constitutional right flourished in the late nineteenth and early twentieth centuries.⁴² According to Professor Bernstein, "the basic motivation for *Lochnerian* jurisprudence was the Justices' belief that Americans had fundamental unenumerated constitutional rights, and the Fourteenth Amendment's Due Process Clause protected those rights."⁴³ Liberty or freedom of contract represented one such natural right.⁴⁴

In *West Coast Hotel v. Parrish*⁴⁵, the Supreme Court explicitly rejected the use of a "substantive due process" right to freedom of contract as a basis for overturning various pieces of New Deal legislation.⁴⁶ The Court expressly overruled *Adkins v. Children's Hospital*⁴⁷ and, in doing so, indirectly overturned many of the *Lochner* era

36. *Great N. Ins. Co. v. ADT Sec. Serv., Inc.*, 517 F. Supp. 2d 723 (W.D. Pa. 2007).

37. *Wash. Nat'l Arena*, 386 A.2d at 1227-28.

38. *See, e.g.*, *Pub. Serv. Co. of New Hampshire v. Westinghouse Elect. Corp.*, 685 F. Supp. 1281 (D.N.H. 1981).

39. *See, e.g.*, *K & C, Inc. v. Westinghouse Elec. Corp.*, 263 A.2d 390, 393 (Pa. 1970); WHITE & SUMMERS, *supra* note 8, § 13-11 at 710.

40. *See* U.C.C. § 2-719 (2003).

41. *See, e.g.*, *Lochner v. New York*, 198 U.S. 45 (1905).

42. Bernstein, *supra* note 7, at 15-16.

43. *Id.* at 12.

44. *Id.* at 45.

45. *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). *See also* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 958-961 (1992) (Rehnquist, C.J. concurring in part and dissenting in part).

46. *West Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937).

47. *Adkins v. Children's Hospital*, 298 U.S. 525 (1923).

cases.⁴⁸ Even before *West Coast Hotel*, the Supreme Court recognized that freedom of contract remained subject to reasonable regulation under a state's police power.⁴⁹ *West Coast Hotel* and its progeny left little doubt that the freedom of any person or entity to contract no longer enjoyed an ascendant perch under the Constitution. As one federal appellate court later noted, "plaintiffs bringing substantive due process challenges to [economic] statutes must traverse unusually inhospitable legal terrain because the Supreme Court has not invalidated an economic statute on substantive due process grounds since . . . 1935."⁵⁰ Since freedom of contract does not qualify as a fundamental right, regulation involving it will only trigger a "rational basis" test that most statutes and other actions routinely pass.⁵¹

On the other hand, the Supreme Court has continued to acknowledge the fundamental nature of the liberty to contract as a component of substantive due process review.⁵² As Justice Souter espoused, the due process conception of liberty

in the aftermath of the so-called *Lochner* Era has been scaled back in some respects, but expanded in others, and never repudiated in principle. The Court said that Fourteenth Amendment liberty includes "the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."⁵³

Moreover, the Supreme Court's extension of the due process clause to protect an unenumerated right to privacy⁵⁴ suggests that non-textual rights can be deserving of protection.⁵⁵

Several cases have recognized a right to procedural due process prior to termination of employment contracts.⁵⁶ In *Board of Regents of State Colleges v. Roth*,⁵⁷ the Supreme Court described the "liberty" protected by the Fourteenth Amendment as follows:

48. *West Coast Hotel*, 300 U.S. at 400.

49. Bernstein, *supra* note 7, at 45.

50. *Blue Diamond Coal Co. v. Sec'y of Health & Human Servs.* (*In re Blue Diamond Coal Co.*), 79 F.3d 516, 521 (6th Cir. 1996) (internal citation omitted).

51. See, e.g., *Harrah Indep. School Dist. v. Martin*, 440 U.S. 194, 198 (1979).

52. *Washington v. Glucksberg*, *supra*, 521 U.S. 702, 760 (1997) (Souter, J. concurring).

53. *Id.* (quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)) (emphasis added).

54. See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

55. Bernstein, *supra* note 7, at 56.

56. See *Breach as Due Process*, *supra* note 6, at 1101-1102.

57. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

Without doubt, it denotes 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, 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 . . . as essential to the orderly pursuit of happiness by free men.⁵⁸

The Supreme Court also recognized that contracts might give rise to property interests that would be afforded due process protection.⁵⁹ Property interests are defined by an independent source such as state law.⁶⁰ Ultimately, the *Roth* Court held that the University did not violate the plaintiff professor's due process by refusing to renew his one-year contract, since he had not acquired a "right" to renewal.⁶¹ Likewise, the University did not violate any liberty interest since the professor remained free to pursue opportunities without any stigmas or disabilities.⁶²

By way of contrast, in the companion case to *Roth*, *Perry v. Sindermann*,⁶³ the Supreme Court held that a non-tenured professor may be able to establish a sufficient property interest by virtue of understandings, policies or practices that amounted to *de facto* tenure.⁶⁴ The case was remanded to allow the plaintiff to offer evidence of such understandings, policies or practices which might entitle him to job tenure under Texas law⁶⁵. If successful, the plaintiff would be afforded a hearing regarding the reasons for his dismissal.⁶⁶

One reason for limiting the reach of the due process clause with respect to contracts results from a textual interpretation of the Constitution.⁶⁷ As previously indicated, the Bill of Rights contains no express protection for the liberty to contract. The "Contracts" Clause of the Constitution states that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts."⁶⁸ Although this clause was

58. *Id.* at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)) (emphasis added).

59. *Id.* at 576-77.

60. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).

61. *Roth*, 408 U.S. at 578.

62. *Id.* at 573-574.

63. *Perry v. Sinderman*, 408 U.S. 593 (1972).

64. *Id.* at 601-603. The Court suggested that "there may be an unwritten 'common law' in a particular university that certain employees shall have the equivalent of tenure."

65. *Id.* at 602-603.

66. *Id.* at 603. As in *Roth*, the professor claimed improper termination due to his exercise of free speech rights.

67. Kreymin, *supra* note 6, at 1108.

68. U.S. CONST., art. I, § 10.

principally directed to revolutionary debts,⁶⁹ it provides a constitutional protection that may be invoked to redress state infringements of contract rights.⁷⁰

As the Supreme Court stated in *Allied Structural Steel Co. v. Spannaus*,⁷¹ “the Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment, and particularly with the development of the large body of jurisprudence under the Due Process Clause of that Amendment in modern constitutional history.”⁷² In overturning the application of Minnesota’s Private Pension Benefits Protection Act to the appellant’s contractual pension obligations, the Court recognized the constitutional vitality of contracts:

The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.⁷³

The Court’s decision in *Spannaus* confirmed the potential viability of the Contracts Clause, but did not generate a tidal wave of litigation rivaling due process cases.⁷⁴ Even under that opinion’s standards, the impairment must be substantial or severe.⁷⁵ The *Spannaus* decision involved a divided Supreme Court. Justice Brennan penned a vigorous dissent, in which he also negated any possible due process violation associated with the Minnesota law.⁷⁶ *Spannaus* represents the only case in decades that has struck down a law impairing a contract between private parties.⁷⁷ The Contracts Clause thus quite remains limited in its reach.⁷⁸

The *Spannaus* decision nevertheless reinforces several key points relative to freedom of contract. First, the Framers of our Consti-

69. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 256 (1978) (Brennan, J. dissenting) (citation omitted).

70. Although the Takings Clause could also be discussed, that addresses “property” more directly rather than contracts.

71. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

72. *Id.* at 241.

73. *Id.* at 245. The Supreme Court characterized the impact as “sudden, totally unanticipated and substantially retroactive.”

74. See, e.g., *State of Nev. Employees Ass’n. v. Keating*, 903 F.2d 1223 (9th Cir. 1990).

75. *Spannaus*, 438 U.S. at 244-45.

76. *Id.* at 251.

77. *State of Nev. Employees Ass’n. v. Keating*, 903 F.2d at 1226.

78. *Id.*

tution recognized the value and importance of protecting private contracts against state actions, as James Madison made clear in the Federalist Papers.⁷⁹ This historical perspective makes it somewhat easier to understand why the Supreme Court used freedom of contract as a basis for striking down laws that threatened freedom of contract through the *Lochner* era.⁸⁰ Simply put, constitutional protection for freedom of contract is not a new concept. Second, parties who have entered contracts should be able to rely on their enforceability. This can be seen as the flip side to the freedom to enter into contracts initially. Third, and perhaps most importantly, the Contracts Clause only indirectly affects the freedom of contract, since it pertains solely to existing contracts.⁸¹

III. LIBERTY AND PROPERTY INTERESTS

As the foregoing decisions indicate, the freedom to contract potentially implicates two separate due process interests: liberty and property. The recent case of *EJS Properties, LLC v. City of Toledo*⁸² helps illustrate how these interests are adjudicated in practice. In *EJS Properties*, the plaintiff claimed that re-zoning actions by the City of Toledo and an individual City commissioner violated its procedural and substantive due process rights.⁸³ It asserted both liberty and property interests arising from certain contracts associated with the real property for which it sought re-zoning.⁸⁴ The district court granted summary judgment on all of the constitutional claims and the Court of Appeals for the Sixth Circuit affirmed.⁸⁵

The *EJS Properties* court recognized that both the right to contract and interests created by contracts represented “property” under Ohio law, thus both rights are potentially subject to due process protection.⁸⁶ The particular contract interests of the developer plaintiff, however, amounted to contingent interests, inasmuch as the contin-

79. See generally, THE FEDERALIST, NO. 4 (James Madison).

80. See *supra* notes 42-51 and accompanying text.

81. *Spannaus*, 438 U.S. at 241.

82. *EJS Props., LLC v. City of Toledo*, 698 F.3d 845 (6th Cir. 2012).

83. *Id.* at 854.

84. *Id.* at 855.

85. *Id.* at 851.

86. *Id.* at 857. The court cited a prior Sixth Circuit decision, *Mertik v. Blalock*, 983 F.2d 1353 (6th Cir. 1993), which in turn quoted language from *Joseph Bros. Co. v. Brown*, 415 N.E. 2d 979, 990 (1979) indicating that the right to contract was specifically guaranteed under the Ohio Constitution. The constitutional language itself only expressly mentions “property.”

gency was subject to the discretionary zoning action of the City of Toledo.⁸⁷ Such interests did not qualify as “property” under Ohio law.⁸⁸ The court acknowledged that “[t]he right to contract is a long-recognized liberty interest.”⁸⁹ It characterized the developer’s vague argument as a “right to be free from government interference with the occurrence of a wholly discretionary condition precedent.”⁹⁰ It concluded that since the contracts were freely entered, no constitutionally protected liberty interest had been identified.⁹¹

Another Sixth Circuit decision, *American Express Travel Rel. Servs. v. Kentucky*,⁹² likewise refused to find a substantive due process violation involving a challenge to a 2008 statutory amendment shortening the presumptive period of abandonment of unclaimed traveler’s checks.⁹³ The appellate court employed the “rational basis” test for constitutionality, which it concluded had been mis-applied by the district court.⁹⁴ The court found that the 2008 amendment satisfied due process requirements because it was rationally related to Kentucky’s legitimate state interest in assuming possession of abandoned property.⁹⁵

The bulk of the cases asserting due process rights have arisen in two contexts: public (primarily academic) employment and government contracts.⁹⁶ Courts have recognized a narrow right to procedural due process, assuming that a “property right” or “entitlement” has been established.⁹⁷ This amounts to protection of existing contracts more than it amounts to “freedom of contract.” If a plaintiff gets a hearing, or a chance to litigate an alleged breach, it receives all the process that is due.⁹⁸ Some courts have flatly rejected any notion that commercial contracts merit due process protection.⁹⁹

87. *EJS Props., LLC v. City of Toledo*, 698 F.3d 845, 858 (6th Cir. 2012).

88. *Id.*

89. *Id.* at 859.

90. *Id.*

91. *Id.*

92. *American Express Travel Rel. Servs. v. Kentucky*, 641 F.3d 685 (6th Cir. 2011).

93. *Id.* at 686.

94. *Id.* at 690.

95. *Id.* at 693.

96. *See Breach as Due Process*, *supra* note 6, at 1101.

97. *See, e.g.*, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see generally*, *Breach of Due Process*, *supra* note 6.

98. *Kay v. Bd. of Educ. of City of Chicago*, 547 F.3d 736, 739 (7th Cir. 2008) (opportunity to litigate breach of contract claim provides all process due).

99. *See Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990); *S&D Maint. Co. v. Goldin*, 844 F.2d 962, 965-966 (2d Cir. 1988).

Despite language endorsing the notion of “freedom of contract” in various cases as mentioned above, few if any modern cases actually elevate this freedom to a constitutional right.¹⁰⁰ This reflects the oft-stated policy concern with constitutionalizing contract law.¹⁰¹

IV. PROTECTING A LIMITED LIBERTY

On a theoretical plane, if freedom of contract is a cherished right that does not emanate from the Constitution, what is its source? Is this freedom simply part of the common law inherent in our system? Certainly, the Framers recognized the importance of protecting contract obligations, as reflected in the Contracts Clause. One might even consider freedom of contract one of Justice Harlan’s “basic values implicit in the concept of ordered liberty.”¹⁰² As one commentator has suggested that “[m]ore than any other species of property short of realty and personalty, contract interests definitionally fall within the due process clause’s protection. They are always more than indefinite unilateral expectations, and they always a step away from being converted into indisputable property interests such as money, goods or judgments.¹⁰³

One can envision scenarios where the need for recourse would manifest itself. Suppose that a state passed a law prospectively restricting companies from limiting their liability in any contract. Worse yet, imagine if a state prescribed certain contract forms for categories of commercial transactions. Rather than companies’ pre-printed forms, parties would be relegated to state-supplied pre-printed forms. This sounds contrary to capitalism and free enterprise, and would probably never occur. On the other hand, many the concept of unconscionability generated significant interest and concern when it was introduced into Article 2 of the Uniform Commercial Code.¹⁰⁴

Would such laws be constitutional? Since these laws would not affect existing contracts, substantive due process would serve as the only constitutional basis for a challenge. Under the current state of the law, a party challenging such laws would bear a strong burden of

100. Again, this stems from the ruling in *West Coast Hotel*, *supra* note 45. *See, e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 957 (1992) (Rehnquist, C.J. dissenting).

101. *See, e.g.*, *Breach as Due Process*, *supra* note 6, at 1102.

102. *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Justice Harlan concurring).

103. *Kreymin*, *supra* note 6, at 1107.

104. *See, e.g.* *Leff*, *supra* note 13, at 486.

demonstrating no rational basis.¹⁰⁵ It seems relatively easy to conjure up justifications for such laws, such as consumer protection or easing burdens on the court system, but the Supreme Court has repeatedly indicated that it will not substitute its judgment for that of the legislature.¹⁰⁶ The simple answer is that a challenge would almost certainly be unsuccessful. Freedom of contract would be substantially affected, without any remedy or solution.

The primary concern of this author, however, lies with court decisions where a court overturns a negotiated provision, such as a limitation of liability, on public policy grounds. In the final analysis, the author submits that protecting freedom of contract in these scenarios relies on judicial restraint. Those cases limiting the doctrine of unconscionability or restricting the types of public policies or public interests that can render a provision unenforceable provide excellent examples.¹⁰⁷ If courts do not exercise such restraint, their decisions might disrupt freedom of contract, but the affected parties presumably receive due process via the court proceedings themselves,¹⁰⁸ accompanied of course by a right to appeal.¹⁰⁹ This differs from the legislative or executive actions that are more commonly challenged in the courts. In other words, the only recourse for a judicial deprivation of due process is exhaustion of the judicial process.

Even if freedom of contract were considered a right entitled to constitutional protection, it is impossible at this juncture to conceive that it could ever attain “fundamental right” status for substantive due process purposes.¹¹⁰ The best that one could hope for is “rational basis” review. That being said, the Supreme Court has also demonstrated that even a “rational basis” review can sometimes be invoked to protect a liberty interest based on substantive due process.¹¹¹ Recognition of the right, accompanied by at least rational scrutiny,

105. See, e.g., *American Exp. Trav. Servs. Co., v. Kentucky*, 641 F.3d 685, 694 (6th Cir. 2011) (referring to a “heavy burden”).

106. See, e.g., *West Coast Hotel*, *supra* note 45 at 399.

107. See *supra* notes 35-40 and accompanying text.

108. See, e.g., *Kay v. Bd. of Educ. of City of Chicago*, 547 F. 3d 736, 739 (7th Cir. 2008) (opportunity to litigate breach of contract claim provides all process due).

109. See generally Craig W. Hillwig, Comment, *Giving Property All the Process That's Due: A “Fundamental” Misunderstanding About Due Process*, 41 CATH. U. L. REV. 703, 726 (1992).

110. See, e.g., *DeKalb Stone, Inc. v. County of DeKalb, Ga.*, 106 F. 3d 956, 959 n. 6 (11th Cir. 1997) (fundamental rights are created only by the Constitution); *McKinney v. Pate*, 20 F. 3d 1550, 1556 (11th Cir. 1994) (substantive due process protection limited to “most” provisions in the Bill of Rights and certain penumbras).

111. See *Lawrence v. Texas*, 539 U.S. 558 (2003). The nature of the liberty to contract differs markedly from the type of liberty interests acknowledged in *Lawrence v. Texas* and

might further ensure that courts more clearly determine that “public policies” truly exist before disrupting negotiated contracts along with the underlying “liberty” to enter into such contracts.

CONCLUSION

Freedom of contract merits more than mere words. It represents an essential component of our liberty. Contracts also establish rights and interests, which may fall short of the “entitlement” characterization necessary to establish a constitutionally protected property interest.¹¹² This author is not advocating the injection of due process review into every case involving contract interpretation or breach. Parties should be able to negotiate and sign contracts, however, knowing that courts will likely enforce their terms with only limited exceptions. While courts have by and large refrained from interfering with parties’ bargains, exceptions based on amorphous conceptions of public policy arguably go beyond the well-accepted common law exceptions for enforceability.¹¹³ Acknowledgement of a due process right would at least reinforce restraint.

the cases upon which it relied. See Laurence Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV 1893, 1933-1940 (2004).

112. See generally *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

113. See *supra* notes 30-37 and accompanying text.