

OPTIMIZING THE OXYMORON: SUBSTANTIVE DUE PROCESS JUSTICE THOMAS COULD LOVE

*Evan D. Bernick\**

It's no coincidence that Justice Clarence Thomas is both the most ardently originalist member of the Supreme Court and the Court's most vociferous critic of the doctrine of "substantive due process." Few, if any, constitutional propositions have been derided as thoroughly and consistently by originalist scholars<sup>1</sup> and judges<sup>2</sup> as the proposition that the Due Process of Law Clauses of the Fifth and Fourteenth Amendments not only guarantee access to certain *procedures* prior to any deprivations of "life, liberty, or property" but impose restrictions on the *content* or *substance* of governmental acts that effectuate those deprivations. Substantive due process is as-

---

Visiting Lecturer, Georgetown University Law Center; Fellow, Georgetown Center for the Constitution.

<sup>1</sup> See, e.g., Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911); 2 LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY? 374-96 (1932); Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of the Due Process of Law*, 19 AM. J. LEGAL HIST. 265 (1975); Raoul Berger, "Law of the Land" Reconsidered, 74 NW. U. L. REV. 1 (1979); Stephen F. Williams, "Liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions, 53 U. COLO. L. REV. 117 (1981); Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85 (1982); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 (1997); 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1102-08 (1953); Walton Hamilton, The Path of Due Process of Law, in THE CONSTITUTION RECONSIDERED 168 (Conyers Read ed., 1968); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 248 (1999); ANDREW C. MCLAUGHLIN, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 461 (1935); HUGH EVANDER WILLIS, CONSTITUTIONAL LAW OF THE UNITED STATES 705-06 (1936); Christopher Wolfe, *The Original Meaning of the Due Process Clause*, in THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 213 (Eugene W. Hickok, Jr. ed., 1991); Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations of Legislatures* (pts. 1-3), 2 TEX. L. REV. 257 (1924), 2 TEX. L. REV. 387 (1924), 3 TEX. L. REV. (1924); Charles M. Hough, *Due Process of Law—To-Day*, 32 HARV. L. REV. 218 (1919); Robert P. Reeder, *The Due Process Clauses and "The Substance of Individual Rights"*, 58 U. PA. L. REV. 191 (1910); Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses* (pt. 2), 14 CREIGHTON L. REV. 735 (1981); Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555 (2004); Andrew T. Hyman, *The Little Word "Due,"* 38 AKRON L. REV. 1 (2005); Matthew E. Franck, *What Happened to the Due Process Clause in the Dred Scott Case? The Continuing Confusion over "Substance" versus "Process"*, 1 AM. POL. THOUGHT 4 (2015).

Substantive due process has been defended on originalist grounds. Notable examples include BERNARD SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION (1989); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941; James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315 (1999); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009). Although Tim Sandefur doesn't identify as an originalist, he has drawn upon originalist materials to defend substantive due process. See Timothy Sandefur, *In Defense of Substantive Due Process, Or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL'Y 283 (2012).

<sup>2</sup> See, e.g., *Griswold v. Connecticut*, 381 US 479, 513 (1965) (Black, J., dissenting) (denying that judges "are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose"); *Kerry v. Din*, 135 S. Ct. 2128, 2133 (2015) (opinion of Scalia, J.) (describing it as a "textually unsupported doctrine"); *Gosnell v. City of Troy, Ill.*, 59 F. 3d 654, 657 (7th Cir. 1985) (opinion of Easterbrook, J.) (describing it as an "oxymoron" and describing "procedural due process" as a "redundancy").

sociated with what originalists consider to be among the Court’s most egregious decisions, including *Lochner v. New York*,<sup>3</sup> *Griswold v. Connecticut*,<sup>4</sup> and *Roe v. Wade*.<sup>5</sup> For his part, Justice Thomas condemns substantive due process because he believes that “neither its text nor its history suggests that it protects the many substantive rights th[e] Court’s cases . . . claim it does.”<sup>6</sup>

This being the one-hundred-and-fiftieth anniversary of the ratification of the Fourteenth Amendment, it’s worth emphasizing that—unlike such substantive-due-process critics as Judge Robert Bork<sup>7</sup> and the late Justice Antonin Scalia<sup>8</sup>—Justice Thomas has articulated and defended an originalist alternative to what’s long been the primary constitutional mechanism that the judiciary uses to protect individual rights against state infringements. In the most thorough examination of the framing of Section One of the Fourteenth Amendment ever to appear in the United States Reports, Justice Thomas, concurring in *McDonald v. City of Chicago*,<sup>9</sup> offered the Fourteenth Amendment’s Privileges or Immunities Clause as an alternative enforcement mechanism. After presenting a wealth of evidence that the original meaning of the Fourteenth Amendment’s long-neglected Privilege or Immunities Clause protects at least constitutionally enumerated rights—including the right to keep and bear arms—Justice Thomas added the following in response to concerns that the clause could be invoked to enforce unenumerated rights that have no constitutional status and thus prove “hazardous”:

When the inquiry focuses on what the ratifying era understood the Privileges or Immunities Clause to mean, interpreting it should be no more “hazardous” than interpreting these other constitutional provisions by using the same approach. To be sure, interpreting the Privileges or Immunities Clause may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer. I believe those questions are more worthy of this Court’s attention—and far more likely to yield discernible answers— than the substantive due process questions the Court has for years created on its own, with neither textual nor historical support.<sup>10</sup>

---

<sup>3</sup> 198 US 45 (1905).

<sup>4</sup> 381 US 479 (1965). Although Justice William O. Douglas’s opinion for the Court expressly declines to rely upon due process of law, *Griswold* has long since been treated as a substantive due process decision. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (describing “martial privacy” as an instance of the “‘liberty’ specially protected by the Due Process Clause,” citing *Griswold*); *Obergefell v. Hodges*, (2015) (Due Process Clause protects “intimate choices that define personal identity and beliefs”, citing *Griswold*).

<sup>5</sup> 410 US 113 (1973).

<sup>6</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 812 (2010) (Thomas, J., concurring).

<sup>7</sup> As Bork described the Privileges or Immunities Clause as an “inkblot”, it’s not clear how he thought individual rights could be directly enforced against the states by the judiciary in the absence of substantive due process. See ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 116 (1990) (declaring that “[n]o judge is entitled to interpret an inkblot” and that “[the] [Privileges or Immunities] clause has been a mystery since its adoption.”).

<sup>8</sup> As Scalia declined to accept the invitation to revive the Privileges or Immunities Clause in *McDonald*, it’s not clear how he thought individual rights could be directly enforced against the states by the judiciary in the absence of substantive due process.

<sup>9</sup> 561 U.S. 742 (2010).

<sup>10</sup> *McDonald*, 561 U.S. at 855 (Thomas, J., concurring).

It's instructive to compare Justice Thomas's originalist analysis in *McDonald* to Justice Scalia's separate concurrence.<sup>11</sup> Clearly troubled by the prospect of opening up a Pandora's Box<sup>12</sup> of what he regarded as meritless individual rights claims that substantive-due-process doctrine had—in part because of his efforts<sup>13</sup>—largely prevented courts from recognizing in recent years, Justice Scalia didn't engage the original meaning of the Privileges or Immunities Clause *at all*, despite invitations to do so from counsel for the petitioners.<sup>14</sup> Both at oral argument in *McDonald* and in his concurring opinion, Scalia strongly intimated that he believed that the costs associated with moving to a Privileges-or-Immunities-centered regime exceeded any benefits that might be captured by shifting individual-rights enforcement to the “right” clause.

One might view Justice Scalia's concurrence in *McDonald* through the lens of a concept that's familiar in welfare economics—the theory of the second best.<sup>15</sup> Roughly, the theory holds that when all the conditions required for optimal efficiency can't be met, one can't assume that the second-best outcome can be attained by trying to meet as many of those conditions as possible.<sup>16</sup> Half a loaf may not be better than none. Justice Scalia may have accepted a doctrine he deemed incompatible with original meaning in the belief that shifting individual-rights enforcement to the Privileges or Immunities Clause might—in a world rife with meritless rights-claims and without any established doctrine to screen them out—produce outcomes that were even worse by originalism's own lights than the existing substantive due process regime.

If that's indeed what Justice Scalia was doing, no originalist of whom this author is aware defended Justice Scalia in such terms. Indeed, some originalist-oriented critical evaluations of

---

<sup>11</sup> *Id.* at 791-805 (Scalia, J., concurring).

<sup>12</sup> See Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities, the Constitution in 2020, and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1 (2010).

<sup>13</sup> See *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (in identifying rights under the Due Process of Law Clause “[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”); *Reno v. Flores*, 507 U.S. 292, 294 (1993) (“‘Substantive due process’ analysis must begin with a careful description of the asserted right, for ‘[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.’”).

<sup>14</sup> See Brief for Petitioners at 42, *McDonald*, 130 S. Ct. 3020 (2010) (No. 08-1521).

<sup>15</sup> See Kevin Lancaster & R.K. Lipsey, *The General Theory of the Second Best*, 24 REV. OF ECON. STUD. 11 (1956). As David Carlson has put it, the proposition that “[o]ne market imperfection may in fact be a market perfection in light of some other countervailing imperfection” is “as familiar to economists as it is foreign to law professors.” David Gray Carlson, *On the Efficiency of Secured Lending*, 80 VA. L. REV. 2179, 2184 (1994).

<sup>16</sup> *Id.* at 11-12.

Justice Scalia’s concurrence criticized him for what they perceived to be his consequentialism<sup>17</sup> and praised Justice Thomas’s absolutism.<sup>18</sup>

The originalist celebration of Justice Thomas’s *McDonald* concurrence—and corresponding criticism of Justice Scalia’s concurrence—creates a problem for any originalist effort to enforce the rights guaranteed by the Fourteenth Amendment against the states. Namely, if 1.) no Justice besides Thomas is interested in reviving the Privileges or Immunities Clause (and there’s no evidence of such interest); and 2.) avowed originalists shouldn’t accept a doctrine that violates original meaning on second-best, consequentialist grounds, then originalists may be stuck hoping for the realization of a constitutional ideal that will continue to elude them.

Happily, the matter isn’t so hopeless. Substantive due process needn’t be defended as a second-best solution to a problem created by the Court’s decisions in the *Slaughter-House Cases*<sup>19</sup> and *United States v. Cruikshank*,<sup>20</sup> which rendered the Privileges or Immunities Clause a practical nullity as a means of individual rights-enforcement. A forthcoming Article will detail why the original meaning of the text—or “letter”—of the Due Process of Law Clauses guarantees not only *process* but *law*.<sup>21</sup> Deprivations of life, liberty, or property must take place pursuant to constitutionally proper exercises of government power in order to become part of the “law of the land”<sup>22</sup>, which in turn requires substantive judicial evaluation of such exercises of power.

This Essay summarizes the originalist case for substantive due process. But it goes further. The fact that due process of law imposes substantial limits on legislative action doesn’t compel any particular conclusion about *who* should enforce those limits or *how* they should do so. This Essay engages these questions—questions of institutional choice (who decides?) and design (how should they decide?)—as well. Although a form of substantive due process is required by the Constitution’s original meaning, there are good reasons to question whether the doctrine that the Court has developed in order to implement substantive limits on government power is optimal.

---

<sup>17</sup> George Thomas, *Who’s Afraid of Original Meaning?*, 164 POL’Y REV. 1 (2010), <http://www.hoover.org/research/whos-afraid-original-meaning> (criticizing Scalia and arguing that “[i]t is time the Court formally overturned The Slaughter-House Cases as the beginning point of bringing coherence to our Fourteenth Amendment jurisprudence”); Nelson Lund, *Two Faces of Judicial Restraint (Or Are There More?) in McDonald*, 63 Fla. L. Rev. 487, 511 n. 112 (2011) (“Apparently, Justice Scalia thinks that originalism is the only proper approach to constitutional interpretation by judges, except when he has rejected it, at which point it becomes an exercise in academic silliness.”); Damon Root, *How Antonin Scalia Shaped—and Misshaped—American Law*, REASON MAGAZINE (May 2016) (accusing Scalia of “backtrack[ing] on originalism”); Alan Gura, Ilya Shapiro, & Josh Blackman, *The Tell-Tale Privileges or Immunities Clause*, 2010 CATO SUP. CT. REV. 163, 170 (criticizing Scalia for failing to discuss originalist evidence).

<sup>18</sup> See, e.g., Randy E. Barnett, *The Supreme Court’s Gun Showdown*, WALL ST. J., June 29, 2010, available at <http://online.wsj.com/article/SB10001424052748703964104575335060436777670.html> (praising Justice Thomas’s “impressive 56-page originalist analysis”); Gura et. al, *supra* note 17, at 178 (describing it as a “historic concurrence”).

<sup>19</sup> 83 US 36 (1873).

<sup>20</sup> 92 US 542 (1876).

<sup>21</sup> See Randy E. Barnett & Evan Bernick, *No Arbitrary Power: An Originalist Theory of Due Process of Law*, WM. & MARY L. REV. (forthcoming 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3149590](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149590).

<sup>22</sup> U.S. CONST. Art. VI, cl. 2.

This Essay thus undertakes to optimize the “oxymoron.”<sup>23</sup> It calls for a reaffirmation of *United States v. Carolene Products*<sup>24</sup>—decided eighty years ago this year—not its famous “Footnote Four,”<sup>25</sup> but the standard of review deployed in the case itself. It argues that the default standard of constitutional review of legislation that deprives people of life, liberty, or property should be similar to what it was prior to the Court’s fateful embrace of what can be termed “conceivable-basis review” in *Williamson v. Lee Optical*.<sup>26</sup> That standard should, however, be informed by an express theory of the legitimate ends of government that’s consistent with the original function—the “spirit”—of the Fourteenth Amendment’s Due Process of Law Clause and informed by a realistic theory of legislative decisionmaking.<sup>27</sup>

The adoption of such a standard would equip judges to reduce the legislative agency costs<sup>28</sup> that loom under the Due Process of Law Clause—the costs imposed on members of the public through deviation from the letter and spirit of the clause on the part of legislators. Agency costs loom because of imperfectly aligned incentives—what maximizes legislators’ chances of being reelected isn’t necessarily consistent with the letter or spirit of the law of the land—and high information and organizational costs that make it difficult for people to either detect abuses

---

<sup>23</sup> “Substantive due process” seems to have been first described as an oxymoron by Judge Richard Posner. See Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir. 1982) (discussing “the ubiquitous oxymoron ‘substantive due process.’”). The phrase was thereafter picked up by originalists. See, e.g., Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1531 (2008) (“For me as an originalist, the very notion of substantive due process is an oxymoron.”).

<sup>24</sup> 304 U.S. 144 (1938).

<sup>25</sup> See Jack M. Balkin, *The Footnote*, 83 NW. U.L. REV. 275 (1989).

<sup>26</sup> 348 U.S. 483 (1955).

<sup>27</sup> I will posit that public choice theory is such a theory. It is beyond the scope of this Article—and frankly would exceed my capacity—to comprehensively defend the premises of public choice theory, which has been both highly influential and is highly controversial, even if “nearly everyone concedes the power of at least some of [its] insights.” David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647, 663 (1997) (reviewing MAXWELL STEARNS, *PUBLIC CHOICE AND PUBLIC LAW* (1997)). The literature is vast. Foundational works include KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958); WILLIAM RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: THE LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); WILLIAM NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971). For general overviews, see Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339 (1988); DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003); GORDON TULLOCK ET AL., *GOVERNMENT FAILURE: A PRIMER ON PUBLIC CHOICE* (2002). For critiques, see, e.g., Mark Kelman, *On Democracy Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988); DANIEL A. FARBER & PHILLIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); Dorothy A. Brown, *The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions*, 74 WASH. U. L.Q. 179 (1996); Tom Ginsburg, *Ways of Criticizing Public Choice: The Uses of Empiricism and Theory in Legal Scholarship*, 2002 U. ILL. L. REV. 1139, 1140 (2002). For a collection of influential legal writings that rely upon public-choice insights, see *PUBLIC CHOICE & PUBLIC LAW* (Daniel A. Farber, ed., 2007).

<sup>28</sup> For a sampling of foundational agency cost literature, Michael C. Jensen and William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Eugene Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Eugene Fama & Michael C. Jensen, *Agency Problems and Residual Claims*, 26 J.L. & ECON. 327 (1983). For an overview of the literature, see Kathleen M Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57 (1989).

of legislative discretion or to mobilize to do anything about it. An appropriately-stringent default level of judicial review would reduce legislative agency costs by decreasing the expected value of abuse of legislative power *to legislators*—thus discouraging such abuses *ex ante*—and protecting the public against any abuse that does take place *ex post*.<sup>29</sup>

Part I briefly summarizes three of the leading originalist criticisms of substantive due process that have been advanced over the course of the past century, as well as Justice Thomas’s distinctive critique. Part II canvasses the evidence bearing upon the original meaning of *both* Due Process of Law Clauses and presents the case for substantive review of governmental deprivations of life, liberty, or property to determine whether those deprivations are reasonably calculated to achieve constitutionally proper ends. Part III provides an overview of the constitutional heuristics<sup>30</sup>—ready-to-hand rules that are used to simplify constitutional decisionmaking—that the judiciary has used to implement the due process of law; first the “health, safety, public morals” police-power doctrine associated with the oft-maligned “*Lochner* era”; then, the rational-basis test deployed in *Carolene Products*; now, a conceivable-basis approach that is less a standard of review than a rule of decision that insulates legislative decisionmaking from substantive review. It then uses the theory of good-faith construction<sup>31</sup> to formulate an alternative default standard of review that will equip judges to reduce legislative agency costs.

## I. ORIGINALISTS AGAINST SUBSTANTIVE DUE PROCESS

Criticism of substantive due process comes in a variety of forms, from sneering dismissals accompanied with comparisons to “green pastel redness”<sup>32</sup>, to careful historical critiques that see scholars parsing cases and legal commentaries from the Founding era through the ante-bellum period and finding nothing that suggests the kind of means-ends reasonableness analysis of legislation that typifies modern substantive due process cases. This Part focuses on three broad types of the latter before describing Justice Thomas’s critique.

### A. Positivist Due Process

---

<sup>29</sup> I’m assuming that increasing the probability of judicial invalidation of abusive policy can lower its expected value enough to discourage purchases from interest groups in a nontrivial number of cases—that is, I’m assuming demand elasticity. This is admittedly a debatable assumption—it may be that purchases will remain worthwhile in nearly all cases. See Jack M. Beerman, *Interest Group Politics and Judicial Behavior: Macey’s Public Choice*, 67 NOTRE DAME L. REV. 183 (1991) (critiquing a proposed approach to statutory interpretation that’s designed to raise the costs of enacting abusive legislation). Regardless, judicial review can still serve to thwart abusive policy *ex post*.

<sup>30</sup> For an accessible overview of heuristics, see Gerd Gigerenzer and Wolfgang Gassmaier, *Heuristic Decision Making*, 62 ANN REV. PSYCHOL. 451 (2011) (defining a heuristic as “a strategy that ignores part of the [available] information, with the goal of making decisions more quickly, frugally, and/or accurately than more complex methods.”). For evidence that judges rely on heuristic reasoning, see, e.g., Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L. Q. 979 (1994); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. L. & ECON. REV. 26 (1999); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903 (2001); Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb In Securities Fraud Opinions*, 51 EMORY L.J. 83 (2002); Chris Guthrie et al., *Inside the Bankruptcy Judge’s Mind*, 86 B. U. L. REV. 1227 (2006).

<sup>31</sup> See Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, GEO. L. J. (forthcoming 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3049056](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049056).

<sup>32</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980).

The earliest critiques of substantive due process that rested upon claims about original meaning long predated originalism as a distinctive methodology and were advanced by progressives rather than by conservatives. Shortly after the enactment of the Fourteenth Amendment, lower federal courts and eventually the Supreme Court began to evaluate the content of state legislation—including but not limited to legislation that restricted the exercise of economic rights—in an effort to determine whether such legislation was reasonably calculated to carry into effect legitimate state “police” powers.<sup>33</sup> Progressive legal scholars—among them Edward Corwin<sup>34</sup> and Charles Warren<sup>35</sup>—argued that such review was an illegitimate doctrinal innovation that was inconsistent with the text and history of the Fourteenth Amendment.

Corwin’s criticism is representative. After investigating pre-Civil War decisions involving state due process of law and “law of the land” clauses and several Supreme Court decisions, Corwin concluded that the “general constitutional law of the era” rejected review of the content of legislation.<sup>36</sup> Corwin maintained that in so doing the Court hewed close to the historical understanding of “law of the land,” which phrase Corwin traced through English history and took to either denote only “statutory enactment” or “the common law” (which was displaceable through statutory enactment).<sup>37</sup> In embracing substantive review towards the end of the nineteenth century, Corwin argued, the Court had “left behind the definite, historical concept of ‘due process of law’ as having to do with the enforcement of law and not its making.”<sup>38</sup> Properly understood, neither “law of the land” nor “due process of law” imported “any limitation upon legislative power.”<sup>39</sup> The government need only deprive people of life, liberty, or property in conformance with positive law.

What Ryan Williams has termed “positivist” due process<sup>40</sup> animated the jurisprudence of Justice Hugo Black, who argued that due process of law required solely that the government proceed “according to written constitutional and statutory provisions as interpreted by court decisions.”<sup>41</sup> While the Court never explicitly embraced positivist due process,<sup>42</sup> it was long the consensus academic understanding of the original meaning of the clause. Not only progressives like Corwin and Warren—and later Raoul Berger<sup>43</sup>—but conservative originalists like Robert Bork<sup>44</sup> and Frank Easterbrook<sup>45</sup> embraced it. Indeed, conservative originalists invoked substantive-due-

---

<sup>33</sup> See DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 11-20 (2011).

<sup>34</sup> See, e.g., Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911); Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643 (1909), reprinted in 2 CORWIN ON THE CONSTITUTION: THE JUDICIARY (Richard Loss, ed. 1987).

<sup>35</sup> See Charles Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

<sup>36</sup> Corwin, *The Doctrine of Due Process of Law Before the Civil War*, *supra* note, at 471.

<sup>37</sup> *Id.* at 371.

<sup>38</sup> *Id.* at 370.

<sup>39</sup> 2 CORWIN ON THE CONSTITUTION, *supra* note, at 146.

<sup>40</sup> Williams, *supra* note, at 420.

<sup>41</sup> *In re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting).

<sup>42</sup> Williams, *supra* note, at 420.

<sup>43</sup> See Raoul Berger, *Law of the Land Reconsidered*, 74 NW. U. L. REV. 1 (1979).

<sup>44</sup> See BORK, *supra* note, at 43.

<sup>45</sup> See Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85 (1982).

process decisions that had been subjected to scathing historical critiques by progressive scholars in order to condemn decisions celebrated by liberals in the 1960s and 1970s—*Roe v. Wade* in particular. Thus Bork: “Who says *Roe* must say *Lochner*.”<sup>46</sup>

The core of the historical argument for positivist due process has remained the same: “Due process of law” meant in 1791 and 1868 what “law of the land” meant in Chapter 39 of Magna Carta. In the Fifth and Fourteenth Amendments, just as in Chapter 39, it denoted proceedings that were consistent with the positive law at the time that the proceedings commenced. While American constitutions were written and the English Constitution unwritten, and the latter consisted in both common law and parliamentary statutes that were considered constitutional in virtue of their enactment, the law of the land and due process in the English and American contexts imposed no restrictions on legislative action that weren’t otherwise imposed by existing law. That understanding was preserved by the Supreme Court until its decision in *Dred Scott v. Sandford*.<sup>47</sup> Writing for the majority in *Dred Scott*, Chief Justice Roger Taney denied that “an act of Congress which deprives a citizens of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could . . . be dignified with the name of due process of law.”<sup>48</sup> That substantive due process was first deployed in what is probably the most universally-reviled decision in the Court’s history some sixty years after the Constitution was ratified might not be enough to damn it on originalist grounds, but it certainly suggests that the Court took a wrong turn. That it in fact did so is confirmed by careful scrutiny of the relevant history—or so positivists argue.

Careful readers may have perceived a tension within the positivist position. Namely, if the “law of the land” on *these* shores is written and due process of law requires consistency with existing law, doesn’t it follow that due process of law at least prevents unconstitutional legislation from being used to deprive people of life, liberty, or property? Don’t federal judges have to inspect the content of legislation that is being used to deprive people of life, liberty, or property to make sure it’s consistent with the Constitution? Isn’t that *substantive* due process?

Kind of. A positivist might concede that a congressional act that violated, say, the Establishment Clause, couldn’t be used to deprive someone of life, liberty, or property, consistently with due process of law. Yet modern substantive due process doctrine requires that legislation which violates *no other constitutional provision* be evaluated to determine whether its content is calculated to achieve constitutionally legitimate ends. To defend the application of such a doctrine to state legislation—as distinct from federal legislation, the legitimate ends of which are textually specified because Congress must be acting *in order to* carry enumerated powers into effect—an originalist defender of substantive due process would have to make the case that due process of law requires legislatures to act in ways that 1.) are reasonably calculated to achieve ends that aren’t textually specified in the Constitution; and 2.) don’t contradict the communicative content of any other constitutional text. Positivist due process can’t get there.

## B. Traditional Procedural Due Process

---

<sup>46</sup> BORK, *supra* note, at 32.

<sup>47</sup> 60 US 393 (1857).

<sup>48</sup> *Id.* at 450. This origin story is criticized in Barnett & Bernick, *supra* note, at \*23-4.



At the risk of being glib, the Due Process of Law Clauses sure seem to be primarily about *process*. The concept of due process of law was first deployed against adjudications that didn't take place pursuant to processes associated with common-law courts.<sup>49</sup> The Fifth Amendment's Due Process of Law Clause is nestled next to a pair of guarantees that involve the process of the courts. It's thus unsurprising that several originalists have embraced an understanding of due process of law which holds that individuals can be deprived of life, liberty, or property only through common-law processes. Call this *traditional-procedural due process*.

The Supreme Court endorsed traditional-procedural due process in its most extended early engagement with due process. Writing for the Court in *Murray's Lessee v. Hoboken Land & Improvement Co.*,<sup>50</sup> Justice Benjamin Curtis affirmed that due process of law "is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will."<sup>51</sup> Rather, judges must determine whether a given adjudicative process is consistent with due process of law by "examin[ing] the constitution itself, to see whether this process be in conflict with any of its provisions" and, failing that, "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."<sup>52</sup>

It's important to distinguish traditional-procedural due process from a more contemporary understanding, associated with the Court's 1976 decision in *Mathews v. Eldridge*.<sup>53</sup> *Mathews*, which involved the denial of Social Security benefits, set forth a three-part test that courts use today to determine whether adjudicative procedures are consistent with due process of law. Courts applying the *Mathews* test weigh (1) the private interest that will be affected by the official action; (2) 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 (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>54</sup> Traditional procedures aren't required, nor are courts—*Mathews* embraces adjudication outside the courts, so long as the procedures afforded meet a threshold level of "fairness."

In a lengthy concurrence in *Pacific Mut. Life Ins. Co. v. Haslip*,<sup>55</sup> Justice Scalia warmly described—without explicitly embracing—traditional-procedural due process and carefully distinguished it from the "balancing analysis" of *Mathews*.<sup>56</sup> Whereas *Mathews* untethered fairness from both history and constitutional text, Scalia maintained that "fundamental fairness," should be assessed *only* with reference to whether a procedure was "(1) a traditional one and, if so, (2)

---

<sup>49</sup> See J.C. HOLT MAGNA CARTA 208 (George Garnett & John Hudson eds., 2014) (concluding that Magna Carta's "law of the land" clause—to which the concept of due process of law can be traced— was "aimed" primarily against "arbitrary disseisin at the will of the king," against "summary process," and against "arrest and imprisonment on an administrative order.")

<sup>50</sup> *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 US 272 (1856).

<sup>51</sup> *Id.* at 276-7.

<sup>52</sup> *Id.* at 277.

<sup>53</sup> 424 US 319 (1976).

<sup>54</sup> *Id.* at 335.

<sup>55</sup> 499 U.S. 1 (1991).

<sup>56</sup> *Id.* at 36 (Scalia, J., concurring).

prohibited by the Bill of Rights.”<sup>57</sup> As Scalia saw it, “unbroken usage” was sufficient to establish the constitutionality of procedures absent any explicit constitutional bar.<sup>58</sup> Scalia didn’t, however, elaborate on how judges should evaluate procedures that were neither traditional nor prohibited by the Bill of Rights. Rather, he acknowledged the precedential force of *Hurtado v. California*,<sup>59</sup> in which the Court upheld the conviction of a man for murder who hadn’t been indicted by a grand jury—a departure from tradition—while noting that it provided “scant guidance” concerning “when a departure from historical practice denies due process.”<sup>60</sup>

Traditional-procedural due process of law has also recently been endorsed by Philip Hamburger, who argues that administrative adjudications initiated by federal regulatory agencies violate due process of law.<sup>61</sup> Hamburger draws attention to numerous Founding-era affirmations that state due process of law and law-of-the-land clauses prohibited legislative action that denied access to the courts and the proceedings traditionally associated with the courts.<sup>62</sup> Such affirmations, according to Hamburger, rested upon the premise that government officials could *only* proceed against individuals’ life, liberty, or property in a manner consistent with what he describes as “ideals about the personnel, structure, and mode of proceeding of . . . courts—ideals that could be summed up as the due process of law.”<sup>63</sup> On this view, the balancing approach of *Mathews* is as water to the Fifth Amendment’s whiskey.

Like positivist due process, traditional-procedural due process arguably has substantive elements. A judge must inspect the content of challenged legislation to determine whether it dispenses with traditional procedures—statutory enactment alone doesn’t due process of law make. Further, certain of those traditional procedures afforded the opportunity for substantive review. Consider the right to trial by jury. During the Founding era, juries could judge both law and fact—that is, they could determine whether an act was constitutional before applying it in a given civil or criminal case to deprive someone of their life, liberty, or property.<sup>64</sup> By guaranteeing juries, traditional-procedural due process would necessarily guarantee substantive review of legislation. Similarly, insofar as traditional-procedural due process requires adjudication to take place before an impartial judge who is bound to hear constitutional challenges—whether they be process or substance-based—traditional-procedural due process makes substantive judicial review possible.

Like positivist due process, however, the domain of traditional-procedural due process is much more limited than that of modern substantive due process. Traditional due process of law doesn’t impose any constraints on legislative acts which don’t dispense with traditional adjudicative procedures, and doesn’t entail inquiry into the legitimacy of the ends that a given piece of legislation is designed to accomplish if that legislation doesn’t affect the adjudicative process.

---

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

<sup>58</sup> *Id.* at 35.

<sup>59</sup> 110 U.S. 516 (1884).

<sup>60</sup> *Pacific Mut. Lif. Ins.*, 499 U.S. at 32 (Scalia, J., concurring) (emphasis in original).

<sup>61</sup> See PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 227-77 (2014).

<sup>62</sup> See Philip Hamburger, *Administrative Evasion of Procedural Rights*, \*14-16, available at

<https://sls.gmu.edu/csas/wp-content/uploads/sites/29/2017/04/Administrative-Evasion-of-Procedural-Rights.pdf>.

<sup>63</sup> *Id.* at 257.

<sup>64</sup> See CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 13-64 (2013).

### C. Minimal Substance Due Process

Recent originalist scholarship has cast doubt upon both positivist and traditional-procedural due process. Among those who have questioned the conventional wisdom—albeit in different ways—are Michael McConnell, Nathaniel Chapman, Ryan Williams, and Christopher Green.

Let's start with McConnell and Chapman. In defending positivist due process, Raoul Berger made much of Alexander Hamilton's 1790 opposition before the New York General Assembly of a proposed Senate amendment to an act regulating elections—one that would disqualify the owner or owners of British privateers of vessels of war that had attacked the "vessels, property, or persons" of the United States from holding any state office of trust.<sup>65</sup> Because Hamilton denied that "the law of the land" would "include an act of the legislature"<sup>66</sup> and affirmed that it could "never be referred to an act of the legislature,"<sup>67</sup> Berger concluded that Hamilton must have believed that New York's law of the land clause did not *constrain* the legislature.<sup>68</sup>

As McConnell and Chapman show, careful inquiry into the context of Hamilton's remarks reveals that Berger misunderstood them. Hamilton's opposition to the 1790 amendment was based on his conviction that the amendment violated New York's law of the land clause. Three years earlier, Hamilton had argued that a bill which stripped Tories of their citizenship was "contrary to the law of the land," averring that "the legislature . . . cannot, without tyranny, disfranchise or punish whole classes of citizens by general descriptions, without trial and conviction of offences known by laws previously established declaring the offence and prescribing the penalty."<sup>69</sup>

By situating Hamilton's statements in context, examining a string of state-law decisions during the time period in which Fifth Amendment was ratified, and tracing the pertinent language through ratification process itself, McConnell and Chapman discern that positivist due process fails to capture something important about how that language was understood.<sup>70</sup> Time and again, state courts during the Founding era distinguished between a mere "act" of a legislature and a "law." What became the Fifth Amendment was, according to Madison's original design, to be inserted between "article 1st, section 9, between clauses 3 and 4" alongside other limits on congressional power.<sup>71</sup> Shortly after ratification and throughout the early 19th century, republicans and federalists, courts and commentators rejected the idea that legislative enactments necessarily became the law of the land.<sup>72</sup>

What was going on? McConnell and Chapman argue that the separation of powers was a conceptual common denominator that can be traced through materials that might otherwise ap-

---

<sup>65</sup> See RAUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 194 (1977).

<sup>66</sup> Alexander Hamilton, Remarks on an Act for Regulating Elections (Feb. 6, 1787), in 4 *THE PAPERS OF ALEXANDER HAMILTON* 34 n.1 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

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

<sup>68</sup> BERGER, *supra* note, at 196.

<sup>69</sup> Alexander Hamilton, Letter from Phocion to the Considerate Citizens of New York, on the Politics of the Day 5 (New York, Samuel Loudon 1784), reprinted in 3 *THE PAPERS OF ALEXANDER HAMILTON* 483.

<sup>70</sup> Chapman & McConnell, *supra* note, at 1716-7.

<sup>71</sup> 1 *ANNALS OF CONG.* 434 (1789) (Joseph Gales ed., 1834).

<sup>72</sup> See sources cited *supra* notes 132-43.

pear disparate—cases involving general legislative deprivations of property rights that had “vested” prior to the legislation and cases involving legislative interference with the life, liberty, or property of named persons.<sup>73</sup> The common denominator: to be legislation, as distinct from adjudication, a legislative act had to be both general and prospective.<sup>74</sup> Green’s analysis of English, antebellum, and Reconstruction-era materials leads him to a similar conclusion concerning the Fourteenth Amendment’s Due Process of Law Clause.<sup>75</sup>

On Ryan Williams’ account, this is “substantive due process,” and its development during the antebellum period provides good reason to believe that those who ratified the Fourteenth Amendment understood “due process of law” to have substantive components as well as procedural components.<sup>76</sup> Yet, Chapman and McConnell<sup>77</sup> resist this characterization, as does Green<sup>78</sup>—and understandably so, as modern substantive due process requires considerably more of legislation than that it be general, prospective, and consistent with common-law procedural guarantees. The major modern substantive-due-process cases that—as Matthew Franck has put it—“gave the doctrine its name,” from *Lochner* to *Griswold* to *Roe* to *Lawrence v. Texas*<sup>79</sup> to *Obergefell v. Hodges*,<sup>80</sup> concerned general, prospective laws that denied no one access to the processes of the courts. Ascertaining whether a statute is general and prospective requires inspection of its content, yes, but it is sufficiently distinct from modern substantive due process to use a different term—call it minimal substance due process.<sup>81</sup>

#### D. Justice Thomas Versus Substantive Due Process

Prior to *Obergefell v. Hodges*, Justice Thomas said little about substantive due process—although he said enough about it to make plain that he considered it illegitimate. In a brief discussion in *McDonald*, Justice Thomas asserted that “a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.”<sup>82</sup> If due process of law guarantees *only* process, it might guarantee either traditional processes or processes authorized by preexisting law—it’s hard to see how it could guarantee that legislative deprivations of prop-

---

<sup>73</sup> Chapman & McConnell, *supra* note, at 1727.

<sup>74</sup> *Id.*

<sup>75</sup> Green, *Duly Convicted*, *supra* note, at 78 (arguing that “due process of law” requires that “legislation not contravene traditional limits on retroactivity”).

<sup>76</sup> Williams, *supra* note, at 415.

<sup>77</sup> Chapman & McConnell, *supra* note, at 1679 (“The distinctive aspect of modern “substantive due process” . . . is its treatment of natural liberty as inviolate, even as against prospective and general laws passed by the legislature and enforced by means of impeccable procedures.”).

<sup>78</sup> Christopher R. Green, *Twelve Problems With Substantive Due Process*, \* (“[A]s [Williams] notes himself, antiretroactivity vested-rights rules are not the same sort of substantive due process we see in cases like *Munn* [v. Illinois], *Lochner*, *Roe*, and *Obergefell*”).

<sup>79</sup> 539 US 558 (2003).

<sup>80</sup> 135 S.Ct. 2584 (2015).

<sup>81</sup> I owe this felicitous formulation to Matthew Franck.

<sup>82</sup> See *McDonald*, 561 U.S. at 811 (Thomas, J., concurring) (“The notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words”).

erty be general and prospective. That is to say, Justice Thomas’s assertion seemed to reflect a positivist or traditional-proceduralist understanding of due process of law rather than minimal-substance due process.

In *Obergefell*, Justice Thomas elaborated his understanding of due process of law at greater length. He began by flatly denying that due process of law guaranteed anything but process. He then honed in on the word “liberty”, undertaking to ascertain its original meaning.

On Justice Thomas’s account, “liberty” in the Fourteenth Amendment means the same thing that it means in the Fifth Amendment means the same thing that it meant to Sir William Blackstone. Justice Thomas pointed out that early state constitutions generally replicated the language of Chapter 39 of Magna Carta but incorporated the Blackstonian triad of “life, liberty, and property.”<sup>83</sup> Drawing upon Warren’s defense of positivist due process, Justice Thomas affirmed that “[s]tate decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word ‘liberty’ to refer only to freedom from physical restraint.”<sup>84</sup> Justice Thomas further noted that physical restraint “was the consistent usage of the time when ‘liberty’ was paired with ‘life’ and ‘property’” and that this usage “avoid[ed] rendering superfluous those protections for ‘life’ and ‘property’”—life and property could both easily be swept into a broad concept of liberty.<sup>85</sup> Again, however, Justice Thomas didn’t clearly commit to either a positivist or traditional-proceduralist understanding of due process of law. Grant that liberty means only freedom from bodily restraint and it’s still not clear what kind of legislation the state can use to physically restrain someone—say, Joseph Lochner<sup>86</sup> or John Lawrence<sup>87</sup>—consistently with the process of law.

In *Nelson v. Colorado*<sup>88</sup> and *Sessions v. Dimaya*,<sup>89</sup> Justice Thomas strongly suggested a commitment to positivist due process. *Nelson* concerned a Colorado law that permitted the state to retain conviction-related assessments unless and until the prevailing defendant instituted discrete civil proceedings and proved their innocence by clear and convincing evidence.<sup>90</sup> The Court held 7-1 that the law violated the Fourteenth Amendment’s Due Process of Law Clause. Justice Thomas, dissenting alone, argued that people whose convictions had been reversed had no property interest recognized by state law in the money exacted on the basis of their convictions. Wrote Justice Thomas, even if Colorado couldn’t have exacted the money absent conviction and even if Colorado cannot exact any further money in the future. “[i]t does not follow . . . that petitioners have a property right in the money they paid pursuant to their then-valid convictions, which now belongs to the State and the victims under Colorado law.”<sup>91</sup> This is positivist due process with a vengeance—Justice Thomas made no effort to determine whether the government could take property pursuant to an invalid conviction under traditional common-law

---

<sup>83</sup> *Obergefell*, 135 S. Ct. at 2633.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Lochner was convicted of a misdemeanor, sentenced to pay a \$50 dollar fine, and was required to “stand committed until paid, not to exceed fifty days in the Oneida County jail.” Lochner, 198 U.S. at 47.

<sup>87</sup> Lawrence and Tyrone Gardner were arrested, held in custody overnight, fined \$200, and assessed court costs of \$141.25. Lawrence, 539 U.S. at 563.

<sup>88</sup> 137 S. Ct. 1249 (2017).

<sup>89</sup> 138 S. Ct. 1204 (2018).

<sup>90</sup> *Nelson*, 137 S. Ct. at 1253-4.

<sup>91</sup> *Id.* at 1266 (Thomas, J., dissenting).

procedures. In *Dimaya*, Justice Thomas, again in dissent, highlighted the “not insubstantial” case for what he described as the “law of the land view” of due process of law.<sup>92</sup> The accompanying citations to Berger, Corwin, Justice Black’s dissent in *In Re Winship*, and Alexander Hamilton’s denial that due process of law can “be referred to an act of legislature” make plain that it was positivist due process that he had in mind.

There’s also an institutional element to Justice Thomas’s critique of substantive due process. Like the late Justice Scalia, Justice Thomas regards substantive due process as not merely theoretically illegitimate but practically dangerous—as a standing invitation to judges to impose their own normative convictions on the rest of us. This critique is best-developed in his dissent in *Whole Woman’s Health v. Hellerstedt*,<sup>93</sup> in which Justice Thomas took aim at the distinction that the Court has drawn between “fundamental” substantive due process rights which receive “preferential treatment” in the form of heightened judicial scrutiny when they are burdened, and other rights which receive lesser scrutiny.<sup>94</sup> Justice Thomas argued that the tiers of scrutiny associated with Footnote Four of *Carolene Products* are without constitutional basis and have had the effect of “reducing constitutional law to policy-driven value judgments”—judgments that threaten to deprive the Court of “the last shreds of its legitimacy.”<sup>95</sup> The problem is particularly apparent, maintained Justice Thomas, when the Court elevates unenumerated rights—like the right to terminate a pregnancy—over enumerated rights, like freedom of speech, restrictions on which the Court had in the same term upheld in a case involving a state law forbidding judges to solicit campaign contributions.<sup>96</sup>

## II. THE ORIGINALIST CASE FOR SUBSTANTIVE DUE PROCESS

Justice Thomas is correct that the originalist case against substantive due process is “not insubstantial.” It has convinced some of the twentieth-century’s most distinguished originalist scholars, and the Court’s two leading originalist Justices. This Part sketches an affirmative originalist case for a distinctive understanding of the due process of law—one that places the means-ends substantive due process that’s familiar today on firm constitutional foundations.

### A. The Origins of Due Process of Law

There’s little dispute over the origins of the phrase “due process of law.” Scholars generally trace it to Magna Carta, a series of concessions extracted at sword point from King John at Runnymede by aggrieved barons in 1215—and promptly annulled by the Pope at John’s request shortly thereafter. Chapter 39, commonly termed the “law of the land” clause, provides:

---

<sup>92</sup> Sessions, 138 S. Ct. at 1243 (Thomas, J., dissenting).

<sup>93</sup> 136 S. Ct. 2292 (2016).

<sup>94</sup> *Id.* at 2328 (Thomas, J., dissenting).

<sup>95</sup> *Id.* at 2330.

<sup>96</sup> *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015).

No free man shall be taken or imprisoned or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go or send against him, except by the legal judgment of his peers or by the law of the land.<sup>97</sup>

It's also uncontroversial that this language was primarily directed against arbitrary *executive* action—in particular, John's use of administrative orders that rested on his mere will, enforced through prerogative courts that lacked both independent, presumptively impartial judges and traditional procedures designed to protect individual rights. At the time, there was but a rudimentary Parliament that didn't threaten the barons. The "we" denoted in the text is the royal "we"—there's no reason to doubt that the King alone was Chapter 39's originally-intended target.

John promptly disregarded his promises, and subsequent monarchs were loath to be bound by them. When in the fourteenth century King Henry III started summarily punishing subjects outside the common-law courts, Parliament codified a series of statutes that more particularly described what Chapter 39 entailed. A 1354 statute linked "due process of law" to access to common-law courts with judges and traditional proceedings: "No man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law."<sup>98</sup>

The phrases "law of the land" and "due process of law" became synonymous, thanks in significant part to the commentaries of Lord Edward Coke, who interpreted Chapter 29 of King Henry's now-definitive 1225 confirmation of the Magna Carta (corresponding to Chapter 39 in the original). Chapter 29 reads thus:

No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.<sup>99</sup>

In interpreting this language, Coke drew upon a 1363 statute which stated "that no man be taken, imprisoned, or put out of his free-hold without process of the law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the common law."<sup>100</sup>

Coke's understanding of Chapter 39 drove his opposition to the absolutist claims of James I, the first Stuart king, who claimed the authority to adjudicate cases outside of the courts of law. James maintained that "[t]he King being the author of the Lawe is the interpreter of the law" and that, being that the law rested upon reason, he—being eminently reasonable—was as well-equipped to interpret it as any judge.<sup>101</sup> Coke responded that the law of the land was "higher" than the actions of the king and denied that "the King in his own person [could] adjudge any

---

<sup>97</sup> Magna Carta (1215 & 1225), reprinted in RALPH V. TURNER, *MAGNA CARTA THROUGH THE AGES* app. at 226, 231 (2003) (emphasis added).

<sup>98</sup> See *id.* at 40 (explaining "due process" was "construed to exclude procedure before the councils or by special commissions and to limit intrusions into the sphere of action of the common-law courts").

<sup>99</sup> 9 Hen. 3, ch. 29 (1215).

<sup>100</sup> E. COKE, 2 *INSTITUTES OF THE LAWS OF ENGLAND* 50 (1798).

<sup>101</sup> *Prohibitions Del Roy*, 77 Eng. Rep. 1342, 1342 (1607).

case,”<sup>102</sup> gently pointing out that cases were not to be decided by natural reason—which the King certainly possessed— “but by the artificial reason and judgment of Law”, the development of which required experience that the King did possess.<sup>103</sup> James may have won the battle—he dismissed Coke for his insubordination—but Coke’s defense of the proposition that the King wasn’t above the law of the land became iconic and cemented his historical reputation as a champion of the rule of law against overreaching monarchs.

But what of Parliament? Coke interpreted “per legem terrae”—by the law of the land—as “by the Common Law, Statute Law, or Custome of England.”<sup>104</sup> Did that mean that parliamentary statutes could deprive people of the set of procedural rights and personnel that had long since come to be associated with the common-law courts? Hamburger has shown that the status of Parliament as the highest court in the land created institutional impediments to any judicial invalidation of acts of Parliament on the grounds that those acts were inconsistent with the law of the land. Because England’s constitution was developed through custom and Parliament was the court in which customs were declared or altered, Hamburger explains that Parliament’s “enactments amounted to decisions upholding their constitutionality.”<sup>105</sup>

For his part, Coke acknowledged that parliamentary statutes necessarily became part of the law of the land. Some confusion has arisen because of what Richard Bernstein has described as the “crabbed, thorny prose of the seventeenth century,”<sup>106</sup> particularly in the context of Coke’s report of *Dr. Bonham’s Case*.<sup>107</sup> Dr. Thomas Bonham had been sentenced to pay a fine and to be incarcerated for practicing medicine in London without permission from the Royal College of Physicians, and the case arose from his action for wrongful imprisonment. A majority of the Court of Common Pleas held that the College could not imprison Bonham. Coke explained the judges’ reasoning thus, in language that has since been upheld as an endorsement of the proposition that Parliament cannot violate the common law:

The censors cannot be judges, ministers, and parties . . . And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void.<sup>108</sup>

Some have claimed that Coke in *Bonham’s Case* asserted authority to hold acts of Parliament unlawful if they violated “common right and reason”—here, by making the censors judges in their own case.<sup>109</sup> But Richard Helmholz has shown that the term “void” was often used to mean “empty” or “ineffective” and the provisions of other statutes and grants of royal privilege were then described as “void” and treated as having no effect if they conflicted with fundamental prin-

---

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> COKE, *supra* note, at 45.

<sup>105</sup> LAW AND JUDICIAL DUTY, *supra* note, at 239.

<sup>106</sup> RICHARD B. BERNSTEIN, THOMAS JEFFERSON: THE REVOLUTION OF IDEAS 5 (2004).

<sup>107</sup> 77 Eng. Rep. 646 (CP 1610).

<sup>108</sup> *Id.* at 652.

<sup>109</sup> See Chapman & McConnell, *supra* note, at 1689–92 (summarizing the debate over the meaning of Coke’s words).



ciples,<sup>110</sup> on the (charitable) assumption that no violation of those principles had been intended<sup>111</sup>—not by way of asserting any judicial power to hold acts of Parliament unconstitutional. The better view seems to be that Coke was engaging in equitable interpretation—interpretation which was itself a component of the common law.<sup>112</sup>

Subsequent generations, however, would embrace the proposition that—as James Otis put it during the lead-up to the American Revolution—Parliament “cannot make two and two, five”<sup>113</sup>—that it too was bound by fixed prior principles, violations of which would be unconstitutional. When five petitioners from Kent were imprisoned by a Tory-dominated House of Commons in 1701, Daniel Defoe and the Whigs drew upon natural-rights theory to criticize not only the imprisonments but the idea of parliamentary supremacy.<sup>114</sup> The tension between parliamentary supremacy and natural-rights theory was perhaps best-captured in Chief Justice John Holt’s opinion in the 1701 case of *City of London v. Wood*,<sup>115</sup> wherein Holt declared that Parliament was bound by natural right—but that no judicial remedy was available for a Parliamentary act that contradicted natural right. Rather, the remedy consisted in exercising the natural right of revolution.<sup>116</sup> Parliamentary violations of natural right would return individuals to the state of nature—government having undermined its very purpose for being, the people could justly cast it off. *Judges* would be bound to give effect to the law—but the people might, as John Locke put it, “appeal to heaven.”<sup>117</sup> Fortunately, Holt found that the act at issue could be construed in a way that made such an appeal unnecessary.

## B. Due Process of Law in 1791

American judges didn’t face the institutional impediments that made the judicial invalidation of legislative acts on constitutional grounds almost unthinkable across the Atlantic. American corporations and colonies had written constitutions that couldn’t be altered by ordinary legislation; after independence, states generally adopted such constitutions. Ten state constitutions included law of the land provisions that tracked the language of Chapter 39.<sup>118</sup>

How was this language understood? Prominent and widely-cited American jurists relied upon Coke in interpreting both “due process of law” and “law of the land.” St. George Tucker, a Virginia judge who taught constitutional law at William and Mary in the 1790s, wrote that “[d]ue process of law must then be had before a judicial court, or a judicial magistrate.”<sup>119</sup> Supreme Court Justice Joseph Story in his *Commentaries on the Constitution* defined due process of law as “due presentment or indictment, and being brought in to answer thereto by due process of the

---

<sup>110</sup> See Richard H. Helmholz, *Bonham's Case, Judicial Review, and the Law of Nature*, 1 J LEGAL ANALYSIS 325, 331 (2009).

<sup>111</sup> LAW AND JUDICIAL DUTY, *supra* note, at 55.

<sup>112</sup> *Id.* at 274.

<sup>113</sup> For an account of the imprisonment of the Kentish Petitioners, see Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood*, 94 COLUM. L. REV. 2097-2111 (1994);

<sup>114</sup> *Id.* at 2100.

<sup>115</sup> 88 Eng. Rep. 1591 (1702).

<sup>116</sup> 88 Eng. Rep. at 1597.

<sup>117</sup> SECOND TREATISE, § 168.

<sup>118</sup> See Riggs, *supra* note, at 974-5.

<sup>119</sup> ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES 203 (1803).

common law” and stated that it “affirms the right of trial according to the process and proceedings of the common law.”<sup>120</sup> Chancellor James Kent of New York in his influential *Commentaries on American Law* defined due process of law as “law in its regular course of administration through the courts of justice.”<sup>121</sup> For these jurists, due process of law required individualized deprivations of life, liberty, or property to take place through the courts—thus implicitly prohibiting both executives and legislatures from unilaterally effectuating such deprivations.

Positivist due process runs aground against case after case in which legislative acts were evaluated under due process of law and law-of-the-land provisions. At first blush, many early state cases interpreting “law of the land” and “due process of law” appear to be solely concerned with procedural rights available at common law rather than the content or substance of the law being applied.<sup>122</sup> Other cases focus on statutory deprivations of “vested” property rights of specific persons who had acquired that property consistently with the positive law then in effect.<sup>123</sup>

But significant authority held that “due process of law” and “law of the land” required a legislative act to be consistent with superior law—full stop—to qualify as law at all. The proposition that only such acts as were consistent with the federal Constitution were in fact *law* was advanced by both republicans and federalists. In the 1798 Kentucky Resolutions, arch-republican Thomas Jefferson declared that the Alien and Sedition Acts were “not law, but . . . altogether void, and of no force” because they violated the First, Fifth, and Tenth Amendment;<sup>124</sup> in the 1803 case of *Marbury v. Madison*<sup>125</sup> arch-federalist Chief Justice John Marshall asked whether “an act repugnant to the Constitution can become the law of the land,” and answered that “a legislative act contrary to the Constitution is not law.”<sup>126</sup> Some years later in *McCulloch v. Maryland*,<sup>127</sup> Chief Justice Marshall stated that “the laws” of Congress “when made in pursuance of the constitution, form the supreme law of the land,” the implication being that when “the laws” of Congress aren’t made in pursuance of the Constitution, they are mere acts that don’t become part of the “law of the land.”<sup>128</sup> That was the position taken by Alexander Hamilton in Federalist 33, wherein he expressly denied that congressional acts which exceeded Congress’s constitutional powers became part of the law of the land. Wrote Hamilton, “the clause which declares the supremacy of the laws of the Union . . . expressly confines this supremacy to laws made pursuant to the Constitution.”<sup>129</sup> Thus, while a law authorized by the Constitution—one “laying a tax for the use of the United states”—would be “supreme in its nature,” a law that exceeded Congress’s

---

<sup>120</sup> JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION 1783 (1883).

<sup>121</sup> JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 13 (1826).

<sup>122</sup> See, e.g., *Trevett v. Weeden* (R.I. 1786), in 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 417 (Bernard Schwartz ed., 1971); *Butler v. Craig*, 2 H. & McH. 214 (Md. 1787); *Zylstra v. Corp. of Charleston*, 1 S.C.L. 382 (Ct. Com. Pl. 1794).

<sup>123</sup> See, e.g., *Bayard v. Singleton*, 1 NC 5 (1787); *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304 (1795); *Dash v. Van Kleeck*, 7 Johns. 477 (1811); *Allen’s Adm’r v. Peeden*, 4 N.C. 442 (1816); *Merrill v. Sherburne*, 1 N.H. 199 (1818).

<sup>124</sup> *Kentucky Resolutions of 1798 and 1799*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 541 (Jonathan Elliot, ed., 1836) (emphasis added) [hereinafter “Elliot’s Debates”].

<sup>125</sup> 1 Cranch 137, 176 (1803).

<sup>126</sup> *Id.* at 199.

<sup>127</sup> 4 Wheat. 159 (1819) (emphasis added).

<sup>128</sup> *Id.* at 199.

<sup>129</sup> THE FEDERALIST NO. 33 (Alexander Hamilton) at 161 (James McClellan & George W. Carey, 2001).

constitutional powers—one “for abrogating or preventing the collection of a tax laid by the authority of the State, (unless upon imports and exports)”—would not enjoy that status.<sup>130</sup> The latter act wouldn’t really be law—it would be but “an usurpation of power not granted by the Constitution.”<sup>131</sup>

State courts, too, maintained that laws that violated state constitutions weren’t consistent with the law of the land. Judge Locke in a highly influential 1805 opinion in *Trustees of the University of North Carolina v. Foy*<sup>132</sup> stated that North Carolina’s law-of-the-land provision forbade “depriv[ations] of . . . liberties or property, unless by a trial by Jury in a court of Justice, according to the known and established rules of decision, derived from the common law, and such acts of the Legislature as are consistent with the constitution.”<sup>133</sup>

Several judges went so far as to deny that acts which violated the social compact were laws, even in the absence of any written constitutional provision that forbade them. The most famous example is probably Justice Samuel Chase, who in *Calder v. Bull*<sup>134</sup> discussed the limits of legislative power under what was at the time Connecticut’s unwritten, customary constitution. Even absent a written constitution, wrote Justice Chase, “[t]he purposes for which men enter into society . . . determine the nature and terms of the social compact” and “the nature, and ends of legislative power will limit the exercise of it.”<sup>135</sup> Justice Chase offered several examples of exercises of legislative power that were sufficiently inconsistent with the purposes of the social compact that “it cannot be presumed” that people had delegated it.<sup>136</sup> Among them: “A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B.”<sup>137</sup>

While some scholars have argued that Justice Chase, like Coke, was merely endorsing equitable interpretation,<sup>138</sup> his colleague, Justice James Iredell, didn’t so understand him and felt the need to respond with robust positivism. Iredell asserted that “[i]f . . . a government, composed of Legislative, Executive and Judicial departments, were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void.”<sup>139</sup> As authority for his position, Justice Iredell cited Blackstone, who was describing the powers of Parliament and who held that Parliament’s will was necessarily law. Justice Iredell’s response seems unnecessary if all Justice Chase was doing was affirming a long-established rule which counseled in favor of construing unclear language to avoid natural-rights violations. The debate between Justices Chase and Iredell has long been un-

---

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> 5 N.C. 58 (1805).

<sup>133</sup> *Id.* at 89.

<sup>134</sup> 3 Dall. 386 (1798).

<sup>135</sup> *Id.* at 388.

<sup>136</sup> *Id.*

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

<sup>138</sup> *Id.* at 398 (opinion of Iredell, J.). [Or that he was endorsing minimal substance due process. See McChapman and McConnell.]

<sup>139</sup> *Id.*

derstood as a debate over whether legislatures have unlimited power absent positive restrictions, and both men appear to have understood it that way.

Iredell's view of legislative power appears to be an outlier during the Founding era.<sup>140</sup> In the 1792 case of *Bowman v. Middleton*,<sup>141</sup> the South Carolina Supreme Court held unconstitutional an act that transferred a freehold from the heir-at-law to another person, and also from the eldest son of an intestate, and vested it in a second son, on the grounds that it was contrary to "natural law" and "common right."<sup>142</sup> Justice William Paterson of the United States Supreme Court, then riding circuit, stated in the 1795 case of *Vanhorne's Lessee v. Dorrance*,<sup>143</sup> that "the legislature . . . had no authority to make an act divesting one citizen of his freehold and vesting it in another, without a just compensation," as such an act was "contrary to the principles of social alliance, in every free government," as well as "contrary to the letter and spirit of the constitution."<sup>144</sup> Similarly, in his opinion for the Court in *Fletcher v. Peck*,<sup>145</sup> Chief Justice Marshall acknowledged that "[t]o the legislature all legislative power is granted" but "doubted whether the nature of society and of government does not prescribe some limits to the legislative power" and questioned whether "the act of transferring the property of an individual to the public, be in the nature of the legislative power."<sup>146</sup>

It's true that the above commentaries and cases don't always involve discussion of the phrase "due process of law," which in turn raises the question whether those who ratified the Fifth Amendment in 1791 understood it to denote a concept of inherently limited legislative power. The history of the drafting and ratification of the Fifth Amendment is sparse, and it's unclear why Madison chose to use the phrase "due process of law" rather than "law of the land," despite his own state's support for the latter.<sup>147</sup> But it *is* clear that the terms "law of the land" and "due process of law" were synonymous, and that they were generally understood to constrain legislatures to comply with higher law—whether that of state constitutions, the federal Constitution, or fundamental social-contractual principles. Determining whether statutes interfered with common-law procedural rights; whether statutory deprivations of vested rights were adjudicative rather than properly legislative acts; or whether they violated the social compact, necessarily entailed inquiry into substance. Precisely how much inquiry, and how that inquiry was conducted in the years leading up to the enactment of Fourteenth Amendment, is the subject of the next section.

### C. Due Process of Law in 1868

---

<sup>140</sup> Gedicks, *supra* note, at 651-4 (documenting how Iredell's view was "largely rejected by state constitutional decisions of the period.")

<sup>141</sup> 1 Bay 252 (1792).

<sup>142</sup> *Id.*

<sup>143</sup> 2 Dall. 304 (1795).

<sup>144</sup> *Id.* at 310.

<sup>145</sup> 6 Cranch 87 (1810).

<sup>146</sup> *Id.* at 136.

<sup>147</sup> Chapman and McConnell speculate that Madison was trying to avoid conflation of the phrase with the reference to "the supreme law of the land" in the Supremacy Clause of Article VI. Because the enactments identified as "the law of the land" identified in the Supremacy Clause are all examples of written, positive law, perhaps people would have concluded that the Fifth Amendment did not incorporate any independent procedural requirements derived from the common law. Chapman & McConnell, *supra* note, at 1724. It's plausible.

The connection between the concept of inherently limited government and the due process of law was forged over the course of the early-nineteenth century. *Pace* McConnell, due process of law came to be understood as forbidding not only legislative enactments that weren't generally applicable or prospective or interfered with common-law procedural rights but enactments that weren't good-faith efforts to accomplish legitimate governmental ends. *Pace* Williams, courts did engage in means-ends analysis. *Pace* Green, many of these didn't involve legislative actions that put anyone at risk of criminal prosecution.

Consider three Tennessee cases, decided over the course of two years. In the first two cases, Judge John Catron interpreted the state's law-of-the-land clause to require "general public law[s]" as distinct from "partial or private laws" that treated similarly situated individuals differently.<sup>148</sup> The perceived vice of the latter was explained by Judge Nathan Green of the Tennessee Supreme Court in a decision voiding an act that created a special court to handle all lawsuits brought against the Bank of the State of Tennessee: such partial legislation was "the same in principle, as if a law had been passed in favor of someone [individual or corporate body]."<sup>149</sup> Evidently, laws designed to "favor" the interests of only certain individuals or groups were deemed inconsistent with the law of the land. In *People v. Morris*,<sup>150</sup> Judges Nelson, interpreting a New York state constitution which at the time had no bill of rights, wrote that "[the] vested rights of the citizen," including "that private property cannot be taken for strictly private purposes at all, nor for public without a just compensation" and that the "obligation of contracts cannot be abrogated or essentially impaired," are to be held "sacred and inviolable, even against the plenitude of power of the legislative department."<sup>151</sup> Deprivation of vested rights to serve private purposes was thus inconsistent with due process of law. Quite obviously, one has to identify the purposes of legislative action in order to determine whether they're designed to serve only private purposes.<sup>152</sup>

---

<sup>148</sup> See *Vanzant v. Waddell*, 2 Yerg. (Tenn.) 260 (1829); *Wally's Heirs v. Kennedy*, 2 Yerg. 554 (1831).

<sup>149</sup> *Bank v. Cooper*, 2 Yerg. 599 (1831). See also *Dunn v. City of Charleston*, 16 S.C.L. 189, 200 (1824) ("Any act of partial legislation, which operates oppressively upon one individual, in which the community has no interest, is not the law of the land"); *Sears v. Cottrell*, 5 Mich. 251, 254 (1858) ("By 'the law of the land' we understand laws that are general in their operation, and that affect the rights of all alike; and not a special act of the legislature, passed to affect the rights of an individual against his will, and in a way in which the same rights of other persons are not affected by existing laws.").

<sup>150</sup> 13 Wend. 325 (N.Y. 1835).

<sup>151</sup> *Id.* at 328. See also *Taylor v. Porter & Ford*, 4 Hill 140 (N.Y. 1843) (averring that "'law of the land' did not encompass 'statute[s] passed for the purpose of working the wrong' by 'tak[ing] the property of A., either with or without compensation, and giv[ing] it to B.'").

<sup>152</sup> Although it is beyond the scope of this Essay to defend the proposition that one can coherently speak of the purposes of multimember bodies at any length, I'll note here that even the most ardent critics of judicial inquiry into "legislative intent" concede that groups of individuals can agree to pursue common goals through agreed-upon means. See, e.g., John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV 2003, 2010 (2009) ("Textualists understand that statutes are enacted to serve a purpose"); *Nat'l Tax Credit Partners. L.P. v. Havlik*, 20 F. 3d 705, 707 (7th Cir. 1994) (Easterbrook, J.) (affirming that "[k]nowing the purpose behind a rule may help a court an ambiguous text"); *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 450 (2002) (Scalia, J., dissenting) (finding "[e]vidence of pre-emptive purpose . . . in the text and structure of the statute at issue" (alteration in original) (emphasis and internal quotation marks omitted) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993))). For penetrating arguments against intent-skepticism, see RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* (2012); Timothy Grinsell, *Linguistics and Legislative*

In order to distinguish between proper and improper exercises of legislative discretion, antebellum courts developed what became known as the “police power” doctrine. At the time of the framing, the phrase “internal police” or “police” was used to refer generally to the reserved powers of the states.<sup>153</sup> Judges and legal commentators evaluating exercises of state power under state constitutions frequently noted the difficulty of defining the contours of the police power.<sup>154</sup> This is understandable, given that the *historical* police power—which can be traced back through centuries of authoritarian governance—was unlimited. As Markus Dubber has documented, it was rooted in a conception of state government as household governance—the householder’s absolute power to arrange the household for the common good of the whole family served as a model for absolute continental monarchies.<sup>155</sup> Transforming the police power into a heuristic through which courts could *limit* legislative power was an ambitious project indeed.

Courts undertook that project by conceptualizing the police power in part as a means of enforcing a common-law maxim governing the law of nuisance, *sic utere tuo, ut alienum non laedas*—use your own property in such a way that you do not injure other people’s.<sup>156</sup> While fuzzy at the edges—what counts as an injury?—*sic utere* was for a time a serviceable means through which to distinguish proper from improper exercises of state power. As Judge Lemuel distilled it in an influential 1843 opinion:

We think it a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall be injurious not to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.<sup>157</sup>

Exercises of state power over life, liberty, and property that were not designed to “regulate[]” the use of property in order to prevent “injur[y] . . . to the equal enjoyment of others” or “the community” were considered beyond the constitutionally proper scope of the police power. Today, we might refer to the police power as a means of forcing people to internalize externalities—police measures raised the costs to individuals of engaging in activities that either violated or

---

Intent, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2471026](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2471026); CHRISTIAN LIST & PHILIP PETIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011). Like Caleb Nelson, I suspect that most textualists are in the final analysis intentionalists who prefer to use rules rather than standards in ascertaining intent. See Caleb Nelson, *What is Legislative Intent?*, 91 VA. L. REV. 347, 349 (2005) (“[M]uch of what separates textualism from intentionalism may be less about the desirability of the search for legislative intent than about the mechanics of that research and about whether a relatively rule-like approach will advance or hinder it.”).

<sup>153</sup> See RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 324-8 (2004) (surveying usage). Pennsylvania, North Carolina, Delaware, Maryland, and Vermont incorporated provisions into their new constitutions which stated that “the people of this state have the sole, exclusive and inherent right of governing and regulating the internal police of the same.”

<sup>154</sup> ERNST FREUND, THE POLICE POWER, PUBLIC POLICY, AND CONSTITUTIONAL RIGHTS (1904) (affirming that the police power “has remained without authoritative or generally accepted definition.”).

<sup>155</sup> MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 46-50 (2005).

<sup>156</sup> See, e.g., *Shaw v. Kennedy*, Taylor 158, 595 (1817); *State v. Buzzard*, 4 Ark. 18, 41 (1842); *Thorpe v. Rutland & B.R. Co.*, 27 Vt. 140 (1855); *State v. Glen*, 7 NC 321, 326 (1859).

<sup>157</sup> *Commonwealth v. Alger*, 61 Mass. 53, 84-5 (1843).

threaten to violate the individual rights of others or otherwise had negative impact on aggregate social welfare.<sup>158</sup> But nineteenth-century courts didn't speak the language of welfare economics—they spoke of health, safety, and public morals.

Caleb Nelson has shown that the scrutiny that courts applied to police measures in the early nineteenth century wasn't always or even often particularly rigorous.<sup>159</sup> Judges limited themselves almost exclusively to the face of statutes in evaluating them, sometimes emphasizing the respect that they owed to members of a coordinate branch of government in doing so. It wasn't that legislative ends were irrelevant to constitutionality—it was that judges generally abstained from trying to identify those ends for institutional reasons. Thus in *Hoke v. Henderson*,<sup>160</sup> which saw the South Carolina supreme court holding that the state legislature could not exercise its control over judicial clerks' offices *for the purpose of* expelling clerks from office, Judge Ruffin noted that “the court . . . cannot enquire into motives not avowed” and would “be obliged to execute [the act in question] as a law” if the act were “couched in general terms.”<sup>161</sup> But he made plain that if the act was in fact designed to accomplish an end not grounded in “public expediency”, he would apply it—not “because it was constitutional; but because the court could not see its real character, and therefore could not see that it was unconstitutional.”<sup>162</sup>

One struggles, indeed, to identify *any* instances in which courts in the early-nineteenth century held a police measure unlawful. State courts upheld prohibitions of dirt-removal from privately-owned beaches,<sup>163</sup> regulations specifying the hours during which cattle could be driven through the city streets,<sup>164</sup> statutes authorizing cities to make by-laws governing the interment of the dead,<sup>165</sup> and by-laws requiring people to sell produce that wasn't from their farm to get permission from the clerk of the market.<sup>166</sup> Rare indeed were cases like *Austin v. Murray*,<sup>167</sup> in which the Massachusetts Supreme Judicial Court sustained a challenge to a by-law prohibiting the bringing of the dead into Charlestown for purposes of burial—a prohibition that solely affected Catholic parishioners. The court determined that “the object and purpose” of a measure wasn't “made in good faith” or directed at the “public good,” even though it was passed “under the guise of a police regulation.”<sup>168</sup>

---

<sup>158</sup> Externalities are so called because self-interested actors don't ordinarily take account of the costs or benefits that their actions create for others—those costs and benefits are therefore *external* to their decisions about whether to take a given action.

<sup>159</sup> Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1790 (2007).

<sup>160</sup> 15 N.C. 1 (1833), overruled in part by *Mial v. Ellington*, 46 S.E. 961 (N.C. 1903). *See also* *Jordan v. Overseers of Dayton*, 4 Ohio 294, 309-10 (Oh. 1831) (“If the state should pass a law for the purpose of destroying a right created by the constitution, this court will do its duty [and hold it void]; but an attempt by the legislature, in good faith, to regulate the conduct of a portion of its citizens, in a matter strictly pertaining to its internal economy, we can not but regard as a legitimate exercise of power”).

<sup>161</sup> *Id.* at 26.

<sup>162</sup> *Id.* at 27.

<sup>163</sup> *Commonwealth v. Tewksbury*, 11 Metc. 55 (1846).

<sup>164</sup> *Cooper v. Schultz*, 32 N.Y. 107 (1866).

<sup>165</sup> *Coates v. City of New York*, 7 Cow. 585 (1827).

<sup>166</sup> *Commonwealth v. Rice*, 50 Mass. 253 (1840).

<sup>167</sup> 16 Pick. 121 (1834).

<sup>168</sup> *Id.* at 126.

Yet, the propositions that state power over life, liberty, and property wasn't unlimited and that legislative ends were constitutionally relevant were sufficiently well-established by 1868<sup>169</sup> that Judge Thomas Cooley—aptly described by Williams as “[b]y far the most influential of the early post-Civil War commentators to address the meaning of due process and law-of-the-land provisions”<sup>170</sup>—focused on the “legitimacy of the legislature’s objectives and the means pursued to attain those objectives”<sup>171</sup> in his 1868 treatise on constitutional limitations on state power. Further, due process of process of law was understood to stand for those propositions. Legislation was deemed *not to be part of the law of the land* and therefore unsusceptible of being applied to individuals consistently with due process of law if (1) it deprived individuals of certain procedural rights traceable to the common law; (2) if it was either retrospective or insufficiently general, and thus usurped judicial power; (3) if it violated a superior source of law; or (4) it was not a good-faith effort to promote a constitutionally proper governmental end. At the state level, (4) meant that it had to be—in Cooley’s words—“calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of the rights of others.”<sup>172</sup>

The communicative content of the text of the Fourteenth Amendment’s Due Process of Law Clause isn’t sufficiently thick to prescribe answers to every question that may arise under it. The triad of health, safety, and public morals was the first of several heuristics that judges deployed over extended periods of time to simplify what might otherwise be overwhelmingly complex inquiries into whether government decisionmakers were seeking to prevent rights-conflicts or otherwise increase aggregate welfare, on the one hand, or—to borrow Madison’s description of factional legislation in Federalist 10—acting “adverse[ly] to the rights of other citizens, or to the permanent and aggregate interests of the community”, on the other.<sup>173</sup> The next Part will pursue the question of how the original meaning of the Fourteenth Amendment’s Due Process of Law Clause has been, is now, and ought to be implemented in the future.

---

<sup>169</sup> See, e.g., *Vanderbilt v. Adams*, 7 N. Y. 49 (1827) (upholding a statute authorizing harbor masters to regulate and station vessels in the East and North rivers only after determining that it was “calculated for the benefit of all” and cautioning that it “would not be upheld, if exerted beyond what may be considered a necessary police regulation.”); *Vadine’s Case*, 6 Pick 187, 191 (1828) (upholding a law preventing people from removing waste materials or other filth from dwelling houses without a license but noting that “[i]f the regulation is unreasonable, it is void; if necessary for the good government of the society, it is good” and describing an *unreasonable* by-law that “went to . . . private benefit . . . and was in the nature of a monopoly.”); *Nightingale’s Case*, 11 Pick 167, 174 (1831) (upholding as a “valid . . . police regulation” a bylaw requiring people to sell produce that was not from their farm to get permission from the clerk of the market on the grounds that it was a “wholesome regulation” that was designed “to prevent the market from being unnecessarily thronged and encumbered.” The court stated that the “partial operation of the ordinance” was “no objection to its validity” because it did “not infringe private rights.”); *Bagg’s Appeal*, 43 Pa. St. 512, 515 (1862) (“Any form of direct government action on private rights, which, if unusual, is dictated by no imperious public necessity, or which makes a special law for a particular person, or gives directions for the regulation and control of a particular case after it has arisen, is always arbitrary and dangerous in principle, and almost always unconstitutional.”).

<sup>170</sup> Williams, *supra* note, at 394.

<sup>171</sup> *Id.*

<sup>172</sup> See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE UNITED STATES OF THE AMERICAN UNION 572 (Boston, Little, Brown, & Co. 1868) (emphasis added).

<sup>173</sup> THE FEDERALIST NO. 10 (Madison) *supra* note, at 43.



### III. IMPLEMENTING DUE PROCESS OF LAW

Institutions—whether understood as formal and informal rules (including constitutions, statutes, regulations, social norms, and decisionmaking procedures) or decisionmaking bodies (including courts, legislatures, and agencies)—matter. As organizational theorist Herbert Simon long ago recognized, human beings are *boundedly rational*—we are informationally and computationally limited, and we don’t always act in ways that maximize our utility.<sup>174</sup> Institutions can enable us to economize on bounded rationality by structuring our interactions with one another and our own mental processes in ways that make it easier to acquire and process information, draw upon our knowledge, and instantiate our preferences.<sup>175</sup> Determining how to achieve any goals we might have entails prudent institutional design and careful choice between what are inevitably imperfect institutional alternatives. As Neil Komesar has put it:

On the one hand, institutional performance and, therefore, institutional choice can not be assessed except against the bench mark of some social goal or set of goals. On the other, because in the abstract any goal can be consistent with a wide range of public policies, the decision as to who decides determines how a goal shapes public policy. It is institutional choice that connects goals with their legal or public policy results.<sup>176</sup>

The same can be said for decision about to *how* to decide. Identifying the reduction of carbon emissions or the production of safe driverless vehicles or compliance with the due process of law as goals tells us little about who should be responsible for achieving them or how they should structure their decisionmaking.

True, the Constitution itself makes certain institutional choices. Judges are duty-bound in virtue of their oath to “this Constitution” and by Article III’s provision for “[t]he judicial power” to decide constitutional questions in accordance with their independent judgment, for stance<sup>177</sup>—even if it were proved by 20 welfare economists that the social costs of independent judicial review exceed the benefits<sup>178</sup>. But what if the original meaning of the due process of law doesn’t yield enough information to decide a given question—whether because of scarce judicial time, judicial fallibility, or the thinness of the text’s communicative content?

---

<sup>174</sup> See Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 QUART. J. ECONOM. 99 (1955); HERBERT A. SIMON, *MODELS OF MAN: SOCIAL AND RATIONAL* (1957). For a summary and defense of the application of bounded rationality to economic models, see John Conlisk, *Why Bounded Rationality?*, 34 J ECON. LITERATURE 669 (1996). For applications of the concept to judicial decisionmaking, see ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 192 (2006); Stephen M. Bainbridge & G. Mitu Galati, *How Do Judges Maximize -The Same Way Everybody Else Does- Boundedly: Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83 (2002).

<sup>175</sup> Efficient institutions therefore can lower both the costs associated with reaching decisions *and* the costs associated with erroneous decisions—both decision costs and error costs.

<sup>176</sup> NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 5 (1996).

<sup>177</sup> See LAW AND JUDICIAL DUTY, *supra* note, at 507.

<sup>178</sup> See *Hotchkiss v. National City Bank of N. Y.*, 200 F. 287, 293 (D.C.N.Y. 1911) (testimony of twenty bishops insufficient to prove that two contracting parties “intended something else than the usual meaning which the law imposes upon them”).

This Part summarizes the theory of *good-faith constitutional construction*—a theory that is tailored to optimize constitutional decisionmaking where the original meaning of the Constitution’s text (its “letter”) doesn’t yield clear answers, in a way that promotes fidelity to the text’s original function (its “spirit”). It then identifies the spirit of the Fourteenth Amendment’s Due Process of Law Clause. After describing several heuristics that judges have used over the years to implement the Due Process of Law Clause, it puts forward an alternative designed to optimize judicial enforcement of the Fourteenth Amendment’s Due Process of Law Clause today.

### A. Good-Faith Construction

The Constitution can be likened to an incomplete contract,<sup>179</sup> owing to the fact that its language does not provide for every contingency. Comparatively simple commercial agreements inevitably fail to provide for every contingency, for a variety of reasons—uncertainty<sup>180</sup> and positive transaction costs<sup>181</sup> among them—and although there is compelling evidence that the drafters of the 1788 Constitution and its subsequent amendments strove at points for precision,<sup>182</sup> it would be unreasonable to expect any text forged in the heat of intense controversy by a multi-member decisionmaking body and subsequently ratified into law by numerous other multimember bodies to address every legal question that would arise under it within the next few years, let alone the next two centuries.<sup>183</sup>

Those who interpret the Constitution’s text today, moreover, are—it bears repeating—boundedly rational and subject to both time and institutional constraints that make it difficult for them to arrive at the right answers to questions concerning the text’s meaning. Even if those answers are available, interpreters must be prepared for the possibility that those answers will escape them on any given occasion.

Because the Constitution is incomplete and because interpreters are boundedly rational and institutionally constrained, any prescriptive theory of constitutional decisionmaking that doesn’t address what decisionmakers should do when either the text runs out or a given decisionmaker’s knowledge of it runs out, is itself incomplete. Legislators, judges, and executive-branch officials will necessarily enter what Lawrence Solum has called the “construction

---

<sup>179</sup> See Oliver D. Hart, *Incomplete Contracts and the Theory of the Firm*, 4 J. OF LAW, ECON. & ORG. 123 (1988) (An incomplete contract “contains gaps or missing provisions; that is, the contract will specify some actions the parties must take but not others; it will mention what should happen in some states of the world, but not in others.”).

<sup>180</sup> See Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies* 21 J. LEGAL STUD. 271, 278 (1992) (listing the fact that “the future is imperfectly knowable” among the causes of contractual incompleteness”).

<sup>181</sup> See Oliver D. Hart & Sanford Grossman, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 JOURNAL OF POLITICAL ECONOMY 692, 695 (1986) (“It may be extremely costly to write a contract that specified unambiguously the payments and actions of all parties in every observable state of nature.”).

<sup>182</sup> See THE FEDERALIST No. 37 (Madison), *supra* note, at 183.

<sup>183</sup> Delegation to the future need not have been intentional—even on the assumption that the Framers strove to strictly minimize the discretion of future decisionmakers, they might still have left gaps to be filled by failing to choose language that clearly resolved certain matters. See Neil K. Komisar, *Back to the Future: An Institutional View of Making and Interpreting Constitutions*, 81 NW. U. L. REV. 191, 201-2 (1986).

zone”—a zone in which constitutional decisionmakers must have recourse to textually-unspecified rules of decision in order to implement the relevant constitutional text.<sup>184</sup>

Good-faith construction, as elaborated elsewhere, holds that constitutional decisionmakers aren't free to indulge their normative preferences within the construction zone—even if they don't violate the constitutional text when so doing. Such indulgence is a sure-fire recipe for depriving those who live under the Constitution of the full measure of benefits that its various provisions are designed to capture. As the duty of good faith in both contract law and fiduciary law prevents power-exercising parties from self-interestedly abusing their discretion under the letter of their agreements to expropriate value from vulnerable parties,<sup>185</sup> so too does good-faith construction aim to prevent government officials from using their discretion under the letter of “this Constitution”—which they must promise to follow prior to receiving power from it—<sup>186</sup> to expropriate value from members of the public.

For the goals and desires of government officials and ordinary members of the public may conflict. Closest to the context with which this Essay is concerned, public choice theory—which applies game theory and the rational-utility-maximizer model associated with microeconomic analysis to political decisionmaking and which has proven robust<sup>187</sup> against criticism of its admittedly dispiriting model of official behavior—posits that legislation is “‘sold’ by the legislature and ‘bought’ by the beneficiaries of the legislation.”<sup>188</sup> Legislators seeking to maximize aggregate political support produce legislation that is designed to benefit interest groups who value it enough to out-bid rivals—whether “by campaign contributions, votes, implicit promises of future favors, or outright bribes”<sup>189</sup>—regardless whether it promotes aggregate social welfare,<sup>190</sup> and sometimes when it is designed only to transfer resources from the politically weak to the politically strong. To the extent that the short-term political interests of public officials and

---

<sup>184</sup> Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 469 (2013).

<sup>185</sup> See Barnett & Bernick, *The Letter and the Spirit*, *supra* note, at \*23-5.

<sup>186</sup> U.S. CONST. ART. VI, cl. 2.

<sup>187</sup> See, e.g., JOHN A. FERREJOHN, *PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947-1968* 137 (1974) (finding, consistent with the assumption that congresspeople use committee membership in order to maximize political support, that each member of the Public Works Committee in Congress obtained 0.63 additional projects for his state over nonmembers); R. DOUGLAS ARNOLD, *CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE* 41 (1979) (finding that if a member of Congress wants a water and sewage grant for his or her home state, the chances for success are 80% higher if the member sits on the relevant appropriations subcommittee and 60% higher if he or she is a member of the relevant authorizing committee); Roger L. Faith et al., *Antitrust Pork Barrel*, 25 *J.L. & ECON.* 329 (1982) (finding that businesses in congressional districts with oversight responsibility over the Federal Trade Commission get investigated less frequently by the FTC than do competitors who aren't so situated); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 *J. POL. ECON.* 132, 152–55 (1988) (canvassing evidence that committee members receive a disproportionate share of the benefits from their committees).

<sup>188</sup> William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & ECON.* 875, 877 (1975).

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

<sup>190</sup> Understood as a function of the subjective well-being of individuals, such that policy X increases aggregate welfare more than Y if and to the extent that A increases the subjective well-being of X more than does Y and everyone else is indifferent to the choice between X or Y. This understanding assumes the possibility of interpersonal utility comparisons. It is the dominant understanding of aggregate welfare in welfare economics, although it is not uncontroversial—alternatives include defining welfare in terms of the enjoyment of specified objective goods.

interests of the public in those officials' constitutional compliance aren't perfectly aligned, what are termed *agency costs* in organizational theory loom.<sup>191</sup>

*How* does good-faith construction minimize agency costs? By increasing the probability that the abuse of constitutionally-delegated power will be detected and censured and thereby decreasing its expected value to legislators. Good-faith construction counsels constitutional decisionmakers operating within the construction zone to identify the original function or functions of the relevant constitutional text and to make decisions that are calculated to fulfill those functions. It counsels judges to develop implementing doctrines that are calculated to fulfill those functions across all cases of particular kinds, and to distinguish between legislative decisions that are consistent with those functions and those which aren't. It also helps members of the public evaluate whether judges are discharging their constitutional duties. The political transaction costs associated with removing judges from office are extremely high—the Constitution deliberately provides them with a good deal of protection from political winds in order to ensure their fidelity to the law of the land<sup>192</sup>—but empirical evidence indicates that they're sensitive to criticism from their professional peers and colleagues, and the imposition of reputational costs may have an impact on decisionmaking that hollow impeachment threats will not.<sup>193</sup>

Identifying the spirit of any given constitutional provision requires recourse to some of the same materials as the identification of the letter—that is, the original meaning of the constitutional text. The next Section will peruse those materials in order to identify the spirit of the Fourteenth Amendment's Due Process of Law Clause.

## B. The Spirit of Due Process of Law

In England, the “due process of law” was designed to prevent people from wrongfully deprived of their life, liberty or property at the mere will of the executive. In America, due process of law came to be understood as a guarantee against *all* arbitrary government action, whether initiated by the executive or the legislature, and which obviated the need for those subject to arbitrary legislative action to appeal to heaven for relief. At all points, “the due process of law” was understood to denote a concept of rule by prior principles of reason rather than the beliefs or desires of those exercising power at a given time, as well as of impartial adjudication in neutral courts of law.

The *content* of the relevant prior principles, of course, changed. The amended Constitution rests on the premise that legitimate governments are established among men to accomplish particular ends; authorizes particular means by which the newly-created governmental institutions to which it delegates power may achieve those ends; and imposes restrictions on existing governmental institutions. Those who framed and ratified the Fourteenth Amendments undoubtedly understood what it meant for government action to be arbitrary differently than did Lord Coke. The understanding embodied in the amended Constitution, not that enshrined in the “Great Charter,” should guide the implementation of the due process of law today.

---

<sup>191</sup> See sources cited *supra* note 28. Include Meckling's definition. Cite Macey for extension to political context.

<sup>192</sup> See Frank H. Easterbrook, *Judges as Honest Agents*, 33 HARV. J.L. & PUB. POL'Y 915, 915 (2010) (“Judges get tenure [during good behavior in exchange for promising to carry out federal laws. Tenure . . . liberates them from today's public opinion, so that they can be faithful to yesterday's rules.”).

<sup>193</sup> See generally LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006).

What was that understanding? Although scholars have called his significance into question over the years, the weight of the evidence indicates that the theorist who did more than any other to shape Founding-era thought about the ends of legitimate governments was John Locke. Founding-era writings are positively saturated with Lockean themes: among them, the “state of nature” as a starting point for the discussion of the source of legitimate political authority; the priority of individual rights derived from human nature; and the requirement of the consent of the governed.<sup>194</sup>

Locke was an empiricist—he derived principles from data available to the senses.<sup>195</sup> Drawing upon that evidence, Locke concluded that human beings are *rational* beings—that they must be free to act in accordance with their own judgment to live and to flourish, and that none of them is sufficiently superior in respect of intelligence or strength to rule other adults on the basis of mere will.<sup>196</sup> Because of human rationality and natural equality, Locke argued that governments can only be legitimately established through informed, voluntary consent and justified on the grounds that they will render individual freedom more secure than it would be in their absence.<sup>197</sup> Locke drew upon maxims articulated by Coke and defended them as inferences from human nature that both justified and limited government power. For example, he justified the maxim that one cannot be a judge in one’s own cause in terms of people’s disposition to be biased towards their own interests—and argued that subjection to partial judgment was one of the deficiencies of the state of nature absent government.<sup>198</sup>

Locke’s theory of the purpose and limits of government squared with Americans’ own experience better than did Blackstone’s theory of Parliamentary supremacy. Blackstone’s Parliament was “supreme, irresistible, absolute, [and] uncontrolled.”<sup>199</sup> Colonists, by contrast, experienced Parliament as distant and powerless most of the time and oppressive and unreasonable when it made its presence known in new ways at the end of Seven Years War.<sup>200</sup> When it became increasingly clear that Blackstone’s theory was *the* operating theory of the English government—when both King and Parliament were deaf to pleas against ruinous legislation predicated upon the idea that Parliament could bind the colonists “in all cases

---

<sup>194</sup> See SCOTT DOUGLAS GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 58-92 (2000) (canvassing evidence from the framing and ratification debates, the Federalist Papers, the Anti-Federalist Papers, and writings and speeches from leading intellectual figures and concluding that “there was a continuity of Lockean liberal ideals between the revolutionary period and the constitutional period with regard to the fundamental purpose of the state.”).

<sup>195</sup> See generally JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* (Peter H. Nidditch ed., 1975).

<sup>196</sup> *SECOND TREATISE*, *supra* note, at § 63 (“The Freedom then of Man, and Liberty, of acting according to his own Will, is grounded on his having Reason, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will.”)

<sup>197</sup> *SECOND TREATISE*, *supra* note at § 123.

<sup>198</sup> *Id.* at 124.

<sup>199</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 49 (1765).

<sup>200</sup> See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 203 (1967)(Parliament’s authority “touched only the outer fringes of colonial life . . . All other powers were enjoyed, in fact if not in constitutional theory, by local, colonial organs of government.”).

whatsoever”—Americans appealed to heaven.<sup>201</sup> The result—as with John and the barons—was a military conflict. As before, the proponents of arbitrary power lost.

Yet as John’s military defeat didn’t spell the end of *executive* arbitrariness, neither was *legislative* arbitrariness repudiated once and for all in 1783. The most potent threats to individual rights under the Articles of Confederation did not come from an unrepresentative Parliament but legislatures that, in the words of Gordon Wood, “were probably as equally and fairly representative of the people as any legislatures in history.”<sup>202</sup> State legislatures began enacting debtor relief laws that both violated the rights of creditors and discouraged lending, thus hampering economic prosperity; erecting trade barriers to protect their own businesses from competition from out-of-state firms; confiscating the property of loyalists; and targeting religious and ethnic minorities.<sup>203</sup> Majoritarian tyranny had become a reality within less than a decade—a reality described in detail by James Madison in an essay on “The Vices of the Political System of the United States.”

In “Vices,” Madison called into question a key premise of the “republicanism” that Americans embraced in the wake of the revolution—the premise that legislative majorities would serve as “the safest Guardians both of public Good and private rights.”<sup>204</sup> Among the principal vices of government under the Articles was that legislative majorities, united by “an apparent interest or common passion,” were able to trample the “rights and interests of the minority, [and] of individuals.”<sup>205</sup> This wasn’t a result of the breakdown of the democratic process—it followed from the nature of that process. Wrote Madison, “[p]lace three individuals in a situation wherein the interest of each depends on the voice of the others, and give to two of them an interest opposed to the rights of the third? Will the latter be secure? The prudence of every man would shun the danger.”<sup>206</sup> Those who might be inclined to doubt the latter proposition, added Madison, needed only look to the “notorious factions and oppressions which take place in corporate towns limited as the opportunities are,” as well as to “little republics when uncontrolled by apprehensions of external danger.”<sup>207</sup> If republicanism was committed to “[the] public Good and private rights”—and all agreed that it was—republicanism needed to be redefined.

Madison wasn’t alone in his conviction that the nation was plagued by an “excess of democracy,” understood as unlimited majority rule.<sup>208</sup> Yet the problem of sovereignty—the location of the ultimate source of political authority—that had been a central component of revolutionary-era debates about Parliamentary authority presented itself once again.

---

<sup>201</sup> Declaratory Act (March 18, 1766), reprinted in DOCUMENTS OF AMERICAN HISTORY 61 (Henry S. Commager ed. 1944). See also DECLARATION OF INDEPENDENCE (1776) (condemning both King and Parliament for “declaring themselves invested with Power to legislate for us in all cases whatsoever”).

<sup>202</sup> GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776-1787 404 (2d. ed. 1998).

<sup>203</sup> *Id.* at 410-4.

<sup>204</sup> See James Madison, *Notes of Debates in the Federal Convention of 1787*, at 77 (Adrienne Koch ed., Ohio Univ. Press 1984) (1840) (statement of James Madison).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> See Michael J. Klarman, *The Framers’ Coup: The Making of the United States Constitution* 244 (2017) (adducing evidence that “the delegates [to the Philadelphia Convention] wished to create a federal government that would be as detached as possible from public opinion, without forfeiting the label of ‘republican’”).

The elegant solution that the Constitution’s supporters settled upon was to locate sovereignty in the people, understood as individual bearers of natural, inalienable rights—who in turn dispensed portions of power to the states and to the federal government. None grasped or expounded this concept of popular sovereignty better than James Wilson. Responding to those who took vigorous exception to the Constitution opening with the words “We the People” rather than “We the States,”<sup>209</sup> Wilson expressly denied that the states ought to be regarded as sovereigns under the new Constitution.<sup>210</sup> All government power, argued Wilson, was ultimately delegated by individuals to their agents in government in order to protect their natural rights, and individuals retained all power that they did not delegate.<sup>211</sup> Neither the federal government nor that of the states had *inherent* power.

If the theory of sovereignty that informed the Constitution is incompatible with any arbitrary power, the Constitution—notoriously—does not completely bar such power. For Locke, the paradigmatic example of arbitrary power was slavery—to be a slave is to be subject to “the inconstant, uncertain, unknown, arbitrary will of another man.”<sup>212</sup> Such arbitrary power could never arise from consent and therefore could never be legitimate. And yet the Framers found a system of chattel slavery among them and didn’t abolish it—rather, they entrenched it. If, as Michael Klarman has put it, “[t]o have expected the Constitution to be less protective of slavery than it was probably would have been unrealistic,” owing to the fact that “southern delegates were generally more intent upon protecting slavery than northern delegates were upon undermining it” and the former made credible commitments to walk out of the convention if they did not get their way, the fact remains that the 1788 Constitution left slavery more secure than it was under the Articles of Confederation.<sup>213</sup>

Given that the Constitution, like the Declaration of Independence, ties popular sovereignty to the protection of natural rights of all people,<sup>214</sup> it is no surprise that the conflict over slavery saw defenders of slavery denying the truth of the Declaration,<sup>215</sup> suppressing the individual rights of both slaves and abolitionists,<sup>216</sup> and relying upon a Blackstonian conception of “irresistible,

---

<sup>209</sup> 3 ELLIOT’S DEBATES, *supra* note, at 22.

<sup>210</sup> 2 ELLIOT’S DEBATES, *supra* note, at 444.

<sup>211</sup> 1 THE DEBATE ON THE CONSTITUTION 796-9 (Bernard Bailyn, ed., 1993).

<sup>212</sup> SECOND TREATISE, *supra* note, at § 22.

<sup>213</sup> KLARMAN, *supra* note, at 303. Klarman points out that Northern delegates sometimes did threaten to walk out over slavery-related questions—the problem was that these threats weren’t credible, as most northerners patently “cared far more about how southern slavery would affect the political power and economic interests of the North than they cared about eliminating the institution.” *Id.* at 304.

<sup>214</sup> See RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE 34-40 (2016) (demonstrating that “[t]he text of the Constitution expressly acknowledges the political theory of the Declaration, namely, its roots in the natural and inalienable rights of individuals”).

<sup>215</sup> See John C. Calhoun, Speech on the Oregon Bill (June 27, 1848), reprinted in UNION AND LIBERTY, *supra* note 66, at 565–66 (“there is not a word of truth in [the Declaration]”); Alexander Stephens, Cornerstone Speech (Mar. 21, 1861), reprinted in HENRY CLEVELAND, ALEXANDER H. STEPHENS, IN PUBLIC AND PRIVATE 721 (National, 1866) (“The prevailing ideas entertained by (Jefferson) and most of the leading statesmen at the time of the formation of the old constitution, were that the enslavement of the African was . . . wrong in principle, socially, morally, and politically. . . . This was an error”).

<sup>216</sup> See MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 40 (1989) (“Beginning in the 1830s, southern states passed laws abridging freedoms of speech and the press as they applied to slavery. Advocating abolition and denying a master’s right to property in

absolute” state sovereignty.<sup>217</sup> Nor is it surprising that opponents of slavery revered the Declaration,<sup>218</sup> claimed that sovereignty derives from the natural rights of individuals (which states in turn must respect),<sup>219</sup> and cited the Fifth Amendment’s Due Process of Law Clause for the proposition that slavery could not be established in newly-acquired federal territories—and that statutes that purported to establish it were mere “pretended legislation.”<sup>220</sup> War came as a

---

slaves were made crimes. Antislavery publications were eliminated from mails in the South, and southern states sought to extradite northerners responsible for anti-slavery publications. What could not be accomplished by law was enforced by mobs.”).

<sup>217</sup> See Jeremiah S. Black, *Observations on Senator Douglas's Views of Popular Sovereignty, as Expressed in Harper's Magazine, for September, 1859* at 18 (2d ed. 1859) (“Sovereignty . . . is in its nature irresponsible and absolute. . . . Mere moral abstractions or theoretic principles of natural justice do not limit the legal authority of a sovereign. No government ought to violate justice; but any supreme government, whose hands are entirely free, can violate it with impunity.”).

<sup>218</sup> See, e.g., *THE POLITICAL DEBATES BETWEEN ABRAHAM LINCOLN AND STEPHEN A. DOUGLAS* (Part I) 175 (G. Putnam ed. 1913) (“I adhere to the Declaration of Independence. If Judge Douglas and his friends are not willing to stand by it, let them come up and amend it. Let them make it read that all men are created equal except negroes. Let us have it decided whether the Declaration of Independence, in this blessed year of 1858, shall be thus amended.”). For a detailed treatment of how the Declaration served as “the most important source of anti-slavery Republicanism,” see Daniel A. Farber and John E. Muench, *Ideological Origins of the Fourteenth Amendment*, 1 *Const. Comment.* 235 (1994).

<sup>219</sup> See, e.g., John Quincy Adams, *An Oration Addressed to The Citizens of The Town of Quincy on The Fourth of July, 1831, The Fifty-Fifth Anniversary of the Independence of the United States of America* 30 (1831) (arguing that Southern conception of state sovereignty is “a mere reproduction of the omnipotence of the British parliament in another form, and therefore not only inconsistent with, but directly in opposition to, the principles of the Declaration of Independence”); WILLIAM GOODELL, *VIEWS OF AMERICAN CONSTITUTIONAL LAW IN ITS BEARING UPON AMERICAN SLAVERY* 137 (Utica, Lawson & Chaplin, 2d ed. 1845) [hereinafter “Goodell”] (“Before the Declaration of Independence . . . there were no independent sovereign States . . . There has been no State sovereignty that has not been connexed with the unity of the States, and modified by it”); JOEL TIFFANY, *A TREATISE ON GOVERNMENT, AND CONSTITUTIONAL LAW, BEING AN INQUIRY INTO THE SOURCE AND LIMITATION OF GOVERNMENTAL AUTHORITY, ACCORDING TO THE AMERICAN THEORY* 50-51 (1867) (arguing that “[s]overeignty, as an attribute of the people of the United States as a nation, excludes the like sovereignty of the people of a single State, as State citizens merely” and that “the authority of a citizen as a constituent of the nation, is superior to his authority as a constituent of a mere State or territory”). For accounts of the development of the concept of “paramount national citizenship” and its influence upon Republican constitutional thought, see JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 71 (1951); James H. Kettner, *The Development of American Citizenship, 1608-1870* (1978); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 *Yale L.J.* 57 (1993).

<sup>220</sup> See, e.g., Alvan Stewart, *A Constitutional Argument on the Subject of Slavery* (1837), reprinted in JACOBUS TENBROEK, *EQUAL UNDER LAW* 281-95, app. B (1837) (1965) (thanks to the Fifth Amendment, “Congress, by the power conferred upon it by the Constitution, possesses the entire and absolute right to abolish slavery in every state and territory in the Union”); CONG. GLOBE, 31ST CONG., 1ST SESS. 1146 (1850) (statement of Sen. Salmon Chase) (“[S]o long as the Constitution retains unaltered, the provision which denies to Congress all power to deprive any person of liberty without due process of law, I shall not believe that any person can be held in the territories as a slave without a violation of that instrument.”); CONG. GLOBE, 34th Cong., 1st Sess. app. 124 (1856) (Rep. John Bingham) (attacking “pretended legislation” recently passed by the Kansas pro-slavery legislature which declared it a felony even to agitate against slavery on the grounds that it “deprives persons of liberty without due process of law.”); *id.* at 296 (Rep. A.P. Granger) (affirming that the Fifth Amendment’s Due Process of Law Clause “seals the death warrant of slavery” and that “no State sovereignty has the power to protect it”); CONG. GLOBE, 33D CONG., 1ST SESS. app. 524 (1854) (Rep. Garrett Smith) (citing *Terrett v. Taylor*, arguing that the Due Process of Law Clause would “put[] an end to American slavery” if allowed “free course”); Republican Platform of 1856, reprinted in J.M.H. FREDERICK, *NATIONAL PARTY PLATFORMS OF THE UNITED STATES* 28 (1896) (“[A]s our Republican fathers . . . ordained that ‘no person shall be deprived of life, liberty or property with-



consequence of fundamentally differing views about human nature and the nature and limits of government.

After losing the war, southern states sought to reassert the very kind of power that gave rise to the conflict. Southern states responded to the passage of the Thirteenth Amendment by enacting the infamous “black codes”: state statutes designed to limit the economic opportunities of recently freed blacks by—among other things—mandating the forfeiture of wages already earned if laborers left their jobs before their contracts expired, threatening those who offered work to laborers under contract with imprisonment and fines, forbidding freedmen from renting land in urban areas, banning freedmen from leaving the plantation or entertaining guests upon it without permission of the employer, criminalizing the exercise of rights such as hunting, fishing, and the free grazing of livestock, and imposing licensing taxes on “emigrant agents”—agents represented by planters who advertised distant opportunities for labor.<sup>221</sup> The function—the spirit—of these statutes was to perpetuate institutions that systematically and brutally transferred wealth created by blacks to whites over the span of generations.

Together with reports of violence against the freedmen and retribution against abolitionists and white supporters of the Union more generally, the passage of the black codes generated a widespread conviction among Republicans that what Abraham Lincoln described as the “spirit that says ‘You work and toil and earn bread and I’ll eat it’” was still being implemented.<sup>222</sup> The need to thwart that spirit gave rise to far-reaching federal legislation and, ultimately, further constitutional amendments.

In a penetrating examination of the original and final versions of the 1866 Civil Rights Act, Professor Kurt Lash details how the original version guaranteed all “persons” certain equal rights relating to the protection of person and property—rights that proponents believed to be “originally declared in the Declaration of Independence and constitutionalized by the Fifth Amendment’s Due Process Clause.”<sup>223</sup> Among those rights included the right to due process of law, understood—as Bingham described it—as “law in its highest sense, that law which is the perfection of human reason, and which is impartial, equal exact justice.”<sup>224</sup>

Owing to concerns that Congress lacked power to enforce the rights of non-citizens, proponents amended the Act to protect only citizens. John Bingham, who would become the Fourteenth Amendment’s principal drafter, refused to support the Act, in part because it failed to protect all *persons* and in part because he believed that Congress lacked the constitutional power to protect the rights of citizens or persons more generally.<sup>225</sup> Following the ratification of the Fourteenth Amendment, Congress in 1870 passed the Enforcement Act, which included provisions that extended all of the rights of the 1866 Civil Rights Act to “all persons.”<sup>226</sup>

---

out due process of law’ . . . we deny the authority of the Congress, of a Territorial legislature, or of any individuals, to give legal existence to slavery in any Territory of the United States.”).

<sup>221</sup> For an overview of these statutes and their impact, *see generally* DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR RELATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 1-28 (2001).

<sup>222</sup> THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858 393 (Paul M. Angle, ed., 1958).

<sup>223</sup> Kurt T. Lash, *The Due Process Understanding of the Civil Rights Acts of 1866*, at \*4 (2016), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2712809](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2712809).

<sup>224</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1094 (1866).

<sup>225</sup> Lash, *supra* note, at \*73.

<sup>226</sup> *Id.* at \*96.

Thus, although it has long been accepted that the Fourteenth Amendment was designed to eliminate any doubt as to the constitutionality of the 1866 Civil Rights Act, this isn't quite correct.<sup>227</sup> The principal drafter of Section One objected on both legal and moral grounds to the 1866 version of the Civil Rights Act and drafted a constitutional amendment that enabled Congress to pass a *different* version. That version would empower Congress to protect what Bingham and many other Republicans, adopting the arguments of abolitionists like Joel Tiffany, William Goodell, and Alvan Stewart, believed the Fifth Amendment *already* guaranteed to all persons.<sup>228</sup> As Bingham put it, the new amendment would “take[] from no State any right that every pertained to it”—but it would ensure that the federal government would have “power . . . to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any state.”<sup>229</sup> “You work, I’ll eat” would be no more.

To anticipate an objection: claiming that the Fourteenth Amendment’s Due Process of Law Clause forbids legislation that rests on a “you work, I’ll eat” principle might seem unhelpful, in view of the fact that this spirit can be understood at varying levels of generality. Narrowly understood, it might only prohibit legislation designed to perpetuate chattel slavery in all but name; broadly understood, it might prohibit all redistributive legislation that arguably decreases aggregate social welfare.

Any argument that the Fourteenth Amendment’s Due Process of Law Clause requires that government action increase aggregate social welfare would be implausible. But it’s not too much to say that the clause was designed to do more than prevent the effective resumption of chattel slavery—although it was certainly designed to do the latter. Republicans sought economic autonomy, praising labor as the source of wealth and maintaining that workers—regardless of race—were entitled to the full fruits of their labor.<sup>230</sup> There’s no reason to think that the anti-arbitrariness spirit of the Fourteenth Amendment’s Due Process of Law Clause is compatible with any legislative deprivations of life, liberty, or property—including deprivations effectuated through restrictions on economic activity—that rest upon what Cass Sunstein has termed naked preferences: “distribution[s] of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.”<sup>231</sup> Legislators need not *succeed* in increasing aggregate welfare—but policies that are not even *designed* to do so are off-limits.

### C. Constructing Constitutional Heuristics

---

<sup>227</sup> See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 375 (1962); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 20-51 (1977); MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 118 (1994); AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 389-90 (2005).

<sup>228</sup> See CURTIS, *supra* note, at 46.

<sup>229</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866).

<sup>230</sup> See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY* 111-39 (1970) (describing Republican stress on free labor in the territories and Lockean conception of the right to property).

<sup>231</sup> Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

Having established that the original meaning of the Fourteenth Amendment's Due Process of Law Clause does impose substantive restrictions on state law and its original spirit is an anti-arbitrariness spirit, it's now time to develop implementing doctrines that give effect to the latter spirit. Doing so will reduce the agency costs associated with legislative and judicial deviations from that spirit.

There's a growing body of evidence that boundedly rational judges with scarce time will—like the rest of us—inevitably rely upon rules of thumb that are designed to simplify decisionmaking.<sup>232</sup> Scholars have identified a number of judicial heuristics that are deployed in order to simplify decisionmaking—the business judgment rule in corporate law, which essentially insulates decisionmaking by corporate directors from substantive review for carelessness absent showings of conflicts of interest, gross negligence, or conscious disregard of the law, offers a highly relevant example. The rule economizes on scarce judicial and effort that would otherwise be spent evaluating whether company projects are well-calibrated to yield net positive present value and can be defended on the grounds that 1.) judges lack the business acumen to make such determinations; 2.) well-functioning capital markets will force badly-behaving boards to internalize the costs of poor decisionmaking; 3.) directors would be sufficiently unwilling to make risky decisions that would be net-beneficial to shareholders under stringent liability rules; and 4.) some competent would-be directors would not be willing to serve at all under stringent liability rules.<sup>233</sup>

Judicial heuristics like the business judgment rule aren't inherently good or bad, in the sense of either improving or worsening overall outcomes in the decisionmaking contexts in which they “fire.” They *can*, however, be either good or bad. Indeed, they can be good for a time and become bad, or worse than an alternative strategy—the technical term is *maladaptive*—when the relevant contexts change. In the constitutional context, think of the rule set forth in *Gideon v. Wainwright*,<sup>234</sup> in which the Court held that criminal defendants are entitled to an attorney at public expense. *Gideon* simplified what had been a complex inquiry into whether the “totality of the facts” indicated that the lack of assistance from counsel would “constitute a denial of fundamental fairness.”<sup>235</sup> While its author, Justice Hugo Black, made plain that he believed that the text of the Sixth Amendment, as incorporated through the Fourteenth, commanded that the fundamental-fairness test—associated with *Betts v. Brady*—be discarded, Justice John Marshall Harlan, in a separate concurrence, took the position that the test *no longer* was defensible:

In noncapital cases, the “special circumstances” rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after *Betts*, there were cases in which the Court found special circumstances to be lacking, but usually by a sharply divided vote . . . However, no such decision has been cited to us. At the same time, there have been not a few cases in which special circumstances were found in little or nothing more than the “complexity” of the legal questions presented, although those questions were often of only routine difficulty. The Court has come to recognize, in other words, that the mere

---

<sup>232</sup> See sources cited *supra* note 28.

<sup>233</sup> See FRANK E. EASTERBROOK & DANIEL FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); Stephen M. Bainbridge, *The Business Judgment Rule As Abstention Doctrine*, *supra* note, at 109-28.

<sup>234</sup> 372 U.S. 335 (1963).

<sup>235</sup> See *Betts v. Brady*, 316 US 455, 462 (1942).

existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts v. Brady* rule is no longer a reality.<sup>236</sup>

That's a description of a maladaptive heuristic—one that no longer improves decisionmaking but, rather, hinders it, and would produce systematic errors if consistently applied. If the existence of a criminal charge itself constitutes a special circumstance requiring assistance, any totality-of-the-facts inquiry amounts to deadweight loss—consisting of decision costs without compensating benefits in every case and error costs in those cases in which no special circumstance is found.

The following Section discusses three heuristics that have been used to implement the Fourteenth Amendment's Due Process of Law Clause.

### *1. A Brief History of Substantive Due Process Heuristics*

#### *a. Health, Safety, Public Morals*

The triad of “health, safety, and public morals” served as state and federal courts' first cut at capturing the difference between legitimate laws and illegitimate acts of usurpation. It wasn't a bad start, but it came under severe pressure and was ultimately discarded for understandable reasons.

As discussed above, the triadic police power was understood in significant part as a means of preventing rights-conflicts—with rights being defined largely as they were at common law. The morals prong of the police power, however, gradually became untethered from any concern with individual rights. Not that morals regulation served as a blank check for legislatures—as John W. Compton details in *The Evangelical Origins of the Living Constitution*, while nineteenth-century jurists “rarely questioned the legitimacy of traditional forms of morals regulation,” those regulations were justified in terms of “the maintenance of *public* order” rather than “the eradication of *private* vice.”<sup>237</sup> But the necessary connection between morals regulation and the protection of individual rights was sufficiently attenuated that it was fairly easy to pass off measures designed to eradicate private vice as measures designed to promote public morals.

Consider how the Supreme Court in *Mugler v. Kansas*<sup>238</sup> sanctioned the constitutionality of a state prohibition on liquor against a due process of law challenge in which the plaintiffs alleged that the law did not fall within the scope of the police powers. Writing for the Court, Justice John Marshall Harlan insisted that the Court had a solemn duty to invalidate purported police measures with “no real or substantial relation” to the ends of “protect[ing] the public health, the public morals, or the public safety.”<sup>239</sup> But the means-end analysis in which he engaged was insubstantial: “[W]e cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks.”<sup>240</sup> Q.E.D.

---

<sup>236</sup> *Gideon*, 372 U.S. at 351 (Harlan, J., concurring).

<sup>237</sup> JOHN W. COMPTON, *THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION* 8 (2014).

<sup>238</sup> 123 US 623 (1887).

<sup>239</sup> *Id.* at 661.

<sup>240</sup> *Id.* at 662.

The late-nineteenth and early-twentieth centuries saw the enactment of progressive economic legislation that was designed to redress inequalities of bargaining power between employers and employees, stabilize prices and employment during economic downturns, and prop up industries that were deemed essential to economic prosperity—legislation, that is, that went well beyond preventing rights-conflicts.<sup>241</sup> The Court wasn't overwhelmingly hostile to such legislation. An example: *Holden v. Hardy*,<sup>242</sup> in which the Court upheld an act regulating the hours of employment in underground mines. In *Holden*, Justice Henry Brown endorsed the following observations, made by the Utah Supreme Court below, about a liberty-of-contract argument advanced by an employer who had been prosecuted under the act:

It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defence is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employés, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.<sup>243</sup>

This isn't the language of anything that could fairly be called laissez-faire constitutionalism. It not only recognizes inequalities in bargaining power between employers and employees but endorses the constitutional legitimacy of efforts to redress them—to promote aggregate social welfare through means other than the prevention of rights-conflicts.

The Court had, however, an increasingly difficult time distinguishing between novel efforts to increase aggregate social welfare and “mere meddlesome interference[s]”<sup>244</sup> with constitutionally protected rights, to the point where its decision to uphold what seems in retrospect to be a fairly obvious example of a naked economic preference in *Carolene Products*<sup>245</sup> seems less the product of capitulation than a confession of institutional incompetence.

Consider the maximum-hours and minimum-wage cases that spanned the first thirty-odd years of the twentieth century. Three years after the Court in *Lochner* upheld a maximum hours provision of New York's 1895 Bakeshop Act that covered biscuit, cake, and bread bakers—a provision which Justice Peckham, writing for the majority, struggled to distinguish from a provision of a mining act that the Court in *Holden* upheld over his dissent seven years earlier, even

---

<sup>241</sup> For an overview of this legislation, see Herbert Hovenkamp, *The First Great Law and Economics Movement*, 42 STAN. L. REV. 993 (1990).

<sup>242</sup> 169 U.S. 366 (1898).

<sup>243</sup> *Id.* at 397.

<sup>244</sup> *Lochner*, 198 U.S. at 61.

<sup>245</sup> See Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 399, 417 (1987) (showing that although “[t]he case against filled milk had the appearance of scientific rigor,” it was “utterly unproved” and explaining that “[t]he consequence of the [Court's] decision was to expropriate the property of a lawful and beneficial industry; to deprive working and poor people of a healthful, nutritious, and low-cost food; and to impair the health of the nation's children by encouraging the use as baby food of a sweetened condensed milk product that was 42 percent sugar”).

though a forceful argument that it was a naked economic preference might have been made<sup>246</sup>—the Court in *Muller v. Oregon*<sup>247</sup> upheld maximum-hour legislation that applied only to women. Nine years later, in *Bunting v. Oregon*,<sup>248</sup> it upheld maximum-hour legislation covering mill, factories, and other manufacturing facilities, with nary a mention of *Lochner*. Whereas in *Lochner* the Court highlighted the lack of evidence that bakers were peculiarly in need of state protection,<sup>249</sup> the Court in *Bunting* rejected the contention that the challenged law “[wa]s not either necessary or useful for preservation of the health of employes [sic] in mills, factories and manufacturing establishments” on the grounds that the record “contains[ed] no facts to support the contention”, stating only that “the custom in our industries does not sanction a longer service than 10 hours per day” and citing average daily working time in several other countries.<sup>250</sup> The Court went from upholding federal and state minimum wage legislation in two 1917 decisions<sup>251</sup> to disapproving all minimum wage legislation in decisions spanning the period from 1923 to 1927<sup>252</sup> to upholding state minimum wage legislation in 1937<sup>253</sup> that had been in existence since 1914.

Where it was most needed, judicial scrutiny of pretended police measures often left much to be desired. Probably the most appalling example is *Plessy v. Ferguson*,<sup>254</sup> in which the Court upheld Louisiana legislation forbidding private street-car operators to provide service to both blacks and whites. Justice Brown—he of the nuanced majority opinion in *Holden*—spent all of a single paragraph analyzing whether “the statute of Louisiana is a reasonable regulation.”<sup>255</sup> Justice Brown emphasized that “there must necessarily be a large discretion on the part of the legislature” and that legislatures are “at liberty to act with reference to the established usages, cus-

---

<sup>246</sup> See Rebecca L. Brown, Constitutional Tragedies: The Dark Side of Judgment, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 139, 142 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (“[S]ubsequent analysts . . . have demonstrated that the [hours] law . . . was probably a rent-seeking, competition-reducing measure supported by labor unions and large bakeries for the purpose of driving small bakeries and their large immigrant workforce out of business.”). For a deep-dive, see BERNSTEIN, *supra* note, at 23-40.

<sup>247</sup> 208 US 412 (1908).

<sup>248</sup> 243 US 426 (1917).

<sup>249</sup> *Lochner*, 198 U.S. at 57 (“There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State”).

<sup>250</sup> *Bunting*, 243 U.S. at 438.

<sup>251</sup> *Wilson v. New*, 243 U.S. 332 (1917); *Stettler v. O'Hara*, 243 U.S. 629 (1917).

<sup>252</sup> *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Donham v. West-Nelson Mfg. Co.*, 273 U.S. 657 (1927); *Murphy v. Sardell*, 269 U.S. 530 (1927).

<sup>253</sup> *West Coast Hotel Co. v. Parrish*, 300 US 379 (1937).

<sup>254</sup> 163 US 537 (1896). A case might be made for *Buck v. Bell*, 274 U.S. 200 (1927), in which the Court upheld 8-1 a compulsory sterilization law as a reasonable police measure. In the years following *Buck*, the number of states with sterilization laws increased from 17 to 33, and an estimated 25,000 individuals who were determined to have mental disabilities were reportedly sterilized in the 1930s alone. See KARL MENNINGER & SARAH F. HAAVIK, SEXUALITY, LAW, AND THE DEVELOPMENTALLY DISABLED PERSON: LEGAL AND CLINICAL ASPECTS OF MARRIAGE, PARENTHOOD, AND STERILIZATION 125-27 (1981). Carrie was in fact of normal intelligence—she was institutionalized after being raped by her foster parents' nephew. For an exhaustive history, see ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2016).

<sup>255</sup> *Id.* at 550.

toms, and traditions of the people, and with a view to the promotion of their comfort and the preservation of the public peace and good order.”<sup>256</sup>

*Carolene Products* was delivered in the context of a growing recognition—reflected in the Court’s jurisprudence in preceding years—that determining whether the novel economic legislation that was being generated at the federal and state levels was calculated to achieve legitimate constitutional ends was putting an increasing amount of stress on the Court’s docket and its police power doctrine. The decision costs associated with distinguishing valid from invalid government action increased as the scope and scale of government action increased.<sup>257</sup> The benefits, too, became increasingly hard to identify.

#### *b. Footnote Four*

The rational-basis test wasn’t invented in *Carolene Products*. The standard of review applied by Justice Harlan Fiske Stone in his opinion for the Court was indistinguishable from that applied in prior police power cases, including *O’Gorman & Young, Inc. v. Hartford Fire Ins. Co.*,<sup>258</sup> decided in 1931; *Nebbia v. New York*,<sup>259</sup> decided in 1934; and *Metropolitan Casualty Ins. Co. v. Brownell*,<sup>260</sup> decided in 1935. The default standard of judicial review had long been a soft, rebuttable presumption of constitutionality. As early as 1888, the Court in *Powell v. Pennsylvania*<sup>261</sup> articulated and applied what would later be called the rational-basis test to a state ban on oleomargarine:

Whether the manufacture of oleomargarine, or imitation butter, of the kind described in the statute, is, or may be, conducted in such a way, or with such skill and secrecy, as to baffle ordinary inspection, or whether it involves such danger to the public health as to require, for the protection of the people, the entire suppression of the business, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, are questions of fact and of public policy which belong to the legislative department to determine. And as it does not appear upon the face of the statute, or from any facts of which the court must take judicial cognizance, that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts.<sup>262</sup>

---

<sup>256</sup> *Id.* at 550.

<sup>257</sup> See Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 691 (1988) (“Although many factors may have contributed to the retreat from economic due process which occurred, the sizable and increasing price tag for judicial involvement and the failure of judicial strategies to control these rising costs pushed relentlessly in that direction”).

<sup>258</sup> 282 US 251, 257-8 (1931) (“[T]he presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.”)

<sup>259</sup> 291 US 502, 537-8 (1934) (“[E]very possible presumption is in favor of [the] validity [of a statute] . . . though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.”).

<sup>260</sup> 294 US 580, 586 (1935) (“Discriminations between life and casualty insurance companies are not forbidden and cannot be assumed to be irrational.”).

<sup>261</sup> 127 US 678 (1888).

<sup>262</sup> *Id.* at 685.

Under this standard of review, the Court wouldn't question the constitutionality of facially legitimate statutes, absent the introduction of evidence which tended to show they weren't calculated to serve legitimate ends. The plaintiff bore the burden of both producing evidence *and* the burden of persuasion on the merits of the constitutional question. But both burdens *could* be carried—as the Court put it in *Borden's Farm Products Co. v. Baldwin*,<sup>263</sup> “[i]t is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault” and the Court wouldn't “treat[] any fanciful conjecture as enough to repel attack.”<sup>264</sup>

What made *Carolene Products* different was that the Court suggested that a more stringent standard of review might be appropriate in two sets of constitutional cases that did *not* involve “ordinary commercial transactions.”<sup>265</sup> Enough is known about the drafting of Footnote Four to identify the constitutional and political theories behind each set. The key passages are excerpted below:

[W]hen 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.

Legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation . . . [and] statutes directed at particular religious, or national, or racial minorities . . . 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.<sup>266</sup>

Although they share space in the same footnote, these two sets of suspect statutes were incorporated on the basis of different premises and at different times. Chronologically, the second set came first. The originally-circulated opinion rested only on what can be called a *legislative-failure theory*—a theory which held that a well-functioning legislative process will not systematically make any subset of the citizenry permanent political “losers” from whom rents, whether economic or otherwise,<sup>267</sup> can be extracted on a wholesale basis, interference with participation in that process and certain outputs from it can generate and evince malfunction on a

---

<sup>263</sup> *Borden's Farm Products Co. v. Baldwin*, 293 US 194 (1934).

<sup>264</sup> *Id.* at 209.

<sup>265</sup> *Carolene Products*, 304 U.S. at 152.

<sup>266</sup> *Id.* at 153 n. 4.

<sup>267</sup> The unfortunate term “rent” plays a central role in economic language games and is used to refer to economic returns in excess of a resource owner's opportunity costs. In public-choice literature, rent-seeking is “the expenditure of scarce resources to capture an artificially created transfer.” Robert D. Tollison, *Rent-Seeking: A Survey*, 35 *KYKLOS* 575, 576 (1982). Anytime interest groups seek to extract concentrated benefits by means of government power, that is fairly described as rent-seeking—even when the benefits solely consist in the satisfaction of having one's normative views imposed on others. See KENNETH N. BICKERS & JOHN T. WILLIAMS, *PUBLIC POLICY ANALYSIS: A POLITICAL ECONOMY APPROACH* (1993) (coining the term “ideological rent-seeking”); Geoffrey Brennan & Hartmut Kliemt, *Regulation and Revenue*, 19 *CONST. POL. ECON.* 149, 250 (2008) (including into “rent-seeking not only the pursuit of monetary rents but also ideological rents that result from biasing the legal order in favour of some ‘Weltanschauung’ or other.”).



retail basis, respectively.<sup>268</sup> The first set that appears in the footnote was added later, in response to a letter from Chief Justice Charles Evans Hughes.<sup>269</sup> According to Louis Lusky—the clerk who drafted Footnote Four—Chief Justice Hughes believed that “[s]ome rights . . . deserve[d] more judicial attention than others because they are mentioned in the text of the Constitution.”<sup>270</sup> As Lusky observed, “[t]he dynamics of government play[ed] no part in the calculus.” Call this the enumerated-rights theory. When Chief Justice Hughes sent a letter to Justice Stone communicating his views, Justice Stone simply incorporated them.<sup>271</sup> The lack of controversy over substantially different theories of when the judiciary might engage in heightened scrutiny suggests either that those who relied upon them either didn’t see them as conflicting or that none concerned understood themselves to be settling the issue.

Because there’s nothing in the text of the Constitution about legislative-failure theory, a tension would inevitably emerge between *any* theory of heightened scrutiny that rested upon the primacy of textually enumerated rights and one that didn’t. For a legislative-failure theory can justify heightened scrutiny for burdens on constitutional rights that aren’t textually enumerated, depending on whether statutes that burden those rights are more likely than other statutes to be byproducts of legislative failure.

The problem can be crystallized focusing on that most controversial of cases, *Roe v. Wade*. There’s obviously no *textually* enumerated right to terminate a pregnancy, or, for that matter, to use contraceptives.<sup>272</sup> But it’s not very difficult to make out the case that criminal prohibitions on abortion like those challenged in *Roe* were byproducts of a kind of legislative failure. Public choice theory provides reasons to expect that the millions of individuals affected by contraceptive and abortion-restricting legislation will have a difficult time organizing and, when they do, discouraging free-riding, making it unlikely that they will be able to effectively express their preference-intensity at the polls.<sup>273</sup> As compared to intensely-interested, relatively small groups,<sup>274</sup> diffuse groups generally have difficulty organizing; organizations that represent their

---

<sup>268</sup> For an extended discussion of how “[s]ubordination of a particular group can occur if that group is persistently excluded from majority political or economic coalitions, thereby becoming the subject of rent-seeking rather than being able to gain benefits for itself” and how Footnote Four deals with this problem, see Jeffrey A. Roy, *Carolene Products: A Game-Theoretic Approach*, 2002 BYU L. REV. 53 (2002).

<sup>269</sup> Louis Lusky, *Footnote Redux: A “Carolene Products” Reminiscence*, 82 COL. LAW. REV. 1093, 1097 (1982).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> This doesn’t foreclose the possibility that the term “liberty” was originally used to denote a concept broad enough to encompass the right to terminate a pregnancy. Concepts aren’t identical to their referents, and words denote concepts that include *all* of their referents, both known and unknown to the initial word-users. See AYN RAND, INTRODUCTION TO OBJECTIVIST EPISTEMOLOGY 237 (Harry Binswanger & Leonard Peikoff eds., 1990). For an argument that the term “liberty” may not denote a concept that includes the right to terminate a pregnancy among its referents, but that the term “life” may do so, see Sheldon Gelman, “*Life*” and “*Liberty*”: *Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights*, 78 MINN. LAW REV. 585 (1994).

<sup>273</sup> For an extended discussion of how privacy-infringing statutes are likely to be downstream from legislative failure, see Lynn Stout, *Strict Scrutiny and Social Choice*, 1805-1810 (1992). To be sure, as Stout acknowledges, the *Carolene Products* Court was primarily concerned with legislative failures which resulted from “the literal exclusion of minority groups from political bargaining”, not with all kinds of legislative failure—it had no concept of minoritarian tyranny that resulted from rent-seeking by industrial minorities. *Id.* at 1806 n. 82. For the seminal critique of this omission, see Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

<sup>274</sup> See OLSON, *supra* note, at 142-45 (1965).

interests receive financial support and personal support from a mere fraction of them; that lack of support for organizations that support abortion access in particular may be a byproduct of the fact that those who are not pregnant regard the risk of an unwanted pregnancy as too low to require action.<sup>275</sup> Public choice theory also counsels wariness of prohibitory legislation that's enacted at the behest of politically-influential professional groups who stand to capture concentrated economic benefit from that legislation, and that's a fair description of the raft of restrictions on early-term abortion for which the American Medical Association and its university-trained members lobbied during the late-nineteenth century.<sup>276</sup>

This isn't an argument that *Roe* was correctly decided.<sup>277</sup> It only illustrates the kind of tension that could arise between enumerated-rights theory and any theory that focused on legislative failure. In view of this tension, it's unsurprising that enumerated-rights theory was jettisoned and replaced with "fundamental rights" theory long before *Roe*. Fundamental-rights theory preserved heightened scrutiny for a set of preferred "personal" rights, including rights to marry,<sup>278</sup> use contraceptives,<sup>279</sup> associate with others for lawful purposes,<sup>280</sup> and live together with members of one's family,<sup>281</sup> by implicitly repudiating the theory on which Footnote Four's preferred set rested—namely, that textually-specified rights were more important than others.

Footnote Four responded to an institutional problem that the police power experience had exposed—the escalating and certain decision costs associated with arbitrariness review of economic regulation and its uncertain benefits. It did so by saving heightened judicial scrutiny for cases involving legislative-process-related failures that judges might have an easier time identifying and which, being remedied, might lower the costs associated with evaluating the outputs of the legislative process.<sup>282</sup> But it was an effort to "serve two masters,"<sup>283</sup> and the fate of enumerated-rights theory illustrates the wisdom of the biblical admonition against such efforts.

---

<sup>275</sup> Stout, *supra* note, at 1807.

<sup>276</sup> See KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 31 (2008) ("By becoming visible activists on an issue such as abortion, [physicians] could claim both moral stature (as a high-minded, self-regulating group of professionals) and technical expertise (derived from their superior training)"); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 283 (1992) (detailing how "[n]ineteenth-century Regulars fought abortion as part of a larger campaign to wrest control over medical practice from competing sects.").

<sup>277</sup> I really don't have a considered position on the constitutional question. Compare Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT 291 (2007) (original meaning of Fourteenth Amendment protects right to terminate pregnancy) with Joshua Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539 (2017) (original meaning of Fourteenth Amendment compels states to forbid termination of pregnancies). I will only note here that the law at issue in *Roe* did threaten violators with a minimum of 5 years in prison. See Texas Penal Code of 1857, Art. 1195. That implicated "liberty" under even the narrow understanding of the term championed by Justices Scalia and Thomas—it threatened violators with physical restraint—and therefore needed to be calculated to achieve a constitutionally proper end. See *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting) ("The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this.").

<sup>278</sup> *Loving v. Virginia*, 388 US 1 (1967).

<sup>279</sup> *Griswold v. Connecticut*, 381 US 479 (1965).

<sup>280</sup> *NAACP v. Alabama ex rel. Patterson*, 357 US 449 (1958).

<sup>281</sup> *Moore v. East Cleveland*, 431 US 494 (1977).

<sup>282</sup> See Komesar, *A Job For the Judges*, *supra* note, at 699-700 ("A judiciary severely constrained by its limited resources as well as doubts about its abilities must leave vast areas of decisionmaking unattended, and struggle with whatever it does handle. If political malfunction can be reduced, fewer resources expended on review of the output

### *c. The Political Judgment Rule*

As the set of fundamental rights expanded, the level of scrutiny that the Supreme Court applied to burdens on rights deemed nonfundamental decreased. From the standpoint of economizing on scarce judicial resources, the latter move made a certain amount of sense. An increase in the number of constitutional rights meriting preferential treatment required cost-cutting measures elsewhere.

That's one way to understand the Supreme Court's 1955 decision in *Williamson v. Lee Optical*,<sup>284</sup> in which the Court upheld a nasty piece of protectionism that forbade anyone but a licensed optometrist or ophthalmologist to "fit, adjust, adapt or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person" or to replace any lenses without a written prescription from an Oklahoma-licensed ophthalmologist or optometrist.<sup>285</sup> A three-judge panel of the Western District of Oklahoma, applying the rational-basis standard familiar from *Carolene Products*, determined after careful scrutiny of the evidence in the record that the legislation wasn't actually designed to promote better vision but, rather, served only to "place within the exclusive control of optometrists the power to choose just what individual opticians will be permitted to pursue their calling."<sup>286</sup> The Court reversed, in an opinion by Justice William O. Douglas that articulated a default rule governing judicial review of nonfundamental rights that is less like a standard of review than an abstention doctrine—it effectively cuts off judicial review whenever it applies. Justice Douglas made plain that the Court would henceforth uphold legislation under its constitutional default if the Court could conceive of any hypothetical reason why the legislature might have enacted that legislation—even if that reason was unsupported by record evidence:

The Oklahoma law 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 . . . [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.<sup>287</sup>

If logical consistency between legislative means and avowed ends isn't essential; if the fact that it "might be thought" that legislation is directed at an "evil at hand" is sufficient for legislation to pass constitutional muster, even absent any evidence that it's so directed; if judges

---

of the corrected process. Similarly, if a malfunction can be corrected, an area of political activity can be ignored with less regret.").

<sup>283</sup> *Matthew 6:24* (King James).

<sup>284</sup> 348 US 483 (1955).

<sup>285</sup> 59 Okla.St. Ann. §§ 941-947.

<sup>286</sup> *Lee Optical of Oklahoma v. Williamson*, 120 F. Supp. 128, 137 n. 20 (WD Okla. 1954).

<sup>287</sup> *Williamson*, 348 U.S. at 488.

can't inquire into what legislatures are *actually* seeking to achieve—then it's impossible for constitutional challengers to prevail.

The essence of this non-review was distilled by Justice Thomas in an otherwise-obscure case: *FCC v. Beach Communications*.<sup>288</sup> Writing for the Court, Justice Thomas stated that judges must ordinarily uphold legislation “if there is any reasonably conceivable state of facts that could provide a rational basis for it”; that those challenging legislation must “negative every conceivable basis which might support it”; and that the government needn't justify legislation with “evidence or empirical data.”<sup>289</sup> As Justice John Paul Stevens ruefully observed in concurrence, the conceivable-basis approach is “tantamount to no review at all.”<sup>290</sup> Indeed, if the *Carolene Products* Court was correct in assuming that it would deny due process to “preclude[] the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis,”<sup>291</sup> the conceivable-basis approach might well be unconstitutional.

Assuming for the moment, however, that the conceivable basis approach *is* constitutional, one might defend it as a kind of *political judgment rule*, analogous to the business judgment rule in corporate law. The latter insulates decisions by boards of directors from substantive review for carelessness absent evidence of conflicts of interest, gross negligence, or conscious disregard of the law.<sup>292</sup> A political judgment rule might be defended on the basis of similar concerns to those which have been invoked to defend the business judgment rule—in particular, concerns upon about the judiciary's institutional disadvantages and the availability of alternative constraints on agency costs. It might be argued that making good legislative policy is hard, just like making business decisions; judges are informationally limited and fallible in their assessments of both legislative policy and business decisions; and policymakers can be removed from office if they support arbitrary legislative policy, just as directors can be removed for arbitrary business decisions.

This defense fails. True, making good legislative policy is hard. True, judges are informationally limited and fallible in their assessments of it. But unlike in the context of corporate law, where well-functioning capital markets composed of diversified shareholders can swiftly punish badly-behaving boards, alternative constraints on legislative agency costs aren't present.<sup>293</sup> The information and organization costs associated with identifying arbitrary legislation and “voting the bums out” are generally higher than any benefits that individuals stand to gain from opposing such legislation, which legislation is often far more beneficial to its supporters than it is costly to

---

<sup>288</sup> 508 U.S. 307 (1993).

<sup>289</sup> *Id.* at 315.

<sup>290</sup> *Id.* at 323 n. 3 (Stevens, J., concurring).

<sup>291</sup> *Carolene Products*, 304 U.S. at 152.

<sup>292</sup> For overviews, see Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004); Mary Siegel, *The Illusion of Enhanced Review of Board Actions*, 15 U. PA. J. BUS. L. 599, 602-08 (2013).

<sup>293</sup> See Jonathan Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 491 (1988) (“Unlike the corporate sphere, with its public market for shares, nothing in the political realm provides outside observers (i.e., the electorate) with a low-cost mechanism for observing and evaluating the performance of the relevant participants (i.e., elected officials).”).

those burdened by it.<sup>294</sup> Judicial review, with all its flaws and foibles, is often the only game in town.

Moreover, whatever cost-savings the political judgment rule might have been designed to capture have been compromised by its inconsistent application. It's generally acknowledged that the rule shares doctrinal space with a less-deferential rule that more closely resembles old-school rational-basis review—sometimes referred to as “rational basis with bite.”<sup>295</sup> Accordingly, judges have the capacity to pick and choose whether to apply one of two fundamentally different rules in cases involving nonfundamental rights—a choice that invites the influence of naked ideological preferences.

The significance of the latter choice can be perceived in lower courts' treatment of cases involving occupational licensing regimes that are alleged to be *mere* exercises in intrastate protectionism—as distinct from protectionism in the service of some arguable public good. If mere intrastate protectionism is a legitimate government interest, the choice between the political judgment rule and a genuine standard of review matters not, as protectionist legislation would survive under both if well-designed to transfer wealth from As to Bs, regardless of whether the transfer is designed to maximize some social welfare function. But if it isn't, the choice matters a great deal.

In the 2017 case of *Niang v. Carroll*,<sup>296</sup> a panel of the Eighth Circuit upheld a Missouri licensing regime that required African-style hair braiders to be licensed as barbers or cosmetologists. It didn't do so on the ground that mere intrastate protectionism is a legitimate end—it did because the state alleged it was “protecting consumers and ensuring public health and safety” and “offered evidence of health risks associated with braiding” because and the district court conceived of two additional legitimate ends: “stimulating more education on African-style braiding and incentivizing braiders to offer more comprehensive hair care.”<sup>297</sup> The panel rejected arguments that the means poorly fit the alleged ends and declined to follow the reasoning of other district court decisions<sup>298</sup> holding similar braiding restrictions unconstitutional because the latter didn't “appropriately defer to legislative choices.”<sup>299</sup>

Let's look at one of those district court decisions. In *Brantley v. Kuntz*,<sup>300</sup> Judge Sam Sparks of the Western District of Arizona evaluated a “specialty” occupational license that Texas had created for African hair-braiders in 2007 and which required would-be hairbraiding instructors to create a fully-equipped barber college with at least 2,000 square feet of floor space, ten

---

<sup>294</sup> See DOWNS, *supra* note, 240-59 (articulating theory of the “rationally ignorant” voter).

<sup>295</sup> See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 20-22 (1972); Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1986). Cases associated with rational-basis-with bite include *Eisenstadt v. Baird*, 405 US 438 (1972); *Department of Agriculture v. Moreno*, 413 US 528 (1973); *Plyler v. Doe*, 457 US 202 (1982); *Zobel v. Williams*, 457 US 55 (1982); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 US 869 (1985); *Romer v. Evans*, 517 US 620 (1996); *Village of Willowbrook v. Olech*, 528 US 562 (2000); *US v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>296</sup> 879 F.3d 870 (8th Cir. 2017).

<sup>297</sup> *Id.* at 873.

<sup>298</sup> The decisions were *Brantley v. Kuntz*, 98 F. Supp. 3d 884 (W.D. Tex. 2015); *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012); *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101, 1103 (S.D. Cal. 1999).

<sup>299</sup> *Niang*, 879 F.3d at 875 n. 3.

<sup>300</sup> 8 F. Supp. 3d 884 (W.D. Tex. 2015).

barber workstations, and five sinks.<sup>301</sup> Judge Sparks evaluated each of the government’s proffered justifications for these minimums on the basis of the “facts before the court” and concluded that the minimums, as applied to duly-licensed hair-braider Isis Brantley, “d[id] not advance public health, public safety, or any other legitimate government interest.”<sup>302</sup> For instance, Judge Sparks rejected the argument that the 10-chair minimum had a rational basis because it “ensure[d] that each student has an adequate space in which to work and maintain a clean environment” because barber schools that offered only hair-braiding were *exempted* from the requirement they have one barber chair available for each student—thus fatally undermining any claim that braiding students “actually needed barber chairs to have adequate workspace or to maintain a clean environment.”<sup>303</sup>

It’s easy to see that fundamentally different understandings of what is nominally the same standard of review—rational-basis review—were at work in *Niang* and *Brantley*, respectively. The political judgment rule thus generates high legislative *and* judicial agency costs. It affords legislatures a degree of deference that is arguably appropriate in the context of judicial review of decisions by corporate boards because of alternative mechanisms for keeping agency costs down but which *isn’t* appropriate in the absence of those mechanisms. Further, because the rule doesn’t always apply, and because no neutral principle instructs judges when to apply it, judges can choose between two fundamentally different approaches to resolving cases in the same constitutional space on the basis of their own normative convictions.

## 2. *Optimizing Substantive Due Process*

It’s easy to criticize. (Fun, too.)<sup>304</sup> But can the judiciary make cost-justified improvements upon the status quo? Given the judiciary’s limited resources and institutional competence, the optimal level of unconstitutional legislation that doesn’t get judicially invalidated is probably not zero. In economic terms, when the marginal benefits captured through an additional increment of judicial scrutiny cease to exceed the marginal costs, the case for purchasing an additional increment becomes weak. Ideally, that precise point would be identified—realistically, doing so represents a computationally intractable problem and it’s necessary to rely upon institutionally-sensitive intuitions.

This Section synthesizes a framework for implementing the due process of law that improves upon prior heuristics in two respects. First, it rests upon a realistic model of collective decisionmaking. Second, it rests upon an explicit theory of what makes exercises of legislative power legitimate.

### a. *Positioning Presumptions*

In *Carolene Products* the Court applied two soft, rebuttable presumptions—first, a presumption that facts existed which supported the rationality of the challenged legislation; sec-

---

<sup>301</sup> *Id.* at 888.

<sup>302</sup> *Id.* at 894.

<sup>303</sup> *Id.* at 891.

<sup>304</sup> See *The Simpsons: Bart Star* (Fox television broadcast November 9, 1997). It is thus that Homer defends his less-than-constructive heckling of Ned Flanders, who is coaching Springfield’s football team.

ond,<sup>305</sup> a presumption that the legislation itself was constitutionally valid.<sup>306</sup> Challengers thus had the burdens of producing evidence of irrationality and of persuading the court on the merits of the constitutional argument.

Alternative regimes are possible. The government might be allocated the burden of producing evidence while *retaining* the benefit of a presumption of constitutionality. That is, the government might lose if it produced no evidence but win if the evidence produced left the question of substantive constitutionality in near-equipose. Or the government might be allocated both the burden of producing evidence *and* of demonstrating the constitutionality of its actions—the constitutional tie might go to the challenger.

The question of which set of presumptions is optimal is an empirical and institutional one. Here as elsewhere, goal choice alone—minimizing legislative arbitrariness—does not dictate an answer. Imagine that a legislature regularly churns out arbitrary statutes, such that 6 of 10 that are challenged are unconstitutional. Under such circumstances, a presumption of unconstitutionality at first seems sensible—all things being equal, a challenged piece of legislation is more likely than not to be unconstitutional. But suppose that judges misclassify 1 of 2 challenged statutes that they consider sufficiently close calls to trigger the presumption of unconstitutionality, and they find close calls in 4 of 10 cases. Judges could then be expected to wrongly invalidate statutes in 2 of 10 cases. A presumption of constitutionality would produce *exactly the same result*. Suppose now that judges are more likely to find false positives than they are to find false negatives—that they will misclassify 1 of 2 challenged statutes as unconstitutional but misclassify only 1 of 4 challenged statutes as constitutional. A presumption of constitutionality will better promote constitutional compliance, even though legislative error rate remains constant, if judges are more likely to err by invalidating legislation than by upholding it.

The problem, of course, is that no one knows the relevant error rates; no one can—in a cost-justified manner—gather enough information about error rates that could be used to identify probabilities that merit any epistemic weight; and one could generate an infinite set of optimal presumptions through arbitrarily positing different rates. Accordingly, the only option available is to take stabs on the basis of generalizations about the institutional competencies of courts and legislatures and keep track of the outcomes that any chosen set of presumptions generates in practice.

The institutional case for imposing the burden of producing evidence on government officials is strong. Because government officials are in control of the evidence concerning the ends that legislation is designed to achieve and can produce it at a lower cost than can challengers, placing the burden of producing evidence on the government is likely to yield more evidence than would otherwise be available.<sup>307</sup> Placing the burden of production on the government in

---

<sup>305</sup> *Carolene Products*, 304 U.S. at 152 (“[The existence of facts supporting the legislative judgment is to be presumed”).

<sup>306</sup> *Id.* (“[R]egulatory legislation 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”).

<sup>307</sup> See *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1362 (11th Cir. 2002) (explaining that “[a] presumption is generally employed to benefit a party who does not have control of the evidence on an issue” and that it would therefore be “unjust to employ a presumption to relieve a party of its burden of production when that party has all the evidence regarding that element of the claim”).

turn allows judges to better determine whether legislation is calculated to achieve a constitutionally legitimate end.

Allocating the burden of persuasion concerning constitutionality is more complicated. It can't be assumed that the legislative process generally produces nonarbitrary statutes. If the reelection-maximizing public choice model of legislative behavior is generally valid—and there is more evidence that supports its validity than there is evidence supporting the public-interested models<sup>308</sup> that it has largely replaced<sup>309</sup>—legislative choice under majority rule will neither generally produce legislation that is designed to increase aggregate social welfare nor even reliably reflect majoritarian preferences. Legislation that does no more than confer concentrated benefits upon some while imposing diffuse costs on others will in many cases be the order of the day; the precise alternative chosen will in many cases be determined by agendas set by legislative leaders, not by whether that alternative would command a majority—any number of alternatives might command majorities, and voting can be manipulated by agenda-setters to ensure that alternatives that command *no* majority are chosen.<sup>310</sup> No presumption of constitutionality can rest comfortably on the assumption that the enactment of arbitrary legislation that is designed only to effectuate naked preferences, economic or otherwise, and which no legislative majority prefers, is an unusual occurrence.

The question thus arises whether judges are more likely to find false positives than false negatives—to err by invalidating perfectly constitutional statutes as arbitrary rather than upholding unconstitutionally arbitrary statutes—or to impose greater constitutional costs through invalidation, even if the number of false positives and false negatives is the same. There's no obvious reason why judges might be more inclined to err as a result of eagerness to correct coordinate branches' perceived errors than to err as a result of undue deference. The immediate constitutional costs of wrongful invalidation and wrongful affirmation are identical—depriving the community of a perfectly constitutional measure is no less constitutionally costly than imposing an unconstitutional measure. The costs of constitutional error *correction* are, however, probably higher in the context of invalidation. Holding all else constant, the constitutional damage resulting from wrongful affirmation can be addressed through ordinary legislation—wrongful invalidations can be corrected only at the cost of either litigation that brings about judicial self-reversal or constitutional amendment, both of which costs are likely to be higher than those of legislative change.<sup>311</sup> Accordingly, there's an uneasy case for a presumption of constitutionality—uneasy because the costs of correcting either wrongful invalidations or wrongful affirmations are both very high. Remember that amendments or repeals of unconstitutional legislation that's been upheld by the courts need to be purchased in the same political market that produced that legislation in the first place.

---

<sup>308</sup> See, e.g., ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932).

<sup>309</sup> See Jonathan Macey, *Public Choice and the Legal Academy*, 86 *GEO. L.J.* 1075 (1998) (book review) (“[T]he reason public choice is such an attractive approach for so many people is not because it explains everything, but because it explains more than any of the other available approaches to the study of democracy and public institutions.”).

<sup>310</sup> The seminal work on how voting procedures can be used to determine legislative outcomes is KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963). For a summary in English, see Saul Levmore, *Public Choice Defended*, 72 *U CHI L. REV.* 777, 779-83 (2002).

<sup>311</sup> See Christopher R. Green, *The Duty of Clarity, Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 *S. TEX. L. REV.* 169, 197 (2015) (observing that “[j]udicial errors are just as difficult to correct today as they have ever been.”).



The political judgment rule should be discarded altogether. While it conserves judicial resources, it has intolerably high agency costs, and the alternative mechanisms for bringing those costs down aren't comparable to those available in the corporate setting. The Court largely struck the right balance in *Carolene Products*—although allocating the burden of production to the government would be desirable—and should return to it.

*b. Theorizing about Legitimacy*

Neither in *Carolene Products* nor since has the Court expressly articulated a theory of legitimacy that can be used to evaluate legislation under its default standard of constitutional review. In a thoughtful article, Thomas Nachbar contends that the Court has since abandoning the police-power heuristic gradually “developed ad hoc a conception of the proper role of government that has become almost entirely utilitarian in nature” and deployed means-ends analysis to determine whether legislative ends “contribute to social welfare.”<sup>312</sup> On Nachbar’s account, the conception that has emerged rests upon “Justices’ intuitive understanding of social wealth maximization,”<sup>313</sup> and privileges instrumental over noninstrumental ends, particularly those related to morality.<sup>314</sup> As Nachbar acknowledges, however, nineteenth-century treatise writers like Cooley and Christopher Tiedeman conceptualized the police power in terms that evinced a concern with “limiting the reach of the police power to vices that affect social wealth, not merely moral values.”<sup>315</sup> It would be more precise to say, not that modern constitutional law is distinctively concerned with social welfare maximization, but that it’s distinctively unconcerned with ensuring that legislatures attempt to maximize social welfare when enacting a particular kind of legislation—namely, economic legislation. The submission here is that legislative deprivations of life, liberty, or property must *always* attempt to increase aggregate social welfare, regardless of the subject matter of that legislation—within limits that are discussed below.

Is there a way to reduce the costs associated with arbitrary legislation at present without increasing the price of judicial review to the point where marginal benefits fall short of marginal costs? Judges can’t be expected to distinguish between arbitrary and nonarbitrary economic legislation on the basis of whether that legislation *actually* increases social welfare—modern regulatory environments are far too complex for such inquiries to be tractable and most judges are not trained welfare economists any more than they are trained historians or moral philosophers. What they may be able to do is make it marginally less likely that legislation that doesn’t even represent an *attempt* to increase aggregate social welfare will be enacted and marginally more likely that, even if it is enacted, it will be detected and judicially invalidated.

---

<sup>312</sup> See Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1661 (2016)

<sup>313</sup> *Id.* at 1662.

<sup>314</sup> *Id.* at 1677.

<sup>315</sup> Nachbar’s analysis raises the question whether the arc of police power jurisprudence bent towards efficiency. For classic arguments that the common law does so, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d. ed. 1977); Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEG. STUDIES 51 (1977); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); For critiques, see Mario J. Rizzo, *Uncertainty, Subjectivity, and the Economic Analysis of Law*, in *TIME, UNCERTAINTY, AND DISEQUILIBRIUM* 71-89 (1979); James A. Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990); Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551 (2002).

This could be done by (1) allocating the burden of production to the government; (2) allocating the burden of persuasion to constitutional challengers; and (3) insisting upon a reasonable fit between a legislative act and either the reduction of costs associated with rights-conflicts or the provision of public goods that are unlikely to be supplied at efficient levels by the market. The latter would include such redistributive measures as accommodations for the disabled, which no individual disabled person has sufficient financial incentive to purchase but the value of which to *all* disabled people might well-exceed the cost of supply.<sup>316</sup> Can a convincing story be told—one supported by record evidence—according to which such redistribution is an effort to contribute to aggregate welfare? If so, the legislation should be upheld.

What about “mixed” legislation that confers distinctive benefits upon some interest groups but does so in the service of promoting social welfare overall? Countless statutes are of this kind—the most benign occupational licensing regimes confer benefits upon incumbents by making it more costly to compete with them than it would otherwise be—and eliminating every trace of rent-seeking from the statute books would keep the courts busy indeed.

Think back to the *Slaughter-House Cases*.<sup>317</sup> There’s a compelling story to be told about the corruption of the Louisiana legislature during Reconstruction and the likelihood that a state statute granting a monopoly over the slaughtering of livestock in New Orleans and surrounding parishes to a privately-owned slaughterhouse was in substantial part the product of special interest machinations.<sup>318</sup> There’s *also* a compelling story to be told about the externalities associated with slaughtering and a pressing public health problem that required some kind of centralization and regulation of the slaughtering industry. Requiring that slaughtering take place in a single, tightly-regulated abattoir addressed health problems associated with the dumping of offal—cow waste left over after slaughtering—in waterways.<sup>319</sup> To be sure, the Crescent City Livestock Landing and Slaughter-House Company benefited from this arrangement, in the form of mandatory (although tightly-limited) fees that more than defrayed the costs of operating the abattoir—but the case is strong that the general public was left better off as a consequence, despite this distributive effect.

More recently, a panel of the United States Court of Appeals for the Fifth Circuit in *St. Joseph Abbey v. Castille*<sup>320</sup> demonstrated how courts can, operating within the confines of rational-basis review, distinguish between mixed legislation that’s designed to promote aggregate welfare and arbitrary legislation that’s designed to impose naked preferences.

*St. Joseph Abbey* involved a set of rules issued by the Louisiana Board of Funeral Directors requiring that intrastate casket sales be made only by state-licensed funeral directors and only at state-licensed funeral homes. The panel acknowledged that one of its sister circuits—as of

---

<sup>316</sup> See Charles Silver, *Public Choice and Judicial Review*, 18 LAW & SOCIAL INQUIRY 165, 184 (1993) (book review) (analyzing this example—which has been deployed an example of why it’s difficult to classify modern legislation as either public-interested or the mere product of rent-seeking—and explaining why it plausibly increases aggregate welfare by addressing an inefficiency that’s downstream of free-market transaction costs).

<sup>317</sup> 83 US 36 (1873).

<sup>318</sup> See Randy E. Barnett, *The Three Narratives of the Slaughter-House Cases*, 41 J. SUP. CT. 295 (2016), Barnett observes, however, that “there was an extensive record in the Louisiana legislature that the slaughter-house bill was a good faith public health measure.” Randy E. Barnett, *In Defense of Constitutional Republicanism: A Reply to Criticisms of Our Republican Constitution*, 32 CONST. COMMENT. 207, 228 (2017).

<sup>319</sup> See RONALD M. LABBÉ & JONATHAN LURIE, *THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT* 27, 32 (2005).

<sup>320</sup> *St. Joseph Abbey v. Castille*, 712 F. 3d 215 (5th Cir. 2013).

today, two—has endorsed intrastate protectionism as a legitimate state interest, but pointed out that the Supreme Court has never, even at its most deferential, done so.<sup>321</sup> In *Lee Optical* the Court hypothesized that the legislature might have concluded that some persons would benefit from seeing a doctor when replacing a lens; in *City of New Orleans v. Dukes*,<sup>322</sup> the Court upheld a New Orleans ordinance that allowed only pushcart food vendors with eight or more years of experience in the French Quarter to operate in the neighborhood because (so the Court speculated) “street peddlers and hawkers tend to interfere with the charm and beauty of a historic area and disturb tourists and disrupt their enjoyment of that charm and beauty, and that such vendors in the Vieux Carre, the heart of the city’s tourist industry, might thus have a deleterious effect on the economy of the city.”<sup>323</sup> There might have been some protectionism involved, wrote Judge Patrick Higginbotham for the *St. Joseph Abbey* panel, but “protection . . . [could] be linked to advancement of the public interest or general welfare.”<sup>324</sup>

Judge Higginbotham didn’t, however, apply the political judgment rule. Rather, he deployed *Carolene-Products*-style rational-basis review, emphasizing that while government had “no affirmative evidentiary burden” to carry, “plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality.”<sup>325</sup> They did so by showing that the government’s claims that the challenged ordinance “restrict[ed] predatory sales practices by third-party sellers and protect[ed] consumers from purchasing a casket that [wa]s not suitable for the given burial space” were “betrayed by the undisputed facts” and that its public-health related justifications for its actions similarly “elide[ed] the realities of Louisiana’s regulation of caskets and burials”—for instance, Louisiana didn’t require caskets for burial, require caskets to be sealed before burial, prescribe requirements for casket construction or design, or require funeral directors to have any casket-related expertise.<sup>326</sup> Concluded Higginbotham:

The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation. The deference we owe expresses mighty principles of federalism and judicial roles. The principle we protect from the hand of the State today protects an equally vital core principle—the taking of wealth and handing it to others when it comes not as economic protectionism in service of the public good but as “economic” protection of the rulemakers’ pockets.<sup>327</sup>

---

<sup>321</sup> Both the Tenth and Second Circuits have embraced intrastate protectionism as a legitimate government interest. See *Powers v. Harris*, 379 F. 3d 1208 (10th Cir. 2004); *Sensational Smiles, LLC v. Mullen*, 793 F. 3d 281 (2d Cir. 2015).

<sup>322</sup> 427 US 297 (1976).

<sup>323</sup> *Id.* at 304-5.

<sup>324</sup> *Id.* at 222. It’s true that Judge Higginbotham formally embraces the legitimacy of upholding statutes that aren’t primarily designed to increase aggregate welfare on the basis of *post hoc* public-oriented rationales. *Id.* But he pointedly rejects the use of hypothetical facts that aren’t in the record to support any such *post hoc* rationales, and the results of his fact-sensitive analysis illustrate the significance of that rejection. *Id.* at 223.

<sup>325</sup> *Id.* at 223.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 226-7.

The approach advocated here wouldn't require invalidation simply because challenged legislation is found to have distributive effects—even pronounced ones, even ones which interest-groups mobilized to secure. What is crucial is that legislation be designed to *increase* the size of the pie—*increase* aggregate welfare—rather than solely to transfer slices from some to others. Were political transaction costs zero, such transfers might not be problematic from a welfarist perspective—the size of the pie would remain the same, even if As now have more slices than Bs—but they're not, and the costs associated with seeking, opposing, and adjusting to legislative wealth transfers represent social deadweight loss.<sup>328</sup>

One might object at this point that alleged public health and safety measures present easy cases—they're either supported by empirical evidence or they're not, and if they're not, they can be invalidated. Where does this leave the controversial field of private morals legislation, which doesn't necessarily depend upon any empirical evidence—just convictions about how people ought to behave, irrespective of how what they do affects others? Nachbar notes that the Court's pre-*Carolene Products* police-power jurisprudence did little to address the legitimacy of legislation governing private moral conduct—such as sexual intimacy—but that such legislation would have been in tension with any nuisance-based understanding of the police power.<sup>329</sup> But if the welfare costs associated with the knowledge that immoral activity is taking place exceed the welfare benefits reaped by those who participate in it and transaction costs make bargaining between all of the affected parties prohibitively expensive, can't the government step in to correct the market failure and promote aggregate welfare by prohibiting that activity?

No. The emergence of a nuisance-based understanding of the police power during the nineteenth century reflects something crucially important about how people understood the social welfare maximization that government was competent to engage in when depriving people of life, liberty, or property. Welfare was to be maximized by enforcing and respecting widely-understood boundaries. Thus, legislation in the early republic and throughout the antebellum period that seems at first to rest entirely upon moral preferences was justified in terms of the protection and facilitation of the exercise of individual, pre-political<sup>330</sup> rights. Thomas West has detailed how prohibitions on various kinds of sex outside of marriage rested on the belief that doing so was “indispensably necessary for the securing of natural rights,”<sup>331</sup> rather than the belief that states enjoyed plenary power to maximize the satisfaction of citizens' moral preferences, and that there was a stark contrast between strict adultery, anti-sodomy, and obscenity laws (in those places where such measures existed) and lax enforcement.<sup>332</sup> Only towards the end of the nineteenth century did this change, in the wake of evangelical religious fervor and progressive technocratic zeal that led reformers to treat pre-political rights as often-dangerous fictions that pre-

---

<sup>328</sup> See Macey, *Transaction Costs*, *supra* note, at 478-80 (detailing the various sources of this deadweight loss).

<sup>329</sup> Nachbar, *supra* note, at 1643.

<sup>330</sup> By “pre-political” I mean that these rights were understood to be 1.) grounded in aspects of human nature that are present absent political organization; and 2.) essential to human flourishing, everywhere and always. I don't dispute the institutionalist/realist insight that *all* rights are “positive” in the sense that securing them requires costly enforcement machinery. See Robert L. Hale, *Force and the State: A Comparison of “Political” and “Economic” Compulsion*, 35 COLUM. L. REV. 149 (1935) (elaborating this insight).

<sup>331</sup> See THOMAS G. WEST, *THE POLITICAL THEORY OF THE AMERICAN FOUNDING* 226 (2017)

<sup>332</sup> *Id.* at 227 (finding that this contrast “characterized all [the Founders'] sex and marriage policies”).

sented obstacles to social welfare, rather than reliable guides to promoting it.<sup>333</sup> The possibility that morals legislation that has no relation to either the protection of individual rights that are—to borrow from Justice Thomas—“freedoms that existed *outside of government*”<sup>334</sup> or the facilitation of their exercise might be socially efficient, while interesting, doesn’t make that legislation compatible with the original spirit of the due process of law.

To summarize: The legitimate ends which can justify the deprivation of life, liberty, or property can be subsumed under the heading of rights-bounded social welfare maximization. Welfare maximization can only be accomplished through particular means: prohibiting inherently injurious acts (rape, murder, theft); regulating acts that, while not inherently injurious, can expose others to injury and generate externalities and third-party effects (driving, cement-mixing, the performance of surgery); and correcting market failures that result in the undersupply of desired public goods that facilitate the exercise of individual rights (accommodations for the disabled, poverty relief).

### *c. Criticisms*

The proposed return to a modified version of the rational-basis test applied in *Carolene Products* and abandonment of the political judgment rule might be criticized on two grounds. First, the rational-basis test, even before *Lee Optical*, was in practice if not in theory a rubber stamp, and is therefore inadequate to thwart naked preferences today; second, to the extent that it’s not a rubber stamp, the rational-basis test would increase both judicial decision costs and perhaps error costs as well without providing compensating benefits because judges aren’t competent to distinguish between naked preferences and good-faith efforts to maximize social welfare.

The first objection is the easiest to dispose of. Rational-basis review can and *does* thwart naked preferences, whether economic or otherwise. It did so in *Brantley v. Kuntz*; it did so in *St. Joseph Abbey v. Castille*. That it didn’t do so in *Carolene Products* can be attributed to credulity about public-spirited justifications for statutes that confer concentrated benefits upon discrete, insular, and well-resourced industrial minorities. Modern judges are unlikely to be so credulous—it’s telling that even judges who have authored opinions endorsing broad deference to economic regulations have made plain that they understand how such regulations can be used to impose naked preferences, even as they deny that it’s the business of the judiciary to thwart them.<sup>335</sup> Compared to the political judgment rule, which thwarts nothing, rational-basis review is a bulwark against legislative opportunism.

The second objection is more troublesome. The Justices who signed onto the opinion in *Carolene Products* didn’t think that a general rule of deferential-but-not-toothless rational-basis review, coupled with heightened scrutiny in a subset of constitutional cases, would break the judicial bank. But the demand for constitutional adjudication has steadily increased over the years

---

<sup>333</sup> See generally EVANGELICAL ORIGINS, *supra* note; THOMAS C. LEONARD, ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA (2016).

<sup>334</sup> Obergefell, 135 S. Ct. at 2635 (Thomas, J., dissenting).

<sup>335</sup> See, e.g., Powers v. Harris, 379 F. 3d 1208,1221 (10th Cir. 2004) (“[W]hile baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments”); Sensational Smiles, LLC v. Mullen, 793 F. 3d 281, 287 (2d. Cir. 2015) (“Much of what states do is to favor certain groups over others on economic grounds.”).

as the Court has supplied more constitutionally-enforceable rights, burdens on which trigger heightened and costly review. Should the Court make plain that rational-basis review should never be toothless, perhaps litigants would bring more and diverse claims as the expected benefits of doing so rise. There would be transition costs as lower courts adjusted to the new demand, and those costs would—as they always do—fall hardest on unsophisticated parties with limited resources.<sup>336</sup> And for what? What gives us reason for confidence that judges will handle these new claims in a way that boosts constitutional compliance overall? Why wouldn't we see a repeat of the above-discussed minimum wage mess, or perhaps dueling lower-court opinions about the constitutional legitimacy of rent control? Mightn't such legitimate concerns have inspired Justice Thomas to define rational basis review in *Beach Communications* as the “paradigm of judicial restraint”?<sup>337</sup>

The same institutional limitations that led to Footnote Four make the prospect of judges wrongly striking down health, safety, and public-oriented redistributive measures left and right under *Carolene Products* review sufficiently implausible as to be unworthy of any serious concern. The federal judiciary simply doesn't have the physical resources bring down the welfare state. Any individual judge who considered attempting to do so would have to reckon with the possibility that other judges might respond by seeking to instantiate preferences for much bigger government—and the possibility that there would be far more of those judges.<sup>338</sup> It's far more plausible that a handful more naked preferences would be thwarted by the courts every year and a handful fewer naked preferences would be enacted in the first place—results that few would find objectionable. The bet here is that the benefits of doing so would exceed the modest transition costs associated with discarding a rule that a majority of the Court hasn't reaffirmed since before the turn of the century.

## CONCLUSION

All good things are scarce, and judicial review of state legislation is no exception. Legislative agency costs can't be eliminated, and any concerted judicial effort to eliminate them might be met with a political response that reminded the judiciary of its powerlessness. Still, the Constitution's Due Process of Law Clauses *do* prohibit arbitrary legislation, and federal judges who draw their power from “this Constitution” *must* enforce that prohibition. The question they must confront isn't *whether* they ought to thwart arbitrary legislation, but *how* they can best do so, given bounded rationality and institutional constraints.

This Essay has argued that the Court can, by tweaking our default standard of constitutional review, modestly reduce legislative agency costs without sending the judiciary down a dangerous path from which it can't retreat. It joins a chorus of voices that have criticized the po-

---

<sup>336</sup> See NEIL KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* 163 (2001) (pointing out that the costs of legal change “fall disproportionately on those least able to adjust—most likely those who are generally disadvantaged” whereas “higher stakes players or those with lower information and organization costs can be expected to adjust more quickly and easily to change.”).

<sup>337</sup> *Beach Communications*, 508 U.S. at 314.

<sup>338</sup> Stout, *supra* note, at 1832 (observing that “any individual judge is likely to decide only a minute fraction of the cases processed by the legal system” and that “a judge contemplating whether to adopt a legal rule that encourages judicial intervention in legislative decisions can foresee that other judges will employ that rule as precedent to themselves overturn legislative judgments.”).

litical judgment rule as excessively deferential.<sup>339</sup> It adds only that discarding the political judgment rule needn't raise the hackles of any originalist who's concerned about the imposition of naked ideological preferences by judges. The oxymoron is constitutionally legitimate and its implementing doctrines can and should be optimized, with the aid of good-faith construction and the original spirit of due process of law.

---

<sup>339</sup> See, e.g., Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & LIBERTY 897 (2005); Jeffrey D. Jackson, *Classical Rational Basis and the Right to Be Free of Arbitrary Legislation*, 14 Geo. J.L. & Pub. Pol'y 493 (2016); Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 Geo. J.L. & Pub. Pol'y 401 (2016); Aaron Belzer, *Putting the Review Back in Rational Basis Review*, 41 W. St. U. L. Rev. 339 (2013) (calling for an end to conceivable-basis review).