ARTICLE

SUBSTANTIVE DUE PROCESS
AND THE CONSTITUTIONAL TEXT

John Harrison*

No person shall... be deprived of life, liberty, or property, without due process of law...¹

[N]or shall any State deprive any person of life, liberty, or property, without due process of law...²

Mr. ROGERS. . . I only wish to know what you mean by "due process of law."
Mr. BINGHAM. I reply to the gentleman, the courts have settled that long ago, and the gentleman can go and read their decisions.³

INTRODUCTION

A reader of the Supreme Court's substantive due process cases can come to feel like a moviegoer who arrived late and missed a crucial bit of exposition. Where is the part that explains the connection between this doctrine and the text of the constitutional provisions from which it takes its name?

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¹ U.S. Const. amend. V.
² U.S. Const. amend. XIV, § 1.
This is not a piece of exposition that a reader can easily supply. In fact, the whole idea that the Due Process Clauses have anything to do with the substance of legislation, as opposed to the procedures that are used by the government, is subject to the standard objection that because "process" means procedure, substantive due process is not just an error but a contradiction in terms.

Nonetheless, the question is important for at least two reasons. First, many of the most significant and controversial aspects of the Supreme Court's work are ostensibly derived from the Due Process Clauses and now bear the name substantive due process. Under this rubric, the Court imposes parts of the Bill of Rights on the states, applies part of the Fourteenth Amendment to the federal government, and examines all laws for their reasonableness, some strictly, others indulgently.

Second, the Court maintains that its function of judicial review is mandated by the written Constitution and involves the application of that document to government actions. The claim that judicial review is derived from the constitutional text appears in Marbury v. Madison, one of the great landmarks of American law. Almost as famous as Marbury is M'Culloch v. Maryland, which also connects a basic doctrinal conclusion to a particular reading of the text: Someone who wants to know why the Supreme Court thinks that the word "necessary" in the Necessary and Proper Clause of Article I, Section 8, does not mean absolutely necessary can find the answer in the Court's opinion. As suggested by those cases, the relationship between text and doctrine is at least significant, perhaps absolutely fundamental.

In an attempt to improve our understanding of this area, this Article begins, in Part I.A, by clarifying the terminology. Next, in Part I.B, the Article briefly sets forth the content of substan-

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4 See infra Part II.D.4.
5 A summary of the substance of substantive due process appears infra Part I.B.
6 To be sure, some commentators deny this. See, e.g., Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 706-14 (1975). But theirs is the minority view, at least as far as anyone is willing to admit.
7 5 U.S. (1 Cranch) 137 (1803).
8 17 U.S. (4 Wheat.) 316 (1819).
9 Id. at 414-15.
Substantive Due Process doctrine in order to know what the text is supposed to yield. Finally, in Part I.C, the Article establishes that the textual pedigree of substantive due process has no definitive judicial articulation—there is no Marbury, no M'Culloch, for substantive due process.

Part II, the bulk of the Article, presents several readings of the constitutional language that lead to some or all of substantive due process. For each reading, I will describe the doctrine it produces and identify situations in which courts or commentators seem to have relied on it in applying the Due Process Clauses or related state provisions. Each discussion will conclude with an analysis of the reading’s merits, looking to the entire Constitution for context. My view is that while some of the readings have surface plausibility, ultimately none is persuasive.

Part II’s discussion of the relation between text and doctrine ends with an issue as to which I do not present a strong conclusion: the possibility that, when the Fifth or Fourteenth Amendments were adopted, the Clauses as a whole constituted terms of art with generally accepted meanings that could not be directly deduced from the ordinary meanings of their component words. While I have some thoughts on that subject, at this point the question remains open.

There is more to the overall question of substantive due process than the relationship between the doctrine and the text. While most courts and commentators take the position that the language of the document is of fundamental importance in constitutional law, few regard it as entirely dispositive. Indeed, even a reader who is inclined to agree with my textual critique may think it largely irrelevant, on the theory that the doctrine is well established and could not be eliminated without also eliminating the principle of stare decisis. Without claiming to resolve this question, or the larger question of the proper role of prece-

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10 This way of discussing the cases differs from the traditional approach, the common law method of comparing case with case. The great studies in this area, for example, are mainly about judicial doctrines as they develop in cases, not about the text and its meaning. See, e.g., J.A.C. Grant, The Natural Law Background of Due Process, 31 Colum. L. Rev. 56 (1931); Lowell J. Howe, The Meaning of “Due Process of Law” Prior to the Adoption of the Fourteenth Amendment, 18 Cal. L. Rev. 583 (1930); Roscoe Pound, Liberty of Contract, 18 Yale L.J. 454 (1909).

11 See infra Part II.F.
dent, the Article concludes by suggesting that the precedential authority of substantive due process is less than it might seem.\textsuperscript{12}

In sum, I hope that this Article illuminates the textual problems and points the way toward a reassessment of this matter. It does not claim to resolve all the relevant issues. But it does deal with one of the great nagging questions in American constitutional law.

I. PRELIMINARY CONSIDERATIONS

A. Substance and Process

In an Article devoted to readings of the text it is important to keep the terminology as clear as possible. That is especially tricky here because I will be using the twentieth century nomenclature of substantive and procedural due process to label two modern doctrines that have always gone by those names as well as earlier doctrines that were not so called until much later. Although the Court that decided \textit{Roe v. Wade}\textsuperscript{13} knew that there was something called substantive due process, the one that decided \textit{Dred Scott v. Sandford}\textsuperscript{14} almost certainly did not. Nor, very likely, did the Court in \textit{Lochner v. New York}.\textsuperscript{15} Rather, the earlier Courts produced what we would call substantive results from the Due Process Clauses without thinking that they had invented substantive due process. In similar fashion Justice Curtis did not describe his doctrine in \textit{Murray’s Lessee v. Hoboken Land & Improvement Co.}\textsuperscript{16} as procedural due process, although we would do so today. My nomenclature will thus be in part stipulative. I will give a definition of substantive due process that includes \textit{Lochner} without meaning to suggest that Justice Peckham thought he was doing the same thing Justice Blackmun thought he was doing in \textit{Roe}.

\textsuperscript{12} Another issue I will not address is whether some or all of the substance of substantive due process might properly be derived from other provisions in the Constitution, such as the Ninth Amendment or the Privileges or Immunities Clause. This Article will try the reader’s patience enough as it is.

\textsuperscript{13} 410 U.S. 113 (1973).

\textsuperscript{14} 60 U.S. (19 How.) 393 (1856).

\textsuperscript{15} 198 U.S. 45 (1905).

\textsuperscript{16} 59 U.S. (18 How.) 272 (1856).
With these reservations in mind, we can define substantive due process by first stipulating a definition of procedural due process. In their procedural aspect, the Due Process Clauses are understood first of all to require that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law. Judges and executive officers may not simply make up some method of proceeding and sentence someone to prison on that basis. This requirement that deprivation follow the rule of law is so fundamental that it is often forgotten, but there is good reason to believe that some version of it is the historical root meaning of due process.\(^{17}\)

Second, the Due Process Clauses, as read procedurally, require that judicial or executive deprivations follow fair procedures. The generating case here is *Murray's Lessee*, in which the Court rejected the suggestion that the Due Process Clause of the Fifth Amendment was limited to imposing the rule of law. Rather, according to Justice Curtis, some procedures that the legislature might adopt would not constitute due process of law.\(^{18}\) Although this form of due process applies to the content of legislation, and hence in some sense to the legislature, it regulates only the procedures that the legislature may direct.

In preparation for what will come, it is worth noting the different textual readings underlying these two doctrines. Under the rule of law interpretation, a deprivation of life, liberty, or property is a loss of one of those three things imposed on a particular person in a particular instance by the courts or the executive—the classic instance is a judicial sentence or judgment. Process of law is legal procedure, and the process of law that is

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\(^{17}\) See Frank H. Easterbrook, Substance and Due Process, 1982 Sup. Ct. Rev. 85, 95-100; see also David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, at 272 (1985) ("[C]onsiderable historical evidence supports the position that 'due process of law' was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law."). Justice Black believed that this was the full extent of the guaranties of "due process of law." See In re Winship, 397 U.S. 358, 382 (1970) (Black, J., dissenting) ("For me the only correct meaning of that phrase is that our Government must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions as interpreted by court decisions.").

\(^{18}\) 59 U.S. (18 How.) at 276.
due is the process of law that is appropriate or called for under the applicable legal rules. Ordinary procedural due process, as articulated in Murray's Lessee, differs from the rule of law in that "due" means not "appropriate according to the applicable law," but appropriate in a broader sense, a sense that has its own content rather than a meaning derived from other legal rules.

Any application of a due process clause other than these aforementioned two is substantive due process. This terminology will prove to be somewhat misleading because there are important readings of the clauses in which the substance does not come from the words "due process." But calling substantive due process by some other name would defeat this Article's purpose, which is to reduce (and not add to) the confusion surrounding the doctrine.

B. The Substance of Substantive Due Process

Putting the point broadly, one would say that there have been three categories of doctrine that today would be called substantive due process. One, which Edward Corwin characterized in 1914 as the basic doctrine of American constitutional law, is the rule that the legislature may not take away vested rights of property. State and federal judicial decisions before the Civil War that now would be characterized as substantive due process generally appear to have involved this limitation. Best known

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19 Different taxonomies are possible; this one is primarily historical.


We are now prepared to consider the underlying doctrine of American Constitutional Law, a doctrine without which indeed it is inconceivable that there would have been any Constitutional Law. This is the Doctrine of Vested Rights, which—to state it in its most rigorous form—setting out with the assumption that the property right is fundamental, treats any law impairing vested rights, whatever its intention, as a bill of pains and penalties, and so, void.

Id.

of these is the most fateful substantive due process decision of all, *Dred Scott*. In a famous but delphic passage, Chief Justice Taney said that the Missouri Compromise’s ban on slavery in some of the territories deprived slave holders of property without due process of law.22

Second is the kind of due process associated with *Lochner*. According to this doctrine, every restriction on liberty or property had to be reasonably related to a legitimate public purpose. Put that way, it might sound like contemporary constitutional law, or at least “minimum rationality” scrutiny. The earlier law, however, had three distinctive features. First, the courts had a somewhat restrictive list of possible public purposes, their favorite being the police power. Second, they were quite willing to form their own judgments as to the relationship between means and ends; if the courts thought that a law did not really serve police power ends they were likely to hold it invalid. Finally, under the old doctrine the purpose of legislation had to be public, rather than private, and the test of what served the public was restrictive. In particular, purely redistributive legislation, seeking to equalize fortunes, was treated as not having a public purpose. In the view of the courts, it simply helped some people at the expense of others.23

Third is contemporary substantive due process, which itself has three main subcategories. One is the rule that certain non-procedural aspects of the first eight amendments apply to the states as well as to the federal government. Limitations largely identical to those imposed on Congress by the First Amend-

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22 Chief Justice Taney wrote:

“[A]n act of Congress which deprives a citizen 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 hardly be dignified with the name of due process of law.”

*Dred Scott*, 60 U.S. (19 How.) at 450. Confirmation that Chief Justice Taney was making a vested rights argument appears in Justice Curtis’s response in dissent. According to Justice Curtis, for a state or territory not to recognize slavery does not deprive a slave holder who seeks to bring slaves thereto of property. Id. at 624-27 (Curtis, J., dissenting).

23 *Lochner* itself exhibits all three features; when Justice Peckham distinguished between a health regulation and a mere labor law, he apparently regarded the latter as simply redistributive legislation. See *Lochner*, 198 U.S. at 53-64.
ment, for example, are imposed on the states as a matter of substantive due process.\textsuperscript{24} There is also the mirror image of that doctrine. Although the Equal Protection Clause by its terms applies only to the states, the Court has found an equal protection component in the Due Process Clause of the Fifth Amendment.\textsuperscript{25} With certain variations, the rules developed under the Equal Protection Clause of the Fourteenth Amendment limit the national government.

Finally, there is pure substantive due process, in which the content of the doctrine is not borrowed from elsewhere in the Constitution. This flavor comes mild or spicy—in the Court’s terminology, it comes with two levels of scrutiny. The mild flavor, or minimum rationality scrutiny, requires that most governmental actions bear a rational relationship to a permissible governmental objective.\textsuperscript{26} This minimum rationality requirement is extremely lenient. The spicy flavor is reserved for gov-

\textsuperscript{24} See Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) (“Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights.”). Whitney itself is a Lochner-era case, but it and its siblings have survived while their economic-rights cousins have not, and the Court has never repudiated substantive due process as the basis of incorporation. See, e.g., John Paul Stevens, The Freedom of Speech, 102 Yale L.J. 1293, 1298 (1993) (“[T]he development of what we often think of as First Amendment law is in fact linked to the broader doctrine that bears the once unpopular name of ‘substantive due process.’”).

The textual plausibility of the Court’s incorporation doctrine, which ostensibly rests on the Due Process Clause, is quite a different question from the soundness of incorporation as an original matter. The best argument for a form of incorporation, resting on the Privileges or Immunities Clause, is to be found in Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992).

\textsuperscript{25} The leading case is Bolling v. Sharpe, 347 U.S. 497 (1954), which held that the Fifth Amendment forbids segregation in the District of Columbia’s public schools. The Court also appears to have assumed that race discrimination could violate the federal Due Process Clause in the Japanese exclusion cases, although it upheld the racial measures. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). Korematsu is the source of the notion that racial distinctions must be subjected to “the most rigid scrutiny,” 323 U.S. at 216. This doctrine is substantive, not procedural, due process. Chief Justice Warren explained in Bolling that “discrimination may be so unjustifiable as to be violative of due process.” 347 U.S. at 499. He was not talking about any failings in enforcement procedure.

\textsuperscript{26} The classic citation for this aspect of the doctrine is Williamson v. Lee Optical, 348 U.S. 483 (1955).
ernmental actions that impinge on interests the Court regards as fundamental. For practical purposes, the most important fundamental right is the right to privacy, and the most important application of that right involves abortion. When the Court applies this higher level of scrutiny, it imposes substantial limits on the permissible ends of government action and reaches its own judgment as to whether a law adequately furthers those ends. Here, the leading cases are *Roe* and its progeny.

**C. Skepticism and Silence**

My concern that there is a gap between these doctrines and the language of the Due Process Clauses is not original. Rather, there is a time-honored objection to the very idea of substantive due process. The objection is that the "process" referred to in the Clauses is procedure. At least one Justice thought that this was the correct view of the Clauses’ meaning, although he thought it too late to change the Court’s direction. Agreeing that the Due Process Clause of the Fourteenth Amendment protects the freedom of speech, Justice Brandeis said, "[d]espite arguments to the contrary which had seemed to me persuasive, it is settled that the Due Process Clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure." 27

Almost sixty years later Justice White, speaking for the Court in *Bowers v. Hardwick*, 28 admitted that the connection between process and substance still was not obvious: "It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content . . . ." 29

Whatever doubts the Justices may entertain, they seem to feel bound (or empowered) by the doctrine of stare decisis. Commentators, by contrast, have felt free to argue that substantive due process is textually unsound. John Hart Ely finds an ex-

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27 Whitney, 274 U.S. at 373 (Brandeis, J., concurring).
29 Id. at 191.
amination of the text devastating to substantive due process: "[T]here is simply no avoiding the fact that the word that fol-
ows ‘due’ is ‘process.’ . . . Familiarity breeds inattention, and we
apparently need periodic reminding that ‘substantive due proc-
ess’ is a contradiction in terms—sort of like ‘green pastel red-
ness.’"

Similarly, David Currie’s magisterial two-volume study of the
Supreme Court’s constitutional cases is shot through with frus-
tration at the textual conundrum of substantive due process.
Concerning Chief Justice Taney’s due process argument in *Dred
Scott*, Currie writes, “the idea that the due process clause limited
the substantive powers of Congress also needed a bit of ex-
plaining. On its face the term ‘due process’ seemed to speak of
procedural regularity . . . .” By the time of *Lochner*, he notes,
no one even argued that due process “related only to proce-
dure,” even though the Court’s contrary conclusion was “im-
probable.”

This difficulty is at once so obvious and so well known that
one would expect the Court to have a standard answer to it, but
there is none. The legion of cases that Justice White referred to
in *Bowers* does not include one in which the Court systemati-
cally explains why it examines the substance of legislative rules
under the Due Process Clauses.

To say that the Court has never explained how the word
“process” produces doctrines that are not limited to procedure
is not to say that no Justice has ever responded to the textual
objection. Justice Harlan’s famous and influential dissent in
*Poe v. Ullman*, the proximate source of the contemporary right
to privacy and the *Roe* decision, speaks volumes about the con-
temporary Court’s theory of the relationship between substan-
tive due process and the constitutional text.

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31 Currie, supra note 17, at 272.


In his dissent Justice Harlan pointed out that the Court had consistently rejected attempts "to limit the [Fourteenth Amendment due process] provision to a guarantee of procedural fairness." According to Justice Harlan, the Court declined the invitation to limit process to procedure for the following reason:

Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three. Compare, e.g., Selective Draft Law Cases, 245 U.S. 366; Butler v. Perry, 240 U.S. 328; Korematsu v. United States, 323 U.S. 214. Thus the guaranties of due process, though having their roots in Magna Carta's "per legem terrae" and considered as procedural safeguards "against executive usurpation and tyranny," have in this country "become bulwarks also against arbitrary legislation." Hurtado v. California, 110 U.S. 516, at 532.

That is, clauses about process cannot govern only procedure because if they did the consequences would be unfortunate. Consequential arguments like that, however, cannot qualify as textual interpretation without an explanation of how the text will bear the reading that avoids the unfortunate consequences. Maybe Justice Harlan forgot that part.

If there were a case explaining why it is sensible to read the language of the Due Process Clauses as guaranteeing freedom from arbitrary legislation, Justice Harlan probably would have cited it. So, for that matter, might have Justice White or one of the dissenters in Bowers. No one has done so. This is not to say that it is never possible to discern a reading of the Due Process Clauses that underlies the reasoning in a particular case. On the contrary, one of the tasks of the next part of this Article will be to identify appearances in cases of the various readings of the language. But I do mean to say that as far as I know the Supreme Court of the United States has never explained why its

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34 Id. at 540 (Harlan, J., dissenting).
35 Id. at 541 (Harlan, J., dissenting).
understanding of the language is a good account of the text. Indeed, the Court rarely even makes its reading clear. In the next part of the Article I will provide a menu of readings, along with some comments from the perspective of one who has tried to digest them.

II. LANGUAGE, DOCTRINE, AND HISTORY

This Part will try to link text and doctrine, presenting several readings of the Due Process Clauses that lead to all or part of substantive due process as it has appeared through American history. For each reading I will describe the doctrine it could generate, identify cases or commentary that seem to appeal to it, and assess its textual plausibility.

The readings I present will be derived from possible ordinary uses of the component words, and the assessments will likewise be based on those ordinary uses. This approach neglects two kinds of historical inquiry. First, I will put off until the end of this Section the question whether the Clauses or any of their components were ever terms of art, the meaning of which cannot be deduced from the individual words. Second, the evaluations of the different readings will not depend on whether anyone, say in 1791 or 1868, actually used the words in those ways. The question is whether someone could have done so, and how likely such a use would be.

A. The Classic Instance

Interpretation often builds on exemplars. One useful way to approach the textual twists and turns that can lead to substantive due process in its varying forms is to understand those forms as variations on a basic reading of the text, a central exemplar. The basic reading addresses the classic instance of an enforcement action in defiance of governing procedural law.

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36 In the last century the state courts were the principal innovators in due process doctrine, with the federal courts following their lead. I have likewise been unable to find a state court opinion that provides the kind of textual exegesis I am talking about.

37 See infra Part II.F.
Suppose, for example, that a federal court entered a criminal sentence of imprisonment after ignoring the defendant's demand for a jury trial, or after refusing to hear evidence that was required to be admitted by an act of Congress. Such a criminal sentence would call for (and imprisoning the defendant would impose) a deprivation of liberty without due process of law. A sentence of death entered after such a proceeding would involve a deprivation of life, and a fine would impose a deprivation of property, both without due process of law. The Fifth Amendment forbids this.

It is easy to see the reading of the Due Process Clauses that underlies this conclusion. A judicial sentence requiring that someone be executed, be imprisoned, or pay money leads to a deprivation of life, liberty, or property, respectively. Process can refer to procedures, and the legal procedures enforcing whatever law is at issue are processes "of law." "Process of law" therefore includes the procedures used by courts, and a procedure is not due if it is inconsistent with applicable law, whether constitutional or statutory.

The foregoing two paragraphs are phrased to reflect the fact that an exemplar is not a definition. Thus, to say that deprivation of property includes a judicial sentence exacting a fine is not to say that "deprived of property" means "fined." Likewise, to say that some legal procedures are processes of law is not to say that everything done by a government institution pursuant to a statute is "of law." Similarly, there is a difference between claiming that process refers to procedure and claiming that it refers only to procedure; between claiming that a procedure is undue if it is otherwise unlawful and claiming that it is due if it is otherwise lawful; and between saying that a court fails to give due process of law when it violates the procedural rules that apply to courts and saying that another branch of government must abide by laws concerning judicial procedure.

The first three textual derivations of substantive due process discussed below, which seem to be the ones the Supreme Court has from time to time relied on, build on the possibilities that the foregoing discussion shows to be inherent in the language.
B. No Legislative Deprivations of Life, Liberty, or Property

The first route to substantive due process proceeds from the central exemplar by extending the concept of deprivation of life, liberty, or property to include certain kinds of legislation and by claiming that judicial procedure is not simply an example of due process of law but is its definition. This reading forbids actions by the legislature that constitute deprivations; its principal product is the doctrine of vested rights.

1. Language: Requiring Legislatures to Act Like Courts

If there is going to be substantive due process the relevant Due Process Clause must in some fashion apply to the legislature, not just to the courts and the executive. The first reading to be considered rests on a very straightforward way of applying the Clause to the legislature. This approach requires specific interpretations of two parts of the text.

First, it supposes that a statute can constitute a deprivation of life, liberty, or property—not merely provide for a deprivation, but actually be a deprivation itself. Most statutes provide for deprivations. For example, a statute saying that anyone who commits treason shall suffer death provides that the courts and the executive shall deprive convicted traitors of life. Criminal statutes with lesser sentences provide for deprivation of liberty through imprisonment. The deprivation, however, does not take place unless the sentence is either passed or executed by the judiciary or the executive.

But some laws can be said to be deprivations of property. Every nineteenth century lawyer’s favorite example of an unconstitutional statute—albeit one that was thought to be unconstitutional for various different reasons—involves a law that, in Justice Miller’s formulation from Davidson v. New Orleans,\(^3\) "declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B. . . .”\(^4\) Such an act of the legislature

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38 96 U.S. 97 (1878).

39 Id. at 102. Justice Story also thought such laws impermissible. See Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 658 (1829) ("We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a
certainly looks like a deprivation of property. It does not simply provide for a deprivation because it does not set forth the circumstances under which A would lose the property; rather, it operates immediately and of its own force. If a court entered such a decree, most people would say that it had deprived A of property.

The second specific textual interpretation this reading requires concerns the phrase "due process of law." It might be reasonable to say that a court had deprived A of property without due process of law if it had entered a decree stating that property that had been A's is now B's without first having conducted a trial. That is so because the primary instance of due process of law is the procedure that the courts normally use in determining people's rights—preeminently notice, hearing, and a decision based on existing law. This concept of due process could be formulated at varying levels of generality. It might entail some specific set of procedures drawn from common law practice, or it might be more abstract, perhaps limited to notice, hearing, and decision according to law. However due process is understood, this way of reading the text would largely prevent the legislature from passing statutes that are deprivations of life, liberty, or property, because legislatures generally do not use anything resembling judicial procedures. They do not normally give people notice, they do not conduct judicial trials before passing statutes, and they rarely, if ever, decide by applying prior law. The whole point of being a legislature is to make law or change it, not to apply existing law. Because legislatures are virtually incapable of acting with due process in the judicial sense, under this reading they may not pass statutes that in and of themselves deprive people of life, liberty, or property.

This reading yields a ban on privative legislation. The details of its content depend on the scope of the concepts of deprivation on one hand, and of liberty and property on the other. On the first concept, it is possible that to constitute a deprivation, an act of the legislature must be as specific as a judicial decree, in the manner of the A-to-B law. Deprivation also could be defined more broadly to include perfectly general laws that take away preexisting rights. Under this latter approach, a statute constitutional exercise of legislative power in any state in the union.

1997] Substantive Due Process 507
providing that people could not own automatic weapons would deprive those who owned them at the time of enactment of their property. There is also some play in the concept of deprivation concerning degrees of impairment of property rights. For example, a statute providing that minors may not purchase or own automatic weapons might be said to deprive adult owners of some of their property because it limited their right of alienation. On the other hand, it might not be regarded as a deprivation, as the owners retain all other ownership rights.

Similarly, the concepts of property and liberty can have wide or narrow scope, with varying results for substantive due process doctrine. Property might be limited to vested rights in tangible or intangible property, or it could be conceived very broadly, including virtually everything of value." Liberty too can be broadly or narrowly conceived. Understood most narrowly, liberty is simply freedom from physical restraint, the ability to move about as one chooses. Someone who has been imprisoned has been deprived of liberty in this sense. At its broadest, liberty consists of the ability to do what one likes, free from any restraint, physical or legal. Any law that forbids some type of conduct limits liberty in this sense. Between these two is a sense of liberty that is normally contrasted with license. This last form of liberty might best be characterized as the legal

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40 There is, for example, a sense in which an individual’s labor power is property. Justice Stephen Field maintained that an individual’s labor is “the most sacred and inviolable” form of property. Butchers’ Union Co. v. Crescent City Co. 111 U.S. 746, 757 (1884) (Field, J., concurring) (quoting Adam Smith’s Wealth of Nations). The Court in that case upheld the Louisiana legislature’s action revoking the monopoly that had itself been sustained in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). What goes around comes around.

41 “This personal liberty consists in the power of locomotion, of changing situation, or moving one’s person to whatsoever place one’s own inclination may direct, without imprisonment or restraint, unless by due course of law.” 1 William Blackstone, Commentaries *134. No legislative action except possibly a bill of pains and penalties (a bill of attainder in which the punishment is something other than death) would deprive someone of liberty in this sense.

42 Speaking of “Liberty of Contract,” Justice Holmes said scornfully that “[i]t is merely an example of doing what you want to do, embodied in the word liberty.” Adkins v. Children’s Hospital, 261 U.S. 525, 568 (1923) (Holmes, J., dissenting).

privilege to do as one pleases consistent with the rights of others. A law against murder probably would not be said to deprive anyone of this kind of liberty, but a law against rolling over in bed would be.

2. Doctrine: Vested Rights and More

Different combinations of meanings for deprivation, liberty, and property, together with the definition of due process of law as characteristically judicial procedures, can produce almost all the familiar substantive due process doctrines. If deprivation means specific, decree-like actions and property means vested rights, the result is the earliest and most limited form of the doctrine of vested rights. Under this reading legislation affecting specified property rights is forbidden. Thus, a legislature may not enact an A-to-B law, whereas it may enact a general statute forbidding all ownership of automatic weapons. Under a broader concept of deprivation, no legislative action may interfere with existing property arrangements. This broader concept encompasses general laws. Combined with a concept of property that includes the ability to use one’s natural faculties, such an interpretation of deprivation leads to *Lochner*-style restrictions (and maybe more). The same result obtains if the concept of property is replaced with the intermediate concept of liberty, which includes freedom of contract but not simply doing anything one pleases.

The substantive due process limitations on legislation that exist under the formulation outlined here can coexist with a state’s affirmative authority to legislate under the police power, a central element of both vested rights and *Lochner*-era doctrine. Pursuant to the police power, the government could regulate liberty and property. Although its content was endlessly debated, the police power doctrine rests on the common assertion that all property is held subject to the police power (as well as the powers of taxation and eminent domain), so that valid exercises of the police power do not deprive people of property at all and hence are consistent with the ban on legislative deprivations.\(^4\) For example, a rule against keeping explo-

\(^4\) Classic discussions of the police power include Ernst Freund, The Police Power:
sives in fire-prone buildings would interfere with the use of explosives, but would be permissible because protection of the public safety is a legitimate end of the police power. Similarly, if liberty is the opposite of license, it is certainly subject to the police power, which exists to protect the rights of others and the public at large.

As for contemporary substantive due process, it seems that an appropriate notion of liberty could generate most of the doctrine. In principle, notions of property could likewise do the trick, but it is more natural to locate Bill of Rights freedoms and privacy in the word liberty. This reading, however, could not easily produce the equal protection component now found in the Fifth Amendment. One might simply stipulate that liberty includes equal liberty, but that seems rather arbitrary. For each component of the doctrine, the crucial question will always be the content of property (or liberty) as no law that deprives anyone of either liberty or property—however defined—is permissible.

Public Policy and Constitutional Rights (1904), and Christopher G. Tiedeman, A Treatise on the Limitations of Police Power in the United States: Considered from Both a Civil and Criminal Standpoint (St. Louis, The F.H. Thomas Law Book Co. 1886). In the last century the canonical citation was to Chief Justice Shaw's opinion in Commonwealth v. Alger, 61 Mass. (7 Cush.) 53 (1853). Alger upheld a statute limiting the construction of wharves in Boston harbor and requiring that wharves built after the statute's passage that violated the new law be dismantled, even if they were built on tidal flats which had been previously granted to the owner. As Chief Justice Shaw stated:

We think it is 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 not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.

Id. at 84-85. The important thing about the police power was that it was built into the concept of property, and hence into everyone's property rights. A valid exercise of that power, therefore, was not a deprivation of property. See also Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 138 (1874) (Field, J., concurring) ("No one has ever pretended, that I am aware of, that the fourteenth amendment interferes in any respect with the police power of the State.").

For a description of contemporary doctrine, see supra notes 24-26 and accompanying text.
3. History: The Basic Doctrine

The ban on all legislative deprivations underlies much of due process doctrine as it developed in the nineteenth century. It naturally follows from a reading equating "due process" with judicial proceedings. Because legislatures do not use anything resembling judicial procedures, there can never be a valid legislative deprivation.46

This view derives protection for vested rights from a reading of due process based on considerations of government structure. It was held by at least some of the judges of the New York Court of Appeals in the often-discussed pre-Civil War case of Wynehamer v. People.47 The court found invalid a statute that severely restricted the use that owners of liquor could make of their property. Justice Comstock seems to have believed that "due process" as it appeared in the New York Constitution meant judicial proceedings in which pre-existing law was applied; thus, the New York due process clause ruled out deprivations that proceeded by mere force of statute.48 He stated: "The better and larger definition of due process of law is, that it means law in its regular course of administration through courts of justice."49 The problem the court found with the New York

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46 See supra Part II.B.1, at 506. The most important discussion of the emergence of this reading is Wallace Mendelson, A Missing Link in the Evolution of Due Process, 10 Vand. L. Rev. 125 (1956). Mendelson explained that the early vested rights due process cases were understood by their authors primarily in terms of the constitutional structure of separated powers: Legislative deprivations were seen as an attempt to exercise the judicial power. He maintained that this intermediate step between rule of law due process and full blown protection for vested rights made the transition to the latter easier, precisely because it seemed to rest only on structural principles: "Separation with its procedural connotations had been a ready, if narrow, bridge between orthodox procedural due process and the doctrine of vested interests in an age when legislatures habitually interfered with property by crude retrospective and special, i.e., quasi-judicial, measures." Id. at 136.

47 13 N.Y. 378 (1856).

48 See id. at 392-95 (Comstock, J.).

49 Id. at 395 (Comstock, J.) (quoting and adding the second emphasis to 2 James Kent, Commentaries *13). The passage continues, "It is plain, therefore, both upon principle and authority, that these constitutional safeguards, in all cases, require a judicial investigation . . . ." Id.

Although there was no opinion for the court in Wynehamer, most of the other judges in the majority generally agreed that due process required a judicial proceeding. See id. at 418 (A.S. Johnson, J.) ("[W]ithout judicial investigation,
statute was that the legislation effected a change in property rights without judicial intervention.

Antislavery theorist Alvan Stewart took the same approach in arguing that Congress had the power to abolish slavery throughout the country. He maintained that "due process of law" meant "an indictment or presentment by a grand jury, of not less than twelve, nor more than twenty-three men; a trial by a petit jury of twelve men, and a judgment pronounced on the finding of the jury, by a court." Because no American slave had ever been pronounced to be one through such procedures, Stewart maintained that they had all been deprived of liberty unlawfully. It is also likely that individuals with less extreme views, such as the organizers of the Republican Party, adopted the same reading when they asserted that slavery in the territories violated the Due Process Clause of the Fifth Amendment. The Republicans seem to have been responding to earlier arguments made by Southern congressmen that the Due Process Clause protected the vested rights of slave holders in places subject to congressional power.

without 'due process of law,' no act of legislation can deprive a man of his property, and ... in civil cases an act of the legislature alone is wholly inoperative to take from a man his property."; id. at 433 (Selden, J.) ("[B]oth courts and commentators in this country have held that ... [due process of law] secure[s] to every citizen a judicial trial, before he can be deprived of life, liberty, or property."); id. at 454 (Hubbard, J.) ("There can be no room ... for difference of opinion as to the meaning of the phrase 'due process of law,' as used in the constitution. It means an ordinary judicial proceeding."). Certain of the "inconsiderate dicta" in Wynehamer were disapproved ten years later in Metropolitan Board of Excise v. Barrie, 34 N.Y. 657, 668 (1866), which upheld a law requiring the licensing of retail dealers in drink.


51 Id. at 294 app B.

52 The Republican Platform of 1856 stated:

[A]s our Republican fathers, when they had abolished Slavery in all our National Territory, ordained that no person shall be deprived of life, liberty, or property, without due process of law, it becomes our duty to maintain this provision of the Constitution against all attempts to violate it for the purpose of establishing Slavery in the Territories of the United States by positive legislation, prohibiting its existence or extension therein.


53 This proslavery due process theory featured prominently in a House committee report that denied Congress' power to abolish slavery in the District of Columbia.
The Supreme Court of the United States was never so explicit in saying that due process means judicial procedures. Nevertheless, that reading almost certainly underlies the Court’s vested rights due process cases starting with *Dred Scott*, and lasting until at least 1880. The giveaway is the striking difference between the approach in those cases and the modern Court’s way of talking about what it now calls substantive due process.

In this century, on those unusual occasions when the Court’s reasoning proceeds with an eye to the text, the analysis generally assumes that liberty has been restricted because a prohibition has been imposed, and asks whether due process has been given. The older approach, by contrast, assumed that due process was not given and then directed its inquiry toward whether there had been a deprivation of property or liberty. Under the old analysis, courts could assume that due process had not been given because it was equated with judicial procedures, and legislative bodies did not employ those procedures in passing statutes. Thus, any deprivation worked directly by statute was achieved without due process. The crucial and difficult issue, then, was whether there had been a deprivation of property or liberty.

*Dred Scott* and the subsequent vested rights due process cases followed the older approach. The opinions of Chief Justice Taney and Justice Curtis in *Dred Scott* are illustrative. Chief Justice Taney’s famous passage says little, but certainly shows that he did not think the question of whether there had been been


An excellent account of the development of this line of cases in the 1870s and 1880s, told with gathering exasperation at the Court’s failure to explain its reading, appears in Currie, supra note 17, at 369-78.

By the time of *Lochner*, some well-informed people apparently thought that this was the proper substantive due process inquiry. See, e.g., Learned Hand, Due Process of Law and the Eight-Hour Day, 21 Harv. L. Rev. 495, 496 (1908) (“[W]hen a law forbids all persons or a class of persons to make contracts exactly as they like, we may know certainly that it does ‘deprive’ them of their ‘liberty,’ but we may not certainly know whether such deprivation was ‘due process of law.’”). Hand appeared at least skeptical about the soundness of substantive due process as an original matter. Id. at 495 (“The history of how [the Due Process Clauses] . . . came to apply to statutes passed by representative assemblies is not of consequence now . . .”).
due process difficult. Justice Curtis's response is more revealing. He began by observing that "[s]lavery, being contrary to natural right, is created only by municipal law." Thus, he argued, a slave owner who took a slave into a free state or territory had, upon entering, no property right in the slave. Without a property right, the slave owner could not have been subject to a deprivation. Justice Curtis never needed to stop to consider whether or not there was due process.

This separation of powers based reading underlies a number of cases from the 1870s. In Bartemeyer v. Iowa the Court upheld a state prohibition statute against a Wynehamer-like challenge. Bartemeyer was prosecuted for selling alcohol. The Court found that because it was impossible to say that the defendant had owned the liquor at issue when the statute went into effect, there was no deprivation. Had Bartemeyer been

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56 See supra note 22. Chief Justice Taney made a similarly opaque reference to the Due Process Clause a few years before Dred Scott in Bloomer v. McQuewan, 55 U.S. (14 How.) 539 (1853). In Bloomer, the Court declined to interpret a special congressional act that extended a patent as requiring prior purchasers of the patented article once again to buy the right to use the goods from the patentee. So interpreted, said Chief Justice Taney, the act would be subject to serious constitutional objections. The patented machines were property, and "a special act of Congress, passed [after they were purchased], depriving the appellees of the right to use them, certainly could not be regarded as due process of law." Id. at 553.

57 Dred Scott, 60 U.S. (19 How.) at 624.

58 Id. at 625-626.

59 The Court apparently relied on this older approach in applying the Due Process Clause of the Fifth Amendment to Civil War legislation making greenbacks legal tender. See Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870), overruled by Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871). Supporters and opponents of the tender law debated whether, by requiring people to accept depreciated greenbacks, it deprived them of property; no one suggested that the deprivation, if it occurred, was with due process. Probably the strongest indication that the Court took the Due Process Clause to be an anticonfiscation rule appeared in Justice Strong's majority opinion upholding the statute in the Legal Tender Cases:

[T]he argument [is] pressed upon us that the legal tender acts were prohibited by the spirit of the fifth amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals.

Legal Tender Cases, 79 U.S. (12 Wall.) at 551.

60 85 U.S. (18 Wall.) 129 (1874).
able to show ownership prior to the statute’s effective date, Justice Miller said, there would have been a “very grave” question whether the statute deprived him of property without due process. Justice Miller’s focus on property rights existing at the time of enactment suggests that the question for the Court was whether the statute was a deprivation. Nowhere did he suggest that the question whether the statute had given due process would be difficult once it was determined that a confiscation had taken place. Such a conclusion would follow from equating due process with judicial proceedings. The Court at this time thought that legislative deprivations, because they did not comply with judicial procedures, were categorically unconstitutional.

*Munn v. Illinois* shares this older approach. In *Munn* the Court, through Chief Justice Waite, sustained an Illinois law regulating the prices charged by grain elevators. The Chief Justice’s opinion centers on the meanings of deprivation and property, rather than due process. He began by explaining that “[t]he Constitution contains no definition of the word ‘deprive,’ as used in the Fourteenth Amendment.” Next, the Chief Justice turned “to the common law, from whence came the [property] right which the Constitution protects.” Under the common law, he found, when an owner devotes property to public use, “he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.” The public, then, had become a part owner with certain

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61 Id. at 133-135.
62 Justice Field, concurring, made clear that for him the Due Process Clause banned confiscations:

> The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law.

Id. at 137 (Field, J., concurring).
64 *Munn*, 94 U.S. at 123.
65 Id. at 126.
66 Id. at 126.
rights. Though the Chief Justice acknowledged that the Constitution required that legislation not be a deprivation, he concluded that the common law defined the extent of property rights under a state’s property law. Under this approach, in which the Constitution forbids legislative confiscations, property law is the heart of due process.

Dissenting in Munn, Justice Field showed that as far as he was concerned the Due Process Clause banned legislative deprivations of property, period. He was especially disturbed by the Illinois court’s doctrine, “that no one is deprived of his property, within the meaning of the constitutional inhibition, so long as he retains its title and possession.” Justice Field thought that the concept of deprivation of property must be broad in order to effect the purpose of the Due Process Clause. Accordingly he proposed to fashion out of the generally accepted ban on confiscation a comprehensive doctrine restricting economic regulation.

In this series of cases the best comes last. One of the great riddles concerning the origins of substantive due process is posed by Davidson v. New Orleans, in which Justice Miller seemed both to affirm and deny the doctrine’s existence. His

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67 Id. at 141 (Field, J., dissenting).
68 Ibid. at 142 (Field, J., dissenting).
70 96 U.S. 97 (1878).
71 Justice Miller’s seeming flip-flop in Davidson has baffled more than one student of substantive due process. See Robert H. Bork, The Tempting of America: The Political Seduction of the Law 42 (1990) (“In Davidson v. New Orleans, . . . [Justice Miller] managed to say both that the due process clause of the fourteenth amendment was satisfied by a fair judicial procedure and also that it was not, because the clause had substantive content.”) (footnote omitted); Currie, supra note 17, at 375 (“Without giving the faintest semblance of an explanation and in the same
opinion for the Court rejected a due process challenge to a Louisiana tax assessment for swamp drainage. In order to decide whether there had been due process, Justice Miller looked to the Court’s seminal procedural case, *Murray’s Lessee v. Hoboken Land & Improvement Co.* Applying that precedent, he concluded that the taxpayer could not claim that her property had been taken without due process, because Louisiana’s laws provided “for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case.” Here, Justice Miller appears to have been saying that if a law provides for constitutionally acceptable procedures before a deprivation takes place, the Court will not inquire into the law’s content. His reasoning suggests that he thought due process of law consisted of judicial procedures. Indeed, Justice Miller seemed offended by Davidson’s appeal. He found it remarkable that the Court’s docket was crowded with due process challenges to state legislation. The situation made him think that the bar entertained “some strange misconception of the scope of this provision as found in the fourteenth amendment.” Counsel somehow had come to believe that the Clause was “a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.”

Although the modern reader might find a rejection of substantive due process in the foregoing passage, such a reader would have found an affirmation of it earlier. Before denouncing the bar’s strange delusion, Justice Miller gave an example of a statute that *would* constitute a deprivation of property without due process of law. After explaining that the Due Process Clause applied to legislatures as well as courts and the execu-

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59 U.S. (18 How.) 272 (1856).
7 David *nson, 96 U.S. at 105.
74 Id. at 104.
75 Id.
It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision.  

Of course it would, if one applies a reading of the Due Process Clause under which statutes can deprive people of property and under which due process consists of judicial proceedings based on existing law. The A-to-B law is the archetypal legislative deprivation and always has been. It is without due process of law because legislatures cannot give people due process of law as envisioned under this reading. Legislatures do not apply pre-existing law, they change it.
Substantive Due Process

Justice Miller’s reading protects vested rights by assuming that certain statutes are deprivations and are therefore forbidden because legislatures do not give due process in the judicial sense. Whether to call this substantive due process is a matter of nomenclature. It is substantive due process by the definition used in this Article, because it results in limitations on legislative power that are unrelated to the procedures prescribed by the legislation. My nomenclature, however, is by intention not descriptive: It includes as substantive due process readings under which “due process of law” refers to procedure, and Justice Miller’s approach is such a reading. His reading clearly does differ from a strictly modern conception of substantive due process. A court would not apply the dictum of Davidson by examining a legislative deprivation and asking whether it was in accord with the traditions of the English-speaking peoples or fundamental concepts of personhood or some other content-bearing translation of “due process of law.” Rather, the court would ask whether the statute deprived any person of property. If so, it would be void.

The vested rights due process reading seems to have receded from the judicial mind, but it is hard to pinpoint when. By the time of Lochner, substantive due process doctrine tended to discuss deprivations of liberty more than property. The most

is merely window-dressing. Therefore, the A-to-B law with a hearing is, in and of itself, just as much a deprivation as the A-to-B law without a hearing. The hearing is irrelevant not because the wrong issues are being tried, but precisely because no issues are being tried, as a result of the formal, not the substantive, character of A-to-B laws.

Munn demonstrates how under this reading the content of the due process rule comes from concepts external to due process itself. In Munn Chief Justice Waite looked to the common law to define property rights. See supra notes 63-69 and accompanying text.

Compare Allgeyer v. Louisiana, 165 U.S. 578 (1897) (state regulation of insurance contracts is deprivation of liberty without due process) with Munn, 94 U.S. 113 (regulation of grain elevators does not deprive owners of property).

This is not to say that the anti-confiscation rule had been forgotten. One influential commentator from the Lochner era, after quoting Justice Comstock in Wynehamer and Justice Field in Bartemeyer, said, “[s]ince the power of alienation is frequently one of the fundamental elements of a complex legal interest (or property aggregate), it is obvious that a statute extinguishing such power may, in a given case be unconstitutional as depriving the owner of property without due process of law.” Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 45-46 n.67 (1913).
common approach by that point seems to have been to assume that any legislative ban on conduct constituted a deprivation of liberty, so that the great question was whether there had been due process of law. Under this approach, due process of law became an amorphous concept, the content of which could be determined only by the courts in the process of deciding cases. This feature of the *Lochner* era has endured. The notion that due process means judicial procedures seems to have receded. Thus, if the current Court were to attempt a textual derivation of the doctrine, it probably would not talk about A-to-B laws or due process as judicial procedures.

4. Critique: Legislatures Are Not Courts

The textual critique of these readings begins with the observation that in each, process does refer to procedure. Indeed, they define due process quite specifically as the kind of procedures used by courts, or the application of pre-existing law through notice and hearings. None is subject to the classic objection that "process" refers to procedure.

These readings proceed from the classic example of a judicial decree not based on applicable procedures by transforming part of the example into a definition. "Due process of law" is taken not simply to *include* appropriate judicial procedures, but to *mean* appropriate judicial procedures. The phrase "due process of law," however, does not, by itself, connote specifically judicial procedures. Certainly there are legal processes that take place elsewhere than in courts. In particular, legislatures have their own characteristic procedures; the most important procedural rules for Congress are set out in the Constitution itself. While it makes sense to say that a due process provision requires that courts do their work in an appropriately judicial fashion, the application of this principle to legislation would require that legislatures do theirs in an appropriately legislative fashion. It

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* See, e.g., Hand, supra note 55.
* See, e.g., U.S. Const. art. I, § 7, cl. 2, 3.
Substantive Due Process

certainly would not forbid them from making or changing law, which is their job.

This is to say that the ban on legislative deprivations requires some sleight-of-hand with context. In order to derive the ban, it is necessary to shift the concept of deprivation out of the context that first comes to mind—judicial decrees and executive acts—without shifting the concept of due process in a corresponding way to include distinctively legislative procedures. The point about shifting contexts also provides a ready answer to the historical claim on which the inventors of this theory rested—that in Magna Carta and its descendants, due process (or the law of the land) refers to judicial procedures. The claim is true enough, but it was so in the context of a provision that applied only to the monarch and the royal courts, not to the legislature. To refuse to make an adjustment when the context changes is to ignore one of the basic principles of language. In discussing legislative actions, “due process of law” most naturally means the procedures appropriate in the context of a legislature.

One response to this critique is that it leads to an unthinkable result because it permits an A-to-B statute. Surely something that looks so much like a judicial decree should be entered only after a judicial hearing. My argument, however, does not necessarily imply that outright legislative confiscations are constitutional. It implies only that they do not violate a due process clause. Certainly if Congress really did purport to adjudicate a case between A and B it would violate Article I, which grants Congress all, but only, legislative power, and Article III, which vests the judicial power only in the courts.

On the other hand, if it is a legitimate exercise of legislative power to transfer property from A to B, or otherwise to divest A of property, then it is silly to say that the legislature should be required to proceed as if it were a court. There is nothing unthinkable about permitting legislatures to legislate through legislative procedures. The real question, one that the Due Process Clauses cannot answer, is whether the legislative power extends

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84 This was the view in Wynehamer, for example. See Wynehamer, 13 N.Y. at 392, 395 (Comstock, J.); id. at 416 (A.S. Johnson, J.).
to statutes, including A-to-B laws, that directly work deprivations.

The appeal of vested rights due process is thus parasitic on the underlying assumption that some statutes, paradigmatically confiscatory statutes, are not valid exercises of legislative authority, but are instead judicial decrees in disguise. This connection provides an answer to the objection that my critique is a-historical. It is true that if my argument is correct a great many important legal figures in the nineteenth century, including Roger Taney and Samuel Miller, erred in their reading of the text. According to the objection, whoever finds himself saying something like I have has somehow gone wrong, probably by applying contemporary standards to earlier thinking.

In order to answer that charge, it is necessary to explain how an unpersuasive reading could nevertheless have been embraced so often. The connection between the vested rights reading of due process and deeper structural principles provides a substantial part of that answer. Suppose we assume, for separation of powers reasons, that only judicial power may effect a direct deprivation of life, liberty, or property. Assume further that each branch must use the procedures appropriate to it, a conclusion I say results from a natural reading of the Due Process Clauses. It would follow that all direct deprivations must be effected through judicial procedures, and hence through the application of pre-existing law.

Even though that conclusion follows, not from the Due Process Clauses alone, but from the Clauses plus the structural premise, someone who took the structural premise to be obvious might attribute the conclusion to the Due Process Clauses themselves. Imagine that someone were to respond, in defense of an A-to-B law, that a legislature gives due process when it acts like a legislature. The answer would be that in effecting a deprivation the legislature was acting like a court and hence was not giving the process due to the function being performed. That answer too rests on the premise that only the courts and not the legislatures may work deprivations. Once again, the Due Process Clause adds nothing. It is a fifth wheel.

Nineteenth century believers in vested rights due process seem clearly to have embraced the structural principle I have
described and to have associated their reading of the Due Process Clauses with it. It is thus very easy to see how they could recruit due process into the argument, even though in strict logic it was not doing any independent work. Moreover, not only did vested rights due process rest on a structural premise that seemed obvious, it led to a substantive conclusion that also seemed obvious. It forbade A-to-B laws. Under these circumstances it should come as no surprise that the Due Process Clauses were taken along for the ride.

If the premise concerning the reach of legislative power is invalid, however, then reading the Due Process Clauses as requiring that legislatures act like courts is not sensible. Due process therefore has no independent role to play in this debate. If an A-to-B law is a proper exercise of legislative power and not a bill of attainder there is nothing unthinkable about saying that it is consistent with due process or with saying that it is oth-

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According to Theodore Sedgwick:

If, as we have seen, by the right to the law of the land is meant the right to judicial procedure, investigation, and determination, whenever life, liberty, or property is attacked; and if it be conceded, as it must be, that our legislatures are by our fundamental law prohibited from doing any judicial acts,—then it would seem, as far as the present question is concerned, that the rights of the citizen are as perfectly protected by the guarantee of the law of the land, as they can be by a peremptory distribution of power. In fact, the special clause works a division of power.

Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law 676 (1857). Similarly, Thomas Cooley thought that the legislative power could not operate on vested rights and that due process clauses were not needed to establish this:

The bills of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land; but if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void. If the act proceeded upon the assumption that such other person was justly entitled to the estate, and therefore it was transferred, it would be void, because judicial in its nature; and if it proceeded without reasons, it would be equally void, as neither legislative nor judicial, but a mere arbitrary fiat.

Thomas M. Cooley, A Treatise On the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union *175 (1st ed. 1868). Cooley did not discuss the case in which the legislature was motivated by redistributive reasons, such as thinking that B needed the property and that A could spare it. He might have called that reason arbitrary too, the equivalent of no reason at all.
erwise constitutional. It is perfectly natural to conclude that an exercise of legislative power through constitutionally prescribed procedures is due process of law. The doctrine of vested rights should stand or fall with the principle that legislative power may not interfere with vested rights. Due process has nothing to do with it.

86 The question whether a legislative act is invalid because really an exercise of judicial power arises today, but tends to do so in a more straightforward guise. See, e.g., Plaut v. Spendthrift Farm, 115 S. Ct. 1447 (1995) (holding that legislation undoing final judgments was an invalid attempt to exercise judicial power).

87 There is a slightly different way of formulating the vested rights reading. It is possible to say that a deprivation worked directly by legislation is not due process of law because the procedure of passing a statute, as opposed to, for example, the procedure of a judicial decree, is the wrong procedure. In this sense a deprivation is procedurally infirm if the actor effecting the deprivation exceeds its proper role. According to Laurence Tribe, "the very idea of 'process' has often been taken to include concerns as to the nature of the body taking an action, and legislatures have at times been understood as structurally improper sources of particular kinds of public actions." Laurence H. Tribe, Substantive Due Process of Law, in 4 Encyclopedia of the American Constitution 1796, 1797 (Leonard W. Levy, Kenneth L. Karst, Dennis J. Mahoney eds., 1986).

Tribe, like his nineteenth century forbears, rests his conclusion on structural principles that do not appear in the Due Process Clauses themselves. By itself, all a due process requirement says is that the procedure of passing a statute may be used only when it is the appropriate procedure for doing what has been done. Principles that distinguish proper uses of the different powers must come from elsewhere. The Due Process Clauses presuppose but do not provide those principles.

88 The old doctrine of vested rights dealt with rights of property. Modern substantive due process is mainly about liberty. See, e.g., Adair v. United States, 208 U.S. 161 (1908) (ban on anti-union employment policies violates liberty of contract); Roe, 410 U.S. at 152-53 (right of privacy found within Fourteenth Amendment liberty). As noted above, it is possible to derive the modern doctrine from the ban on legislative deprivations by taking a substantive view of "liberty." A leading objection to Lochner-era substantive due process was that liberty in the Due Process Clauses meant only freedom from physical restraint. See Charles E. Shattuck, The True Meaning of the Term "Liberty" in Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty, and Property.", 4 Harv. L. Rev. 365 (1891). Shattuck's historical evidence raises the kind of term-of-art question that I am avoiding in this Article. I also avoid the question whether the sense of liberty that stands between physical freedom and total license is a plausible one in this context.
C. Due Process of Law and the Form and Substance of Legislative Power

I. Language: Is Everything a Legislature Does Worthy of the Name "Law"?

In suggesting that a lawless enforcement procedure was the central example of a failure of due process, I assumed that the procedure involved was "process of law," perhaps on the grounds that it was process undertaken by a government institution, or that it was process based on a statute. Maybe the word "law" is the key. If all deprivations of life, liberty, and property must be with due process of law and if some purported source of authority for a deprivation is not law, then it is possible to say that the deprivation was without due process of law.

There are two senses in which a legislative act might not be law. First, it might fail to have the formal characteristics associated with law. These are usually thought to include generality, prospectivity, publicity, and intelligibility. According to this thinking, only commands consisting of general rules that those subject to them can use in deciding how to act are law. The second sense in which a statute may not qualify as law under this approach rests on more substantive understandings of law. A little quick work along these lines might make the Due Process Clauses vehicles for the notion that the power of American legislatures is inherently limited. The necessary move is to say that something is not law if it is not a valid exercise of legislative power, and then fill in the blank with a notion of what a valid exercise of legislative power is.

It does not matter for this reading whether the deprivation is understood as being worked by a specific enforcement action or directly by a statute. If deprivation refers to a specific action by one of the enforcing branches and certain statutes are not law, then deprivations pursuant to those statutes would not be due process of law because the procedures would be based on something that was not law. Under this approach non-law statutes, although they might be valid in some abstract sense, are unenforceable. Correspondingly, if statutes are understood as

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working deprivations directly, as in the vested rights approach, then the statutes will not constitute due process of law when they are not law, and their privative effect will be nullified.

2. Doctrine

a. Form: Bills of Attainder, Vested Rights, and a Little More

Formal constraints imposed by this concept of law will generate some but not all of substantive due process as it has developed. To begin with a familiar case, one can easily say that the act of the legislature declaring that the property of A shall be the property of B is not law, both because it is not general and because it is not prospective in that the transfer does not follow from any act of A or B that takes place after the law is adopted. A formal notion of law thus can produce the narrow version of vested rights due process. Formal considerations also can rule out more general statutes that operate directly on preexisting property rights without regard to any action of the owner. For example, a law saying that individuals no longer have property rights in birds is, with respect to people who already own birds, often understood as not being a rule of conduct at all. For those who do not yet own birds but might, by contrast, it does change the effects of certain actions—the ones that otherwise would lead to bird ownership—and hence is prospective and behavior-directing. These formal considerations lead to a broader version of the vested rights doctrine that deals with changes in the rules of property themselves.

Other statutes, however, can readily be characterized as both changes in property rights and prospective rules of conduct. Consider a law making it a crime to sell liquor to minors. That is a prospective rule of conduct, but it also affects the power to sell liquor and hence in a sense affects preexisting property rights. As a practical matter, a determined judge easily could conclude that some such statutes are not law for formal reasons. In doing so, such a judge is likely to end up having to decide

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90 The usual way to criticize such laws around the time of the framing was to call them retrospective. Justice Chase said in his seriatim opinion in Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798): "Every law that takes away, or impairs, rights vested, agreeably to existing laws, is retrospective . . . ."
whether a statute was "really" a regulation as opposed to an expropriation.

Most of modern substantive due process is harder to squeeze out of a formal concept of law. Reverse incorporation might follow from a generality requirement, although only with difficulty. It is hard to say that a Black Code, the quintessential unequal legislation, is not law.\textsuperscript{91} A Black Code may not be fully general, but it is scarcely so specific as not to be law. Incorporation of the first eight amendments cannot be generated out of formal constraints in any natural way, nor can the doctrines of \textit{Lochner} and \textit{Roe}. A ban on criticism of the government is general and prospective, as is a minimum wage law or a ban on abortion. Unless equality completely swallows substance, this understanding of "law" will not produce economic substantive due process, minimum scrutiny, or the doctrine of fundamental rights.\textsuperscript{92}

b. Substance: \textit{Lochner} and Beyond

A requirement that legislation satisfy formal constraints does relatively little to limit the legislature. The substantive approach is much more productive. If legislative power is granted by the people to protect vested rights and not to destroy them, then the due process requirement produces the old doctrine of vested rights. In a more modern mode, if legislatures are not given the power to invade people's privacy, or to interfere with their fundamental rights, or to discriminate arbitrarily among people, due process will produce as much of today's doctrine as one pleases.

\textsuperscript{91} The Black Codes were enacted by the provisionally reconstructed ex-Confederate States in 1865 and early 1866. They restricted the civil rights of freed slaves and blacks. Mississippi, for example, restricted blacks' right to own and lease real property. See An Act to Confer Civil Rights on Freedmen, ch. 4, § 1, 1865 Miss. Laws 82; see generally S. Exec. Doc. No. 39-6 (1867) (collecting Black Codes).

\textsuperscript{92} Some part of the \textit{Lochner}-era requirement that legislation have a public purpose could be saved, but probably not all of it.
3. History: The Road Rarely Taken

The way of reading the Due Process Clauses so that the substance comes from the concept of law has figured to some extent in the thinking of courts and commentators, but that extent remains unclear. One of the most often cited formulations was given by Daniel Webster in his argument in *Trustees of Dartmouth College v. Woodward.* Although the Supreme Court had before it only the federal Contracts Clause issue, Webster sought to buttress his position with an appeal to the New Hampshire Constitution's law of the land clause. Said Webster:

By the law of the land is most clearly intended the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. Every thing which may pass under the form of an enactment, is not, therefore, to be considered the law of the land.

The fact that this passage was frequently quoted, however, does not mean that it was always quoted for its implication that only general and prospective rules are law. Characterizing the law of the land as that which proceeds upon inquiry and renders judgment only after trial is also consistent with the equation of due process with characteristically judicial procedures and hence with the derivation of substantive due process discussed above.

The formal concept of law does appear in one of the very few Supreme Court cases that seeks to explicate the text of a due process clause. In *Hurtado v. California* the Court rejected the claim that the Due Process Clause of the Fourteenth Amend-

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93 17 U.S. (4 Wheat.) 518 (1819).
94 That clause provided that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land." N.H. Const., pt. 1, art. 15 in 2 The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States at 1294, 1295 (Gov't Printing Off. 1878).
95 17 U.S. (4 Wheat.) at 581. According to Cooley, "[p]erhaps no definition is more often quoted" than Webster's. Cooley, supra note 85, at *353.
96 110 U.S. 516 (1884).
Substantive Due Process

requires indictment by a grand jury in a state capital case. Along the way the Court endorsed a sense of "law" limited by the formal constraint of generality:

It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, . . . [and thus excludes], as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation.97

Hurtado does not seem to have had much influence. It is certainly not the M'Culloch of substantive due process: Someone who asks why due process of law has anything to do with the substance of legislation will not automatically be referred to Hurtado.98 Nor did the Court build on that case during the Lochner era. In fact, Hurtado today would be called a procedural case. The discussion of generality was dictum far removed from the merits.

Many cases from the late nineteenth century may have rested on the notion that American legislative power was substantively limited, so that statutes beyond those limits were not law.99 Cer-

97 Id. at 535-36. The ellipsis consists mainly of a quotation from Webster's argument in Dartmouth College.

98 Not automatically does not mean never. Laurence Tribe cites Hurtado in response to John Hart Ely's textual criticism of the very idea of substantive due process in his book Democracy and Distrust. After quoting Ely's observation that the word following "due" is "process," see supra note 30 and accompanying text, Tribe says, "[b]ut the words that follow 'due process' are 'of law,' and the word 'law' seems to have been the textual point of departure for substantive due process." Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1066 n.9 (1980). Tribe then quotes the same passage from Hurtado quoted supra at note 97 and accompanying text. Id. Tribe seems to understand the theory to have been that legislative power did not extend to rearranging vested rights for formal reasons. See id. at 1065-67. Despite Hurtado, I think that Tribe is wrong about the importance of the reading based on "law." It was sometimes there but it was never dominant.

99 According to William Crosskey, most late nineteenth and early twentieth century substantive due process grew out of the proposition that all legislative power, under our American system of government, is limited power. Legislative power was limited, the courts
tainly the notion that legislative power was limited was extremely important and the courts were constantly asking whether some statute fell within some head of power, usually the police power. Whether they thought that anything outside of those categories was not "law" is less certain and cannot be determined conclusively, but it is likely that some of them did.


This approach to "law" has a distinguished pedigree. When people want to show that American judges have a tradition of disregarding legislative acts on some basis other than the text of the Constitution, the list of examples usually begins with Justice Chase's seriatim opinion in *Calder v. Bull*. In that case the Justices discussed an action of the Connecticut legislature that had nullified a judicial decree in a will contest and ordered a new trial. According to Justice Chase, although that particular action was valid, "[a]n act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."

Despite its pedigree, this reading of "law" has serious problems. Consider first the Fifth Amendment's Due Process Clause as applied to federal statutes. According to this approach, the Clause requires the courts to refuse to effect deprivations based on acts of Congress that are not law. The Constitution, however, indicates that there are no such acts of Congress. When a bill has been passed by both Houses and been signed by the President, or when it has been passed by both Houses and before the President, unreturned, for ten days (Sundays excepted

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100 3 U.S. (3 Dall.) 386 (1798).

101 Id. at 388. Justice Chase gave "a law that takes property from A. and gives it to B[,]" as an instance of such an act of the legislature. Id.
and unless Congress has prevented its return by adjourning), or when it has been repassed by two-thirds of both Houses after having been returned by the President with his objections, it becomes "a Law."\textsuperscript{102} Article VI provides that the "Laws of the United States" made "in Pursuance" of the Constitution are "the supreme Law of the Land."\textsuperscript{103} Because properly adopted statutes have been passed as mandated by the Constitution, they are the law.

The original Constitution does more than just affirm that properly enacted federal statutes are law. It also describes as laws things that according to the formally restrictive reading are not: Congress and the states are forbidden to pass any "ex post facto Law."\textsuperscript{104} Nowhere in the 1787 document does the word "law" appear in any context that suggests that it refers to some subset of legally binding commands that is defined by formal or substantive criteria.\textsuperscript{105}

But what about the principle that unconstitutional statutes are not law?\textsuperscript{106} Surely a statute that is inconsistent with the Due Process Clause is in one sense no more law than a duly enacted bill of attainder. Perhaps not, but any attempt to make this into an argument that some statute is in fact inconsistent with the Due Process Clause is question-begging.

This might seem like a mere word game—"law" can have more than one sense—but it is not. In understanding the Constitution, or any legal document, the rational reader postulates a drafter who was trying to make sense. In drafting an amendment to a document that already said that an act of Congress is both a law and the law, no sensible person would try to convey that some acts of Congress are to be disregarded by asking the reader to infer that they are not law, even if there is a different sense of law to which the drafter might be appealing. Such a

\textsuperscript{102} U.S. Const. art. I, § 7, cls. 2, 3.

\textsuperscript{103} U.S. Const. art. VI, cl. 2. Federal treaties, which are not "laws," also qualify as law under the Supremacy Clause. Id.

\textsuperscript{104} U.S. Const. art. I, § 9, cl. 3; U.S. Const. art. I, § 10, cl. 1.

\textsuperscript{105} Almost all of the occurrences of the word refer to statutes or other ordinary sources of legally binding rules. The Constitution does, however, refer to the "Law of Nations," U.S. Const. art. I, § 8, cl. 10, to the "Courts of Law," U.S. Const. art. II, § 2, cl. 2, and to "Law" as opposed to "Equity," U.S. Const. art. III, § 2.

\textsuperscript{106} See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
maneuver is too confusing and too unlikely to be understood to attribute to a rational author. The drafter much more likely would have said that some acts of Congress are invalid when they fail some explicit formal or substantive test.

Putting aside occurrences of the word "law," the Constitution supplies other reasons to believe that the Due Process Clause does not refer to law in a sense that has independent formal or substantive limitations. Just as the Constitution elsewhere labels properly-enacted statutes laws, it also elsewhere determines whether they are formally and substantively valid exercises of legislative power. Any formal constraints are included in whatever limitations are imposed by the grant to Congress of legislative power only. As for limited government, the Constitution has it already too. Article I, Section 8 and other power-granting provisions tell what Congress may do, and the Tenth Amendment reiterates that Congress may do only those things. When a statute is in pursuance of one of those heads of authority we have the Constitution's word that the statute is indeed an exercise of the federal legislative power.

According to the restrictive reading of the word "law," however, the Fifth Amendment to the Constitution contains additional formal or substantive constraints on the federal legislative power. Once again, sensible drafters who wanted to reopen the question, to add a new definition of legislative power or to take away some of the enumerated powers, would say so explicitly. If an amendment's drafters wanted to change aspects of the Constitution that are already dealt with by fundamental provisions, they would make that clear. Packing it all into the word "law" hardly does that.

These considerations of constitutional text and context make it very unlikely that the word "law" in the Fifth Amendment imposes independent formal or substantive constraints. This conclusion in turn suggests that law is used in the Fifth Amendment in the same sense in which one refers to the law of a particular state. Law in this sense is a variable, the value of which is given in any particular situation by the applicable source of legal authority. Understood in this fashion, the Due Process Clause presupposes, but does not supply, a way of determining what is the law of the United States or of a state. This is a perfectly
natural sense of the word “law”—used in saying that in an absolute monarchy the monarch’s will is law—and if the Fifth Amendment uses it the difficulties that accompany more restrictive readings do not obtain.

So far my arguments against a restrictive reading of “law” have been drawn from parts of the Constitution dealing with the national government. They therefore do not necessarily apply to the Due Process Clause of the Fourteenth Amendment, although they do so if that Clause means the same thing as its counterpart in the Fifth. In any event, similar textual considerations apply to the Fourteenth Amendment. The Supremacy Clause refers to the “Laws” of the states and plainly does so in a comprehensive sense that includes anything passed by a state legislature; otherwise, a bill of attainder, which is in some sense not law, might escape. If the restrictive reading of the amendment’s Due Process Clause is correct, however, some acts of the state legislature are both laws of the state and not law. Again, this is extremely confusing, and a drafter who meant to convey this message would make it plain, or at least give some contextual clue that “law” in the Fourteenth Amendment does not refer to every otherwise-valid exercise of a state’s legislative power.

These arguments have been directed against both the formally and substantively restricted senses of “law.” There is an additional difficulty with the substantive sense, which is that it probably does not exist. In ordinary usage a general and prospective command that is also foolish or tyrannical can unquestionably be a law and can be the law. A statute forbidding people from rolling over in bed would be law and so would a statute forbidding saying the Mass.

This is not to say that a substantively limited understanding of the word law has no appeal, but it is to say that any such appeal rests on circular reasoning. A substantively objectionable general rule of conduct is law according to standard usage. If some particular legal system has limits on the reach of legislative

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107 According to the Supremacy Clause, the Constitution, acts of Congress, and federal treaties “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2.
power, however, then of course any legislation that goes beyond those limits is not law in the sense in which an unconstitutional statute is said not to be law in the American system. But the objectionable statute is not law because of the legal system's substantive limitation, not because of anything having to do with the idea of law. A provision requiring, for example, that the courts follow the law would take its content from the substantive limitation without supplying any content of its own.

On balance, the reading according to which "law" in the Due Process Clauses has a formally restrictive sense is colorable but not persuasive. The suggestion that the word "law" alludes to a substantive theory of the scope of legislative authority is thoroughly unpersuasive.

D. Real Substantive Due Process

This reading extends the meaning of the word "due" from "legally required" to "appropriate." Under this approach, standards of propriety come from outside the Constitution and "process of law" extends beyond procedure.

1. Language: Expanded Dueness, Expanded Process of Law

So far I have discussed every part of the Clauses but the word "due." In a legal document, due might mean "legally required" or "in accordance with the applicable law." This sense of due is used in the rule of law application of the Clauses. It does not appear to lead anywhere substantive because it has no independent content. But as Murray's Lessee v. Hoboken Land & Improvement Co. teaches, there is a sense of what is due that has its own content. It means appropriate, or right, or fitting, whether according to tradition, natural law, or something else. To say that something is due is to say that it conforms to the

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108 Because there is a formally restrictive sense of "law," it is easy to see how someone who believed that the Constitution elsewhere adopted it, say through a restrictive concept of legislative power, would also find it in the Due Process Clauses. Once again, however, due process would only be a vessel for constitutional restrictions that are actually found elsewhere.

Substantive Due Process standards that should be applied to that thing. Here is a word with possibilities.

In light of these possibilities, it seems a waste to limit the requirement of dueness merely to the procedural aspects of government action. That requirement can be extended by rethinking "process of law." The reasoning behind the extension goes like this: A process is an activity. Governments act through law. So, process of law means "what the government does" or "governmental action"—in short, the activity of government. Under this reading the Due Process Clauses provide that no person may be deprived of life, liberty, or property, except by due governmental action. Governmental action includes both statutes and specific enforcement actions, like imprisoning people, so this reading calls for an inclusive sense of deprivation, referring both to changes in the law effected by statutes and to changes in the real world effected by the actions of government officers. Similarly, this reading calls for liberty to refer to both freedom from physical restraint and legal capacities, like freedom of contract.

2. Doctrine: Judicial Supremacy

At last. This is the judicial philosophers' stone, capable of transmuting any attractive but nonconstitutional principle into a constitutional command that can be enforced through judicial review. The efficacy of this magician's tool is so obvious that it is almost a waste of time to show how it can conjure up substantive due process in any of its manifestations. If the main purpose of government is to secure private rights, then it would be completely inappropriate, hence undue, for any government action to interfere with vested rights. If you have a Lochner-like view of the appropriate functions of the state, then once again

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119 Currie, discussing the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), characterizes the reading according to which the Privileges or Immunities Clause protects "fundamental-rights" as reflecting "the incessant quest for the judicial holy grail... a clause that lets us strike down any law we do not like." Currie, supra note 17, at 346-47. Although his trope is striking, and accurately reflects the quest that many Justices seem to make of their careers, it is common to think of the Holy Grail as a tool that will serve only virtuous purposes. The philosophers' stone, by contrast, is not picky.
deprivations will be due only when they are in pursuance of those functions. In a system devoted to the protection of other personal freedoms, such as those in the Bill of Rights or the right of privacy, interference with those freedoms is likewise undue.\footnote{If the idea of due process retains the historical overtones associated with procedural due process in \textit{Murray's Lessee}, see 59 U.S. (18 How.) at 276-77, then the emphasis on tradition urged as a guide to due process by the second Justice Harlan, see \textit{Griswold v. Connecticut}, 381 U.S. 479, 500-02 (1965) (Harlan, J., concurring), would be a permissible approach. So would anything else.} \footnote{169 U.S. 366 (1898).} If equality is a basic principle of American government, discrimination is undue and equal protection principles apply through the Fifth Amendment. And so on.

3. History: The Road to \textit{Lochner}

It is possible to derive this reading from due process doctrine as it existed after \textit{Murray's Lessee} by expanding "process of law." The hallmark is the eradication of the line between procedure and everything else. \textit{Holden v. Hardy},\footnote{Id. at 383.} an important case from the early days of the \textit{Lochner} era that upheld a Utah maximum hours law for miners, seems to derive substance from procedure in this way. Justice Brown, writing for the Court, began by dividing Fourteenth Amendment cases into those involving allegedly unequal treatment and those "where the legislature has changed its general system of jurisprudence by abolishing what had been previously considered necessary to the proper administration of justice, or the protection of the individual."\footnote{113 Justice Brown referred to those cases as instances "wherein a State has chosen to change its methods of trial." Id. at 383. He then went on to a long discussion of procedural issues and cases, showing that some innovations were permissible. Id. at 383-390.} That sounds like procedure.

Indeed, Justice Brown's discussion of the second category seems at first like it is wholly about procedure.\footnote{114 After a lengthy quotation from \textit{Murray's Lessee} and a citation to \textit{Davidson}, some substance appears, although still mixed with procedure. Justice Brown wrote that due process implies "a conformity with natural and inherent principles of justice, and forbid[s] that one man's property, or right to property, shall be taken for the bene-}
fit of another, or for the benefit of the State, without compensation; and that no one shall be condemned in his person or property without an opportunity of being heard in his own defense."

He went on to explain that a law generally forbidding people from entering into contracts with respect to property would be invalid, then discussed the police power over contracts, before eventually upholding the Utah law.

*Holden* is not explicit on the point, but the best way to account for the mixing of procedure with other aspects of government activity is to assume that for Justice Brown they were the same. He seems to have been using "process of law" in the broadest possible sense, because he was fairly clearly discussing the Utah statute rather than the proceeding in which it was enforced. This approach was not confined to one opinion. Ten years later, in the procedural case of *Twining v. New Jersey*, the Court quoted *Holden* for the proposition that "'there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" Talking about procedural and non-procedural cases together makes sense if "process of law" is understood to refer to everything the government does.

Another instance of this kind of thinking appears in one of the very few cases that attempts to defend the idea of extending "process of law" beyond procedure. In *Chicago, Burlington & Quincy R.R. v. Chicago*, which held that there must be just compensation when private property is taken for public use, the first Justice Harlan rejected the notion that the Due Process Clause is limited to the regulation of procedure. He argued

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115 Id. at 390-91.
116 Id. at 391, 392.
117 211 U.S. 78 (1908) (holding that Fourteenth Amendment does not create privilege against self-incrimination).
118 Id. at 102 (quoting *Holden*, 169 U.S. at 389).
119 166 U.S. 226 (1897).
120 *Chicago, B. & Q.R.R.* might have become a standard citation for the textual derivation of substantive due process had it been a better piece of lawyering. Among its weaknesses is bald misuse of precedent. The opinion relies on *Davidson*, a case stating that the Due Process Clause does not impose a just compensation requirement. See *Davidson v. New Orleans*, 96 U.S. 97, 105 (1878) ("[I]t must be remembered that, when the fourteenth amendment was adopted, the provision on
that the Clause would give inadequate protection to life, liberty, and property if it applied only to procedure, because it would be possible to enforce tyrannical measures as long as the enforcement was done through sound mechanisms.\(^{121}\) Justice Harlan seems to have thought that "process of law" meant actual legal proceedings, concrete enforcement events; he went to some length to show that the Fourteenth Amendment applied to "the final judgment of a state court, under the authority of which the property is in fact taken . . . ."\(^{122}\)


Now that the discussion has come to the obvious derivation of substantive due process from the text, it may seem to be time for the obvious answer: Process means procedure. Process differs from substance. Method differs from content. The Legal Process school of jurisprudence takes its name from this distinction and prominent scholars debate whether the Constitution itself

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\(^{121}\) After an obscure discussion of Davidson's dictum about A-to-B laws, and a citation of authorities for the proposition that republicanism requires compensation for takings, Justice Harlan turned to what seems to have been the heart of his analysis:

The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.

Chicago, B. & Q., 166 U.S. at 236-237. The key is the claim that such a proceeding would be a mockery of justice. Limiting process to procedure would be simply unthinkable under Justice Harlan's analysis.

\(^{122}\) 166 U.S. at 235. Justice Harlan appealed to the Davidson discussion of A-to-B laws, see id., but if I read Davidson correctly he missed the point of that case. For Justice Miller in Davidson, the constitutional trouble with an A-to-B law was not that it was unfair, tyrannical, or otherwise undue, although he thought it was, but that it did not operate through characteristically judicial procedures. See supra notes 76-78 and accompanying text.
should be understood in terms of process or substance.\textsuperscript{123} The process of law and the substance of law are two different things, indeed, two contrasting things. To say that the process must meet a standard of dueness is not to say anything about substance.

This obvious answer, while its heart is in the right place, is not adequate. It is true that the reading apparently at work in \textit{Chicago, B. \& Q.} produces virtually the same results as would substitution of the word "substance" for the word "process" in the Due Process Clauses. It is not true, however, that the reading comes to that result by asserting that the substitution would be correct, by equating "substance" with "process." Indeed, it need not even deny that "process" means "procedure." In \textit{Chicago, B. \& Q.} Justice Harlan apparently meant to impose a requirement of dueness on actual enforcement events, such as trials. In the sense in which a particular, concrete trial is a process it is also a procedure.

Justice Harlan apparently thought, and this reading rests on the premise that, a concrete process, proceeding, or procedure can be undue for reasons unrelated to its procedural aspects. That is the sense in which the due process requirement is substantive: Processes are judged, not by their procedural characteristics, but by their substantive consequences, or by the substance of the law that underlies them. In this sense an arrest would be undue if the suspect were charged with violating a statute that was inconsistent with the First Amendment.

This move is unsound as a matter of textual analysis. To begin with, suppose that the Constitution forbade deprivations of life, liberty, or property "except by due government action." That formulation most likely would refer to the procedural aspects of enforcement actions, not the rules being enforced. To be sure, government actions combine substance and procedure. When a court conducts a criminal trial it applies the substance of a legal rule through a procedure. Nevertheless, in discussing

\textsuperscript{123}See, e.g., Tribe, supra note 98, at 1064-65 ("[W]hy do thoughtful judges and scholars continue to put forth process-perfecting theories as though such theories could banish divisive controversies over substantive values from the realm of constitutional discourse by relegating those controversies to the unruly world of power?").
constitutional limitations, references to government action as such are generally references to the action's procedural features. To say that a trial was fair is to say that it employed fair procedures, not that it applied a fair law. Most people would say that you can have a perfectly fair trial under a totally unfair law. In similar fashion it is natural to say that the Sixth Amendment regulates trials, because it is about the procedures to be followed in conducting a trial. It would be unnatural to say, for example, that the First Amendment regulates trials, even though it does affect the outcome of trials by invalidating federal laws that violate its provisions.

When the Constitution regulates the content of rules it does so directly, rather than by referring to the government actions through which they are applied. Article I, Section 9, the federal half of the original Constitution's bill of rights, forbids possible federal statutes by describing their content and telling Congress not to enact them, not by speaking of proceedings in which they should not be enforced. When it means to forbid the enforcement of certain laws, the Constitution does so by describing their content and then banning their enforcement, not simply by purporting to regulate enforcement in general. The Fourteenth Amendment, in the very sentence that contains its Due Process Clause, shows how to bar enforcement of a category of laws that are identified by their content: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Talking about government action is no more a customary way of referring to the content of rules than is talking about process.

124 U.S. Const. art. I, § 9 (forbidding, among other actions, the laying of unproportioned capitations).
125 U.S. Const. amend. XIV, § 1. The reference to enforcement probably reflects the fact that the clause was designed both to forbid the enactment of laws yet to be passed and to nullify the effect of laws—the Black Codes—already adopted.
126 This way of speaking reflects the structure of government. The Constitution generally separates the institution that makes legal rules from the institutions that implement them operationally. Congress very rarely acts in the practical sense in which the courts and especially the executive act. Hence discussions of the government's actions are usually not about the substantive rules at stake, which are the work of the nonoperational branch.
The Due Process Clauses, of course, do use the word that gives them their name. By referring to process and not to action more generally they reinforce the presumption that they are talking about the procedural aspects of government conduct. A drafter who wanted to convey a rule about the content of the law would not talk about the activities through which that content is enforced, and certainly not about the process of enforcement.

Justice Harlan in Chicago, B. & Q. and his grandson in Poe v. Ullman127 made an argument based on a purpose they attributed to the text.128 Briefly put, it is that wholly procedural protection would be an inadequate way of safeguarding life, liberty, and property. In particular, the elder Harlan maintained that it does no good to have fair procedures if they are used to enforce tyrannical laws.129 Their point is that the purpose of the Due Process Clauses is to protect life, liberty, and property, and that a provision interpreted as being purely procedural does not do so adequately.

The argument is unsound. The fact that sometimes a perfectly fair hearing will not avert a substantive wrong implies nothing more than that procedural problems are not the only problems. Of course they are not. But it does not follow that there are no procedural problems, or that there is no reason to try to remedy them. To say that some fair hearings are pointless is hardly to say that a requirement of fair hearings is pointless, because in many other cases the fairness of the hearing will cause the result to be correct. That is justice, not a mockery of it. The Justices Harlans' argument rests on the true premise that the Due Process Clauses were designed ultimately to protect substantive interests and the false premise that it would be unthinkable to have a provision that gives those substantive interests only procedural protection.130 The false premise denies

128 See supra notes 119-122 and accompanying text (first Justice Harlan in Chicago, B. & Q.); supra notes 33-36 and accompanying text (second Justice Harlan in Poe).
130 The argument thus commits the classic error of substituting the reason for having a rule for the rule itself, without considering the possibility that the rule serves its reason only to the extent, and in the way, that it does so.
that any sane person would use a process-based mechanism, a conclusion belied by an examination of the United States Constitution.\textsuperscript{131}

Rules about process are generally rules about procedure, not about the law at issue in the process.\textsuperscript{132} Substantive due process in this sense is conceivable but quite unlikely.

\textbf{E. The Law of the Land}

The three readings discussed so far are pretty much substantive due process as the Supreme Court of the United States has known it and as people might derive it from the text today. One other reading has enough historical significance to deserve extended treatment.

1. Language: Equating Due Process With the Law of the Land

A commonplace of nineteenth century constitutional law was the equivalence of due process clauses and clauses forbidding deprivations of life, liberty, or property except by "the law of

\textsuperscript{131} At the beginning of this century a commentator criticized Hurtado v. California, 110 U.S. 516 (1884), for the argument that the only way to protect the substance of rights is with non-procedural guarantees. He recognized that the Constitution does deal with some issues of substance, such as slavery and religion. See Robert P. Reeder, The Due Process Clauses and "The Substance of Individual Rights," 58 U. Pa. L. Rev. 191, 210 (1910). He went on to say, however, that "it is also clear beyond dispute that those who adopted our constitutions at other times sought to secure good government indirectly, and only indirectly, by provisions concerning governmental methods." Id.

\textsuperscript{132} The discussion so far has assumed that procedural due process as it has developed after Murray's Lessee is the correct reading of the text. Although this issue has little bearing on substantive due process, in my view the reasoning in that case was probably wrong. "Due" in this context much more likely means "proper under the applicable law." In a legal document that seems the natural meaning. Reeder also thought that Murray's Lessee was incorrectly decided. Id. at 209 ("[T]here is no other natural meaning of the words 'due process of law' than 'the process to which the person involved is entitled under the law of the land.'"). If that is correct there will be no substantive due process and virtually no procedural due process.

Justice Black also disagreed with Murray's Lessee, but read the clauses as applying the rule of law to all aspects of government action, not just procedure, primarily because he took them to be identical with a law of the land provision. See In re Winship, 397 U.S. 358, 382 (1970) (Black, J., dissenting).
the land." Indeed, Cooley's influential treatise took as canonical the law of the land formulation, which was gradually displaced by the due process terminology, perhaps because of the Fifth Amendment's prestige.\textsuperscript{134}

One way to build substantive due process, then, is to assume that the two are not just siblings but identical twins, so that "due process of law" means, and can be replaced by, "the law of the land."\textsuperscript{135} There are three readings of this phrase that lead to substantive doctrine, one that corresponds to each of the three readings of the Due Process Clauses discussed in Parts II.B-D. First, the law of the land might be the procedures characteristic of courts—notice, hearing, application of prior law. Second, the focus could be on the word "law," using it as the basis of a formal or substantive doctrine. Finally, the law of the land might be the legal principles under which Americans live, considered as separate from whatever happened to be the actual positive law of the moment.

2. Doctrine: Older Bottle, Same Wine

I discussed above the results of demanding that legislative deprivations rest on judicial procedures and of limiting the concept of law either formally or materially.\textsuperscript{136} Both readings produce only limited results in generating the different categories

\textsuperscript{133} Surveying state constitutional provisions, Cooley observed that "the language employed is generally nearly identical, except that the phrase 'due process [or course] of law' is sometimes used, sometimes 'the law of the land,' and in some cases both; but the meaning is the same in every case." Cooley, supra note 85, at \textsuperscript{*353} (brackets in original).

\textsuperscript{134} Id. at \textsuperscript{*351}-53. The chapter in which Cooley developed this theory is titled "Of the Protection to Property by 'The Law of the Land.'" Id. at \textsuperscript{*351}.

\textsuperscript{135} Despite the citations to Cooley, I hesitate to attribute this textual argument to him because it is difficult to gauge his concern with the text. Referring to the due process or law of the land guarantee, he asserted that "[i]n some form of words, it is to be found in each of the State constitutions," id. at \textsuperscript{*351}, appending a footnote listing the relevant provisions of the various state constitutions. Id. at \textsuperscript{*351-52} n.1. That list does not include "each of the State constitutions." Ohio, for example, is not on the list. See id. at \textsuperscript{*352} n.1. Recognizing that the list is incomplete, the footnote concludes, "[u]nder each of the remaining constitutions, equivalent protection to that which these provisions give, is believed to be afforded by fundamental principles recognized and enforced by the courts." Id. at \textsuperscript{*352-53} n.1.

\textsuperscript{136} See supra Parts II.B & C.
of substantive due process. The third approach, under which "the law of the land" refers to unwritten principles presumed to underlie the legal order, has greater potential to generate substantive due process in its various incarnations.\textsuperscript{137} If the law of the land refers to the way Americans do things in government, it can refer to anything that can be characterized as a principle on which our system of government rests.

Vested rights, \textit{Lochner}-type liberty, and all three heads of the modern doctrine—incorporation, reverse incorporation, and fundamental rights—easily qualify. To take but one example, after the Civil War the principle of equality has pervaded the American constitutional order, so reverse incorporation is appropriate. Although the law of the land formulation might bias doctrine slightly in favor of well accepted principles, this is really another judicial philosophers' stone.

\textbf{3. History: Thomas Cooley's World}

In one of the earliest vested rights cases, \textit{Trustees of University of North Carolina v. Foy},\textsuperscript{138} the phrase "the law of the land" seems to refer to specifically judicial procedures, with the anti-confiscation consequences discussed above.\textsuperscript{139} At issue was a statute repealing a grant to the University of North Carolina of certain escheated lands. According to Justice Locke, the North Carolina law of the land clause meant that "members of a corporation as well as individuals shall not be so deprived of their 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

\begin{footnotes}
\footnote{137}{See supra Part II.D.}
\footnote{138}{5 N.C. (1 Mur.) 58 (1805).}
\footnote{139}{The provision at issue stated that "no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the law of the land." N.C. Const., Declaration of Rights, § 12 (1776).}
\end{footnotes}
as are consistent with the constitution . . . ."140 Accordingly, the
court held the statute invalid.141

The formally restrictive concept of law seems to appear in
Daniel Webster’s famous argument in Trustees of Dartmouth
College v. Woodward.142 Whatever Webster meant, one early
and influential state court discussion of the law of the land did
take it to include a generality requirement. Judge Catron of the
Supreme Court of Tennessee, later a Justice of the U.S. Su-
preme Court, explained in 1829 that "[t]he clause ‘LAW OF
THE LAND,’ means a general and public law, equally binding
upon every member of the community."143

Finally, Cooley took "the law of the land" to refer to some
body of principles not set out explicitly in the Constitution. His
emphasis was not on the formal features of law. Cooley praised
Webster’s formulation insofar as it applied to the courts and
agreed that not everything a legislature passed was the law of
the land, but he also believed that a general rule could fail to be
the law of the land if it deprived individuals of vested rights.144
According to Cooley, something is not the law of the land if it is
"arbitrary and unusual."145 That decision is to be made based on
"those principles of civil liberty and constitutional protection
which have become established in our system of laws . . . ."146 As
for due process of law, it "means, such an exertion of the powers
of government as the settled maxims of law permit and sanction,

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140 Foy, 5 N.C. (1 Mur.) at 88. The North Carolina court seems to have maintained
that interpretation in another famous law of the land decision almost thirty years
141 Wallace Mendelson cites Foy as an example of the structural bridge from the
rule of law reading to broad protection for vested rights. See Mendelson, supra note
46, at 128-29, 136.
142 17 U.S. (4 Wheat.) 518, 581 (1819). See also supra notes 93-95 and accom-
panying text (reviewing Webster’s argument regarding New Hampshire’s law of the
land clause).
143 Vanzant v. Waddel, 10 Tenn. (2 Yer.) 260, 270 (1829) (Catron, J.,) (dictum).
Judge Catron did not specifically say that a partial statute was not the law of the land
because it was not “law,” and indeed at one point he implied that the problem was
that it was not truly “of the land”: "The right to life, liberty and property, of every
individual, must stand or fall by the same rule or law that governs every other
member of the body politic, or ‘LAND,’ under similar circumstances . . . ." Id.
144 See Cooley, supra note 85, at *353-55.
145 Id. at *355.
146 Id. at *356.
and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.\textsuperscript{147} He rested these conclusions on assertion and case authority, rather than textual analysis.\textsuperscript{148}

4. Critique: The Law of the Land as Law

The first and most obvious objection to this reading is that the twins are at best fraternal. The federal Constitution says "due process of law," not "the law of the land." Whether at some point in history the two actually were taken to mean the same thing is a question I will not attempt to answer.\textsuperscript{149}

Even if we stipulate that they are the same, the law of the land route is not an easy one. When it comes to the federal government and the Fifth Amendment, things would be much simpler if there were a law of the land clause, because then a substantive reading would be textually absurd. Acts of Congress and treaties, the non-constitutional sources of federal law,

\textsuperscript{147} Id.

\textsuperscript{148} This understanding of the law of the land may also have appeared in an early Supreme Court case, see Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235 (1819), but it is difficult to tell. Justice Johnson, construing Maryland's law of the land clause for the Court, said that it was designed "to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Id. at 244. The case involved a procedural question, however, and Johnson may have meant only that the clause required compliance with applicable law; the established principles he referred to might have been those of the common law, and an executive or judicial departure from the law is arbitrary.

The Court today seems to understand \textit{Okely} as having referred to procedural matters. In the procedural due process case of Daniels v. Williams, 474 U.S. 327 (1986) (holding that negligent acts causing unintended loss of or injury to life, liberty, or property are not covered by Due Process Clause), the Court discussed Magna Carta, quoted a passage from Hurtado v. California, 110 U.S. 516, 527 (1884), that quotes \textit{Okely}, 17 U.S. (4 Wheat.) at 244, and then said, "[b]y requiring the government to follow appropriate procedures when its agents decide to 'deprive any person of life, liberty, or property,' the Due Process Clause promotes fairness in such decisions." Daniels, 474 U.S. at 331.

\textsuperscript{149} The claim that due process originated as an equivalent to the law of the land is challenged in Keith Jurow, Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law, 19 Am. J. Legal Hist. 265 (1975) (suggesting that process referred to legal process in the narrow sense of writs of summons and execution). Jurow asserts that "[t]he term 'due process of law' never played a crucial role in the development of English law." Id. at 279.
are not just the law of the land, but "the supreme Law of the Land." Deprivations pursuant to them are pursuant to the law of the land. To deny this would be to assert that an entire phrase has different meanings in the Supremacy Clause and the Fifth Amendment. No rational person drafting this hypothetical Fifth Amendment, seeking to impose limitations on the legislature, would use words that already appear in the original document and hope to give them a new meaning.

The Supremacy Clause does more than indicate that statutes and treaties are the law of the land. It also suggests the way in which that phrase would be most naturally used in a constitution: The law of the land is the legally authoritative law. The point of the Supremacy Clause, after all, is to establish the legal status of federal law relative to state law, not to tell where the Constitution, statutes, and treaties stand in the great scheme of the universe. The law of the land is a variable the value of which is given by whatever tells us what the law is. Understood in this fashion, a law of the land clause imposes the rule of law and does nothing else. It simply requires that deprivations be lawful.

There is good reason to believe, then, that if the Constitution spoke about the law of the land in the Fifth or Fourteenth Amendment, it would refer to whatever the law is. Alternate readings have difficulties. The equation of the law of the land with judicial methods would essentially be a fiat, helped along by overtones of due process of law, which sounds much more judicial. As for the claim that "law" in that phrase must have

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150 U.S. Const. art. VI, cl. 2. It is circular to say that a statute might not be the law of the land because it is invalid if inconsistent with the Constitution, including the Fifth Amendment. Of course that is true, but in order to apply the Fifth Amendment we must decide whether a statute is the law of the land before we know whether it is constitutional or not; we cannot rely on a conclusion drawn from an application of the Fifth Amendment in an argument concerning the application of the Fifth Amendment.

151 This equation makes an understandable but important error. In the context of a provision that applies to courts and the executive, a law of the land clause in which the law means whatever is legally binding will usually refer to judicial procedures, because the law about judicial procedures will give content to the legal variable. (The phrase generally refers to judicial procedures when applied to the executive because by and large the executive must resort to the courts in order to effect a deprivation; should the executive fail to go to court when required to do so, the
formal or substantive characteristics, despite the authority of Daniel Webster, it is unappealing for the reasons discussed above.

Finally, the suggestion that "the law of the land" means "the way we do things in government" is unpersuasive. Even if the Supremacy Clause did not contain the phrase, a reference in a constitution to the law of the land would most naturally refer to that which is legally authoritative. Constitutions are legal documents. The law of the land in Cooley's sense, however, consists of rules and principles that are not necessarily legally binding in the absence of a law of the land clause. At least, that must be so if such clauses are to have any independent legal effect.

This last point helps account for the popularity of this reading of law of the land clauses. Most of the judges and commentators who were using them in this way probably thought that the clauses merely reiterated principles that were true in any event. Cooley certainly thought that vested rights would be protected without any due process or law of the land provision. Indeed, Cooley casually equated states that have such a provision in their constitution with states that do not, assuming that in the latter the same protections were found elsewhere.

As for other supporters of this approach, many may have believed that there was an unwritten constitution. At the time of Magna Carta and through most of the history of the concept of the law of the land, the relevant constitution was unwritten, as was most ordinary law. So it was perfectly natural to appeal to

\[\text{deprivation would be without due process because judicial procedures had not been used.}\] That is not to say, however, that the law of the land means judicial procedures as they have traditionally been known. If the judiciary began to do its work differently, the new approach would become the law of the land.

\[\text{152 See supra note 85.}\]

\[\text{153 See supra notes 133 and 135.}\]

\[\text{154 As Corwin pointed out, the doctrine of vested rights, which found a home in due process and law of the land clauses, originally rested "not upon the written constitution, but upon the theory of fundamental and inalienable rights." Corwin, supra note 21, at 375. Alfred Hill suggests that natural rights and appeals to the clauses coexisted. Asking why the pre-Civil War courts thought it obvious that confiscatory statutes were not the law of the land, or were not due process of law, he explains: "The conclusion is inescapable that the ultimate ground for invalidation in such a case was an outlook having its origin in the natural law philosophy exemplified by Justice Chase's opinion in Calder v. Bull." Hill, supra note 21, at 1310.}\]
custom, or custom by its alias, the common law, or even to higher principles, as part of the law of the land. After the adoption of the written Constitution of the United States, one might continue to include unwritten, supreme law as part of the law of the land for one of two reasons. First, some people might not have fully appreciated the notion that a written constitution is the supreme law of the land, displacing other, prior sources of law. That would simply be a mistake. Second, some might not have thought that the adoption of a written constitution displaced those unwritten principles. It is possible to think that there is an unwritten constitution alongside the written one. But to believe in an unwritten constitution is not to imply that a law of the land clause has any independent effect on the constitutional status of an unwritten principle. If there is an unwritten constitution, then it is part of the law of the land, just like the written constitution. If there is no unwritten constitution, then the written constitution contains all of the law of the land that is of constitutional status. In any event, the outcome under a law

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155 See, e.g., Christopher G. Tiedeman, The Unwritten Constitution of the United States: A Philosophical Inquiry into the Fundamentals of American Constitutional Law (1890); Suzanna Sherry, The Founders’ Unwritten Constitution, 54 U. Chi. L. Rev. 1127 (1987). Before relying on Tiedeman, however, one should consider his assertion that in *Marbury*, “[t]he Supreme Court undertook to compel the new Secretary of State to issue the commission, but the mandamus was ignored by the President and his Secretary.” Tiedeman, at 161 n.1.

156 One thing a law of the land clause cannot do is change the status of a legal norm from subconstitutional to constitutional, from one that does not limit a legislature to one that does. A law of the land clause that did so would freeze in place the law that existed at the time of its enactment by transforming existing statutes, for example, into rules the legislature could not alter.

Because a law of the land clause would not change the status of legal norms, we need not unravel the knotty problem of “general constitutional law” in the early years of the Constitution. Important figures at the time believed in something like that. Chief Justice Marshall himself suggested that “general principles which are common to our free institutions,” which he contrasted with “the particular provisions of the constitution of the United States,” might keep a state from (of course) interfering with vested rights of property. *Fletcher v. Peck*, 10 (6 Cranch) 87, 139 (1810). G.E. White has recovered for our time an important doctrinal consequence of Chief Justice Marshall’s distinction between general principles and the written constitution. As White explains, the Justices felt free to consider general principles in cases that came to the Court from the lower federal courts and that therefore presented the entire range of issues relevant to decision. When deciding cases that came from state courts, however, the Justices respected Section 25 of the Judiciary Act, which limited the Court’s error jurisdiction to federal questions, thereby
of the land clause is entirely determined by the answer to the prior question whether there is an unwritten constitution. The clause adds nothing.\footnote{At work here is the same tendency that accounts for the structural, vested rights reading. A provision requiring compliance with the law of the land will of course reflect one's judgments as to the law's content. It is an easy but unsound move to think that the law of the land provision itself provides that content.}

One other argument concerning the law of the land deserves treatment. Consider a challenge to an A-to-B statute under a law of the land clause. A natural response to the challenge is to say that the deprivation was by the law of the land, the law being the very one in question. Justice Bronson of the New York Supreme Court met and rejected this argument in\textit{ Taylor v. Porter},\footnote{13 N.Y. 378 (1856).} a predecessor to\textit{ Wynehamer v. People}.\footnote{According to Justice Bronson:}

\begin{quote}
That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense. The people would be made to say to the two houses [of the legislature], "You shall be vested with 'the legislative power of the state,' but no one 'shall be disenfranchised, or deprived of any of the rights or privileges' of a citizen, unless you pass a statute for that purpose:" in other words: "You shall not do the wrong, unless you choose to do it."
\end{quote}

\textit{Taylor}, 4 Hill at 145-146.

\textit{Wynehamer v. People.} His response was that such a thing was unthinkable, because if it were allowed, the legislature could work the very wrong that the clause was designed to prevent.\footnote{His argument is circular. Justice Bronson’s conclusion can follow only if the clause is indeed designed to prevent legislative deprivations, which is what he was trying to prove. The fact that the legislature is allowed to make the law of the land is good textual evidence that there is no such design. As for the suggestion that a constitutional provision that merely required compliance with existing law would be pointless, it neglects the very real King John and the metaphorical but important Judge excluding general law and general constitutional law. G. Edward White, The Marshall Court and Cultural Change, 1815-35, at 659 (1988).}

\textit{Taylor v. Porter}
Lynch. When the Republicans drafted the Fourteenth Amendment in early 1866 they faced the southern governments that had recently enacted the Black Codes. The Amendment’s authors would not have thought that imposing a federal requirement of legality was a trivial step. Events bore out their fears of lawless state activity.

As a purely textual matter, a law of the land clause is an even less promising home for substantive doctrine than a due process clause. Indeed, with respect to the Fifth Amendment the Supremacy Clause makes any such reading thoroughly unpersuasive.

161 Responding to the argument that a rule of law reading of due process and law of the land provisions represents a “degrading and niggardly view of what is undoubtedly a fundamental part of our basic freedoms,” In re Winship, 397 U.S. 358, 382 (1970) (Black, J., dissenting), Justice Black maintained that the people who struggled to limit government with written constitutions sought: to make certain that men would be governed by law, not the arbitrary fiat of the man or men in power. Our ancestors’ ancestors had known the tyranny of the kings and the rule of man and it was, in my view, in order to insure against such actions that the Founders wrote into our own Magna Carta the fundamental principle of the rule of law, as expressed in the historically meaningful phrase “due process of law.”

Id. at 384 (Black, J., dissenting).

162 In 1871 Congress enacted the Ku Klux Act, designed to deal with private violence against freed slaves and Republicans, private violence that frequently had the connivance of public officials who refused to enforce or follow the law. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13.

163 One reading that has not played any significant role in the debate nevertheless deserves brief mention because it influenced the principal drafter of the Fourteenth Amendment’s Due Process Clause, Representative John Bingham of Ohio. Shortly before helping draft Section 1 of what became the Fourteenth Amendment, Bingham spoke on behalf of an earlier proposal, which he apparently also drafted, that would have empowered Congress to secure “to all persons in the several States equal protection in the rights of life, liberty, and property.” Cong. Globe, 39th Cong., 1st Sess. 1088 (1866). Bingham maintained that the proposal would simply give Congress power to enforce requirements already imposed on the states by the Due Process Clause of the Fifth Amendment. He relied on the Bill of Rights, evidently the Fifth Amendment, for the proposition that the Constitution contemplated “equality in the protection of the rights of life, liberty, and property in every State,” id. at 1089, but complained that Congress lacked power to make that requirement real, see id. at 1088. He seems to have thought that the Due Process Clause forbade deprivations of life, liberty, and property by private people and thereby implicitly obliged the states to remedy such deprivations.

Bingham’s interpretation of the Fifth Amendment is impossible to reconcile with the standard view that the first ten amendments apply only to the national government, see Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833), let alone the
My conclusions as to the textual plausibility of the various derivations of substantive due process are uniformly negative. The impression conveyed by a close study of the doctrine's possible textual sources is that none of them is a natural understanding of the language. Rather, every one is something that would have been devised by a creative lawyer, or fallen into by someone who was taking the seemingly obvious for the analytically sound. As far as I can see, a fair reading of the text leads either to the rule of law interpretation, probably confined to procedural matters, or at most to the Supreme Court's reading in Murray's Lessee, under which the Clauses impose limits on the procedures that may be used when people are deprived of life, liberty, or property. The Due Process Clauses do not mean what they do not appear to say.

standard view that constitutional limitations apply to the government, not private people. When Bingham drafted the second sentence of Section 1, he neglected to write this theory into its Due Process Clause. First, that clause explicitly applies to the states, not private actors. Second, the requirement that the states provide equal protection was embodied in the next clause, which as originally understood required, among other things, that every state respect the principle of equality in its laws and activities designed to prevent and redress private violence. John Harrison, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1385, 1433-1447 (1992).

164 This study has neglected one common tool of interpretation—the intent, in the subjective sense, of the framers or adopters. Whatever one's views may be as to the relevance of subjective intent, there is virtually no evidence on this question with respect to the Due Process Clauses of the Fifth and Fourteenth Amendments. Although the Fourteenth Amendment was hotly debated both in Congress and in the country, most of the debate centered on the politically sensitive provisions—Section 2, which deals with suffrage, and Section 3, which deals with the political rights of ex-Confederates. See generally Joseph B. James, The Framing of the Fourteenth Amendment (1956); Joseph B. James, The Ratification of the Fourteenth Amendment (1984). To my knowledge, no one in the congressional debates explicitly stated a plan or desire to adopt any of the forms of due process discussed in this Article. As for Bingham, he never explained what the Due Process Clause of the Fourteenth Amendment meant given that it followed an Equal Protection Clause that he had implied meant the same thing as the Due Process Clause of the Fifth Amendment.

165 This Article does not consider whether the Due Process Clauses, even as I read them, contribute to an overall constitutional pattern that should be treated the same way an explicit provision would be. The question whether the Constitution as a whole has consequences that cannot be attributed to any of its particular components is not addressed here. This Article is about a pair of important trees, not about the shape of the forest or the question of whether that shape matters.
F. The Due Process Clauses As Terms of Art

At least, the Due Process Clauses do not mean what they do not appear to say if they are built up out of the ordinary meanings of the words that comprise them. But language does not always work that way. There are figures of speech—for example, the phrase “hot dog”—and, in law, terms of art, whose meaning cannot easily be derived from their component words. It is possible that in 1791 or 1868 the words of the Due Process Clauses had a generally accepted meaning that differed from what someone ignorant of that meaning would deduce from the words themselves.

It is common to think that the Due Process Clause of the Fifth Amendment could not possibly have had what would today be called substantive content. If substantive content means the reading adopted in *Chicago, B. & Q.*, let alone *Roe*, that is unquestionably correct. On the other hand, the seeds of the structural vested rights reading were sown before the Constitution was adopted. While this way of thinking probably was a novelty devised by clever lawyers in 1791, by 1868 the situation had changed. It is clear that the vested rights reading was common.

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166 See, e.g., Ely, supra note 30, at 15 (“There is general agreement that the earlier clause had been understood at the time of its inclusion to refer only to lawful procedures.”). The only argument to the contrary that I know of is made by Robert E. Riggs, Substantive Due Process in 1791, 1990 Wis. L. Rev. 941. Riggs’ conclusion that in 1791 the Due Process Clause had substantive as well as procedural content “rests on the proposition that the ‘law of the land,’ the accepted equivalent of ‘due process of law,’ had historically embraced substantive law as well as procedural rules, and that it still retained this connotation when the fifth amendment was drafted.” Id. at 999. Riggs may have allowed himself to be misled by the modern phrase “substantive due process.” A law of the land clause, in its rule of law aspect, would look to the substance of the law as well as to the procedures it employed, because both substance and procedure are part of the law of the land. But a pure rule of law requirement, although it commands compliance with both substantive and procedural law, does not have independent substantive (or procedural) content.

167 Alexander Hamilton, writing as Phocion, seems to have presaged the anticonfiscation reading. His first letter under that name, in January 1784, criticized legislative proposals to strip Loyalists of their citizenship, thereby imposing on them the legal disabilities of aliens. Hamilton maintained that the New York Constitution’s law of the land clause resembled a ban on bills of attainder and forbade legislative punishment. 3 The Papers of Alexander Hamilton 483-86 (Harold C. Syrett & Jacob E. Cooke, eds.) (1962).
Wynehamer v. People\textsuperscript{165} had been decided, and the dictum of Bloomer v. McQuewan\textsuperscript{166} and Chief Justice Taney's opinion in Dred Scott had appeared. Hence, some people may have believed that a due process clause meant that the legislature could not by statute take away people's property rights. It is also possible, although less likely, that people thought that a due process clause imposed some requirement of generality and prospectivity because of the word "law"—as Webster's argument in Trustees of Dartmouth College v. Woodward\textsuperscript{170} had been read, as had then-Judge Catron's opinion in Vanzant v. Waddel.\textsuperscript{171}

It is not clear, however, that either of these readings was generally accepted.\textsuperscript{172} As of 1868 the Supreme Court's most important discussion of due process had appeared in a procedural case, Murray's Lessee, and the Court's most famous venture into vested rights due process, Dred Scott, was loathed by the political party that was about to amend the Constitution. In addition, the doctrine of Wynehamer had been scoffed at by at least one state's supreme court.\textsuperscript{173} Finally, Republicans no longer had any

\textsuperscript{165} 13 N.Y. 378 (1856).
\textsuperscript{166} 55 U.S. (14 How.) 539 (1853). See also supra note 56 (summarizing Chief Justice Taney's dicta in Bloomer).
\textsuperscript{170} 17 U.S. (4 Wheat.) 518 (1819).
\textsuperscript{171} 10 Tenn. (2 Yer.) 260 (1829).

\textsuperscript{172} In saying that the status of due process was not clear I do not mean to deny that lawyers, judges, and commentators in the first half of the nineteenth century thought that A-to-B laws were unconstitutional. The difficult question is the extent to which they thought that due process and law of the land clauses independently made them so, rather than reflecting what they believed was true without regard to those provisions.

\textsuperscript{173} In State v. Keeran, 5 R.I. 497 (1858), the Supreme Court of Rhode Island sustained a liquor control law against a challenge based in part on Rhode Island's law of the land clause. The challengers had specifically relied on Wynehamer. See id. at 499 (argument of counsel). The court was not amused by:

the loose habit of taking constitutional clauses, which, from their history and obvious purpose, have a well-defined meaning, away from all their natural connections, and, by drawing remote inferences from them, of pressing them into the service of any constitutional objection which the ingenuity or fancy of the objector may contrive or suggest.

Id. at 504-505. Referring to the argument that the clause protected property rights against legislative interference, and alluding to Wynehamer, the court went on:

Without unnecessarily criticizing the decisions of other states upon their peculiar local law, whether constitutional or statute, it is sufficient to say, that this article, as it stands in our constitution, admits of no such vague and general
need to profess what may have been a forced belief that the Fifth Amendment outlawed slavery in the territories. So the question remains open. At this stage, if I am right about the non-metaphoric meaning of the words, all we can say is that the case in favor of substantive due process has not yet been made.

III. THE FORCE OF PRECEDENT

For most judges, lawyers, and scholars, there is more to constitutional law than understanding the text. Also very important is what the courts have done with the text, and most important is what the Supreme Court of the United States has done with it. It may seem obvious that the Court's decisions are, under the controlling doctrine of stare decisis, utterly dispositive of the question whether there should be substantive due process. Substantive due process has been going on for a long time.

Stare decisis, however, may have some surprises. In fact, the stare decisis argument in favor of substantive due process is not as strong as the doctrine's seeming age may lead one to think. On the contrary, the peculiarities of substantive due process mean that it is subject to serious objections on precedential grounds. The rule of precedent, the principle that incorrect decisions should be followed despite being erroneous, rests mainly on two claims. One is that stability is very important in law, so having a settled answer is more important than having the right answer. If the courts keep changing their minds about the law, people will be unable to plan their lives. The other claim is that a course of official conduct, if continued long enough, develops legitimacy through acceptance, whatever its initial status may have been.¹⁷⁴

¹⁷⁴ The weight of these considerations, and indeed the whole doctrine of precedent, are subject to intense debate. See, e.g., Payne v. Tennessee, 501 U.S. 808, 827-30 (1991); id. at 833-35 (Scalia, J., concurring); id. at 848-55 (Marshall, J., dissenting). I am not trying to make a contribution to that debate. (I am skeptical of any authoritative role for precedent in the interpretation of written federal law.) Rather, I am discussing some unique aspects of the history of substantive due process in light of the purposes of stare decisis.
Although this Article does not provide a comprehensive historical account of the Supreme Court’s substantive due process cases, it has included enough history to demonstrate three points. First, the content of the doctrine that rests on due process has changed substantially over time. Second, the Court has never clearly stated or justified the textual reading, however doubtful, by which it derives its results. Third, the implicit reading on which it seems to have rested its conclusions has changed.

As to the content, today vested rights are not sacred and liberty of contract is scarcely protected. That much is easy—things changed in the 1930s. They have continued to change. The Court in *Bolling v. Sharpe*[^175] was widely taken to have meant that anything forbidden to the states by the Court’s reading of the Equal Protection Clause was forbidden to Congress. That turned out not to be true, except that afterwards it turned out to be true: for now, 5-4.[^176] Nor has the abortion right been stable since its inception in *Roe*. When the Court most recently considered the issue in *Planned Parenthood v. Casey*,[^177] there was no majority for the trimester framework employed in that case; whether there was still a majority for the strict scrutiny approach is a dicey question. The plurality maintained that it was preserving the essential holding of *Roe*, but it did not leave the law unchanged.[^178]

Moreover, the Court has never made entirely clear what textual reading of the Due Process Clauses it is relying on at any point. The premise that due process means judicial procedures had to be drawn out of *Dred Scott* and the cases from the 1870s. Similarly, it took some work to discover that *Chicago, B. & Q.* relies on an instructive approach to the text. That case is not cited as if it were the doctrine’s *M’Culloch v. Maryland*.

Finally, no reading can claim to be canonical because the Court has generated, however opaquely and tentatively, at least

[^178]: Id. at 869-79 (opinion of O’Connor, Kennedy, and Souter, JJ.).
three different readings, at least two of which are inconsistent with one another. "Due process of law" cannot mean both an appropriate way of applying pre-existing law and a reasonable governmental action. Thus, Justice Miller's reading in Davidson and the first Justice Harlan's reading in Chicago, B. & Q. cannot both be correct. The former, although subject to the gradual process of inclusion and exclusion, is fundamentally structural. The latter is fundamentally substantive and involves the application of standards that are far more difficult to describe.

Change in doctrine does not promote stability in the law. The same is true of the Court's failure to enunciate and follow a reading of the text from which its doctrine would flow. The lack of an articulated, consistent textual account means that those subject to the Court's authority lack a crucial tool for predicting its decisions. One rationale for stare decisis in constitutional adjudication is that the Court's work can make up for any vagueness or ambiguity in the document itself. By choosing authoritatively among possible textual readings, the Court can perfect the project of a written constitution, gradually generating a glossed document that is clearer than the one adopted by the people. If the point of having a written constitution is indeed to make it possible for everyone to know the rules, authoritative resolution of textual difficulties as they come up might well further that purpose. But if the authoritative interpreter changes its reading, or fails to say what the reading is, or does both, it multiplies confusion rather than dispelling it.

It is likely that one's ultimate conclusion on this question will depend on the details of one's theory as to the weight of precedent. But without going into the matter further, it seems plausible that there are legitimate theories of precedent under which substantive due process could be abandoned if other objections to it were thought sufficiently compelling.

IV. CONCLUSION

"The rational study of law is still to a large extent the study of history.... When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and
see just what is his strength." In keeping with Holmes' suggestion, I have tried to coax the old dragon that we now call substantive due process from its den so that we can examine it in the light of day. Although I have had very little good to say for substantive due process as a reading of the constitutional text, the main point of this effort has not been to prove that all readings are inadmissible. Indeed, it would not be surprising if this discussion has the opposite effect with some readers, suggesting readings that may not have occurred to them and that they might find plausible. Rather, the Article's primary purpose has been to think about substantive due process from a different perspective, focusing not on the rules that are ultimately derived but on the readings from which they come.

Recurrence to the text may seem misconceived in connection with a doctrine that these days usually rests on the claim that the language is vague and open-ended, when it rests on any claim about the language at all. Dismissal of the text, however, cannot be completely satisfying as long as it is a criticism of a doctrine to say that it has no Marbury, as that case rests on the notion that judicial review is based on the Constitution. Whatever one's conclusion may be in the end, in the beginning there is the word.

179 Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). Thanks to Chuck McCurdy for drawing my attention to this wonderful line and its application here.