What Happened to the Due Process Clause in the Dred Scott Case? The Continuing Confusion over “Substance” versus “Process”

MATTHEW J. FRANCK

ABSTRACT
Conventional wisdom holds that “substantive due process” first appeared in Supreme Court jurisprudence in the Dred Scott case. Some scholars have attempted to show that the seeds, or even the full growth, of this constitutional doctrine appeared much earlier. Whenever it first appeared, controversy rages over whether substantive due process is a legitimate interpretation of the Constitution’s two due process clauses. The argument here is that both the historical and the interpretive controversies have been largely misplaced. There is a “substantive” element to due process, namely, its protection of norms of the rule of law, as against rule by decree. But this is a far cry from the policy judgment role now routinely assigned to the courts under the rubric of substantive due process. The Dred Scott case does represent a turning point in the history of due process, but not quite the turning point it is usually thought to be.

Conventional wisdom has long held that Dred Scott v. Sandford (1857) was the first case in which the Supreme Court employed the doctrine now known as “substantive due process.” Ruling that the prohibition of slavery in the Missouri Compromise of 1820 was invalid, Chief Justice Roger B. Taney cited the Fifth Amendment’s bar to depriving anyone of “life, liberty, or property without due process of law” and opined that “an act of Congress which de-

Matthew J. Franck is director of the William E. and Carol G. Simon Center on Religion and the Constitution at the Witherspoon Institute, 16 Stockton Street, Princeton, NJ 08540 (mfranck@winst.org). He is also professor emeritus of political science at Radford University and visiting lecturer in politics at Princeton University.

I thank the editors and reviewers of American Political Thought for comments on earlier drafts, often critical or skeptical, that helped me strengthen the evidence and arguments of this essay.
prives 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.”1 This, said David P. Currie,
“was at least very possibly the first application of substantive due process in the
Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. 

Currie was not always given to such cautious circumlocutions as “at least
very possibly.” Here his caution was warranted, but not because there was any
use of the doctrine in a Supreme Court case prior to *Dred Scott*—for there
wasn’t. Nor was it warranted because there are any solid examples of the
doctrine’s use by other courts on earlier occasions—for, as we will see below,
the cases alleged in some recent scholarship to be such examples really aren’t.
No, Currie’s caution was warranted because *Dred Scott*’s own status as an
example of substantive due process is, in some sense, questionable. As we know
the doctrine today, it makes its first unambiguous appearance in the decade
following the Civil War, not in *Dred Scott*.

My purpose here is not to defend the *Dred Scott* ruling, nor to vindicate
what Taney said about the due process clause in his opinion in the case. What I
will show is that the very expression “substantive due process”—even when
employed by critics of the doctrine it is said to represent—is both the pro-
duct of confusion and the cause of still more, as it has come to obscure certain
truths about the original meaning of the due process clause. Taney’s *Dred Scott*
opinion made its own distinctive contribution to this confusion, but it is a kind
of transitional contribution, a bridge from an earlier clarity about the require-
ments of due process to the muddle that would ensue in decades to come. In
order to see that transitional contribution in sharper relief, we must begin at
the beginnings of things, in both the text and the history of due process.

There are two due process clauses in the Constitution, one in the Fifth
Amendment in the passive voice, inhibiting the federal government, and one in
the Fourteenth Amendment in the active voice, inhibiting the state govern-
ments. What these clauses appear to say on their common face is that we can
be deprived of our property, of our liberty, or even of life itself, so long as
something called “due process of law” is provided to us beforehand. Our
subject here is what that “something” is. But we immediately encounter a
difficulty in our legal history, namely, that two very different concepts of due
process are sharply distinguished, with the odd result that the single principle
“due process” is said to do, simultaneously, two completely different, even
incompatible, kinds of work—one called *procedural due process* and the other

1. 19 How. (60 U.S.) 393 (1857), at 450.
called substantive due process. Wielding the “substantive” variety of due process, the Supreme Court has periodically invalidated democratically chosen public policies that a majority of the justices regard as offending some form of protected liberty or property. Once it was the property right of slaveholders that was protected by the justices in the name of due process; then it was a putative freedom of contract between employers and employees; lately, the court has struck down laws that trammel the “most intimate and personal choices a person may make in a lifetime” or the decisions of adults regarding “how to conduct their private lives in matters pertaining to sex.”

How did the innocuous term “due process of law” come to be such a powerful tool for the judicial making and unmaking of public policy—and at the same time retain its more modest concern for mere modes of procedure in the execution of policy?

We can start with some simple reflections on the adjectives here: “procedural” and “substantive.” A procedural right is one that requires the government to enforce its policies—it matters not what they are—in such a way and by such processes that we are treated fairly under the rules laid down. A substantive right is a right against the imposition of certain kinds of policies on us under any circumstances—in this instance it mattering a great deal what the policies are, therefore, and there being no “right way,” no rules laid down, that can render the policy itself legitimate. Hence, it is often said that the phrase “procedural due process” is a redundancy—a self-repeating expression insofar as “procedure” and “process” are synonyms—while “substantive due process” is an oxymoron, the first and third words expressing notions that are contrary or incapable of coexisting, as in the phrase “green pastel redness” used by one scholar years ago (J. H. Ely 1980, 18). The immediate conclusion reached by many scholars is that the redundancy in “procedural due process” is a repetition of something true about the constitutional language, while the self-contradiction in “substantive due process” is a sign of something false about it—in short, that the only real due process is the procedural kind, and that the substantive kind is a fraud and an imposition on our constitutional law. Even a defender of substantive due process, Robert Riggs, tacitly concedes this: “By virtue of the substantive component [of due process], courts identify fundamental values not explicit in the Constitution, translate them


into substantive rights and then deny to government—including legislatures—the power to infringe those rights without some compelling justification” (1990, 942).

In order to think clearly about this distinction and the sense it might make, we must do a little historical detective work. The practice now known as substantive due process is much older than the phrase itself. The first justice of the Supreme Court to use the exact phrase was Justice Wiley Rutledge in 1948, and he did so just after distinguishing between “substantive individual rights” and “procedural ones.” In short order, the phrases “substantive due process” and “procedural due process” came to be standard expressions, and they have been commonly used ever since.

Twenty years before the justices of the court began to use it in their opinions, however, the phrase “substantive due process” first appeared in a law review note by an anonymous student author (1928, 619). As is the wont of students everywhere, this one may have been in search of a shorthand expression that would encapsulate a complex system of ideas, and the handy three-word phrase seemed to do the trick. (Perhaps rather than coining the phrase, the student first heard it used in a classroom.) Senior scholars eventually adopted the shorthand phrase as well. Walton H. Hamilton (1938) discussed the shift in which due process had taken on a “substantive” meaning since the Civil War, but he did not use the phrase itself. But by 1942, Benjamin F. Wright could devote several pages to the same subject and use the phrase “substantive due process” with complete unself-consciousness (1942/1967, 95–107).

The law student who first used this expression was not working altogether from the ground up. For several decades, justices of the court had been in-

---


6. The author of this note also used the phrase “procedural due process”; for an earlier (apparently the first) appearance of this phrase, see Hall (1926, 812).

7. A review of Wright’s book occasioned the first appearance of the phrase in a political science journal, albeit with “substantive” in quotation marks; see Pfankuchen (1942, 757). By contrast, see Corwin (1909, 111), discussing the phenomenon without using the phrase.
sisting that due process of law concerned matters of substance, not merely matters of form. In 1884, the court had held that due process “must be held to guaranty, not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.”

There were a number of cases, over the next several decades, in which members of the court made remarks of this kind, though, as we shall see, they could mean a variety of things. But in an opinion that may have strongly influenced the student who coined “substantive due process” just a year later, Justice Louis Brandeis remarked in the 1927 free speech case of Whitney v. California, “Despite 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.” The context of this remark was the application of the First Amendment’s protection of freedom of speech to a state government, through the vehicle of the Fourteenth Amendment’s due process clause—a doctrine known as “selective incorporation” of the Bill of Rights.

But for our immediate purpose, it is important that Brandeis meant that the due process clause requires a judgment by a court of law about whether a generally applicable statute expresses a valid policy choice by a legislature, in the face of a claim of an individual not to be governed in any way whatever by such a policy. With that reading of the distinction between substance on the one hand and procedure or form on the other, it was only a matter of time before the adjective “substantive” came to modify “due process” itself and the modern due process vocabulary came into being in the practice and the study of constitutional law.

Yet the adoption of the expression “substantive due process” for a particular doctrinal idea (whether applauded or condemned) wrought a great and continuing confusion in constitutional law. It will not do simply to say that “substantive due process” is a self-contradiction and that “procedural due process,” while redundant, is the only proper interpretation of “due process of law.” The distinction is a misleading one, drawing the line in the wrong place between two different readings of this legal principle.

In order to see our modern confusion more clearly, it is necessary to go back much further in history, to the original understanding of due process of law—an understanding that is not fully captured by “procedural due process,” by “substantive due process,” or by both of these phrases together. “Due process of law” has its origins in the Magna Carta, first exacted from King John in 1215, which stated in its original thirty-ninth chapter (later the twenty-ninth, in versions from 1225 onward) that “no free man shall be taken

8. Hurtado v. California, 110 U.S. 516 (1884), at 532 (Matthews, J., for the court).
or imprisoned or disseised [of his property] or outlawed or exiled or in any way ruined” except “by the lawful judgment of his peers, or [vel] by the law of the land” (the usual rendering of the Latin conjunction _vel_ is “or,” though “and” is an alternative reading, leaving open the question whether a trial before one’s peers was necessary in every instance). In 1354, in perhaps the most important of many subsequent parliamentary “confirmations” of Magna Carta, the language about the “law of the land” was changed to read that none of these deprivations could occur “without . . . due Process of the Law.” Roughly three centuries after that, Sir Edward Coke, in his _Institutes of the Laws of England_, spoke for tradition in treating the phrases “but . . . by the law of the land” and “without due process of law” as wholly interchangeable terms (see Coke 2003, 2:858).

In the new United States, both phrases made their way into constitutions and were universally understood, as in England, to mean the same thing. Most state constitutions after independence contained “law of the land” clauses (some still do), while in later years many states adopted “due process of law” clauses, the same phrasing chosen for inclusion in the Fifth Amendment of the federal constitution and later in the Fourteenth Amendment as well. At first glance, however, it is not obvious why “law of the land” and “due process of law” should be taken to be equivalent expressions.

Start with the older phrase: what is an alternative way to deprive someone of his life, liberty, or property, without doing it according to law? If the perpetrator of the deprivation is a private citizen, we would call such behavior murder, kidnapping, or theft. What if the perpetrator is a person acting in the name of public authority? We should call it exactly the same thing, if there were no law, previously enacted and known, that authorized the deprivation. But what if all political power were held by a single individual, a monarch, invested with all public authority, and he issued a formal command that the life, liberty, or property of person A, and no one else, shall be taken from him, and the command relied on no prior law for justification of the taking? Is that a lawful deprivation—one that satisfies the terms of the original Magna Carta that no deprivations shall occur but by the law of the land?

It is not. It is more properly called a “decrees”—and it need need not be confined, as in our example, to a single targeted individual, nor need it issue from an absolute monarch. We may call it an act of power, but not an act of law. For the essence of a law is that it differs from a decree in two ways: in being impersonal, general, or neutral in character, and in being known (or knowable)

---

10. The quotations are from the original 1215 version, in Holt (1992, 461).
11. 28 Edw. III, 1 Statutes of the Realm 345 (1354). The protection now extended to any “Man of what Estate or Condition that he be.”
before we are affected by it, and before we can take those actions that it
governs. Laws govern a people by informing them, publicly, of the polity’s
expectations regarding their behavior and, if need be, by punishing breaches
of those expectations. Such punishment, under law, may deprive a man of his
property, his freedom, or his life. But to dispossess him, to imprison him, or to
condemn him to death by the decree—by the whim—of sovereign power when
no law provides for such treatment is to exert mere force over him, with no
other authority for it than that the raw power exists to do it. Such a decree has
the character of a particularistic judgment (however just it may arguably be in
a given instance), but not of a judgment that could have been foreseen by one
with knowledge of the law. The law is something we can know and to which
we can conform our actions; a decree is a thunderbolt out of the clear blue sky.

Such decrees by the kings of England—in the typical case, commands to
transfer the property of one man to another, or, like as not, to the king him-
self—were at the root of the demand for this clause in Magna Carta (see Holt
between law and will represented a stream of thought which ran deep in the
everyday thinking and arguments of educated laymen” (1992, 90). And it may
be that the wording of the clause commonly became “due process of law,” as
the courts of law became more powerfully established institutions in England,
and as something like a nascent separation of powers began to exist. For no-
tice again the character of particularistic judgment in ruling by decree. Where
law rules, particular judgments in particular cases must still of course be made,
but they will be made in accordance with general rules and established prin-
ciples and therefore will not have the characteristic of surprise, or of com-
manding for a special case. And as English courts emerged as the regular set-
ing for such judgments to be made, so too emerged regular processes for
reaching various sorts of judgments and for holding parties to account. No-
tice, calling to answer, subpoena, indictment, warrant, judgment, condemna-
tion—a myriad of such court processes came into being, many with their own
peculiar writs issuing from the bench. (And “writ” is still synonymous with
“process” itself, in certain legal contexts, as in the expression “process server”
for someone who delivers notice via writs of various kinds.)

Another way to think of this is to consider that lawmaking is prospective:
it looks forward, to future actions and the consequences of those actions.
Judgment under the law is retrospective: it looks backward to deeds that have
been done and measures them by the prospective rule set down in law.\(^{12}\)

\(^{12}\) This distinction between prospective lawmaking and retrospective judging is recog-
nized as far back as Aristotle, whose *Rhetoric* distinguishes in this way between deliberative
Rule by decree is an arbitrary shortcut, combining the prospective and the retrospective in a single act, and a shortcut, moreover, that places the two back to front. The ruler looks backward first, not second, choosing a victim who has displeased him and then “remedying” the situation by looking forward to a preferable state of affairs, in which his victim has suffered harm (and perhaps some chosen favorite has benefited by the same action). And, of course, there has been no process whatsoever, other than the delivery of the startling news that one’s life, liberty, or property is now forfeit.13

Viewed in this light, it is mistaken for any analysis of “due process of law” to begin by asking whether the principle protects “procedural” rights or “substantive” ones. The first and foremost question to ask in an actual case is, has a party been subjected to law at all, or instead to a decree? This is no less true in a republic than under a monarchy, for an elected legislature also can rule by decree as well as by law—even by cloaking decrees in the apparent form of laws. Daniel Webster put his finger on the problem, in an argument before the Supreme Court in the 1819 Dartmouth College case that could have come from Coke himself and was frequently quoted for decades thereafter:

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. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, 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, decrees and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions, of the highest importance, completely inoperative and void. It would tend directly to establish the union of all powers in the legislature.

13. It may occur to some readers that private bills, passed by legislative bodies even today, appear to be particularistic and even retrospective, not generally applicable and prospective, and therefore might be said to run afoul of the rule of law. The observation is accurate, but the conclusion does not follow, since private bills are in the nature of a gift or grant from the government, such as a pension or a compensation of some kind, and not a deprivation that would run afoul of the due process principle—unless some other party is deprived of his property in order to effectuate the gift. In this respect private bills resemble executive pardons and commutations, which are the opposite of (proscribed) executive decrees of penalty targeting named persons.
There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country.14

If we like, we may call the right to enjoy our lives, liberty, and property without being subject to rule by decree a “substantive” right. But what exactly is it a right to? To being ruled by prospective laws that are carried out retrospectively by due process. Is it then a “substantive” right to be governed by lawful “procedures”? That is just what it looks like. So the distinction between substantive due process and procedural due process begins to look misleading and ahistorical. And when we turn to more recent legal history—to the “liberty of contract” rulings at the turn of the twentieth century, or to the “right of privacy” rulings of the past several decades, each said to represent variants of substantive due process—the distinction obscures more than it reveals, by suggesting a fictitious continuity with earlier ages. In short, the substantive/procedural distinction simply does not do much useful work and creates more confusion than clarity.

This problem is evident even in some of the most exhaustive recent research on this subject. Gedicks (2009) and Williams (2010), for instance, disagree on whether “substantive due process” is part of the original meaning of both due process clauses in the Fifth and Fourteenth Amendments (Gedicks says that it is part of both; Williams says that is it is only in the latter). But they are agreed that evidence in favor of “substantive due process” is present wherever a judge, legislator, or commentator characterizes the clause as controlling the “substantive” power of legislatures to pass certain kinds of enactments. Captives of the “substantive versus procedural” conceptual framework, they fail to see that every one of the pre–Dred Scott examples they adduce concerns an enactment that embodies an arbitrary decree in the mere form or guise of law (i.e., punitive, particularistic and/or retrospective deprivations of property or liberty) or an abject failure to provide notice and process. These cases concern classic violations known since at least 1215—as an earlier scholar of Magna Carta put it, they represent “execution without judgment” (McKechnie 1914, 377)—but they are sharply different in kind.

14. Trustees of Dartmouth College v. Woodward, 4 Wheat. (17 U.S.) 518 (1819), at 581–82 (argument of Webster, counsel for plaintiff in error). The case was decided not on these grounds from the New Hampshire Constitution, which were not properly before the court, but on the grounds of the contract clause of Article I, Section 10.
from the invalidations of general, prospective, behavior-regulating enactments that characterize modern substantive due process.

I noted above the possibility of a monarch’s decreeing that one man’s property should be transferred to another’s possession. Webster speaks of this possibility in republics too, when he remarks that legislative acts “directly transferring one man’s estate to another” would not deserve the name of law. This “taking from A and giving to B” problem was a recurrent example in discussions of the law of due process. The earliest appearance of such reasoning in a Supreme Court case was in the opinion of Justice Samuel Chase in *Calder v. Bull* (1798), who gave, as an example of “an act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, . . . a law that takes property from A. and gives it to B.” Affirming the principle that legislation must be prospective in character, Chase said that enactments of the sort he condemned “were legislative judgments; and an exercise of judicial power.”

Here we have the key to the meaning of the early cases, allegedly employing substantive due process, that have confounded so many scholars. The first requirement of due process of law, before we come to questions of the forms of process and whether they are “due” (i.e., fair) in the circumstances, is that life, liberty, and property be subject to law and not decree. And this comes to light as a principle of the separation of powers—a concept that is nascent in early modern and even medieval English law but that comes theoretically into its own in the work of Montesquieu (who, in turn, profoundly influenced Blackstone, along with Coke the great teacher of law to Americans; see Carrese 2003) only a few decades before the Americans turned to writing constitutions. Any legislative enactment taking property from A and giving it to B is a violation of due process because it invades the judicial function. Courts take from A and give to B all the time, in the adjudication of debts, contracts, torts, and so on, both under common-law principles and under the terms of statutes. (The deprivation to which A is subjected for the sake of B may take the form of monetary compensation, or, in some cases, a direct transfer of a specific piece of property, real or personal—in which case a court of equity will effect the transfer by “decree,” a revealing word). For a legislature to provide for such transfers, prospectively, in accord with findings of certain rights and wrongs as adjudicated in courts of law, is of the essence of lawmaking. But

---

15. *Calder v. Bull*, 3 Dall. (3 U.S.) 386 (1798), at 388, 389 (seriatim opinion of Chase, J.). Chase’s comments here were obiter dicta in a case involving the ex post facto clause of Article I, Section 10, and were not, as is commonly believed, an argument for the judicial enforcement of “natural law” principles imported from outside the Constitution. See Franck (1996, 116–27).
to effect the transfers themselves is to perform the judicial function, and so-called laws directly commanding them are not properly laws and provide none of the essentials of process (let alone a process that is “due”). If a case considering such a legislative attempt is properly before a court, with a relevant “law of the land” clause or “due process of law” clause ready to hand from an appropriate constitution, the enactment may properly be invalidated as a violation of the right to hold one’s property subject to law.

In the case of life or liberty, unlike property, it is not possible to take from A and give to B. But lawmakers may declare life or liberty forfeit—as opposed to declaring the terms under which it will be judged forfeit due to the commission of a wrong—and the same problem arises: no prospective general legislation, no process, and a legislative invasion of the judicial function (this is true also of the forfeiture of property, even when it is transferred to no other private party but is taken or utterly destroyed by the state for no public use).

In each of the state-level cases cited by scholars for the proposition that substantive due process can be found before the Civil War, the real ground of the decision was this separation-of-powers principle of “due process of law” (or “the law of the land”). More importantly, none invalidated a statute of general application and prospective effect, regulating future behavior or conduct, which is the central characteristic of the modern substantive due process rulings that gave the doctrine its name.16 Whether every one of these cases was

16. See Bayard v. Singleton, 3 N.C. 42 (N.C. Sup. Ct. 1787) (property not to be forfeit on mere affidavit that it was confiscated from enemy aliens during the Revolution, notwithstanding legislation to that effect); Bowman v. Middleton, 1 Bay 252 (S.C. Sup. Ct. 1792) (legislative transfer of title to property void); Butler v. Craig, 2 H. & McH. 214 (Md. Ct. of Appeals 1787) (without opinion, affirmed lower court ruling that statute is unenforceable if it condemns offspring of a white woman to slavery without conviction according to due process that she married a slave); Ham v. McClaus, 1 Bay 93 (S.C. Ct. of Common Pleas 1789) (statute prohibiting slave importation given equitable construction to relieve party unable to inform themselves of new law while at sea); State v. ——, 1 Hayw. 38 (N.C. Superior Ct. 1794) (statute providing that “delinquencies should be sufficient notice to [receivers of public money] that they were to be proceeded against” by attorney general held void by local judge as “condemn[ing] a man unheard”; later reversed by judges of the same court); Zylstra v. Corp. of City of Charleston, 1 Bay 382 (S.C. Ct. of Common Pleas 1794) (inferior Court of Wardens held to lack authority to try and fine tallow chandler, without a jury, for violation of city ordinance); Lindsay v. East Bay St. Commissioners, 2 Bay 38 (S.C. Ct. of Common Pleas 1796) (equally divided court upholds local authority of eminent domain vested in local commissioners who, without use of a jury, assess compensation due the owners of property taken for paving streets); Trustees of the University of North Carolina v. Foy, 5 N.C. 58 (N.C. Sup. Ct. 1805) (property held by trustees of the university not “subject to the arbitrary will of the Legislature” but protected by legal process in “the Judiciary of the country in the usual and common form”); Holden v. James, 11 Mass. 396 (Mass. Sup. Ct. 1814) (assembly resolution held void as contrary to “standing laws” clause for suspending statute of limitations on commencing litigation, as to particular named parties and no others); Townsend v. Townsend, 7 Tenn. 1 (Tenn. Sup. Ct. 1821) (statute suspending execution of duly rendered
correctly decided or not, the reasoning in them was a lineal descendant from that which informed Webster, Coke, and Magna Carta itself. Some scholars have noticed this essential attribute of some of these cases but persisted in the error of calling them substantive due process rulings, or at the very least harbingers of the doctrine to come in later years (see Strong 1986; Riggs 1990; J. W. Ely 1999; Orth 2003).17

The case usually cited as representing the fruition of this putative trend and the rise of substantive due process in full form in the years immediately before the Civil War is *Wynehamer v. People*, decided by the high court of New York in 1856.18 One recent scholar calls it “the first complete, positive statement” of a “new constitutionalism” in which “an active judiciary polic[ed] state legislatures” in the name of “the substantive rights of individual citizens” (Novak judgments against debtors for two years unless creditor will accept tender of notes issued by state-chartered banks, held void under both state “law of the land” clause and federal legal tender and contract clauses of Article I, Section 10); *Vanzant v. Waddel*, 10 Tenn. 260 (Tenn. Sup. Ct. 1829) (legislative act regulating judicial process respecting litigation against banks is no direct invasion of their property rights without notice or right to be heard); *Hoke v. Henderson*, 15 N.C. 1 (N.C. Sup. Ct. 1833) (arbitrary deprivation of one’s property in a public office, without adjudication of any wrong, is contrary to the law of the land); *Jones’s Heirs v. Perry*, 18 Tenn. 59 (Tenn. Sup. Ct. 1836) (legislative liquidation of a specified estate for payment of debts is “in form a law” but “in substance a judicial decree” and therefore void); *In re John and Cherry Streets*, 19 Wend. 659 (N.Y. Sup. Ct. of Judicature 1838) (taking of land by municipal corporation a violation of due process as well as state takings clause if not put to public use); *Ex parte Woods*, 3 Ark. 532 (Ark. Sup. Ct. 1841) (no statute at issue; lower court overturned for reaching judgment against a party without service of process); *Taylor v. Porter*, 4 Hill 140 (N.Y. Sup. Ct. 1843) (statute permitting right of way to build private roads on others’ property, even with compensation, held to be outside eminent domain power and contrary to law of the land); *Brown v. Hummel*, 6 Pa. 86 (Pa. Sup. Ct. 1847) (legislative displacement of trustees of incorporated private orphanage, against terms of the will and charter establishing it, is deprivation of property contrary to law of the land as well as federal contract clause); *Ross v. Irving*, 14 Ill. 170 (Ill. Sup. Ct. 1852) (“law of the land” clause not violated by statute that requires owners of land to compensate good-faith occupants for improvements thereon); *Neuland v. Marsh*, 19 Ill. 376 (Ill. Sup. Ct. 1857) (limiting operation of statute on land titles consistent with principle that legislature may not directly transfer property from one private party to another); *Sears v. Cottrell*, 5 Mich. 251 (Mich. Sup. Ct. 1838) (seizure of personal property in payment of delinquent taxes not contrary to due process, even when A’s property, in possession of B, is taken to pay B’s taxes, so long as private-law process exists for B to satisfy A); *Sadler v. Langham*, 34 Ala. 311 (Ala. Sup. Ct. 1859) (use of eminent domain power to transfer property from one private party to another violates both state takings clause and “due course of law” clause). Each of these cases rested on a “law of the land” or due process clause in a state constitution, or explicated such a clause in obiter dicta.

17. By contrast, see Mendelson (1956), still the best previous treatment of the subject after almost 60 years. But even Mendelson regards the principle of separation of powers as a “respectable constitutional go-between” (126) connecting procedural due process to the emergence of substantive due process, and he too is to that extent a captive of the misleading language in common use.

18. 13 N.Y. 378 (N.Y. Ct. of Appeals 1856).
1996, 186), while another says that Wynehamer was “the most significant invocation of the substantive component of due process by a state court in the antebellum era” (J. W. Ely 1999, 341). These commonplace descriptions badly mischaracterize the decision.

The New York legislature had passed a highly stringent temperance act, forbidding the sale or even the possession of alcoholic beverages under almost all circumstances. It was the mere possession that formed the crux of the issue, for if one owned any liquor, one need not have committed any act after the law’s passage in order to run afoul of the prohibition. For the judges in the majority in Wynehamer, the trouble with the law was that it made it a crime to possess a species of property that had been legal the day before the statute took effect, with no way to divest oneself of it legally. All one could legally do, in their view, was to destroy the property and take a complete loss. This amounted to a legislative decree of the forfeiture of property, not targeting named persons or an identifiable class of persons, but a specific form of property, whoever might own it. If so, it was a violation of due process of law, an act not looking only prospectively to future behavior, but simply converting hitherto legal property into contraband wherever it existed in the state’s jurisdiction.

The dissenting judges viewed the law differently, as providing, through various exceptions, sufficient opportunity to sell in state or export one’s property out of state legally. It may have radically diminished the value of property in liquor by drawing the exceptions narrowly, but it did not destroy the property outright and was not therefore a decree of complete forfeiture. Everything in the case turned on the question of whether the legislative act was to be characterized as a law, properly understood, or as a decree of the forfeiture of property without recourse to any meaningful process: did the act regulate the uses of property or simply destroy it utterly? None of the judges of the New York court considered it a proper question before them whether a policy of temperance was “reasonable” or not, or whether some constitutional “liberty” existed to possess alcoholic beverages in future or to traffic in them. Indeed, the New York temperance act was wholly unmolested by the court as to its prospective effect on the future sale and purchase of alcohol and remained thus far intact. The Wynehamer ruling was confined to those circumstances in which existing property in an owner’s hands was annihilated, as the supreme court of Alabama recognized three years later.19

Edward Corwin remarked long ago that Wynehamer “was decided by the New York court of appeals at the very close of the interval between the first and second argument of Scott v. Sanford. All things considered, there can be

little doubt that Chief Justice Taney took his doctrine” from the New York
decision (Corwin 1914/2014, 98). Yet no scholar of the Dred Scott case,
including Corwin, has ever adduced any evidence for Taney’s having been
influenced by Wynehamer, and as we shall see, the due process holding in
Dred Scott took a considerable step away from the tradition in which we may
still situate the New York ruling of the previous year. Corwin was certain
both that Wynehamer broke new ground and that it provided the essential
precedent for Taney’s argument. The latter was a mere surmise based on a
putative similarity between the cases, and the former was a failure to see how
much Wynehamer trod a well-worn path in the law of due process. Yet to his
credit, Corwin did see how “the New York precedent throws not the least
light” on a crucial characteristic of Dred Scott, because Congress had only
legislated “to prevent slaves from being brought into the territories hence-
forth” (Corwin 1914/2014, 99; emphasis in the original)—that is, it had leg-
islated prospectively to affect behavior, not retrospectively to destroy property
without notice to its owners, as the New York court ruled the state legislature
had done in Wynehamer.

More recently, Mark Graber has written that there is a “substantial body
of state and federal constitutional law” prior to Dred Scott, sufficient to justify
“the cursory treatment Taney gave to substantive due process when defending
the right to bring [slave] property into the territories” (2006, 65). But all the
cases on which Graber relies fit squarely into the traditional understanding
of due process presented here—as a protection against rule by decree and a
bulwark of the rule of law. All of them concern direct legislative invasions or
transfers of property rights, or failures otherwise to meet the standards that
the law be general in application, prospective in effect, and enforced with
full notice and process of law.20 None of them is a decision invalidating a
general, prospective regulation or proscription of conduct.

20. In addition to the state cases cited in n. 16 above, some but not all of which Graber
cites, see Merrill v. Sherburne, 1 N.H. 199 (N.H. Sup. Ct. of Judic. 1818) (legislative grant of
a new trial for a probate case already res judicata is “an exercise of judicial powers” and not a
prospective law); Regents of Univ. of Md. v. Williams, 9 G. & J. 365 (Md. Sup. Ct. 1838)
dissolution of private corporation charter violates both federal contract clause and, inasmuch as property rights were transferred by “legislative judgment or decree” to a new
corporate body, state “law of the land” clause as well; In re Dorsey, 7 Port. 293 (Ala. Sup.
Ct. 1838) (retrospective effect of oath for admission to the bar, that the applicant has not
previously been involved in duels, violates “due course of law” clause of state constitution);
and Reed v. Wright, 2 Greene 15 (Iowa Sup. Ct. 1849) (territorial legislature’s attempt to
dictate settlement of land claims by procedures outside normal judicial channels violates “law
of the land” clause of Northwest Ordinance). All but one of Graber’s federal court examples
are cases involving direct legislative transfers of real property (Graber 2006, 64n272). His
remaining example, Bloomer v. McQuesten, 14 How. (55 U.S.) 539 (1853), following the
canon of constitutional avoidance, held that an act of Congress could not be read as retro-
The authoritative historian of the *Dred Scott* case, Don Fehrenbacher, found “a notable anticipation of Taney’s *Dred Scott* opinion” in an argument made by John C. Calhoun in the Senate 20 years earlier (Fehrenbacher 1978, 122; see also Fehrenbacher 2001, 80). But Fehrenbacher misunderstood Calhoun, or Taney, or both. Arguing against any use of Congress’s power over the District of Columbia to abolish slavery there, Calhoun remarked, “The property of the citizen cannot be taken from him but by process of law—by a trial by jury, and were not the slaves of this District property? How were they to be taken but by due process of law?”

Calhoun’s argument was a good one—but it had nothing to do with modern substantive due process and everything to do with the traditional barrier to government by arbitrary decree. If an act of Congress were to be passed taking slave property from owners who resided in the District, its execution would have to be attended by some form of legal process, in which individualized determinations were made regarding just what offense had been committed by the owners that justified the forfeiture. If due process required trial by jury before the loss or confiscation of any property—a plausible conclusion though not the only one for all circumstances—then each and every slaveholder would be entitled to such a trial before the emancipation of his slaves.

And what of the offense to be tried, for conviction of which a master was to lose his slaves? Was the offense merely the ownership itself? Did the owner not have to do something, commit some act governed by the law? If not, then a good case could be made that an abolition law—particularly if it mandated uncompensated emancipation—was an arbitrary decree, a destruction of hitherto lawful property of the kind some of the New York judges saw years later in the *Wynehamer* case. But even this would not be the same as the situation in *Dred Scott*.

Bernard Schwartz sees another alleged precursor to Taney’s due process holding, claiming to find it, ironically, in a circuit ruling a few years before *Dred Scott* by Justice Benjamin Curtis, who dissented in the *Scott* case and there criticized Taney’s due process reasoning. Schwartz cites *Greene v. Briggs*, a case from Rhode Island, in which, he says, Curtis “had stricken down a state liquor law on substantive due process grounds” (Schwartz 1993, 117–18). But Schwartz is gravely mistaken in this reading of the *Greene* case. A diversity case brought by a New Yorker against Rhode Island authorities, *Greene* was

pectively decreeing the loss of property rights a licensee held by purchase from a patent holder, or else the act would run afoul of the due process clause.

an action of replevin seeking the return of the plaintiff’s property—“a quantity of wine and spirits” seized by state authorities—and the controversy was settled not under the federal Fifth Amendment but under the clause of the Rhode Island Constitution that guaranteed “trial by an impartial jury” in all criminal cases and that no one could be “deprived of life, liberty, or property, unless by the judgment of his peers, or the law of the land.”23

The precise controversy concerned a state statute that provided that any three voters in a town might swear out a complaint against any individual they had “reason to believe” was in possession of alcoholic liquors “intended for sale” and who was “not authorized” to sell them. On the basis of such a complaint, the local police could seize any spirits found in the possession of such a person. Proceedings before a justice of the peace would settle any claims in favor of persons authorized to engage in the liquor trade and return their seized property, and, in cases of unauthorized persons, impose a fine of $20 or jail time of 30 days and rule the liquor destroyed. But if a party claiming seized property desired a jury trial on “appeal to the court of common pleas,” he must put up a surety of $200—and if he were found guilty, the penalty (where the quantity in question exceeded 5 gallons) was to be a fine of $100 or jail time of 60 days.24

Justice Curtis ruled, quite reasonably, that it violated the Rhode Island Constitution’s explicit right to a trial by jury “in all criminal prosecutions” for the legislature to provide for adjudication of these liquor-seizure cases before a justice of the peace, with no jury trial available unless the defendant paid a bond—and also bore a risk of heavier punishment than if he settled for the bench trial before the local justice. Curtis wrote that “if one onerous condition may be imposed, so may any number, until the right [to a jury trial] becomes so difficult of attainment, that it ceases to be a common right, and can be enjoyed only by a few.” The forfeiture of Greene’s property was invalid because he “was deprived of his property by a criminal prosecution, in which he neither had, nor could have, a trial by jury, without submitting to conditions, which the legislature had no constitutional power to impose.”25

Professor Schwartz thinks he sees substantive due process at work in this case, but it turns entirely on the state legislature’s violation of a jury trial requirement under its own constitution. The only comment Curtis makes on the state constitution’s “law of the land” language is closely tied to the jury trial requirement that is part of the same section. He writes that requiring the

25. Ibid., at 1141, 1142.
accused to provide a surety as the price of a jury trial would punish poor men “for their poverty, or want of friends.”

And it is equally clear, that such a law would not be “the law of the land,” within the settled meaning of that important clause in the constitution. Certainly this does not mean any act which the legislature may choose to pass. If it did, the legislative will could inflict a forfeiture of life, liberty, or property, without a trial. The exposition of these words, as they stand in Magna Charta, as well as in the American constitutions, has been, that they require “due process of law,” and in this is necessarily implied and included the right to answer to and contest the charge, and the consequent right to be discharged from it, unless it is proved.26

Here Curtis does indeed impose a “substantive” requirement on the legislature: that it must provide persons with procedures that enable them to “answer to and contest” the state’s attempts to deprive them of what is rightfully theirs. The substance to which one is entitled is a process. This is not even remotely akin to the substantive due process that decided such cases as Lochner v. New York27 and Roe v. Wade,28 and readers who rely on Professor Schwartz to argue that Justice Curtis had embraced the doctrine in Greene that he condemned five years later in Dred Scott would be badly misled.

Another argument advanced to make Taney’s claims in Dred Scott appear “normal” or unexceptionable for his time—and having the double advantage of being a tu quoque that scores against the critics of Dred Scott—is that the Republicans and other Free-Soilers believed in substantive due process no less than did their political adversaries, the only difference being that they thought that the due process clause forbade slavery rather than protecting it. Graber (2006, 62), for instance, argues that Taney’s critics “seem unaware that Abraham Lincoln and his antislavery supporters promulgated the same and related constitutional ‘abominations.’ . . . The Republican Party platforms of 1856 and 1860 declared that federal laws establishing slavery in the territories deprived enslaved blacks of their liberty without due process of law.” But what did those platforms really say? Here is the 1856 Republican platform:

Resolved, That with our republican fathers we hold it to be a self-evident truth that all men are endowed with the inalienable rights to life,
liberty, and the pursuit of happiness, and that the primary object and ulterior design of our Federal government were, to secure these rights to all persons within its exclusive jurisdiction; that as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should 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 any territory of the United States, by positive legislation, prohibiting its existence or extension therein. That we deny the authority of Congress, of a territorial legislature, of any individual or association of individuals, to give legal existence to slavery in any territory of the United States, while the present constitution shall be maintained.

Resolved, That the constitution confers upon Congress sovereign power over the territories of the United States for their government, and that in the exercise of this power it is both the right and the imperative duty of Congress to prohibit in the territories those twin relics of barbarism—polygamy and slavery. (Republican Party Platform 1856)

And in 1860 the party said this:

SEVENTH. That the new dogma that the constitution of its own force carries slavery into any or all of the territories of the United States, is a dangerous political heresy, at variance with the explicit provisions of that instrument itself, with cotemporaneous exposition, and with legislative and judicial precedent, is revolutionary in its tendency and subversive of the peace and harmony of the country.

EIGHTH. That the normal condition of all the territory of the United States is that of freedom; that as our republican fathers, when they had abolished slavery in all our national territory, ordained that no “person should be deprived of life, liberty or property, without due process of law,” it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the constitution against all attempts to violate it; and we deny the authority of congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any territory of the United States. (Republican Party Platform 1860)

Two things are worth noticing here. First, in the 1856 platform, the Republicans adopted the view that subsequent to the prohibition of slavery in the Northwest Ordinance (which, they assert, was then “all our national ter-
ritory”), any reintroduction of slavery in federal territories by an official act would constitute a deprivation of liberty without due process of law. This would be true if any free person residing in the territories were enslaved as a result of such an enactment; it would have the character of a decree depriving one of liberty, rather than of a law prospectively rendering some act punishable. If we also adopt the view the party takes of the framers’ purposes—to live up as much as possible to the promise of the Declaration of Independence, securing its unalienable rights “to all persons within [the] exclusive jurisdiction” of the federal government—then we might say that the presumption of the Constitution is that men are free, and that only a positive enactment of a law protecting slave property could negate that presumption. (The conclusion just stated, though not the presumption that drove it, was practically the view taken by Stephen Douglas in the “Freeport Doctrine” into which Lincoln forced him in their 1858 debates; see Kelly et al. 1991, 277.) But in the Republicans’ logic, this would mean that every slave setting foot in federal territory would be a slave there not by virtue of any preexisting condition carried over from the laws of a slave state, but only by virtue of some federal territorial law transforming him from a naturally free man into a positively unfree one. Under that logic, liberty would indeed be taken without due process of law. Only on the supposition that slaves were property under state law and had no natural condition as men with rights that others were bound to respect would it be proper to say that they lost nothing under a federal territorial law securing their enslavement upon arrival in the territories.

The second thing worth noticing is that neither of these platforms contemplates any judicial enforcement of the principle of liberty to which the party devotes itself—and in the second platform, in 1860, the party implicitly eschews such judicial enforcement. It is “our duty,” say the 1856 Republicans—the duty of all voters and candidates competing for public office as Republicans—to “maintain this provision of the constitution” protecting liberty. “We deny the authority of Congress” or anyone else to establish slavery in the territories. “We” do not demand of a court that it rule according to such a proposition. And the 1860 Republicans (after Dred Scott) carefully insert a crucial new qualifier, that it is “our duty, by legislation . . . to maintain this provision of the constitution.” The new phrase “by legislation” is as clear an indication as could be demanded that the party is not calling for judicial decisions that vindicate this understanding of the liberty protected by the due process clause. Far from espousing a doctrine indistinguishable from the “substantive due process” of the Dred Scott decision, only in a pro-freedom form rather than a proslavery form, the Republicans of 1860 distinctly reject the doctrine outright. In 1856 they had declared it “the right and the imperative duty of Congress” to protect the natural liberty of every man wherever federal power
governed, and in 1860 they excoriate “the new dogma that the constitution of its own force carries slavery into any or all of the territories.” That new dogma was the invention of the *Dred Scott* majority. Not surprisingly after that “astonisher in legal history” (Lincoln 1953, 2:495), the Republicans are not interested in referring the question of territorial slavery or freedom to the judiciary. To their credit, they evidently weren’t interested in a judicial resolution before the *Scott* case either. The appeal to judicial authority was, by contrast, characteristic of the proslavery forces in American politics since at least the Compromise of 1850, if not before (Kelly et al. 1991, 258, 261).

As for Lincoln himself, there is no sign in his *Collected Works* that he ever advanced a view that could be called “substantive due process” in defense of the freedom of the federal territories. In a fragmentary note apparently written in preparation for one of his 1858 debates with Douglas, Lincoln wrote that “the Republicans hold that if there be a law of Congress or territorial legislature telling the slaveholder in advance that he shall not bring his slave into the Territory upon pain of forfeiture, and he still will bring him, he will be deprived of his property in such slave by ‘due process of law’” (Lincoln 1953, 3:101). Here Lincoln understood the crucial distinction between the situation seen by the majority in *Wynehamer*, on the one hand, and that seen by Taney in *Dred Scott*, on the other: in the *Scott* case, an action by the property owner was prospectively prohibited. But would a slave being taken from a slave state, into a federal territory where slavery was protected, be deprived of his liberty without due process? If Lincoln ever expressed such a view, we have no record of it.

Now let us at last turn once again to Taney, who asserted in *Dred Scott* that “an 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.” What is the best case that can be made for this woefully underdeveloped argument? Taney may have meant to say that the act violated due process by simply eliminating an owner’s property right in his slave. In this it would resemble the arguable forfeiture condemned by the New York court in *Wynehamer* in being a bolt from the blue. If so, this was still some distance from affirming the positive right to engage in a certain kind of behavior notwithstanding a prospective prohibition or regulation of that behavior—which is the pattern of judicial decision making characteristic of substantive due process as it later came to develop. Notice, after all, that everything in Taney’s argument hangs on the minor premise that the slaveholder bringing

his slave into the territory “had committed no offence against the laws.” If this were true, Taney’s argument would have some merit. But the premise is false, and the assertion of its truth is a classic instance of begging the question. Under the Missouri Compromise, one who brought slaves into the free federal territory and continued to hold them as slaves did indeed commit an offense, and the logical consequence was the loss of any further right so to hold them—that is, their freedom. The law was not a decree of forfeiture directed to slaveholders who had done nothing. It gave ample notice to the slaveholder that if he wished to continue in possession of his slaves, he dare not bring them and hold them as slaves in the territory. As Justice Curtis pointed out in dissent, legislation of this sort had been passed by the Congress several times in the past without anyone thinking it more than an ordinary restriction of the movement of a certain kind of property, and the federal ban on the importation of slaves into the country answered the same description. Taney’s argument could not withstand scrutiny. But on its face it seemed to hark back to the Webster–Coke–Magna Carta principle against rule by decree and had only a weak connection to substantive due process as it came to be in later years.

A provisional defense of Taney’s reasoning here was offered by Corwin, who found one possible way in which the charge of question begging might be answered: “If the due process clause prohibits legislation bearing with undue severity upon existing property rights, then all new legislation affecting such rights must be compared in this reference with the law which already defined those rights. In other words, the term ‘laws’ comes to mean the law as it stood before the new legislation was enacted; and ‘offenses against the laws’ means offenses against the law thus defined” (Corwin 1914/2014, 97; emphasis in the original). Corwin did not, in the end, find this mode of reasoning persuasive, not least because he understood (as noted above) that the claim of slave owners to “existing property rights” could only prevail in the case of slave property already in the territories at the time of Congress’s legislation—not in the case of slave property whose owners attempted to bring their property in afterward. He correctly concluded that “so far as available Constitutional Law stood in 1857,” even after the Wynehamer case, such legislation

30. Graber begs this same question when he writes, “Moving to the territories was legal, and persons could be divested of existing property rights only if they had committed a crime” (2006, 65). The question, however, was whether moving to certain territories with human beings held in bondage was legal conduct, and this was answered in the negative by the Missouri Compromise. Nor was it necessary for such conduct to be defined by the act as a crime to be prosecuted. A slave’s successful suit for his freedom, as plaintiff in a civil case, did not depend on finding his putative master guilty of a criminal act.

31. Scott v. Sanford, at 626–27 (Curtis, J., dissenting). Williams writes that “Justice Curtis’s dissenting opinion did not take issue with Taney’s interpretation of the Due Process Clause” (2010, 467), but this is plainly mistaken.
was “entirely valid under the Fifth Amendment” (Corwin 1914/2014, 99). What Corwin did not quite see, on the other hand, was that inquiries into the “undue severity” of conduct-regulating legislation had not yet, in any context in 1857, transformed themselves into questions fit for judges to entertain under the due process clause.

If this is the most that can be said for Taney’s sally into due process reasoning, what accounts for its brevity and feebleness? Fehrenbacher has perhaps the best answer to this question. After his lengthy attempt to interpret away the traditional understanding of Congress’s Article IV power over the federal territories, Taney may have felt the need to pin his decision to something more decisive: “Strict construction has always been a relatively weak foundation for the assertion of judicial power. . . . Something more potent was needed to obliterate a legislative power that had been routinely exercised for two-thirds of a century” (Fehrenbacher 1978, 377). We might go still farther and note that of all the arguments employed by Taney against the constitutionality of the Missouri Compromise, only the due process clause represented a principle customarily understood to be vindicable by a court of law. Thus, a kind of absolute practical necessity accounted for the appearance of the argument at all. The transparent weakness of the argument accounted for its brevity. The desperate need to connect the ruling to the authentic due process tradition of invalidating arbitrary decrees, rather than general, prospective laws, accounted for the false minor premise that Dred Scott’s owner had “committed no offence against the laws.”

_Dred Scott_ represented, therefore, a watershed after all, an important break with that authentic due process tradition—but also an effort to maintain the appearance of continuity with it. And in some of the post–Civil War cases where we find the justices insisting that “substance” was as important as “form” in considering due process claims, the tradition continued almost unaffected by the deviation. Justice Stanley Matthews, in a ruling quoted earlier, explicitly followed Daniel Webster’s view of due process and remarked that it was not the “particular forms of procedure” that mattered the most in a case concerning due process, but “the very substance of individual rights to life, liberty, and property”—by which Matthews meant that the state must satisfy the general principles of notice, hearing before condemning, and giving an opportunity to defend oneself.32 Similar reasoning about the importance of securing the substance of the rights guaranteed by due process, whatever the particular forms of process that might be employed, appeared in a

32. _Hurtado_, at 532. Matthews also relied in part, for his conclusion that the procedures that will satisfy due process may be flexible in character, on the _Murray’s Lessee_ case of 1856.
number of other cases even well into the early twentieth century. But the reference was always to a substantive right to fair procedures.

On a parallel track, however, sometimes using similar language about the importance of substance over form, another and altogether different pattern of cases was emerging, which brought into constitutional law the new mode of reasoning that we now know as “substantive due process.” A harbinger of what was to come could be seen in two cases in 1870 and 1871 concerning the constitutionality of a federal law making paper money legal tender in the payment of all private debts, even if they were contracted before the law’s passage. Chief Justice Salmon P. Chase, first in the majority and then in the minority in these two cases, argued that it was contrary to due process—a taking from A to give to B—to force a creditor to accept paper money from his debtor, since it had a depreciated value compared to gold or silver coin. But as Justice William Strong pointed out for the court in the second of these rulings, due process “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.” Chase’s opinions in these cases seem to have been the first in which due process was held to forbid a legislative act that neither worked an entire forfeiture of one’s life, liberty, or property nor subjected persons to inadequate and unfair procedures in the administration of law. But we are still one or two steps away from the identification of “due process of law” with a positive right to engage in conduct generally and prospectively prohibited by law, such that a prohibition on that conduct per se is defeated.

The decisive movement toward such an identification came in the *Slaughter-House Cases* of 1873. This case concerned the validity of a Louisiana law that solved a public health problem for the city of New Orleans by confining the trade of slaughtering animals to a district downstream from the city. The law gave one company exclusive control of the trade in three parishes (counties) of the state, with all butchers compelled to conduct their slaughtering business at the central slaughterhouse (though the company could not


34. *Legal Tender Cases*, 12 Wall. (79 U.S.) 457 (1871), at 551 (Strong, J., for the court). For Chief Justice Chase’s contrary arguments, see *Hepburn v. Griswold*, 8 Wall. (75 U.S.) 603 (1870), at 624; *Legal Tender Cases*, at 580.
refuse any comers). Resentful butchers brought a suit claiming that the law violated the Fourteenth Amendment, with their emphasis on the clause protecting the “privileges or immunities of citizens.” In a 5–4 ruling, the Supreme Court upheld the statute, with the various opinions in the case mostly focused on that clause of the amendment. Justice Field, for instance, decried the Louisiana law as establishing a monopoly, quoted the Declaration of Independence’s ringing phrase about the rights to life, liberty, and the pursuit of happiness, and declared that a citizen’s “privileges or immunities” included the “pursuit of the ordinary avocations of life”—including that of butchering where one will, it seemed.35

Justices Bradley and Swayne, while relying, as Field did, on the “privileges or immunities” clause, also employed the due process clause in their dissents. Bradley argued that it violated due process to prohibit people “from following a lawful employment previously adopted,” for “their right of choice is a portion of their liberty; their occupation is their property.” And Swayne gave the most revolutionary reading of “due process of law” theretofore seen in our history: “Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection. The right to make it available is next in importance to the rights of life and liberty.”36 Just a line or two later he added that due process is “the application of the law as it exists in the fair and regular course of administrative procedure.” Swayne was very confused. The fairness of “administrative procedure” is one way to think about whether a law sets forth “restraints . . . justly imposed by law,” if what we mean is to inquire whether the restraints (the prohibition or regulation of conduct), whatever they are, are imposed by just processes. But if what we mean is to examine whether the policy of restraint itself is one that by any means can be “justly imposed”—which is what Swayne plainly meant—then we are no longer talking about the “course of administrative procedure,” and therefore we are no longer talking about, or interpreting, “due process of law” as the legal tradition had understood it for centuries.

35. Slaughter-House Cases, 16 Wall. (83 U.S.) 36 (1873), at 105, 109 (Field, J., dissenting). For a thorough treatment of the issues in the case, see Labbé and Lurie (2003). See also Hamburger (2011), which, in powerfully rebutting the “incorporationist” reading of the Fourteenth Amendment respecting the Bill of Rights, also supplies evidence that Justice Field misread the “privileges or immunities” clause.
36. Slaughter-House Cases, at 127 (Swayne, J., dissenting).
These dissenting opinions of Bradley and Swayne in *Slaughter-House*—not Taney’s in the *Dred Scott* case—are the true beginnings of substantive due process as we have come to know it for more than a century now. And while the argument for judicial policy judgments based on the “privileges or immunities” clause seemed decisively rebuffed in *Slaughter-House*, the closeness of the decision gave an added spur to arguments for such policy judgments based on the due process clause. Within five years, Justice Miller could complain that “the docket of this court is crowded with cases” in which counsel offered a “strange misconception of the scope of this provision,” supposing it to be “a means of bringing to the test . . . the merits of the legislation” by which various forms of conduct were regulated.37

Miller and his like-minded colleagues were now fighting a rearguard action for the traditional reading of “due process of law.” Justice Field, coming to the battle just behind his fellow *Slaughter-House* dissenters, became the champion of the new reading.38 And let us be clear as can be about what this new reading does to the language of the due process clause. By its terms, the clause has nothing to say about the validity of any legislative acts of general application, prospectively prohibiting or regulating any species of conduct, so long as there is no outright forfeiture or taking of life, physical liberty, or tangible property, and so long as any restraints on conduct imposed by the law are administered with due notice of the law’s expectations and a procedurally fair opportunity to vindicate oneself. If, on the other hand, any liberty of conduct is held to be unreachable, unrestrained, by any manner of legislation—whether it be taking slaves into federal territory, or butchering animals, or contracting for more than 60 hours of work baking bread in a week,39 or procuring an abortion40—that we have left the plain terms of the clause behind and have entered a wholly new realm of judicial power. For after all, the clause clearly

37. *Davidson v. New Orleans*, 96 U.S. 97 (1878), at 104 (Miller, J., for the court). In the same case, Miller asked, “Can a State make any thing due process of law which, by its own legislation, it chooses to declare such?” His answer in the negative conformed precisely to the thesis of this article, by adducing this example: “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”; ibid., at 102. Miller, like Justice Matthews six years later in *Hurtado* (see n. 32 above), relied on the Murray’s Lessee case for a flexible understanding of the “process” that is “due” in order to satisfy the Constitution. Williams (2010, 488) writes of the “seemingly contradictory nature” of Miller’s two characterizations of due process, saying that it “has long baffled constitutional scholars.” But the contradiction is imaginary and the bafflement unnecessary.

38. See, e.g., *Munn v. Illinois*, 94 U.S. 113 (1877), 141–43 (Field, J., dissenting). For the best account of Field’s dubious contributions to our constitutional law, see Kens (1997).


states that if a genuine law (not a decree) has been passed and a process that is fair is employed for its administration, then one may indeed be deprived of one’s life, liberty, or property. By the end of the nineteenth century, a new dispensation held sway, in which the justices asked, in effect, “What is the liberty of action deserving protection from the legislative power?” It was as though the words “due process of law” had vanished from the constitutional text, the clause now being read to say that no one shall be deprived of life, liberty, or property except by a reasonable act of legislation—with the justices being the arbiters of what is “reasonable.”

In part, the new inquiry into the “rational basis” of legislative policy choices rests on another conceptual error as well, the notion that the arbitrary and the reasonable are opposites. Properly understood, they are nothing of the kind: an act of sovereign power can be both arbitrary and reasonable, or both nonarbitrary and unreasonable. The primary meaning of “arbitrary” (according to the *Oxford English Dictionary*) is “dependent upon will or pleasure . . . discretionary, not fixed . . . capricious, uncertain, varying.” To be governed arbitrarily is not incompatible with being ruled by reason, even by wisdom, in the making of particularistic judgments and decrees. In practice, it will almost certainly be an anxious state of affairs, as everyone must guess at the will of the ruler and the next form its expression will take, when it is evident that Solomon does not govern us. Hence, arbitrary rule has long been considered the enemy of freedom, which rests heavily on the lawfulness of government and the freedom of choice and of movement that is fostered by a regime that governs by known, standing rules of conduct.

But it is really not that difficult for free governments to avoid arbitrariness most of the time, provided that the minimal standards of lawfulness are met in the making and execution of policy. It is quite another matter, and far more

---

41. Even as careful a writer as Christopher Wolfe (1986) can casually slip into equating the arbitrary with the unreasonable, as when he offers a “typical formulation” (145) of substantive due process, a notion he cogently criticizes, as “forbid[ding] government to deprive a person of life, liberty, or property ‘arbitrarily,’ that is, without sufficient grounds to do so.” See also Sandefur (2012), whose article on substantive due process begins promisingly by highlighting the importance of nonarbitrariness as the touchstone of lawfulness but then becomes ensnared in a defense of “value-laden determinations” by judges about whether legislative policies are “rationally related to a legitimate government interest” (323).

42. For classic statements of the relation of law to freedom and the threat to that relation posed by arbitrary government, see Hobbes (1651/1962, 160–61, 163, 218, 233), Locke (1689/1965, secs. 136, 137, 171, 172, 214), and Blackstone (1765/1979, 1:44–46).

43. Of course, allowances must be made for considerable discretion in certain respects, as when prosecutors choose to pursue some crimes and not others. But this is discretion within the ambit of the law, not action apart from it. So too is that wide field of discretion enjoyed by American presidents in diplomatic and military affairs, which is both contemplated and constrained within the boundaries of the Constitution.
difficult, to satisfy everyone’s idea of “reasonable” legislation. It does not entail a turn to relativism to notice that there will naturally be more disagreement about what the laws should be than about whether a given policy has been promulgated and administered in the true form and fashion of law.

But it is exactly by wielding the radically new reading of due process that the Supreme Court has enlarged its power at the expense of the federal and state legislative authority over the past century. What had long been considered properly judicial business was a determination of the government’s conformity with the rule of law, with “judgment before execution.” What is new—and was no part of due process jurisprudence, in any case, treatise, or constitution-framing discussion prior to *Dred Scott*, nor significantly part of due process jurisprudence even for a few decades thereafter—is the judicial assessment of the rational grounds of public policy and of the permissible uses of the police power when employed in general, prospective legislation.

As we have seen, “due process of law,” properly understood, does mark out a principled approach to preventing the rule of decrees from usurping the place of the rule of law, and it thereby protects something that may fairly be called a “substantive” right. What it was not originally understood to do is to authorize courts of law to second-guess, undo, and remake the policy judgments of legislatures regarding the general, prospective regulation of conduct, under some general judicial authority to mete out distributive justice in the name of “liberty” or “property.” But “substantive due process” wrongly implies a continuity between the former and the latter. And Taney’s opinion in *Dred Scott*, by appearing to invoke “due process” of the classical kind while actually invoking the altogether new distortion of the old principle, powerfully contributes to this mirage of continuity. Is it too late, after three-quarters of a century, to replace “procedural due process” versus “substantive due process” with a more descriptively accurate distinction? Perhaps it is. It would be hard to come up with phrases of comparable brevity that are appropriately

44. It might be objected by some readers that I have neglected the natural law or natural rights principles at the foundation of the American constitutional order. But it has been my purpose here only to show that the due process clause does a very limited kind of work in assuring our legal order’s conformity with principles of natural justice. Many advocates of an expansive judicial power to “do justice” under the rubric of constitutional review turn their gaze elsewhere. See, e.g., Barnett (2004), arguing that the Ninth Amendment and the “privileges or immunities” clause of the Fourteenth Amendment are the basis on which the judiciary may impose a general-purpose “presumption of liberty” on both federal and state governments. Barnett, however, gives scant attention to the due process clause. Bernstein (2011) devotes only two pages (9–11) to a discussion of pre-Civil War precedents on the meaning of the due process clause, saying nothing about the view of natural rights from the founding. Finally, most discussion of alleged “natural law” decisions of the early Supreme Court has turned on cases arising under other provisions of the Constitution, such as the ex post facto and contract clauses of Article I, Section 10. See Franck (1996, 107–49).
descriptive of the traditional and modern uses of the due process clauses. Something like “rule of law due process” versus “policy judgment due process” would be about as close to accurate as we could manage in relatively few words. There is admittedly little hope for such a reform of the legal vocabulary at this late date, but at least we can be alert to the presence of something historically and legally misleading when we see it, and can pierce its disguise.

REFERENCES


