SUBSTANTIVE DUE PROCESS FOR JUSTICE THOMAS

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INTRODUCTION

It is no coincidence that Justice Clarence Thomas is both the most ardent originalist on the United States Supreme Court and the Court's most vociferous critic of the doctrine of "substantive due process." Few, if any, propositions about the Federal Constitution have been derided as thoroughly and consistently by originalist scholars[1] and judges[2] as the proposition that the "Due Process of Law" Clauses of the Fifth and Fourteenth Amendments not only guarantee access to certain *procedures* prior to any deprivations of life, liberty, or property, but also impose restrictions on the *content* or *substance*

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[1] S*ee, e.g.*, 1 LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY 374–79 (1932); Raoul Berger, *"Law of the Land" Reconsidered*, 74 NW. U. L. REV. 1, 29 (1979); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 370–73 (1911); Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 85; Matthew J. Franck, *What Happened to the Due Process Clause in the* Dred Scott *Case? The Continuing Confusion over "Substance" Versus "Process"*, 4 AM. POL. THOUGHT 120, 121–22 (2015); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 493–94 (1997); Andrew T. Hyman, *The Little Word "Due"*, 38 AKRON L. REV. 1, 1–2 (2005); Keith Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265, 265–66 (1975); Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557 (2004); Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 431–32 (1926); Stephen F. Williams, *"Liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers' Intentions*, 53 U. COLO. L. REV. 117, 117–18 (1981).

Substantive due process *has* been defended on originalist grounds. *See, e.g.*, James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 315–16 (1999); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 588–90 (2009); Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 941–43.

[2] *See, e.g.*, Kerry v. Din, 135 S. Ct. 2128, 2133 (2015) (Scalia, J.) (describing substantive due process as a "textually unsupportable doctrine"); Griswold v. Connecticut, 381 U.S. 479, 513 (1965) (Black, J., dissenting) (denying that judges "are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose . . . "); Gosnell v. City of Troy, 59 F.3d 654, 657 (7th Cir. 1995) (Easterbrook, J.) (describing substantive due process as an "oxymoron" and procedural due process as a "redundancy").

of legislation. Substantive due process is associated with what some originalists consider to be among the Court's most egregious decisions—*Lochner v. New York*,[3] *Griswold v. Connecticut*,[4] *Lawrence v. Texas*,[5] *Obergefell v. Hodges*,[6] and *Roe v. Wade*.[7] For his part, Justice Thomas condemns substantive due process because he believes that "neither [the Due Process of Law Clause's] text nor its history suggests that it protects the many substantive rights th[e] Court's cases now claim it does."[8]

In what may be the most thorough examination of section one of the Fourteenth Amendment ever to appear in the U.S. Reports,[9] Justice Thomas's *McDonald v. City of Chicago*[10] concurrence offered the Fourteenth Amendment's long-neglected Privileges or Immunities Clause[11] as an alternative means of enforcing individual rights against the states. Justice Thomas presented a wealth of evidence that the original meaning of the Privileges or Immunities Clause protects at least constitutionally enumerated rights.[12] He then added the following in response to concerns that the clause could be

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3 198 U.S. 45 (1905).

4 381 U.S. 479 (1965). Although Justice William Douglas's opinion for the Court in *Griswold* expressly declined to rely upon due process of law, *Griswold* has long since been treated as a substantive due process decision. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2597–99 (2015) (citing *Griswold*, 381 U.S. at 484–86) (explaining the Due Process of Law Clause protects "intimate choices defining personal identity and beliefs"); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (describing the right to "marital privacy" protected in *Griswold* as an instance of "the 'liberty' specially protected by the Due Process Clause").

5 539 U.S. 558 (2003).

6 135 S. Ct. 2584 (2015).

7 410 U.S. 113 (1973).

8 McDonald v. City of Chicago, 561 U.S. 742, 812 (2010) (Thomas, J., concurring in part and concurring in judgment).

9 A case might be made for Justice Hugo Black's dissent in *Adamson v. California*, 332 U.S. 46 (1947). In that dissent, Black set forth the results of his "study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage . . . ." *Id.* at 71 (Black, J., dissenting).

10 561 U.S. 742 (2010).

11 *See* United States v. Cruikshank, 92 U.S. 542, 551–53 (1876) (holding that the Privileges or Immunities Clause guarantees the rights to travel on the high seas and to access subtreasuries but not the right to assemble for lawful purposes or the right to keep and bear arms); Slaughter-House Cases, 83 U.S. 36, 76 (1873). The *Slaughter-House Cases* and *Cruikshank* had the effect of rendering the Privileges or Immunities Clause a "practical nullity." EDWARD S. CORWIN, LEGISLATIVE REFERENCE SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 965 (Edward S. Corwin ed., 1953).

12 As Professor Christopher Green observes, Justice Thomas's favorable citation to Professor Kurt Lash's scholarship in *McDonald* "certainly suggests that he is inclined in th[e] direction" of an enumerated-rights-only view. Christopher R. Green, *Substantive Due Process After* McDonald v. Chicago, 80 MISS. L.J. SUPRA 49, 70–71 (2010). Lash presents the evidence for his view in KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 277–304 (2014). Professor Randy Barnett and I criticize this view in Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 Notre Dame L. Rev. 499 (2019).

invoked to enforce unenumerated rights that have no grounding in original meaning and thus prove "hazardous":

> When the inquiry focuses on what the ratifying era understood the Privileges or Immunities Clause to mean, interpreting it should be no more "hazardous" than interpreting these other constitutional provisions by using the same approach. To be sure, interpreting the Privileges or Immunities Clause may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer. I believe those questions are more worthy of this Court's attention—and far more likely to yield discernible answers—than the substantive due process questions the Court has for years created on its own, with neither textual nor historical support.[13]

It is instructive to compare Justice Thomas's exhaustive analysis of section one to Justice Antonin Scalia's short concurrence in *McDonald*.[14] Evidently troubled by the prospect of opening a Pandora's box[15] of what he regarded as meritless claims that the substantive-due-process doctrine had—in part because of his efforts[16]—prevented the courts from vindicating in recent years, Justice Scalia did not pursue the original meaning of the Privileges or Immunities Clause *at all*. Instead, he merely noted his "misgivings about substantive due process as an original matter" and stated that he had "acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.'"[17] Evidently, Scalia was concerned that any alternative to substantive due process *would not* be "long established" or "narrowly limited."[18]

Justice Scalia's concurrence in *McDonald* can be usefully viewed through the lens of a theory that is familiar in welfare economics: the general theory of the second best.[19] Roughly, the theory holds that when *all* the

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13 *McDonald*, 561 U.S. at 855 (Thomas, J., concurring in part and concurring in judgment).

14 *Compare id.* at 805–58, *with id.* at 791–805 (Scalia, J., concurring).

15 *See* Josh Blackman & Ilya Shapiro, *Keeping Pandora's Box Sealed: Privileges or Immunities*, The Constitution in 2020, *and Properly Extending the Right to Keep and Bear Arms to the States*, 8 GEO. J.L. & PUB. POL'Y 1, 44–46 (2010).

16 *See* Reno v. Flores, 507 U.S. 292, 294 (1993) ("'Substantive due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)) (alteration in original)); Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (stating that in identifying rights under the Due Process of Law Clause "[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified"). For an overview of Scalia's efforts to constrain substantive due process, see Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 154–58 (2015).

17 *McDonald*, 561 U.S. at 791 (Scalia, J., concurring) (quoting Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring)).

18 *Id.*

19 *See generally* R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956). As Professor David Carlson has put it, the proposition that "[o]ne market imperfection may in fact be a market perfection in light of some other countervailing imperfection" is "as

conditions that would make a state of affairs optimal cannot be satisfied, one cannot assume that the second-best state of affairs can be reached by satisfying as many of the remaining conditions as possible.[20] Justice Scalia may have accepted a doctrine he deemed incompatible with original meaning in the belief that shifting the enforcement of individual rights to the Privileges or Immunities Clause might—in a world rife with what he regarded as meritless constitutional claims—produce outcomes that are even worse by originalism's own lights than the existing substantive-due-process regime.

But no originalist of whom I am aware defended Justice Scalia in such terms. Indeed, some originalists criticized Justice Scalia for what they perceived to be his consequentialism[21] and praised Justice Thomas's absolutism.[22]

The originalist celebration of Justice Thomas's *McDonald* concurrence and corresponding criticism of Justice Scalia's concurrence creates a problem for any originalist effort to enforce the substantive rights that the Fourteenth Amendment was designed to secure. Namely, if (1) the Privileges or Immunities Clause is the lone legitimate means of securing substantive rights against the states; (2) the Court is unwilling to revive the Privileges or Immunities Clause; and (3) avowed originalists should not accept a doctrine that violates original meaning on second-best, consequentialist grounds, then originalists may be stuck hoping for the realization of a constitutional ideal that will continue to elude them. It also creates a problem for those who are concerned about the rise of originalism on the Supreme Court and who might worry that a shift by the Court's originalists away from substantive due process and toward the Privileges or Immunities Clause would lead to the demise of its associated rights. These notably include constitutionally recognized reproductive rights,[23] the rights of same-sex couples to engage in consensual

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familiar to economists as it is foreign to law professors." David Gray Carlson, *On the Efficiency of Secured Lending*, 80 VA. L. REV. 2179, 2184 (1994).

20 *See* Lipsey & Lancaster, *supra* note 19, at 11–12.

21 *See, e.g.*, Alan Gura, Ilya Shapiro & Josh Blackman, *The Tell-Tale Privileges or Immunities Clause*, 2009–2010 CATO SUP. CT. REV. 163, 169–72 (criticizing Scalia for failing to discuss originalist evidence); Nelson Lund, *Two Faces of Judicial Restraint (or Are There More?) in* McDonald v. City of Chicago, 63 FLA. L. REV. 487, 511 n.123 (2011) ("Apparently, Justice Scalia thinks that originalism is the only proper approach to constitutional interpretation by judges, except when *he* has rejected it, at which point it becomes an exercise in academic silliness."); George Thomas, *Who's Afraid of Original Meaning?*, 164 POL'Y REV. 75, 93 (2010) (criticizing Scalia and arguing that "[i]t is time the Court formally overturned *The Slaughter-House Cases* as the beginning point of bringing coherence to our Fourteenth Amendment jurisprudence"); Damon Root, *How Antonin Scalia Shaped—and Misshaped—American Law*, REASON, May 2016, at 71 (accusing Scalia of "backtrack[ing] on originalism").

22 *See, e.g.*, Gura, Shapiro & Blackman, *supra* note 21, at 178 (describing it as a "historic concurrence"); Randy Barnett, *The Supreme Court's Gun Showdown*, WALL ST. J., June 29, 2010, at A19 (praising Justice Thomas's "impressive 56-page originalist analysis").

23 *See, e.g.*, Roe v. Wade, 410 U.S. 113, 164 (1974) (discussing the right to terminate pregnancy before viability); Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965) (discussing the right of married couples to use contraceptives).

sexual intimacy[24] and marry,[25] and other unenumerated rights that have been recognized under substantive-due-process doctrine. Nonoriginalists also worry that these rights might be denied to people who are not "citizens of the United States."[26]

The originalist case for substantive due process is stronger than previously thought. Professor Randy Barnett and I have detailed why the "original meaning of the text—the 'letter'—of the Due Process of Law Clauses" guarantees not only *process* but also *law*.[27] Deprivations of life, liberty, or property must take place pursuant to constitutionally proper exercises of government power, which in turn requires substantive judicial evaluation of such exercises of power.

This Article summarizes the originalist case for substantive due process. And it goes further. The fact that due process of law imposes limits on the substance of legislation does not compel any particular conclusion about *who* should enforce those limits or *how* they should do so. This Article engages these questions of institutional choice (who decides?) and institutional design (how should they decide?). Although the Constitution's original meaning requires some form of substantive due process, there are good reasons to believe that the Court's substantive-due-process doctrine can be improved at a tolerable cost.[28]

This Article undertakes to "optimize the 'oxymoron.'"[29] It calls for a reaffirmation of *United States v. Carolene Products Co.*[30]—not its famous "Footnote Four,"[31] but the form of rational-basis review that the Court employed in the case itself. The Article argues that the default standard of constitutional review of state legislation that deprives people of life, liberty, or property should be similar to what it was before the Court embraced what can been termed the *political-judgment rule* in *Williamson v. Lee Optical of Oklahoma, Inc.*[32]—a form of rational-basis review that effectively insulates legislative decision-making from substantive review whenever it is applied.

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24 *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

25 *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

26 *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities *of citizens of the United States* . . . .") (emphasis added).

27 *See* Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1605 (2019).

28 As will become clear, this is a *bounded* optimization project. It seeks to produce the best possible judicial solution to the problem of legislative arbitrariness, given scarce time, limited cognitive resources, and the institutional constraints under which judges labor.

29 It seems that "substantive due process" was first described as an oxymoron by Judge Richard Posner. *See* Ellis v. Hamilton, 669 F.2d 510, 512 (7th Cir. 1982) (discussing "the ubiquitous oxymoron 'substantive due process'"). Originalists picked up the phrase thereafter. *See, e.g.*, Steven G. Calabresi, *Substantive Due Process After* Gonzales v. Carhart, 106 MICH. L. REV. 1517, 1531 (2008) ("For me as an originalist, the very notion of substantive due process is an oxymoron.").

30 304 U.S. 144 (1938).

31 *See id.* at 152 n.4. For an illuminating discussion of Footnote Four's significance, see J. M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 281–82 (1989).

32 348 U.S. 483 (1955).

That standard should, however, be informed by an understanding of the legitimate ends of states' reserved powers over life, liberty, and property that is consistent with the spirit—the design function[33]—of the Fourteenth Amendment's Due Process of Law Clause and informed by a realistic theory of legislative decision-making.[34]

The adoption of such a standard would equip judges to reduce the legislative *agency costs* that loom under the Due Process of Law Clause.[35] These costs can be understood as the costs imposed on members of the public as a consequence of legislative deviation from the original spirit of the Due Process of Law Clause. Such agency costs may be high, owing to the political incentives that legislators face to abuse their discretionary powers, as well as to high information and organizational costs that make it difficult for members of the public to either detect abuses of legislative discretion or to mobilize to do anything about it. Judicial review can reduce legislative agency costs by decreasing the expected value of departures from the spirit of the Due Process of Law Clause *to legislators*—thus discouraging legislative abuses ex ante and protecting the public against any abuse that does take place ex post.[36]

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33 *See* PETER MCLAUGHLIN, WHAT FUNCTIONS EXPLAIN 47–48 (2001) (distinguishing between design function, use function, and service function, and explaining that the design function of an artifact is the function that explains why that artifact "came into being in the first place").

34 This Article posits that public-choice theory, which applies microeconomic and game-theoretic principles to transactions in the political "market," is such a theory. It is beyond the scope of this Article to comprehensively defend public-choice theory, which remains highly controversial even if "nearly everyone concedes the power of at least some of [its] insights." David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship*, 50 VAND. L. REV. 647, 648 (1997) (reviewing MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW (1997)). The literature is vast. Foundational works include, for example, DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS (1963); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1965); MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION (1965); WILLIAM H. RIKER, THE THEORY OF POLITICAL COALITIONS (1962). For a general overview, see DENNIS C. MUELLER, PUBLIC CHOICE III (2003).

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

36 It is assumed here that increasing the probability of judicial invalidation of arbitrary legislation can lower its expected value enough to discourage its enactment in a nontrivial number of cases, and that "demand" for such legislation is elastic in the sense that it is responsive to increases in price. This is a debatable assumption—it may be that interest groups that purchase arbitrary legislation will consider it worthwhile despite the increased risk of judicial invalidation and legislators will respond accordingly. *See* Jack M. Beermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 184–85 (1991) (critiquing a proposed approach to statutory interpretation that is designed to raise the costs of enacting abusive legislation). Regardless, judicial review can still serve to thwart arbitrary legislation ex post.

Part I summarizes the leading originalist criticisms of substantive due process that were advanced over the course of the past century, as well as Justice Thomas's distinctive critique. Part II explores the original meaning of "due process of law" and presents the case for substantive review of state deprivations of life, liberty, or property to determine whether those deprivations are calculated to achieve constitutionally proper ends. Part III provides an overview of what I term *constitutional heuristics*[37]—strategies used to simplify constitutional decision-making—that the judiciary has used to implement the due process of law. These heuristics include (1) the police-power doctrine that was developed in the nineteenth century, (2) the rational-basis test deployed in *Carolene Products*, and (3) today's political-judgment rule. It then uses the theory of good-faith construction to develop a standard of review that will equip judges to control legislative agency costs.[38]

I. ORIGINALISTS AGAINST SUBSTANTIVE DUE PROCESS

Criticism of substantive due process comes in a variety of forms, from sneering dismissals accompanied by comparisons to "green pastel redness,"[39] to careful historical analyses in which scholars parse cases and legal commentaries from the Founding era through the antebellum period. This Part focuses on three broad types of the latter analysis before describing Justice Thomas's critique.

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37 For an accessible overview of heuristics, see Gerd Gigerenzer & Wolfgang Gaissmaier, *Heuristic Decision Making*, 62 ANN. REV. PSYCHOL. 451, 454 (2011) (defining a heuristic as "a strategy that ignores part of the [available] information, with the goal of making decisions more quickly, frugally, and/or accurately than more complex methods"). For evidence that judges rely on heuristic reasoning, see, for example, Stephen M. Bainbridge & G. Mitu Gulati, *How Do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 84–85, 118–38 (2002); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 779–80, 805–11 (2001).

Sitting Justices have characterized constitutional doctrines as heuristics in at least two instances. *See* Kingsley v. Hendrickson, 135 S. Ct. 2466, 2478 (2015) (Scalia, J., dissenting) (describing the "[o]bjective reasonableness of the force used" as a "heuristic for identifying [punitive] intent" in the context of excessive-force claims); United States v. Windsor, 133 S. Ct. 2675, 2716 (2013) (Alito, J., dissenting) ("The modern tiers of scrutiny . . . are a heuristic to help judges determine when [legislative] classifications have that 'fair and substantial relation to the object of the legislation.'" (quoting Reed v. Reed, 404 U.S. 71, 76 (1971))). Defending the value of conceptualizing legal doctrines as heuristics at greater length and providing a framework for evaluating them is left to a future work.

38 *See* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 32–36 (2018).

39 JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980).

A. *Positivist Due Process*

The earliest critiques of substantive due process long predated originalism as a distinctive methodology. Shortly after the enactment of the Fourteenth Amendment, federal courts began to evaluate the content of state legislation under the Fourteenth Amendment's Due Process of Law Clause in order to determine whether such legislation was calculated to carry into effect legitimate state "police" powers.[40] Progressive legal scholars—among them Professor Edward Corwin[41] and Charles Warren[42]—argued that this was an illegitimate doctrinal innovation that was inconsistent with the original meaning of "due process of law."

Professor Corwin's criticism is representative. After investigating pre–Civil War decisions involving state due process of law and "Law of the Land" clauses and several Supreme Court decisions from the same time period, Corwin concluded that the "general constitutional law of the period" rejected review of the content of legislation under the auspices of due process of law.[43] Corwin maintained that in rejecting such review the Court hewed closely to the historical understanding of "law of the land."[44] Corwin traced the latter phrase through English history and determined that it either denoted only "statutory enactment" or "the common law" (which was displaceable through statutory enactment).[45] In embracing substantive review towards the end of the nineteenth century, Corwin argued, the Court had "left behind the definite, historical concept of 'due process of law' as having to do with the *enforcement* of law and not its *making* . . . ."[46] Properly understood, neither "law of the land" nor "due process of law" imported "any limitation upon legislative power."[47] The government need only deprive people of life, liberty, or property consistent with existing positive law.

What Professor Ryan Williams has termed "positivist due process"[48] later animated the jurisprudence of Justice Hugo Black. Justice Black argued that due process of law required only that the government proceed "according

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40 *See* DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 11–20 (2011).

41 *See, e.g.*, Corwin, *supra* note 1, at 366; Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 MICH. L. REV. 643, 647–49 (1909) [hereinafter Corwin, *Supreme Court*].

42 *See* Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 440–43 (1926).

43 Corwin, *supra* note 1, at 471.

44 *Id.* at 371 (arguing that "in the early days of judicial review, a number of cases arose in which the Law of the Land clause would certainly have been brought forward had it been deemed available as a constitutional restriction upon legislative power" and describing this "argument from silence" as "almost conclusive" (footnote omitted)).

45 *Id.*

46 Corwin, *Supreme Court*, *supra* note 41, at 670.

47 *See* Corwin, *supra* note 1, at 370–71.

48 *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 420–21 (2010).

to written constitutional and statutory provisions as interpreted by court decisions."[49] While the Court never explicitly embraced positivist due process,[50] it was long the consensus academic understanding of the original meaning of due process of law. Not only progressives like Corwin and Warren (and later Professor Raoul Berger[51]), but also conservative originalists like Judge Robert Bork[52] and Judge Frank Easterbrook[53] embraced positivist due process. Indeed, conservative originalists invoked substantive-due-process decisions that had been subjected to scathing historical critiques by progressive scholars to condemn decisions celebrated by liberals in the 1960s and 1970s—*Roe v. Wade* in particular. Thus, Bork wrote, "Who says *Roe* must say *Lochner* . . . ."[54]

Readers may have perceived a tension within the positivist position. Namely, if the "law of the land" on American shores is set forth in a written Constitution, and due process of law requires consistency with existing positive law, does it not follow that due process of law, at least, prevents legislation that violates the Federal Constitution from being used to deprive people of life, liberty, or property? Don't federal judges have to inspect the content of legislation that is being used to deprive people of life, liberty, or property to make sure it is consistent with the Federal Constitution? Isn't that *substantive* due process?

A positivist might concede that depriving someone of life, liberty, or property pursuant to a congressional act that violated, say, the Establishment Clause, or an act not calculated to carry into effect any of Congress's enumerated or incidental powers, would deprive that person of due process of law, on the ground that such statutes are forbidden by the supreme positive law of the land. Yet, modern substantive-due-process doctrine requires state legislation that neither exceeds any enumerated powers nor violates *any other* federal constitutional prohibition on state action be evaluated to determine whether its content is calculated to achieve constitutionally legitimate ends.[55]

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49 In re Winship, 397 U.S. 358, 382 (1970) (Black, J., dissenting).

50 Williams, *supra* note 48, at 420.

51 *See* Berger, *supra* note 1, at 30 (arguing "that it is a perversion of 'due process' or of the 'law of the land' to apply either for the judicial overthrow of legislation").

52 *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 43 (1990) (adopting a similar reading to that of Justice Black).

53 *See* Easterbrook, *supra* note 1, at 98 (arguing that "the Due Process Clause places little or no legitimate restraint on the contents of legislation"). Easterbrook acknowledges that legislatures must "not abrogate certain long-recognized judicial procedures when fundamental natural liberties are at stake." *Id.* But he finds those procedures to be specified in "other provisions of the bill of rights," such as those that provide for "jury trial in civil cases; juries, bail, counsel, indictment, compulsory process, speedy and public trial, and the privileges against double jeopardy and self-incrimination in criminal cases." *Id.* at 94, 99.

54 BORK, *supra* note 52, at 32.

55 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (stating that a criminal statute prohibiting same-sex sodomy deprives people of due process of law because it "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual"); Planned Parenthood

To defend the doctrine, originalist defenders of substantive due process must show that due process of law requires legislatures to act in ways that (1) are calculated to achieve ends that are not textually specified in the Constitution, and (2) do not contradict any other constitutional text. Positivist due process cannot get there.

B. *Traditional-Procedural Due Process*

At the risk of sounding glib, what are generally referred to as the "Due Process" Clauses sure seem to be primarily about *process*.[56] It is thus unsurprising that some originalists have embraced an understanding of due process of law holding that individuals can be deprived of life, liberty, or property only through certain traditional procedures associated with the courts at common law.[57] Call this *traditional-procedural due process*.

The Supreme Court endorsed traditional-procedural due process in one of its most extended early engagements with due process of law. Writing for the Court in *Murray's Lessee v. Hoboken Land & Improvement Co.*,[58] Justice Benjamin Curtis affirmed that the Fifth Amendment's Due Process of Law Clause "is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law,' by its mere will."[59] Rather, judges must determine whether a given adjudicative process affords due process of law by "examin[ing] the constitution itself, to see whether this process be in conflict with any of its provisions" or, failing that,

> look to those settled usages and modes of proceeding existing in the common and statue [sic] law of England, before the emigration of our ancestors, and which are shown not to have been

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of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (plurality opinion) (holding that statutes with the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" violate the Fourteenth Amendment's Due Process of Law Clause); Moore v. City of E. Cleveland, 431 U.S. 494, 489–500 (1977) (stating that an ordinance limiting occupancy of dwelling units to limited set of family members violates the Fourteenth Amendment's Due Process of Law Clause because such an ordinance serves "legitimate goals . . . marginally, at best").

56 To avoid this framing trap, this Article uses a clunkier term—Due Process of Law Clause—that does not load the rhetorical dice against a substantive reading.

57 *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 36, 39–40 (1991) (Scalia, J., concurring in judgment) (observing that "very few cases have used the Due Process Clause, without the benefit of an accompanying Bill of Rights guarantee, to strike down a procedure concededly approved by traditional and continuing American practice" and concluding that "[s]ince jury-assessed punitive damages are a part of our living tradition that dates back prior to 1868, I would . . . categorically affirm their validity"); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 254 (2014) (stating due process of law means "following the law, in the courts of law, in accord with their essential traditional procedures").

58 59 U.S. (18 How.) 272 (1856).

59 *Id.* at 276.

> unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[60]

It is important to distinguish *traditional*-procedural due process from the more contemporary understanding of procedural due process crystallized in *Mathews v. Eldridge*.[61] *Mathews*, which involved the administrative denial of Social Security benefits, set forth a three-part test that federal courts use today to determine if adjudicative procedures are consistent with due process of law.[62] Courts applying the *Mathews* test weigh

> [1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of that interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and [3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[63]

Traditional procedures are not required, nor are courts—*Mathews* permits adjudication outside the courts, so long as the procedures afforded exceed a threshold level of fairness.

In a lengthy concurrence in *Pacific Mutual Life Insurance Co. v. Haslip*,[64] Justice Scalia warmly described traditional–procedural due process and carefully distinguished it from the "balancing analysis" of *Mathews*.[65] Whereas *Mathews* untethered fairness from both history and constitutional text, Scalia maintained that "fundamental fairness," should be assessed *only* with reference to whether a procedure was "(1) a traditional one and, if so, (2) prohibited by the Bill of Rights."[66] As Scalia saw it, "unbroken usage" was sufficient to establish the constitutionality of procedures absent any explicit constitutional bar.[67]

Traditional-procedural due process of law has also been endorsed by Professor Philip Hamburger, who argues that many administrative adjudications initiated by federal regulatory agencies violate due process of law.[68] Hamburger draws attention to numerous Founding-era affirmations that state due process of law and law-of-the-land clauses prohibited legislative action that denied access to the courts and procedures traditionally associated with the courts in cases involving life, liberty, or property.[69] Such affirmations,

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60 *Id.* at 277.

61 424 U.S. 319 (1976).

62 *See id.* at 335.

63 *Id.*

64 499 U.S. 1 (1991).

65 *Id.* at 36 (Scalia, J., concurring in judgment).

66 *Id.*

67 *Id.* at 35.

68 *See* HAMBURGER, *supra* note 57, at 227–76.

69 *See* Philip Hamburger, *The Administrative Evasion of Procedural Rights*, 11 N.Y.U. J.L. & LIBERTY 915, 940–43 (2018).

according to Hamburger, rested upon the premise that government officials could *only* proceed against the life, liberty, or property of individuals in a manner consistent with what he describes as "ideals about the personnel, structure, and mode of proceeding of . . . courts—ideals that could be summed up as the due process of law."[70]

Like positivist due process, traditional-procedural due process arguably has substantive elements. For example, a judge must inspect the content of challenged legislation to determine whether it dispenses with traditional procedures. Further, insofar as traditional–procedural due process requires adjudication to take place before a judge who is bound to hear constitutional challenges—whether they be process or substance-based—traditional–procedural due process makes substantive judicial review possible. Like that of positivist due process, however, the domain of traditional–procedural due process is much more limited than that of modern substantive due process. Traditional–procedural due process, unlike modern substantive due process, does not entail inquiry into the legitimacy of the ends that a given piece of legislation is designed to accomplish.

C. *Minimal-Substance Due Process*

More recent scholarship has cast doubt upon both positivist and traditional–procedural due process. Among those who have questioned the conventional wisdom are Professors Ryan Williams, Nathan Chapman, Michael McConnell, and Christopher Green.

By examining state-law decisions during the time period when the Fifth Amendment was ratified and tracing the relevant language through the ratification process itself, Professors Chapman and McConnell discern that positivist due process misses something important about how due process of law was understood during the Founding era.[71] Time and again, Founding-era courts invalidated statutes under due-process-of-law and law-of-the-land provisions of state constitutions.[72] What became the Fifth Amendment was, according to Madison's original design, "to be inserted into 'article 1st, section 9, between clauses 3 and 4'" alongside other limits on legislative power.[73] Many informed legal observers, including James Madison, Alexander Hamilton, Thomas Jefferson, James Iredell, Samuel Chase, and Henry St. George Tucker affirmed that due process of law constrained legislative action.[74]

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70 *See* HAMBURGER, *supra* note 57, at 157.

71 Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1716–17 (2012).

72 *Id*. at 1724–25.

73 *Id*. at 1722 (quoting 1 ANNALS OF CONG. 434 (1789) (Joseph Gales ed., 1834)).

74 *Id*. at 1679.

What was going on? Professors Chapman and McConnell argue that the separation of powers was a conceptual common denominator that could be traced through these due-process-of-law materials. Some early cases involved general legislative deprivations of property rights that had vested prior to the legislation; others involved specific legislative interferences with the rights of named persons.[75] The common denominator: to be legislation, as distinct from adjudication, a legislative act had to be both general and prospective.[76] Green's analysis of English-, Antebellum-, and Reconstruction-era materials leads him to a similar conclusion concerning the Fourteenth Amendment's Due Process of Law Clause.[77]

Professor Williams characterizes these cases as "substantive due process" cases and argues that they provide ample reason to believe that those who ratified the Fourteenth Amendment understood "due process of law" to have substantive components as well as procedural components.[78] Yet, Professors Chapman and McConnell resist this characterization,[79] as does Professor Green.[80] Modern substantive due process requires considerably more of legislation than that it be general and prospective. The major modern substantive-due-process cases—that as Professor Matthew Franck has put it, "gave the doctrine its name"—from *Lochner* to *Griswold* to *Roe* to *Lawrence* to *Obergefell*, concerned general, prospective laws that denied no one access to the traditional processes of the courts.[81] Ascertaining whether a statute is general and prospective requires inspection of its content, yes, but it is arguably distinctive enough from modern substantive due process to warrant the use of a different term—call it *minimal-substance due process*.[82]

D. *Justice Thomas Versus Substantive Due Process*

Although Justice Thomas said little about substantive due process prior to *Obergefell v. Hodges*, he said enough about it to make plain that he considered substantive due process to be illegitimate. In a brief discussion in

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75 *Id.* at 1727.

76 *Id.*

77 Christopher R. Green, *Duly Convicted: The Thirteenth Amendment as Procedural Due Process*, 15 GEO. J.L. & PUB. POL'Y 73, 78 (2017) (arguing that "'due process of law' require[s] that legislation not contravene traditional limits on retroactivity.").

78 Williams, *supra* note 48, at 415–16.

79 Chapman & McConnell, *supra* note 71, at 1679 ("The distinctive aspect of modern 'substantive due process' . . . is its treatment of natural liberty as inviolate, even as against prospective and general laws passed by the legislature and enforced by means of impeccable procedures.").

80 Christopher R. Green, *Twelve Problems with Substantive Due Process*, 16 GEO. J.L. & PUB. POL'Y 397, 409 (2018) ("As [Williams] notes himself, anti-retroactivity vested-rights rules are not the same sort of substantive due process we see in cases like *Munn* [*v. Illinois*], *Lochner*, *Roe*, and *Obergefell*.").

81 Franck, *supra* note 1, at 130–31, 130 n.16.

82 I owe this formulation to an informal conversation with Franck on April 21, 2017, at a conference hosted by Georgetown's Center for the Constitution and the James Wilson Institute.

McDonald, Justice Thomas asserted, "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words."[83] If due process of law guarantees *only* process, it might guarantee either traditional processes or only those processes authorized by preexisting law. It is hard, however, to see how due process of law could guarantee that legislation be general and prospective. That is to say, Justice Thomas's assertion seemed to reflect a positivist or traditional–procedural understanding of due process of law rather than a minimal-substance understanding of due process.

In his *Obergefell* dissent, Justice Thomas elaborated upon his understanding of due process of law. He began by flatly denying that due process of law guaranteed anything but process.[84] He then homed in on the word "liberty," undertaking to ascertain its original meaning.[85]

On Justice Thomas's account, "liberty" in the Fourteenth Amendment means the same thing that it means in the Fifth Amendment and means the same thing that it meant to Sir William Blackstone. Justice Thomas pointed out that early state constitutions generally replicated the language of chapter 39 of Magna Carta but incorporated the Blackstonian triad of "life, liberty, or property."[86] Drawing upon Charles Warren's defense of positivist due process, Justice Thomas affirmed that "[s]tate decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word 'liberty' to refer only to freedom from physical restraint."[87] Justice Thomas further noted that physical restraint "was the consistent usage of the time when 'liberty' was paired with 'life' and 'property,'" and argued that this usage "avoid[ed] rendering superfluous those protections for 'life' and 'property'" because life and property could both easily be swept into a broad concept of liberty.[88] But Justice Thomas did not clearly commit to either a positivist or traditional procedural understanding of due process of law. Grant that liberty means only freedom from bodily restraint and it remains unclear what kind of legislation the state can use to

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83 *See* McDonald v. City of Chicago, 561 U.S. 742, 811 (2010) (Thomas, J., concurring in part and concurring in judgment).

84 Obergefell v. Hodges, 135 S. Ct. 2584, 2631 (2015) (Thomas, J., dissenting).

85 *Id.* at 2632.

86 *Id.* at 2633 & n.3; *see* 1 WILLIAM BLACKSTONE, COMMENTARIES *129 (Bancroft-Whitney Co. 1915) (defining the rights of "personal security" (life), "personal liberty" (liberty), and "private property" (property)).

87 *Obergefell*, 135 S. Ct. at 2633 (Thomas, J., dissenting).

88 *Id.*

physically restrain someone—say, Joseph Lochner[89] or John Lawrence,[90] both of whom were physically restrained.

In *Nelson v. Colorado*[91] and *Sessions v. Dimaya*,[92] Justice Thomas revealed a strong commitment to positivist due process. *Nelson* concerned a Colorado law that permitted the state to retain "conviction-related assessments unless and until the prevailing defendant institute[d] a discrete civil proceeding and prove[d] her innocence by clear and convincing evidence."[93] The Court held 7–1 that the law violated the Fourteenth Amendment's Due Process of Law Clause. Justice Thomas, dissenting alone, argued that people whose convictions had been reversed had no property interest recognized by the positive law of the state in the money exacted on the basis of their convictions.[94] Even if Colorado could not have exacted the money absent conviction, and even if Colorado could not exact any further money in the future, Justice Thomas wrote, "It does not follow . . . that petitioners have a property right in the money they paid pursuant to their then-valid convictions, which now belongs to the State and the victims under Colorado law."[95] Justice Thomas made no effort to determine whether the government could take property pursuant to an invalid conviction under traditional common law procedures. In *Dimaya*, Justice Thomas—again in dissent—highlighted the "not insubstantial" case for what he described as the "law-of-the-land view" of due process of law.[96] The accompanying citations to Professors Berger and Corwin, and Justice Black's dissent in *In re Winship*,[97] make it plain that he had positivist due process in mind.[98]

There is also an institutional element to Justice Thomas's critique of substantive due process. Justice Thomas regards substantive due process as not only theoretically illegitimate but also practically dangerous. He sees it as a standing invitation to judges to impose their own normative convictions on the rest of us— to the detriment of the judiciary's institutional legitimacy. Consider Justice Thomas's dissent in *Whole Woman's Health v. Hellerstedt*,[99] in which he took aim at the distinction that the Court has drawn

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89 Lochner was convicted of a misdemeanor, sentenced to pay a $50 fine, and required to "stand committed until paid, not to exceed fifty days in the Oneida County jail." Lochner v. New York, 198 U.S. 45, 47 (1905).

90 Lawrence and Tyrone Gardner were arrested, held in custody overnight, fined $200, and assessed court costs of $141.25. Lawrence v. Texas, 539 U.S. 558, 563 (2003).

91 137 S. Ct. 1249 (2017).

92 138 S. Ct. 1204 (2018).

93 *Nelson*, 137 S. Ct. at 1252.

94 *Id.* at 1265 (Thomas, J., dissenting) ("Because defendants in petitioners' position do not have a substantive right to recover the money they paid to Colorado under state law, petitioners' asserted right to an automatic refund must arise, if at all, from the Due Process Clause itself. But the Due Process Clause confers no substantive rights.").

95 *Id.* at 1266.

96 138 S. Ct. at 1243 (Thomas, J., dissenting).

97 397 U.S. 358 (1970).

98 *See Dimaya*, 138 S. Ct. at 1243 n.1.

99 136 S. Ct. 2292 (2016).

between "fundamental" substantive due process rights which receive "preferential treatment" in the form of heightened judicial scrutiny when they are burdened, and other rights which receive lesser scrutiny.[100] Justice Thomas argued that the tiers of scrutiny associated with Footnote Four of *Carolene Products* are without constitutional basis *and* have had the effect of "reducing constitutional law to policy-driven value judgments"—judgments that threaten to deprive the Court of "the last shreds of its legitimacy."[101]

II. THE ORIGINALIST CASE FOR SUBSTANTIVE DUE PROCESS

Justice Thomas is correct that the originalist case against substantive due process is "not insubstantial." It has convinced some of our most distinguished scholars and Justices. This Part makes an originalist case for a distinctive understanding of due process of law—one that places the means-ends substantive due process that is familiar today on firm constitutional foundations.

A. *The Origins of Due Process of Law*

There is little dispute over the origins of the phrase "due process of law." Scholars generally trace it to Magna Carta, a series of concessions extracted at sword point from King John at Runnymede by aggrieved barons in 1215.[102] Chapter 39, commonly termed the "law of the land" clause, provides: "No free man shall be arrested or imprisoned, or disseised or outlawed or exiled or in any way victimised, neither will we attack him or send anyone to attack him, except by the lawful judgment of his peers or by the law of the land."[103] It is also uncontroversial that this language was primarily directed against arbitrary *executive* action—in particular, King John's use of unilateral administrative orders enforced through prerogative courts that lacked both independent judges and traditional procedures designed to protect individual rights. At the time, there was but a rudimentary Parliament that did not threaten the barons. The "we" denoted in the text is the royal "we"—there is no reason to doubt that the king alone was chapter 39's originally intended target.[104]

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100 *Id.* at 2328 (Thomas, J., dissenting).

101 *Id.* at 2329–30.

102 Pope Innocent III annulled Magna Carta at King John's request shortly thereafter. *See* Michael Borrie, *What Became of Magna Carta?*, 2 BRIT. LIBR. J. 1, 7 (1976).

103 Magna Carta, ch. 39 (1215), *reprinted in* RALPH V. TURNER, MAGNA CARTA THROUGH THE AGES app. at 231 (Routledge 2014) (2003).

104 *See, e.g.*, Berger, *supra* note 1, at 4; Ely, *supra* note 1, at 320; Gedicks, *supra* note 1, at 598; Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 BYU L. REV. 611, 619–20 (agreeing that chapter 39 was designed to check royal power).

King John promptly disregarded his promises,[105] as did subsequent monarchs. When, in the fourteenth century, King Edward III started summarily punishing subjects outside the common law courts, Parliament codified a series of statutes that more particularly described what chapter 39 entailed.[106] A 1354 statute linked "due process of law" to access to common law courts with judges and traditional proceedings: "[N]o Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, *without being brought in Answer* by due Process of the Law."[107]

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

> No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.[108]

In interpreting this language, Coke drew upon a 1350 statute that he paraphrased: "[N]o man shall be taken, imprisoned, or put out of his freehold without proces of the law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the common law."[109]

Chapter 29 was central to Coke's opposition to the absolutist claims of King James I, who claimed the authority to adjudicate cases outside of the courts of law. King James maintained that "[t]he king being the author of the lawe is the interpreter of the law" and that, since the law rested upon reason, he—being eminently reasonable—was as well-equipped to interpret it as any judge.[110] Coke responded that the law of the land was "higher" than the actions of the king and denied that "the King in his own person [could] adjudge any case."[111] He gently pointed out that cases were not to be decided by

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105 *See* Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law: 1215 to 2015*, 47 ST. MARY'S L.J. 1, 11 (2015) (recounting how "the 1215 Charter was never implemented in any important respect, and soon became a dead letter").

106 For an overview of these statutes, see Jurow, *supra* note 1, 266–71.

107 Liberty of Subject 1354, 28 Edw. 3 c. 3 (Eng.) (emphasis added); *see also* J. C. HOLT, MAGNA CARTA 40 (3d ed. 2015) (explaining that "'due process of law' . . . was construed to exclude procedure before the Council or by special commissions and to limit intrusions into the sphere of action of the common-law courts").

108 9 Hen. 3, cl. 29 (1225) (Eng.).

109 EDWARD COKE, 2 INSTITUTES OF THE LAWS OF ENGLAND 50 (1797) (citing A Statute of Purveyors 1350, 25 Edw. 3 c .4).

110 *See* DAVID CHAN SMITH, SIR EDWARD COKE AND THE REFORMATION OF THE LAWS 199 (2014).

111 Prohibitions Del Roy (1607) 77 Eng. Rep. 1342, 1342; 12 Co. Rep. 63, 63.

natural reason—which he conceded that the King possessed—"but by the artificial reason and judgment of Law"—the development of which required experience that the King did not possess.[112] King James may have won the battle—he dismissed Coke for his insubordination[113]—but Coke's defense of the proposition that the King was subject to the law of the land became iconic.

But what of Parliament? Coke interpreted "*per legem terrae*"— "by the law of the land"—as "by the common law, *statute law*, or custome of England."[114] Did that mean that Parliament could by statute deprive people of procedural rights and personnel that had come to be associated with the common-law courts?

Professor Hamburger has shown that Parliament's status as the highest court in the land served as an institutional impediment to any judicial invalidation of acts of Parliament on the ground that those acts were inconsistent with the law of the land.[115] Because England's constitution was developed through custom and Parliament was the court in which customs were declared or altered, Hamburger explains, Parliament's "enactments amounted to decisions upholding their constitutionality."[116]

For his part, Coke seems to have acknowledged that parliamentary statutes necessarily became part of the law of the land. Some confusion has arisen because of what Professor Richard Bernstein has described as the "crabbed, thorny prose of the seventeenth century,"[117] which has rendered Coke's report of *Bonham's Case*[118] obscure to contemporary readers. Dr. Thomas Bonham had been sentenced to pay a fine and to be incarcerated for practicing medicine in London without permission from the Royal College of Physicians, and the case arose from his action for wrongful imprisonment.[119] A majority of the Court of Common Pleas held that the College could not imprison Bonham.[120] Coke explained the judges' reasoning:

> The censors cannot be judges, ministers, and parties . . . . And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void . . . .[121]

Some have claimed that Coke in *Bonham's Case* asserted authority to hold acts of Parliament unlawful if they violated "common right and reason"—

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112 *Id*. at 1343.

113 FRANCIS HARGRAVE, 1 COLLECTANEA JURIDICA 3–4 (1791).

114 COKE, *supra* note 109, at 45 (emphasis added).

115 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 239 (2008).

116 *Id*.

117 R. B. BERNSTEIN, THOMAS JEFFERSON 5 (2003).

118 (1610) 77 Eng. Rep. 638, 646; 8 Co. Rep. 107a, 113b.

119 *Id*.

120 *Id*. at 651.

121 *Id*. at 652.

here, by making the censors judges in their own case.[122] But Professor Richard Helmholz has adduced evidence that the term "void" was often used to mean "empty" or "ineffective", and that the provisions of other statutes and grants of royal privilege were described as "void" and treated as having no effect if they conflicted with fundamental principles.[123] Coke's interpretation may therefore have been based on the (charitable) assumption that no violation of those principles had been intended[124]—not on the assumption that judges could hold acts of Parliament unconstitutional. Put differently, Coke may have been only engaging in equitable interpretation—interpretation which was itself a component of the common law.[125]

Subsequent generations, however, would embrace the proposition that, as James Otis put it during the lead-up to the American Revolution, Parliament "cannot make 2 and 2, 5."[126] When five petitioners from Kent were imprisoned by a Tory-dominated House of Commons in 1701, Daniel Defoe and the Whigs drew upon natural-rights theory to criticize not only the imprisonments but the idea of parliamentary supremacy.[127] The tension between parliamentary supremacy and natural-rights theory was perhaps best captured in Chief Justice John Holt's opinion in the 1701 case of *City of London v. Wood*.[128] Holt declared both that Parliament was bound by natural right and that no judicial remedy was available for a Parliamentary act that contradicted natural right; rather, the remedy consisted in exercising the natural right of revolution.[129] *Judges* would be bound to give effect to the law—but the people might, as John Locke put it, "appeal to heaven."[130] Fortunately, Holt found that the act at issue could be construed in a way that made such an appeal unnecessary.

B. *Due Process of Law in 1791*

American judges did not face the institutional impediments that made the judicial invalidation of legislative acts on constitutional grounds almost

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122 *See* Chapman & McConnell, *supra* note 71, at 1689–92 (summarizing the debate over the meaning of Coke's words).

123 *See* R.H. Helmholz, Bonham's Case, *Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325, 340–41 (2009).

124 HAMBURGER, *supra* note 115, at 55.

125 *Id*. at 274.

126 JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1763), *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 126 (Bruce Frohnen ed., 2002). For an account of the imprisonment of the Kentish Petitioners, see Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in* City of London v. Wood, 94 COLUM. L. REV. 2091, 2097–100 (1994).

127 Hamburger, *supra* note 126, at 2100.

128 (1702) 88 Eng. Rep. 1592; 12 Mod. 669.

129 *Id*. at 1602.

130 JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 168 (Peter Laslett ed., Cambridge Univ. Press 2003) (1690).

unthinkable across the Atlantic. Many American corporations and colonies had written constitutions, which could not be altered by ordinary legislation; after independence, states generally adopted such constitutions.[131] Ten state constitutions included law-of-the-land provisions that tracked the language of chapter 39.[132]

How was this language understood during the Founding era? Prominent and widely cited American jurists relied upon Coke in interpreting both "due process of law" and "law of the land." Judge St. George Tucker, a Virginia jurist who taught constitutional law at William & Mary in the 1790s, wrote that "[d]ue process of law must then be had before a judicial court, or a judicial magistrate."[133] Supreme Court Justice Joseph Story in his *Commentaries on the Constitution* defined due process of law as "due presentment or indictment, and being brought in to answer thereto by due process of the common law" and stated that it "affirms the right of trial according to the process and proceedings of the common law."[134] Chancellor James Kent of New York in his influential *Commentaries on American Law* defined due process of law as "law, in its regular course of administration, through courts of justice."[135] These jurists understood due process of law to require that any individualized deprivations of life, liberty, or property take place through the courts.

At first blush, many early state cases interpreting "law of the land" and "due process of law" appear to be solely concerned with procedural rights available at common law.[136] Other cases focus on statutory deprivations of "vested" property rights of specific persons who had acquired that property consistently with the positive law then in effect.[137] But significant authority held that "due process of law" and "law of the land" required a legislative act to be consistent with applicable higher law—whether written or unwritten—to qualify as law at all.

Both Republicans and Federalists argued that only such acts that were consistent with the Federal Constitution were in fact law. In the 1798 Kentucky Resolutions, arch-Republican Thomas Jefferson declared that the Alien and Sedition Acts were "not law, but . . . altogether void and of no force"

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131 *See* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381 (1980) (reporting that "[b]y 1783, thirteen states, all but Rhode Island, had adopted written constitutions").

132 *See* Riggs, *supra* note 1, at 974–75.

133 ST. GEORGE TUCKER, 1 BLACKSTONE'S COMMENTARIES app. at 203 (1803).

134 JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783 (1883).

135 JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 13 (6th ed. 1848).

136 *See, e.g.*, Butler v. Craig, 2 H. & McH. 214, 233 (Md. 1787); Trevett v. Weeden (R.I. 1786), *reprinted in* 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 417, 420–21 (Bernard Schwartz ed., 1971); Zylstra v. Corp. of Charleston, 1 S.C.L. (1 Bay) 382, 390–91 (1794).

137 *See, e.g.*, Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 318 (C.C.D. Pa. 1795); Merrill v. Sherburne, 1 N.H. 199, 204 (1818); Dash v. Van Kleeck, 7 Johns. 477, 480 (N.Y. Sup. Ct. 1811); Allen's Adm'r v. Peden, 4 N.C. (Taylor) 442, 442 (1817); Bayard v. Singleton, 1 N.C. (1 Mart.) 42, 47 (1787).

because they violated the First, Fifth, and Tenth Amendments.[138] In the 1803 case of *Marbury v. Madison*[139] arch-Federalist Chief Justice John Marshall asked whether "an act, repugnant to the constitution can become the Law of the Land," and answered that "a legislative act contrary to the constitution is not law."[140]

Some years later in *McCulloch v. Maryland*,[141] Chief Justice Marshall stated that the laws of Congress "when made in pursuance of the constitution, form the supreme law of the land." which implied that when the laws of Congress are *not* made in pursuance of the Constitution, they are mere acts that do not become part of the "law of the land."[142] In Federalist No. 33 Alexander Hamilton expressly denied that congressional acts which exceeded Congress's constitutional powers became part of the law of the land; rather, he wrote, "the clause which declares the supremacy of the laws of the union . . . *expressly* confines this supremacy to laws made *pursuant to the constitution*."[143] Thus, while a law authorized by the Constitution—one "laying a tax for the use of the United States would be supreme in its nature," a law that exceeded Congress's constitutional powers—one "for abrogating or preventing the collection of a tax laid by the authority of a state, (unless upon imports and exports)"—would not enjoy that status.[144] The latter act would be "but an usurpation of a power not granted by the constitution."[145]

State courts, too, maintained that laws that violated state constitutions did not become part of the law of the land. Judge Locke in a highly influential 1805 opinion in *Trustees of the University of North Carolina v. Foy*[146] stated that North Carolina's law-of-the-land provision forbade "depriv[ations] of . . . liberties or properties, unless by a trial by jury in a court of justice, according to the known and established rules of decision derived from the common law and such acts of the Legislature as are consistent with the Constitution."[147]

Several judges went so far as to deny that acts that violated the social compact were laws, even in the absence of any written constitutional provision that forbade them. The most famous example is probably Justice Samuel Chase's opinion in *Calder v. Bull*.[148] Even absent a written constitution,

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138 Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 541 (Jonathan Elliot ed., 1836).

139 5 U.S. (1 Cranch) 137 (1803).

140 *Id.* at 177–78.

141 17 U.S. (4 Wheat.) 316 (1819).

142 *Id.* at 406.

143 THE FEDERALIST NO. 33, at 161 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

144 *Id.*

145 *Id.*

146 5 N.C. (1 Mur.) 58 (1805).

147 *Id.* at 63.

148 3 U.S. (3 Dall.) 386 (1798).

Justice Chase wrote, "The purposes for which men enter into society . . . determine the nature and terms of the social compact," and "[t]he nature, and ends of legislative power will limit the exercise of it."[149] Justice Chase offered several examples of exercises of legislative power that were sufficiently contrary to the purposes of the social compact that "it cannot be presumed" that people had delegated such power, including:

> A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from A. and gives it to B.[150]

Hamburger argues that Justice Chase, like Coke, was merely endorsing equitable interpretation.[151] But Chase's colleague, Justice James Iredell, did not so understand him, and responded with robust positivism. Justice Iredell asserted:

> If . . . a government, composed of Legislative, Executive and Judicial departments, were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void.[152]

Justice Iredell's positivist view appears to have been an outlier during the Founding era.[153] In *Bowman v. Middleton*,[154] the South Carolina Supreme Court held unconstitutional an act that transferred a freehold from the heir-at-law to another person, and also from the eldest son of an intestate to a second son, on the grounds that it was contrary to natural law and "common right."[155] Justice William Paterson of the United States Supreme Court, then riding circuit, stated in *Vanhorne's Lessee v. Dorrance*[156] that "[t]he legislature . . . had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without a just compensation," as such an act was "contrary to the principles of social alliance in every free government," as well as "contrary both to the letter and spirit of the Constitution."[157] Similarly, in his opinion for the Court in *Fletcher v. Peck*,[158] Chief Justice Marshall acknowledged that all legislative power is granted to the legislature but

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149 *Id.* at 388 (opinion of Chase, J.) (emphasis removed).

150 *Id.* (emphasis removed).

151 *See* HAMBURGER, *supra* note 115, at 500 n.52.

152 *Calder*, 3 U.S. (3 Dall.) at 398 (Iredell, J., dissenting).

153 Gedicks, *supra* note 1, at 651–54 (documenting how Justice Iredell's view was "largely rejected by state constitutional decisions of the period").

154 1 S.C.L. (1 Bay) 252 (Ct. Com. Pl. 1792).

155 *See id.* at 254.

156 2 U.S. (2 Dall.) 304 (C.C.D. Pa. 1795).

157 *Id.* at 310.

158 10 U.S. (6 Cranch) 87 (1810).

"doubted whether the nature of society and of government does not prescribe some limits to the legislative power," and questioned whether "the act of transferring the property of an individual to the public, [was] in the nature of the legislative power."[159]

The history of the drafting and ratification of the Fifth Amendment does not shed much light upon its meaning. It is unclear why Madison chose to use the phrase "due process of law" rather than "law of the land," despite his own state's support for the latter phrase.[160] But it *is* clear that the terms "law of the land" and "due process of law" were synonymous, and that they were generally understood to constrain legislatures to comply with higher law—whether that of state constitutions, the Federal Constitution, or fundamental social-contract principles. Determining whether statutes interfered with common-law procedural rights, whether statutory deprivations of vested rights were adjudicative rather than legislative acts, or whether they violated the social compact necessarily entailed an inquiry into substance. Precisely how much inquiry was required, and how that inquiry was conducted in the years leading up to the enactment of the Fourteenth Amendment, is the subject of the next Section.

C. *Due Process of Law in 1868*

The connection between the concept of inherently limited government and due process of law was reinforced over the course of the early nineteenth century. Contrary to Chapman and McConnell, "due process of law" came to be understood as forbidding not only legislative enactments that were not general or prospective (or which interfered with common law procedural rights), but also enactments that were not designed to accomplish legitimate ends. Contrary to Professor Williams' work, courts did engage in means-ends analysis.

Consider three Tennessee cases, decided over the course of two years. In the first two cases, Judge John Catron interpreted the Tennessee Constitution's law-of-the-land clause to mean "general public law[s]," as distinct from "partial, or private laws" that treated similarly situated individuals differently.[161] The perceived vice of the latter was explained by Judge Nathan Green of the Tennessee Supreme Court in a decision voiding an act that created a special court to handle all lawsuits brought against the Bank of the

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159 *Id.* at 135–36.

160 Professors Chapman and McConnell speculate that Madison was trying to avoid conflation of the phrase with the reference to "the supreme Law of the Land" in the Supremacy Clause of Article VI. Chapman & McConnell, *supra* note 71, at 1723–24. Because the enactments identified as "the law of the land" identified in the Supremacy Clause are all examples of written, positive law, perhaps people would have concluded that the Fifth Amendment did not incorporate any independent procedural requirements derived from the common law. *Id.* at 1724.

161 *See* Wally's Heirs v. Kennedy, 10 Tenn. (2 Yer.) 554, 555–56 (1831); Vanzant v. Waddel, 10 Tenn. (2 Yer.) 260, 270 (1829).

State of Tennessee: such partial legislation was "the same in principle, as if a law had been passed in favor of [an individual or corporate body]."[162] Evidently, laws designed to "favor" the interests of only certain individuals or groups were inconsistent with the law of the land.

Tennessee was no outlier. In *People v. Morris*,[163] Judge Nelson, interpreting a New York state constitution that at the time had no bill of rights, wrote that the "vested rights of the citizen," including "that private property cannot be taken for strictly private purposes at all, nor for public without a just compensation," and the "obligation of contracts cannot be abrogated or essentially impaired," are to be held "sacred and inviolable, even against the plenitude of power of the legislative department."[164] Deprivation of vested rights to serve private purposes was thus inconsistent with due process of law. Quite obviously, one must identify the purposes of legislative action to determine whether it is designed to serve only private purposes.[165]

To distinguish between proper and improper exercises of legislative discretion, antebellum courts developed what became known as the "police power" doctrine. At the time of the framing, the terms "internal police" or "police" were used to refer generally to the reserved powers of the states.[166] Judges and legal commentators evaluating exercises of state power under state constitutions frequently noted the difficulty of defining the contours of

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162 Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599, 607 (1831); *see also* Sears v. Cottrell, 5 Mich. 251, 254 (1858) ("By 'the law of the land' we understand laws that are general in their operation, and that affect the rights of all alike; and not a special Act of the Legislature, passed to affect the rights of an individual against his will, and in a way in which the same rights of other persons are not affected by existing laws."); Dunn v. City Council of Charleston, 16 S.C.L. (Harp.) 189, 200 (Const. Ct. 1824) ("Any act of partial legislation, which operates oppressively upon one individual, in which the community has no interest, is not the *law of the land*.").

163 13 Wend. 325 (N.Y. Sup. Ct. 1835).

164 *Id.* at 328; *see also* Taylor v. Porter, 4 Hill 140, 145 (N.Y. Sup. Ct. 1843) (averring that "law of the land" did not encompass "statute[s] passed for the purpose of working the wrong" by "tak[ing] the property of A., either with or without compensation, and giv[ing] it to B.").

165 Even the most ardent critics of judicial inquiry into "legislative intent" concede that groups of individuals can agree to pursue common goals through specified means. *See, e.g.*, City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 450 (2002) (Scalia, J., dissenting) (finding "[e]vidence of pre-emptive purpose . . . in the text and structure of the statute at issue" (first alteration in original) (emphasis omitted) (internal quotation marks omitted)); Nat'l Tax Credit Partners, L.P. v. Havlik, 20 F.3d 705, 707 (7th Cir. 1994) (Easterbrook, J.) (affirming that "[k]nowing the purpose behind a rule may help a court decode an ambiguous text"); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2010 (2009) ("Textualists understand that statutes are enacted to serve a purpose . . . .").

166 *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 324–27 (2004) (surveying usage of the phrase). Pennsylvania, North Carolina, Delaware, Maryland, and Vermont incorporated provisions into their new constitutions which stated that "the people of this State have the sole exclusive and inherent Right of governing and regulating the internal Police of the same." *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 133–34 (Rowman & Littlefield Publishers, Inc. 2001) (1980).

the police power.[167] This is understandable, given that the *historical* police power—which can be traced back through centuries of authoritarian governance—was unlimited. As Professor Markus Dubber has documented, the historical police power was rooted in a conception of state government as household governance, and the householder's absolute power to arrange the household for the common good of the whole family served as a model for absolute continental monarchies.[168] Transforming the police power into a means by which American courts could *limit* legislative power was an ambitious project indeed.

Courts undertook that project by conceptualizing the police power as a means of enforcing a common law maxim governing the law of nuisance, *sic utere tuo, ut alienum non lædas*: use your own property in such a way that you do not injure other people's.[169] While fuzzy at the edges—what counts as an injury?—*sic utere* was for a time a serviceable means through which to distinguish proper from improper exercises of state power. As Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court distilled it in an influential 1843 opinion:

> We think it a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall 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.[170]

Although Shaw acknowledged that it was "much easier to perceive and realize the existence and sources of [the police] power, than to mark its boundaries, or prescribe limits to its exercise," his formulation suggested limits.[171] If states could exercise their police powers over life, liberty, and property in order to prevent "injur[y] . . . to the equal enjoyment of others" or "the community," it did not follow that the police power embraced other ends. Courts and commentators subsequently cited Shaw's opinion for the proposition that

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167 ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS, at iii (1904) (affirming that the police power "has remained without authoritative or generally accepted definition").

168 MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 46–50 (2005).

169 *See, e.g.*, State v. Buzzard, 4 Ark. 18, 41 (1842); State v. Glen, 52 N.C. (7 Jones) 321, 327 (1859); Shaw v. Kennedy, 4 N.C. (Taylor) 591, 595 (1817); Thorpe v. Rutland & Burlington R.R., 27 Vt. 140, 149 (1854).

170 Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84–85 (1841).

171 *Id.* at 85–86.

the police power was limited to the ends that Shaw identified as beyond the constitutionally proper scope of the police power.[172]

Today, we might say that the police powers were interpreted as a means of forcing people to internalize negative externalities, thereby increasing aggregate social welfare.[173] Police measures raised the costs to individuals of engaging in activities that imposed costs on others, by prohibiting outright acts that *necessarily* violated the rights of others—such as murder, rape, robbery, and theft—and by regulating behavior that increased the risk of rights violations in order to reduce those violations—such as warehousing gunpowder, constructing wharves, and slaughtering animals.

Professor Caleb Nelson has shown that the scrutiny that courts applied to police measures in the early nineteenth century was not particularly rigorous.[174] Judges limited themselves almost exclusively to the face of statutes in evaluating them, sometimes emphasizing the respect that they owed to members of a coordinate branch of government when doing so.[175] It was not that legislative ends were irrelevant to constitutionality—it was that judges generally abstained from trying to identify those ends for institutional reasons.[176] Thus, in *Hoke v. Henderson*,[177] in which the North Carolina Supreme Court held that the state legislature could not exercise its control over judicial clerks' offices *for the purpose of* expelling clerks from office, Judge Ruffin noted that "the Court . . . cannot enquire into motives not avowed" and would "be obliged to execute [the act in question] as a law" if the act were "couched

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172 *See, e.g.*, Holden v. Hardy, 169 U.S. 366, 392 (1898); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *573 & n.1 (2d ed. 1871); FREUND, *supra* note 167, at § 405.

For a discussion of the influence of Shaw's opinion, see W. G. Hastings, *The Development of Law as Illustrated by the Decisions Relating to the Police Power of the State*, 39 PROCEEDINGS AM. PHIL. SOC'Y 359, 418 (1900) (describing Shaw's opinion as "a starting point for citations directly relating to the police power in most of the constitutional discussions that embrace the subject").

173 *See* N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 196 (6th ed. 2012) ("An externality arises when a person engages in an activity that influences the well-being of a bystander but neither pays nor receives any compensation for that effect. If the impact on the bystander is adverse, it is called a *negative externality*."). Externalities are so called because their costs are external to those who impose them. For similar externality-based understandings of the police power, see Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 439–46 (1988); Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1 (1999).

174 Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1790 (2008).

175 *Id.* at 1806 (reporting that "while jurists were willing to set aside statutes that either candidly acknowledged their unconstitutional purposes or (perhaps) otherwise foreclosed any innocent explanation by their very language, most statutes that said nothing about their goals were effectively insulated from purpose-based judicial review." (footnotes omitted)).

176 *Id.* at 1808–11 (discussing rationales offered for this restriction on judicial review, including information-gathering difficulties, the need to show respect for legitimate legislative bodies, and the belief that the voting themselves could effectively police the legislature's good faith).

177 15 N.C. (4 Dev.) 1 (1833), *overruled by* Mial v. Ellington, 46 S.E. 961 (N.C. 1903).

in general terms."[178] But he made plain that if the act was in fact designed to accomplish an ends not grounded in "public expediency," he would apply it—not "because it was constitutional; but because the court could not see its real character, and therefore could not see that it was unconstitutional."[179]

One struggles, indeed, to identify *any* instances in which courts in the early nineteenth century held purported police measures unlawful. State courts upheld prohibitions of dirt removal from privately owned beaches,[180] regulations specifying the hours during which cattle could be driven through the city streets,[181] statutes authorizing cities to make bylaws governing the interment of the dead,[182] and bylaws requiring people who desired to sell produce that was not from their farm to get permission from the clerk of the market prior to doing so.[183] Rare indeed were cases like *Austin v. Murray*,[184] in which the Massachusetts Supreme Judicial Court sustained a challenge to a bylaw prohibiting the bringing of the dead into Charlestown for purposes of burial—a prohibition that solely affected Catholic parishioners.[185] The court determined that "the object and purpose" of the measure was not "made in good faith" or directed at the "public good," even though it was passed "under the guise of a police regulation."[186]

Yet, it was well established by 1868 that states' powers to deprive people of life, liberty, and property were not unlimited and that governmental ends were constitutionally relevant.[187] Michigan Supreme Court Justice

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178 *Id.* at 26; *see also* Jordan v. Overseers of Dayton, 4 Ohio 294, 309–10 (1831) ("If the state should pass a law, for the purpose of destroying a right created by the constitution, this court will do its duty [and hold it void]; but an attempt, by the legislature, in good faith, to regulate the conduct of a portion of its citizens, in a matter strictly pertaining to its internal economy, we cannot but regard as a legitimate exercise of power . . . .").

179 *Hoke*, 15 N.C. (4 Dev.) at 26–27.

180 Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55, 55–57 (1846).

181 Cooper v. Schultz, 32 How. Pr. 107 (N.Y.C.P. 1866).

182 Coates v. Mayor of New York, 7 Cow. 585, 603–06 (N.Y. Sup. Ct. 1827).

183 Commonwealth v. Rice, 50 Mass. 253, 257–59 (1845).

184 33 Mass. (16 Pick.) 121 (1834).

185 *Id.* at 125–26.

186 *Id.* at 126.

187 *See, e.g.*, Nightingale's Case, 28 Mass. (11 Pick.) 168, 171–72 (1831) (upholding as a "valid . . . police regulation" a bylaw requiring people to sell produce that was not from their farm to get permission from the clerk of the market on the grounds that it was a "wholesome regulation" that was designed "to prevent the market from being unnecessarily thronged and incumbered"); Vadine's Case, 23 Mass. (6 Pick.) 187, 190–91 (1828) (upholding a law preventing people from removing waste materials or other filth from dwelling houses without a license but noting that "[i]f the regulation is unreasonable, it is void; if necessary for the good government of the society, it is good," and describing as "unreasonable" a bylaw that "went to the private benefit . . . and was in the nature of a monopoly."); Vanderbilt v. Adams, 7 Cow. 349, 351 (N.Y. Sup. Ct. 1827) (upholding a statute authorizing harbor masters to regulate and station vessels in the East and North rivers only after determining that it was "calculated for the benefit of all" and cautioning that it "would not be upheld, if exerted beyond what may be considered a necessary police regulation."); Baggs's Appeal, 43 Pa. 512, 515 (1863) ("Any form of direct governmental action on private rights, which, if unusual, is dictated by no imperious public necessity, or which makes a special law

Thomas Cooley—aptly described by Professor Williams as "[b]y far the most influential of the early post-Civil War commentators to address the meaning of due process and law-of-the-land provisions"—focused on the "legitimacy of the legislature's objectives and the means pursued to attain those objectives" in his 1868 treatise on constitutional limitations on state power.[188] Cooley found general agreement that governmental action needed to be "calculated to prevent a conflict of rights, and to insure [sic] to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others."[189]

Does the original meaning of the Fourteenth Amendment's Due Process of Law Clause empower federal courts to enforce those limits on governmental action? In framing the Fourteenth Amendment, the Thirty-Ninth Congress engaged in little discussion of the meaning of due process of law. John Bingham, the principal author of section one of the Fourteenth Amendment, brushed aside New Jersey Democratic Congressman Andrew Rogers's inquiry into the phrase's meaning, stating that "the courts have settled that long ago, and the gentleman can go and read their decisions."[190] He did not specify *which* decisions. Bingham had reason for caution, as Rogers was an adamant opponent of section one who warned that, were it ratified into law, "despotism and tyranny w[ould] march forth undisturbed and unbroken, in silence and in darkness, in this land which was once the land of freedom . . . ."[191] But if one surveys antebellum jurisprudence, one will find courts insisting that states are obliged to use their police powers to pursue legitimate ends.

To summarize: by 1868, legislation was deemed *not to be part of the law of the land* and therefore insusceptible of being applied to individuals consistently with due process of law if (1) it deprived individuals of certain procedural rights traceable to the common law; (2) it was either retrospective or insufficiently general, and thus usurped judicial power; (3) it violated a superior source of written law; or (4) it was not a good-faith effort to promote a legitimate governmental end. The next Part pursues the question of how the original meaning of the Fourteenth Amendment's Due Process of Law Clause has been, is now, and ought to be implemented in the future.

III. IMPLEMENTING DUE PROCESS OF LAW

Institutions—whether understood as rules (including constitutions, statutes, regulations, or social norms) or as decision-making bodies (including

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for a particular person, or gives directions for the regulation and control of a particular case after it has arisen, is always arbitrary and dangerous in principle, and almost always unconstitutional.").

188 Williams, *supra* note 48, at 493–94.

189 *See* COOLEY, *supra* note 172, at 572.

190 CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

191 *Id.* at 2538.

courts, legislatures, and agencies)[192]—both limit the choices that are available to us and empower us to accomplish our goals. As organizational theorist Herbert Simon long ago recognized, human beings are *boundedly rational*—we are both informationally and computationally limited, and we do not always act in ways that maximize our utility.[193] Institutions can enable us to economize on our bounded rationality by structuring both our interactions with one another and our own decision-making processes in ways that make it easier to acquire and process information, draw upon our knowledge, and satisfy our preferences.[194] Determining how to achieve any end entails prudent institutional design and careful choice between what are inevitably imperfect institutional alternatives. As Professor Neil Komesar has put it:

> On the one hand, institutional performance and, therefore, institutional choice can not be assessed except against the bench mark of some social goal or set of goals. On the other, because in the abstract any goal can be consistent with a wide range of public policies, the decision as to who decides determines how a goal shapes public policy. It is institutional choice that connects goals with their legal or public policy results.[195]

The same can be said for decisions about to *how* to decide. Identifying goals such as the reduction of carbon emissions, the production of safe driverless vehicles, or legislative compliance with the due process of law tells us little about who should be responsible for achieving them, or how they should seek to achieve them.

True, the Constitution itself makes certain institutional choices for public officials. Judges who are empowered by Article III's provision for "the judicial power" to decide constitutional questions in accordance with their independent judgment, for instance,[196] must do precisely that, even if it were proved by twenty welfare economists that the social costs of independent judicial review exceeded the benefits.[197] But what if the original meaning of

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192 For a detailed discussion of different usages of the term "institution" by leading transaction cost scholars, with a special focus on the work of Neil Komesar, see Daniel H. Cole, *The Varieties of Comparative Institutional Analysis*, 2013 WIS. L. REV. 383. Like Komesar, this Article refers to decision-making bodies as institutions.

193 *See* HERBERT A. SIMON, MODELS OF MAN: SOCIAL AND RATIONAL 196–203 (1957); Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99, 99–101, 114 (1955). For a summary and defense of the application of bounded rationality to economic models, see John Conlisk, *Why Bounded Rationality?*, 34 J. ECON. LITERATURE 669 (1996). For applications of the concept to judicial decision-making, see ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 153–288 (2006); Bainbridge & Gulati, *supra* note 37, at 139–45.

194 Efficient institutions therefore can lower both the costs associated with reaching decisions *and* the costs associated with erroneous decisions—both decision costs and error costs.

195 NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1994).

196 *See* HAMBURGER, *supra* note 115, at 541–43, 553–54.

197 *See* Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911) (Hand, J.) (holding that the testimony of twenty bishops was insufficient to prove that two contracting parties "intended something else than the usual meaning which the law imposes upon them.").

"due process of law" does not yield enough information to decide a given question?

This Part describes the theory of good-faith constitutional construction—a theory that is designed to guide constitutional decision-making where the original meaning of the Constitution's text (its "letter") does not yield clear answers, in a way that promotes fidelity to the text's original function (its "spirit"). It then identifies the spirit of the Fourteenth Amendment's Due Process of Law Clause. After describing several frameworks that judges have used over the years to implement the Due Process of Law Clause, it puts forward an alternative framework that will aid judicial enforcement of the Fourteenth Amendment's Due Process of Law Clause today.

A. *Good-Faith Construction*

The text of the Constitution is incomplete,[198] at least in the sense that its language does not provide for every contingency. Comparatively simple commercial agreements inevitably fail to provide for every contingency for a variety of reasons, economic uncertainty[199] and positive transaction costs[200] among them. It would be unreasonable to expect any text forged in the heat of intense controversy by a multimember decision-making body (i.e., the Philadelphia Convention) and subsequently ratified into law by numerous other multimember bodies (i.e., state ratifying conventions) to address every legal question that would arise under it within the next few years, let alone the next two centuries.[201]

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

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198 *See* Oliver D. Hart, *Incomplete Contracts and the Theory of the Firm*, 4 J.L. ECON. & ORG. 119, 123 (1988) (stating that an incomplete contract "contains gaps or missing provisions; that is, the contract will specify some actions the parties must take but not others; it will mention what should happen in some states of the world, but not in others.").

199 *See* Alan Schwartz, *Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL. STUD. 271, 278–79 (1992) (listing the fact that "the future is imperfectly knowable" among the causes of contractual incompleteness).

200 *See* Sanford J. Grossman & Oliver D. Hart, *The Costs and Benefits of Ownership: A Theory of Vertical and Lateral Integration*, 94 J. POL. ECON. 691, 695 (1986) ("It may be extremely costly to write a contract that specifies unambiguously the payments and actions of all parties in every observable state of nature.").

201 Delegation to the future need not have been intentional—even on the assumption that the Framers strove to strictly minimize the discretion of future decisionmakers, they might still have left gaps to be filled by failing to choose language that clearly resolved certain matters. *See* Neil K. Komesar, *Back to the Future—An Institutional View of Making and Interpreting Constitutions*, 81 NW. U. L. REV. 191, 201–02 (1987).

Because the Constitution is incomplete and because interpreters are boundedly rational, time-limited, and institutionally constrained, any prescriptive theory of constitutional decision-making that fails to address what decisionmakers should do when either the meaning of the constitutional text runs out or a given decisionmaker's knowledge of that meaning runs out, is itself incomplete. Legislators, judges, and executive-branch officials will necessarily enter what Professor Lawrence Solum has called the "construction zone"—a zone in which constitutional decisionmakers must have recourse to textually unspecified rules of decision in order to implement the relevant constitutional text.[202]

Good-faith construction holds that constitutional decisionmakers are not free to indulge their normative preferences within the construction zone.[203] Such indulgence threatens to deprive those who live under the Constitution of the full measure of benefits that its various provisions are designed to capture. As the duty of good faith in both contract law and fiduciary law prevents power-exercising parties from self-interestedly abusing their discretion under the letter of their agreements to expropriate value from vulnerable parties,[204] so too does good-faith construction aim to prevent government officials from using their discretion under the letter of "this Constitution" to deny ordinary members of the public the benefits of the constitutional bargain that public officials enter into upon taking their oaths.

The goals and desires of government officials and ordinary members of the public may, after all, conflict. Relevant here, public-choice theory—which has proven robust[205] against criticism of its model of self-interested official behavior—posits that legislation is "'sold' by the legislature and 'bought' by the beneficiaries of the legislation."[206] Legislators seeking to maximize aggregate political support produce legislation that is designed to

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202 Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469 (2013).

203 *See* Barnett & Bernick, *supra* note 38, at 32–33.

204 *Id*. at 23–25.

205 *See, e.g.*, R. DOUGLAS ARNOLD, CONGRESS AND THE BUREAUCRACY: A THEORY OF INFLUENCE 139 (1979) (finding that if a member of Congress wants a water and sewage grant for his or her home state, the chances for success are approximately eighty percent higher if the member sits on the relevant appropriations subcommittee and approximately sixty percent higher if he or she is a member of the relevant authorizing committee); JOHN A. FEREJOHN, PORK BARREL POLITICS: RIVERS AND HARBORS LEGISLATION, 1947–1968, at 137 (1974) (finding, consistent with the assumption that members of Congress use committee membership to maximize political support, that each member of the Public Works Committee in Congress obtained 0.63 additional projects for his state over nonmembers); Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J.L. & ECON. 329, 339–42 (1982) (finding that businesses in congressional districts with oversight responsibility over the FTC get investigated less frequently by the FTC than do competitors who aren't so situated); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 152–55 (1988) (canvassing evidence that committee members receive a disproportionate share of the benefits from their committees).

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

benefit interest groups who value it enough to out-bid rivals.[207] This occurs by "campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes",[208] regardless of whether the legislation increases social welfare—and sometimes when it is designed only to transfer resources from the politically weak to the politically strong. To the extent that the public officials' short-term political interests and the public's interest in those officials' constitutional compliance are not perfectly aligned, agency costs loom.[209]

How does good-faith construction reduce agency costs? Good-faith construction counsels constitutional decisionmakers operating within the construction zone to identify the original function, or functions, of the relevant constitutional text and to make decisions that are consistent with those functions. It counsels judges to develop implementing doctrines that can be used to distinguish legislative acts that are consistent with those functions from those that are not. Good-faith construction also helps members of the public evaluate whether judges are discharging their constitutional duties. To be sure, the political transaction costs associated with removing judges from office are extremely high—the Constitution deliberately provides judges with a good deal of protection from political pressure in order to ensure their fidelity to the law of the land.[210] But empirical evidence indicates that judges are sensitive to criticism from professional peers, colleagues, and other salient audiences, and that the imposition of reputational costs may therefore have an impact on decision-making that hollow impeachment threats will not.[211]

Identifying the spirit of any given constitutional provision requires recourse to some of the same materials as the identification of the letter of that provision—that is, the original meaning of its text. The next Section

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207 Public-choice theory has had little to say about judicial behavior, in part because there is little agreement about what, exactly, judges maximize. Proposed arguments in the judicial utility function include power, collegiality, intellectual satisfaction, leisure, maintenance of the rule of law, and reputation. For a sampling of the literature on judicial behavior, see, for example, MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT (2011); LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE (2002); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993). It is no part of this project to contend that judges are less self-interested than are legislators or that there are no agency costs associated with judicial discretion. It seems likely, however, that federal judges are at a minimum self-interested in different ways than are legislators, given that federal judges do not stand for election, and that the agency costs associated with judicial discretion would thus take a different form than those associated with legislative discretion.

208 Landes & Posner, *supra* note 206, at 877.

209 *See* sources cited *supra* note 35.

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

211 *See generally* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006); NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT (2019).

canvasses those materials in order to identify the spirit of the Fourteenth Amendment's Due Process of Law Clause.

B. *The Spirit of Due Process of Law*

As discussed above, in England, due process of law served to prevent people from being wrongfully deprived of their life, liberty, or property at the mere will of the executive. It did not protect people from the will of Parliament. In America, due process of law came to be understood as a guarantee against *all* arbitrary government action, whether initiated by the executive or the legislature. At all points, due process of law was understood to denote a concept of rule by prior principles rather than the beliefs or desires of those exercising power at a given time.

The *content* of the relevant prior principles, of course, changed. Those who framed and ratified the Fourteenth Amendment undoubtedly differed from Lord Coke in their understanding of what it meant for government action to be arbitrary. Grasping that understanding requires immersion in the antebellum constitutional thought and arguments upon which they relied—in particular, antislavery constitutional thought.

Opponents of slavery were not of one mind concerning the Constitution. Some regarded it as, in William Lloyd Garrison's famous words, "an agreement with hell."[212] Others, like Chief Justice Salmon Chase, Lysander Spooner, Alvan Stewart, William Goodell, Frederick Douglass, and Joel Tiffany, argued that the Constitution was a "glorious liberty document" that was consistent with the natural-rights-based political theory set forth in the Declaration of Independence.[213] The latter group claimed that the Constitution was designed to secure the natural rights of sovereign individuals and that states did not possess inherent or arbitrary power.[214] They also specifically

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212 *See* WALTER M. MERRILL, AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON 205 (1963). Garrison introduced the following resolution before the Massachusetts Anti-Slavery Society in 1843: "That the compact which exists between the North and South is 'a covenant with death, and an agreement with hell'—involving both parties in atrocious criminality; and should be immediately annulled." *Id.*

213 For a detailed treatment of how the Declaration served as "the most important source of antislavery Republicanism," see Daniel A. Farber & John E. Muench, *The Ideological Origins of the Fourteenth Amendment*, 1 CONST. COMMENT. 235 (1984).

214 *See, e.g.*, WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW, IN ITS BEARING UPON AMERICAN SLAVERY 137 (Utica, Jackson & Chaplin 1844) ("Before the Declaration of Independence . . . there were no independent sovereign States . . . . There has been no State sovereignty that has not been connexed with the unity of the States, and modified by it." (emphasis removed)); JOEL TIFFANY, A TREATISE ON GOVERNMENT, AND CONSTITUTIONAL LAW § 82 (1867) (arguing that "[s]overeignty, as an attribute of the people of the United States as a nation, excludes the like sovereignty of the people of a single State, as State citizens merely" and that "the authority of a citizen as a constituent of the nation, is superior to his authority as a constituent of a mere State or territory"); John Quincy Adams, The Jubilee of the Constitution: A Discourse (Apr. 30, 1839), *in* THE JUBILEE OF THE CONSTITUTION 30 (Samuel

cited the Fifth Amendment's Due Process of Law Clause for the proposition that slavery could not be established in newly acquired federal territories, arguing that statutes that purported to establish it were mere "pretended legislation."[215] It was the pro-Constitution abolitionists who exerted the most influence upon Republican constitutional thought.[216]

Pro-Constitution abolitionist literature relied heavily upon natural-rights theory in identifying the legitimate ends of government.[217] In particular, the influence of John Locke loomed large. Lockean themes—the priority of natural rights; the centrality of the natural rights to property in one's own person and in the fruits of one's labor to human flourishing; and the natural

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Colman, VIII ed., 1839) (arguing that Southern conception of state sovereignty is "a mere reproduction of the omnipotence of the British parliament in another form, and therefore not only inconsistent with, but directly in opposition to, the principles of the Declaration of Independence."). For accounts of the development of the concept of "paramount national citizenship" and its influence upon Republican constitutional thought, see JACOBUS TENBROEK, EQUAL UNDER LAW 94–115 (First Collier Books ed. 1965); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 69–73 (1993). For vivid examples, see, for example, CONG. GLOBE, 40th Cong., 3d Sess. app. at 127 (1869) (statement of Rep. James Mullins) ("Government stands based upon the natural right of every individual man, a right which can to a certain extent be compromised, so that the body-corporate may exercise certain powers surrendered by the parties who united to organize it.").

215 *See, e.g.*, CONG. GLOBE, 34th Cong., 1st Sess. app. at 124 (1856) (speech of Rep. John Bingham) (attacking "pretended legislation" recently passed by the Kansas pro-slavery legislature which declared it a felony even to agitate against slavery on the grounds that it "deprives persons of liberty without due process of law."); *id.* at 296 (speech of Rep. A.P. Granger) (affirming that the Fifth Amendment's Due Process of Law Clause "seals the death-warrant of slavery" and that "no State sovereignty has power to protect it"); CONG. GLOBE, 33d Cong., 1st. Sess. app. at 524 (1854) (speech of Rep. Garrett Smith) (arguing that the Due Process of Law Clause would "put[] an end to American slavery" if allowed "free course"); CONG. GLOBE, 31st Cong., 1st Sess. 1146 (1850) (statement of Sen. Salmon Chase) ("[S]o long as the Constitution retains [sic] unaltered, the provision which denies to Congress all power to deprive any person of liberty without due process of law, I shall not believe that any person can be held in the territories as a slave without a violation of that instrument."); WILLIAM GOODELL, SLAVERY AND ANTI-SLAVERY 576 (3d ed. 1855) ("If this Amendment cannot protect us from slavery, what can it protect us from? Or, of what use is it?"); Republican Platform of 1856, Adopted by the National Republican Convention held in Chicago, May 17, 1860, LIBRARY OF CONGRESS, https://www.loc.gov/resource/rbpe.0180010b/ ("[A]s our Republican fathers . . . ordained that 'no person shall be deprived of life, liberty, or property without due process of law' . . . 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."); Alvan Stewart, *A Constitutional Argument on the Subject of Slavery* (1837), *reprinted in* TENBROEK, *supra* note 214, app. B at 281–95 (stating that thanks to the Fifth Amendment, "Congress, by the power conferred on it by the Constitution, possesses the entire and absolute right to abolish slavery in every state and territory in the Union.").

216 *See* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 42–46 (1986) (tracing the influence of Stewart and Tiffany); David A.J. Richards, *Abolitionist Political and Constitutional Theory and the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1187, 1201–02 (1992) (detailing how radical antislavery arguments "responded to the antebellum crisis of constitutional legitimacy by requiring an interpretive attitude to the Constitution that would preserve its legitimacy on the grounds of the rights-based theory of human rights central to its claims to be the supreme law of the land" and tracing their influence).

217 *See* Farber & Muench, *supra* note 213, at 241.

equality among human beings, along with the corresponding need for consensual government—saturate pro-Constitution antislavery treatises and public arguments.[218] Crucially for Locke, the paradigmatic example of arbitrary power was slavery—to be a slave is to be subject to "the inconstant, uncertain, unknown, arbitrary will of another man."[219] Such arbitrary power, Locke argued, could never arise from consent and therefore could never be morally legitimate.[220] Pro-Constitution abolitionists agreed, and put a considerable amount of imagination to work in fashioning arguments that the Constitution's text should be interpreted in accordance with natural-rights principles to avoid affirming slavery's legitimacy as a matter of positive law. If some of these arguments seem strained today,[221] they remain powerful evidence of the influence of natural-rights theory upon pro-Constitution antislavery thought.

The vast majority of Republicans did not adopt Lysander Spooner's view that slavery was unconstitutional everywhere,[222] even if they believed that natural rights were on the side of abolition. Still, to the extent there was a consensus concerning the ends of legitimate government among Republicans, that consensus rested upon natural-rights principles, which were—as Douglass said of the Constitution—"entirely hostile to the existence of slavery."[223]

After losing the war, southern states sought to reassert the very kind of arbitrary power that gave rise to the conflict. They responded to the passage of the Thirteenth Amendment by enacting the infamous "Black Codes": state statutes designed to limit the social and economic opportunities of formerly enslaved people by, among other things: mandating the forfeiture of wages already earned if laborers left their jobs before their contracts expired; threatening those who offered work to laborers under contract with imprisonment

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218 *See* Richards, *supra* note 216, at 1194–96 (arguing that "[r]adical antislavery theory agreed with moderate antislavery that the proper interpretive attitude towards the United States Constitution must be Lockean political theory").

219 LOCKE, *supra* note 130, at § 22.

220 *Id.* at § 23 ("[F]or a man, not having the power of his own life, cannot, by compact, or his own consent, enslave himself to any one, nor put himself under the absolute, arbitrary power of another, to take away his life, when he pleases.").

221 *See* LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1845), *in* 4 THE COLLECTED WORKS OF LYSANDER SPOONER 1, 67–70 (M&S Press 1971) (arguing that what is generally referred to today as the "Fugitive Slave Clause" of Article IV, section 2 should not be interpreted to refer to slaves because the phrase "person[s] held to service or labor" can be understood to refer to "the labor of a servant" and "[t]he law will not allow words to be strained a hair's breadth beyond their necessary meaning, to make them authorize a wrong" (emphasis removed)).

222 *See* Farber & Muench, *supra* note 213, at 240.

223 Frederick Douglass, *Fourth of July Oration*, *in* WHAT COUNTRY HAVE I? POLITICAL WRITINGS BY BLACK AMERICANS 35, 38 (Herbert J. Storing ed., 1970); *see also* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 303–04 (2016) (arguing that "[t]o have expected to the Constitution to be less protective of slavery than it was probably would have been unrealistic," owing to the fact that "southern delegates generally were more intent upon protecting slavery than northern delegates were upon undermining it").

and fines; forbidding marriages across racial lines; forbidding freed people from renting land in urban areas; banning freed people from leaving the plantation or entertaining guests upon it without permission of the employer; criminalizing the exercise of rights such as hunting, fishing, and the free grazing of livestock; and imposing licensing taxes on "emigrant agents" (agents represented by planters who advertised distant opportunities for labor).[224] The function—or, the spirit—of these statutes was to perpetuate institutions that systematically and brutally transferred wealth created by blacks to whites over the span of generations and to maintain white hegemony.

Together with reports of violence against the freed people, and retribution against white abolitionists and supporters of the Union more generally, the passage of the Black Codes generated a widespread conviction among Republicans that what President Abraham Lincoln described as the "spirit that says, 'You work and toil and earn bread, and I'll eat it'" was still being implemented.[225] The need to thwart that spirit gave rise to far-reaching federal legislation and, ultimately, additional constitutional amendments.

It might seem unhelpful to claim that the Fourteenth Amendment's Due Process of Law Clause was designed to thwart government action that rests upon a "you work, I'll eat" principle, given that this spirit might be understood at varying levels of generality. Narrowly understood, it might only prohibit legislation designed to perpetuate chattel slavery in all but name; broadly understood, it might prohibit all redistributive legislation that decreases aggregate welfare.

Any argument that the Fourteenth Amendment's Due Process of Law Clause requires that legislation be economically efficient or forbid redistribution[226] would be implausible. But it is not too much to say that the Clause was designed to do more than prevent the effective resumption of chattel slavery. Republicans sought economic autonomy—praising labor in Lockean language as the source of wealth and maintaining that workers, regardless of race, were entitled to the full fruits of their labor.[227] There is no reason to think that the spirit of the Fourteenth Amendment's Due Process of Law

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224 For an overview of these statutes and their impact, see generally DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR RELATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 8–27 (2001); DOUGLAS R. EGERTON, THE WARS OF RECONSTRUCTION: THE BRIEF, VIOLENT HISTORY OF AMERICA'S MOST PROGRESSIVE ERA 168–210 (2014); JOSEPH A. RANNEY, IN THE WAKE OF SLAVERY: CIVIL WAR, CIVIL RIGHTS, AND THE RECONSTRUCTION OF SOUTHERN LAW 44–61 (2006).

225 THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 393 (Paul M. Angle ed., 1958).

226 Redistribution may be economically efficient if goods will be supplied at an inefficient level by the market, thanks to monopoly, positive transaction costs, or externalities, among other impediments to achieving a Pareto-optimal state of affairs. For a list of the conditions required for Pareto-optimality, see Richard S. Markovits, *Second-Best Theory and Law & Economics: An Introduction*, 73 CHI.-KENT L. REV. 3, 3 n.2 (1998).

227 *See* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 111–39 (1970) (describing Republican stress on free labor in the territories and Lockean conception of the right to property).

Clause is compatible with *any* legislative deprivations of life, liberty, or property that amount to what Professor Cass Sunstein has termed "naked preferences": "[D]istribution[s] of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want."[228]

C. *Constructing Constitutional Heuristics*

It is now time to develop implementing doctrines that give effect to the anti-arbitrariness spirit of the Fourteenth Amendment's Due Process of Law Clause.

There is a growing body of evidence that boundedly rational judges with scarce time will, like the rest of us, inevitably rely upon heuristics—strategies that enable people to economize on time and cognitive effort when making decisions.[229] Although heuristics are sometimes disparaged because they fall short of Bayesian standards for probabilistic inference,[230] people must nonetheless depend upon them because of constraints of time and computational capacity that often make it impossible for them to satisfy Bayesian standards in real-world situations.[231]

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228 Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

229 *See s*ources cited *supra* note 37.

230 There is an entire research program, inspired by the pioneering work of Daniel Kahneman and Amos Tversky, devoted to the study of the ways in which heuristics can lead people into systematic inferential errors—errors by Bayesian lights. For an overview of the heuristics-and-biases program, see MARK KELMAN, THE HEURISTICS DEBATE 19–49 (2011). For an overview of the Bayesian approach to statistical inference, see JAYANTA K. GHOSH ET AL., AN INTRODUCTION TO BAYESIAN ANALYSIS: THEORY AND METHODS 29–37 (2006).

Bayesians hold that agents are rationally required to update the prior probabilities ("priors") that they assign to their beliefs about the world as evidence bearing upon the likelihood that those beliefs are accurate accumulates. *See* William Talbott, *Bayesian Epistemology* (2008), *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Winter ed. 2016), https://plato.stanford.edu/archives/win2016/entries/epistemology-bayesian/ ("If one begins with initial or *prior* probabilities . . . and one acquires new evidence . . . then rationality requires that one systematically transform one's initial probabilities to generate final or *posterior* probabilities . . . ."). Heuristics, by definition, effectively cut short evidentiary inquiry when they are triggered. *See* Gerd Gigerenzer & Peter M. Todd, *Fast & Frugal Heuristics: The Adaptive Toolbox*, *in* GERD GIGERENZER ET AL., SIMPLE HEURISTICS THAT MAKE US SMART 3, 14 (1999) ("Fast and frugal heuristics limit their search of objects or information using easily computable stopping rules, and they make their choices with easily computable decision rules."). Agents who rely on heuristics can thus frequently end up making choices that are, by Bayesian standards, not fully rational. *See* Amos Tversky & Daniel Kahneman, *Judgement Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1130–31 (1974) (summarizing experimental evidence of "systematic and predictable" inferential errors resulting from use of representativeness, availability, and anchoring-and-adjustment heuristics).

231 *See* Russell Korobkin, *The Problems with Heuristics for Law*, *in* HEURISTICS AND THE LAW 45, 47 (G. Gigerenzer & C. Engel eds., 2006) (explaining that "[i]f all judgments and decisions were made only after considering all relevant data, attaching subjective preference weights to all possible outcomes,

The business-judgment rule in corporate law—which insulates decision-making by corporate directors from substantive review for carelessness absent showings of conflicts of interest, gross negligence, or conscious disregard of the law—offers a highly relevant example.[232] The business-judgment rule economizes on scarce judicial time and cognitive effort that might otherwise be spent evaluating whether company projects are designed to yield net-positive present value. It has been defended on the grounds that (1) judges lack the business acumen to make such determinations; (2) well-functioning capital markets will force badly behaving boards to internalize the costs of poor decision-making; (3) directors would be insufficiently willing to make risky decisions that would be net-beneficial to shareholders under stringent liability rules; and (4) some competent would-be directors would not be willing to serve at all under stringent liability rules.[233]

Judicial heuristics like the business judgment rule are not inherently good or bad in the sense of either improving or worsening overall outcomes in the decision-making contexts in which they are triggered. They *can*, however, be either good or bad. Indeed, they can be good for a time and become bad, or worse than alternative strategies—the technical term is *maladaptive* when the relevant environment changes.[234]

What does a maladaptive constitutional heuristic look like? Consider the fundamental-fairness test abandoned by the Court in *Gideon v. Wainwright*.[235] By holding that criminal defendants are entitled to an attorney at public expense, *Gideon* simplified what had been a complex inquiry into whether the "totality of the facts" indicated that the lack of assistance from counsel would "constitute a denial of fundamental fairness."[236] While its author, Justice Hugo Black, made plain that he believed that the text of the Sixth Amendment, as incorporated through the Fourteenth, inherently commanded that the fundamental-fairness test—associated with *Betts v. Brady*[237]—be discarded, Justice John Marshall Harlan, in a separate concurrence, took the position that the test was *no longer* defensible:

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and creating probability predictions of each outcome, none of us could complete the myriad cognitive tasks we face each day").

232 For overviews of the business judgment rule, see Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 88–90, 89 n.37 (2004); Mary Siegel, *The Illusion of Enhanced Review of Board Actions*, 15 U. PA. J. BUS. L. 599, 602–08 (2013).

233 *See* Bainbridge, *supra* note 232, at 109–27.

234 *See* Arndt Bröder & Stefanie Schiffer, *Adaptive Flexibility and Maladaptive Routines in Selecting Fast and Frugal Decision Strategies*, 32 J. EXPERIMENTAL PSYCHOL. 904, 905 (2006) (defining a maladaptive routine as "a behavior sequence that was once efficient in solving a problem but becomes inefficient or even detrimental in a new context."). I plan, in a future work, to develop a detailed framework that judges can use to assess whether existing constitutional heuristics accomplish their purposes with optimal efficiency, and to develop optimally efficiency heuristics anew.

235 372 U.S. 335, 339 (1963).

236 *See* Betts v. Brady, 316 U.S. 455, 462 (1942).

237 316 U.S. 455, 462 (1942).

> In noncapital cases, the "special circumstances" rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after *Betts*, there were cases in which the Court found special circumstances to be lacking, but usually by a sharply divided vote. However, no such decision has been cited to us . . . . At the same time, there have been not a few cases in which special circumstances were found in little or nothing more than the "complexity" of the legal questions presented, although those questions were often of only routine difficulty. The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts v. Brady* rule is no longer a reality.[238]

This is a description of a maladaptive heuristic—one that no longer improves overall decision-making, but rather hinders decision-making in each and every case in which it is triggered. If the existence of a criminal charge itself constitutes a special circumstance requiring assistance, any totality-of-the-facts inquiry in criminal cases where counsel is not provided will yield deadweight loss, consisting of decision costs without compensating benefits in every case, and error costs in those cases in which no special circumstance is found.

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

1. A Brief History of Substantive Due Process Heuristics

a. *Police Powers*

Scholars generally agree that late-nineteenth-century courts developed, under the auspices of due process of law, a doctrine that was designed to establish the bounds of the states' reserved police powers. But there remains intense disagreement concerning the precise contours of that doctrine and what ideological commitments animated it. Did opposition to "class legislation"—the singling out of particular groups for burdens and benefits, for no public-welfare-oriented reason—serve as its driving force?[239] Did emphasis

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238 *Gideon*, 372 U.S. at 350–51 (Harlan, J., concurring) (footnotes omitted) (citations omitted).

239 *See, e.g.*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 103–04 (1993); Barry Cushman, *Some Varieties and Vicissitudes of Lochnerism*, 85 B.U. L. REV. 881, 881–83 (2005) (emphasizing the importance of class legislation to police-power jurisprudence); G. Edward White, *Revisiting Substantive Due Process and Holmes's* Lochner *Dissent*, 63 BROOK. L. REV. 87, 88–97 (1997).

later shift to the protection of fundamental rights?[240] Was opposition to class legislation itself driven by concern with protecting fundamental rights?[241]

This Section does not attempt to resolve the above disagreement. The proposition that the police powers were understood to be means of reducing negative externalities is consistent with all competing narratives. So, too, are the propositions that (1) the connection between purported exercises of police powers and externality reduction that courts were prepared to uphold as sufficient became increasingly attenuated in the late nineteenth century; and (2) that attenuation became particularly pronounced in the context of morals legislation.

It is not that the morals power served as a blank check for legislators. As Professor John Compton details in *The Evangelical Origins of the Living Constitution*, while nineteenth-century jurists "rarely questioned the legitimacy of *traditional* forms of morals regulation," those regulations were justified in terms of "the maintenance of public order" rather than "the eradication of [*private*] vice."[242] But it became increasingly easy to pass off measures designed to eradicate private vice as measures designed to reduce negative externalities.

Consider *Mugler v. Kansas*,[243] in which the Court upheld the constitutionality of a state prohibition on liquor.[244] Writing for the Court, Justice John Marshall Harlan insisted that the Court had a solemn duty to invalidate purported police measures with "no real or substantial relation" to the ends of "protect[ing] the public health, the public morals, or the public safety."[245] But the means-end analysis that he performed was insubstantial: "we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks."[246]

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240 *See* BERNSTEIN, *supra* note 40, at 3 (arguing that the focus on class legislation shifted to a fundamental-rights-oriented approach beginning with *Lochner*); David E. Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12–13 (2003); Victoria F. Nourse, *A Tale of Two* Lochners*: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 752–53 (2009).

241 *See* Barnett & Bernick, *supra* note 27, at 1667–68. Some scholars argue that the ideological commitments that animated police-power doctrine emerged from a theory of the optimal structure of economic relationships. For efforts to capture the political economy of substantive due process, see, for example, William E. Forbarth, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767; Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379 (1987); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 Tex. L. Rev. 1329 (2015).

242 *See* JOHN W. COMPTON, THE EVANGELICAL ORIGINS OF THE LIVING CONSTITUTION 8 (2014).

243 123 U.S. 623 (1887).

244 *Id.* at 662 (finding "no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights.").

245 *Id.* at 661.

246 *Id.* at 662.

Probably the most appalling failure of nineteenth-century police-power doctrine to thwart arbitrary legislation is *Plessy v. Ferguson*,[247] in which the Court upheld Louisiana legislation forbidding private street-car operators to provide service to both blacks and whites.[248] Justice Brown spent all of a single paragraph analyzing "whether the statute of Louisiana is a reasonable regulation."[249] In it, Justice Brown baldly stated that "there must necessarily be a large discretion on the part of the legislature" and that legislatures are "at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."[250]

The Court also had an increasingly difficult time using what amounted to an all-things-considered reasonableness test[251] to distinguish novel but good-faith efforts to reduce externalities[252] from "mere meddlesome interferences"[253] with constitutionally protected rights. The maximum-hours and minimum-wage cases that spanned the first thirty-odd years of the twentieth century are illustrative. Three years after the Court in *Lochner v. New York* upheld a maximum-hours provision of New York's 1895 Bakeshop Act that

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247 163 U.S. 537 (1896). A case for the most appalling failure also might be made for *Buck v. Bell*, in which the Court upheld 8–1 a compulsory sterilization law as a reasonable police measure. *See* 274 U.S. 200, 207 (1927). In the years following *Buck*, the number of states with sterilization laws increased from seventeen to thirty-three, and an estimated 25 thousand individuals who were determined to have mental disabilities were reportedly sterilized in the 1930s alone. *See* SARAH F. HAAVIK & KARL A. MENNINGER, SEXUALITY, LAW, AND THE DEVELOPMENTALLY DISABLED PERSON: LEGAL AND CLINICAL ASPECTS OF MARRIAGE, PARENTHOOD, AND STERILIZATION 125–27 (1981). Carrie Buck was in fact of normal intelligence—she was institutionalized after being raped by her foster parents' nephew. For an exhaustive history, see ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2016).

248 *See Plessy*, 163 U.S. at 548–51.

249 *Id.* at 550–51.

250 *Id.* at 550.

251 *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1287 (2007) (describing this standard of review as "reasonableness" review and observing that the "the demands of reasonableness can be—and were—understood more or less stringently, even by different judges or Justices in the same case."); G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 3–4 (2005) ("During the period from *Marbury v. Madison* to *United States v. Carolene Products, Co.*, the Court essentially subjected all challenged decisions of other branches to the same standard of review." (footnotes omitted)).

252 One might question whether this legislation was directed at reducing externalities at all, rather than simply protecting workers from the consequences of their own choices. The Court did, however, evaluate such legislation within an externality-reduction framework, reasoning that third parties needed in certain cases to be protected from the consequences of workers' choices. *See* Muller v. Oregon, 208 U.S. 412, 421–22 (1908) ("[A] woman becomes an object of public interest and care in order to preserve the strength and vigor of the race . . . . [And] she is properly placed in a class by herself, and legislation designed for her protection may be sustained . . . ."); Holden v. Hardy, 169 U.S. 366, 396–97 (1898) (upholding maximum-hours law regulating employment in underground mines because "[t]he State still retains an interest in [a miner's] welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer").

253 Lochner v. New York, 198 U.S. 45, 61 (1905).

covered biscuit, cake, and bread bakers, the Court in *Muller v. Oregon*[254] upheld maximum-hour legislation that applied only to women.[255] Nine years later, in *Bunting v. Oregon*,[256] it upheld maximum-hour legislation covering mills, factories, and other manufacturing facilities, with nary a mention of *Lochner*.[257] Whereas in *Lochner* the Court highlighted the lack of evidence that bakers were peculiarly in need of state protection,[258] the Court in *Bunting* rejected the contention that the challenged law was "not either necessary or useful 'for preservation of the health of employés in mills, factories and manufacturing establishments'" on the ground that the record "contain[ed] no facts to support the contention"; it stated only that "the custom in our industries does not sanction a longer service than 10 hours per day," and cited average daily working time in several other countries.[259] The Court went from upholding federal and state minimum wage legislation in two 1917 decisions,[260] to disapproving all minimum wage legislation in decisions from 1923 to 1927,[261] to upholding state minimum wage legislation in 1937 (that had been in existence since 1914).[262] This made for an unpredictable rule of law.

Finally, the demand for a predictable rule of law increased. The Court's mandatory docket had by 1890 "swelled to over to over 1800 cases, only four or five hundred of which it could dispose of in a given year."[263] The Court pled for help from Congress, and received some in the form of the 1891 Judiciary Act, which granted the Court discretionary certiorari review over certain classes of cases.[264] But because the Court continued to exercise mandatory appellate jurisdiction over most federal question cases, the Court's docket continued to swell.[265] It was not until the 1925 Judiciary Act that the Court received discretionary certiorari review that enabled it to—as Professor Tara Leigh Grove has put it—"concentrate its limited resources on what the political branches perceived as the Court's principal function: to provide a uniform resolution of important federal questions for the judiciary."[266] In order to discharge those functions, the Court needed to develop doctrine that

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254 208 U.S. 412 (1908).

255 *Id*. at 423.

256 243 U.S. 426 (1917).

257 *Id*. at 432.

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

259 *Bunting*, 243 U.S. at 438–39.

260 Stettler v. O'Hara, 243 U.S. 629, 629 (1917); Wilson v. New, 243 U.S. 332, 359 (1917).

261 Donham v. West-Nelson Mfg. Co., 273 U.S. 657, 657 (1927); Murphy v. Sardell, 269 U.S. 530, 530 (1925); Adkins v. Children's Hosp. of D.C., 261 U.S. 525, 561–62 (1923).

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

263 *See* Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL'Y 475, 480 (2016) (footnote omitted).

264 *Id*.

265 *Id*.

266 *Id*. at 476.

could provide lower courts with more guidance in the many cases that it could not review than could an unpredictable reasonableness test that covered *all* legislation.

The Court's dismantling of its police-power doctrine cannot fairly be described as the mere product of an ideological coup engineered by Progressives. The retreat took place over the span of decades for a variety of reasons—some ideological, to be sure,[267] but some more mundanely institutional. The decision costs associated with distinguishing reasonable from arbitrary government action increased as the scope and scale of government action increased.[268] The contraction of the Court's jurisdiction made it impossible for the Court to correct every erroneous evaluation of the reasonableness of legislation, and all but compelled the development of clear doctrinal rules that could guide lower courts. Viewed in light of these institutional considerations, *Carolene Products* appears less a capitulation than a long-overdue recognition that the Court's scarce resources could be better allocated.

b. *Footnote Four*

It would be a mistake to treat the standard of review applied by Justice Harlan Fiske Stone in his opinion for the Court in *Carolene Products* as entirely novel. It closely resembles the standard that the Court applied in prior police-power cases, including *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*,[269] *Nebbia v. New York*,[270] and *Metropolitan Casualty Insurance Co. v. Brownell*.[271] In all the preceding cases, the Court applied a soft, rebuttable presumption of constitutionality. The plaintiff bore both the burden of producing evidence *and* the burden of persuasion on the merits of the constitutional question. But both burdens *could* be carried—as the Court put it in *Borden's Farm Products Co. v. Baldwin*,[272] "It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to

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267 *See* BERNSTEIN, *supra* note 40, at 40–55 (tracing Progressive opposition to the constitutional protection of natural rights); COMPTON, *supra* note 242, at 15 ("[I]t is beyond dispute that Progressive-era constitutional thought owed a significant debt to pragmatist philosophers who, in turn, owed a great deal to Darwin and Hegel.").

268 *See* Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 693 (1988) ("Although many factors may have contributed to the retreat from economic due process which occurred, the sizable and increasing price tag for judicial involvement and the failure of judicial strategies to control these rising costs pushed relentlessly in that direction.").

269 282 U.S. 251, 257–58 (1931) ("[T]he presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.").

270 291 U.S. 502, 537–38 (1934) ("[E]very possible presumption is in favor of [the] validity [of a statute] . . . [and] though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.").

271 294 U.S. 580, 586 (1935) ("Discriminations between life and casualty insurance companies are not forbidden and cannot be assumed to be irrational.").

272 293 U.S. 194 (1934).

constitutional assault," and the Court would not "treat[] any fanciful conjecture as enough to repel attack."[273]

What made *Carolene Products* different was its formalization of a default standard of review for "ordinary commercial transactions," and its suggestion that a more stringent standard of review might be appropriate in two sets of constitutional cases that did *not* involve ordinary commercial transactions.[274] Enough is known about the drafting of Footnote Four to identify the constitutional and political theories behind the Court's identification of each set. The key passages are excerpted below:

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment . . . .
>
> Nor need we enquire whether similar considerations enter review of statutes directed at particular religious, or national, or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities . . . .[275]

Chronologically, the second set came first. Justice Stone's originally circulated opinion rested only on what can be called a *legislative-failure theory*. According to the legislative-failure theory, while a well-functioning legislative process will not systematically make any subset of the public permanent political "losers" from whom rents, whether economic or otherwise,[276] can be extracted, interference with participation in the legislative process and certain outputs from it can generate and evince malfunction, respectively.[277]

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273 *Id.* at 209.

274 United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

275 *Id.* at 152 n.4 (citations omitted).

276 The awkward term "rent" plays a central role in economic language games and is used to refer to economic returns in excess of a resource owner's opportunity costs. "Rent seeking is the expenditure of scarce resources to capture an artificially created transfer." Robert D. Tollison, *Rent-Seeking: A Survey*, 35 KYKLOS 575, 578 (1982). Whenever interest groups seek to extract concentrated benefits by means of government power, their efforts are fairly described as rent-seeking—even when the benefits solely consist in the satisfaction of having one's normative views imposed on others, rather than in any pecuniary gain. *See generally* KENNETH N. BICKERS & JOHN T. WILLIAMS, PUBLIC POLICY ANALYSIS: A POLITICAL ECONOMY APPROACH (2001) (explaining the principle of ideological rent-seeking); Geoffrey Brennan & Hartmut Kliemt, *Regulation and Revenue*, 19 CONST. POL. ECON. 249, 250 & n.8 (2008) (including in "rent-seeking not only the pursuit of monetary rents but also ideological rents that result from biasing the legal order in favour of some 'Weltanschauung' or other").

277 For an extended discussion of how "[s]ubordination of a particular group can occur if that group is persistently excluded from majority political or economic coalitions, thereby becoming the subject of rent seeking rather than being able to gain benefits for itself," and how Footnote Four deals with this

The first set that appears in the footnote was added later, in response to a letter from Chief Justice Charles Evans Hughes.[278] According to Louis Lusky—the clerk who drafted Footnote Four—Chief Justice Hughes believed that "[s]ome rights . . . deserve[d] more judicial attention than others because they are mentioned in the text of the Constitution."[279] As Lusky observed, "[t]he dynamics of government play[ed] no part in the calculus."[280] Call this the *enumerated-rights theory*. When Chief Justice Hughes sent a letter to Justice Stone communicating his views, Justice Stone simply incorporated them.[281]

The lack of controversy over substantially different theories of when the judiciary ought to engage in heightened scrutiny suggests that the Justices did not believe that these theories were inconsistent with one another. But legislative-failure theory could justify heightened scrutiny for burdens on certain constitutional rights that are not textually enumerated, depending on whether statutes that burden those rights are more likely than other statutes to be byproducts of legislative failure.

Roe v. Wade throws into sharp relief the tension between legislative-failure theory and enumerated-rights theory. It could be argued that there is no textually enumerated right to terminate a pregnancy.[282] But it is not very

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problem, see Jeffrey A. Roy, Carolene Products*: A Game-Theoretic Approach*, 2002 BYU L. REV. 53, 53–100.

278 Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1097 (1982).

279 *Id.*

280 *Id.*

281 *Id.* at 1098.

282 Obviously, neither the 1788 Constitution nor any subsequent amendments contain the word "abortion." That does not mean, however, that abortion rights are not enumerated. The Fifth and Fourteenth Amendments enumerate rights not to be "deprived of life, liberty, or property without due process of law." Certain reproductive freedoms may fall within the concept that was originally expressed by the term "liberty." It is uncontroversial that "the freedom of speech" encompasses the freedom to engage in various forms of speech that are not specifically listed in the constitutional text and that "the right to keep and bear arms" encompasses the freedom to keep and bear a variety of weapons that are not specifically listed in the text. *See* District of Columbia v. Heller, 554 U.S. 570 (2008) ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.") (citations omitted). If the enumerated right not to be deprived of "liberty" without due process of law encompasses the right not to be arbitrarily deprived of certain reproductive freedoms, those reproductive freedoms would be enumerated in the same sense that the First Amendment right to sell violent video games to minors or the Second Amendment right to keep and bear handguns are enumerated. Further, the law at issue in *Roe* threatened violators with a minimum of five years in prison. *See* Texas Penal Code of 1857, art. 531. That implicated "liberty" under even the narrow understanding of the term championed by Justices Scalia and Thomas—it threatened violators with physical restraint—and therefore needed to be calculated to achieve a constitutionally proper end. *See* Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) ("The Due Process

difficult to make out the case that criminal prohibitions on abortion like those challenged in *Roe* were byproducts of a kind of legislative failure.

Public-choice theory provides reasons to expect that the millions of individuals affected by contraceptive and abortion-restricting legislation will have a difficult time organizing, making it unlikely that they will be able to fully express their preference intensity at the polls.[283] As compared to relatively small groups, diffuse groups generally have difficulty organizing because organizations that represent their interests receive financial and personal support from a mere fraction of them.[284] Lack of support for organizations that seek to protect reproductive rights in particular may be a byproduct of the fact that those who are not pregnant regard the risk of an unwanted pregnancy as too low to require political action.[285] Public-choice theory also counsels wariness of prohibitory legislation that is enacted at the behest of politically influential professional groups that stand to capture concentrated economic benefits from that legislation. That is a fair description of the raft of restrictions on early term abortion for which the American Medical

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Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this.").

I do not have a considered position on the question of whether abortion rights are guaranteed by the original meaning of the Due Process of Law Clause, although I intend to explore this question in a future work. *Compare* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007) (arguing the original meaning of Fourteenth Amendment protects right to terminate pregnancy), *with* Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion?*, 40 HARV. J.L. & PUB. POL'Y 539, 541–42 (2017) (arguing the original meaning of Fourteenth Amendment compels states to forbid termination of pregnancies). It is worth observing that the Court in *Roe* seemed to a assume that if a fetus is a constitutional "person," states would be obliged to prohibit abortion, and that this assumption is highly doubtful. *See Roe*, 410 U.S. at 157 n.54 ("When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited."). Probably the most influential piece of philosophical writing on abortion assumes fetal personhood and argues that abortion is nonetheless morally permissible in some cases. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFAIRS 47 (1971). This argument may or may not be correct, but the meaning of "person" would not answer the question of whether state legislators who are persuaded by this argument can, consistently with the Constitution, decide not to prohibit abortion.

283 For an extended discussion of how privacy-infringing statutes are likely to be the product of legislative failure, see Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 GEO. L.J. 1787, 1805–10 (1992). To be sure, as Stout acknowledges, Footnote Four was primarily concerned with legislative failures that resulted from "the literal exclusion of minority groups from political bargaining," not with all kinds of legislative failure—in particular, it was not concerned with legislature failure that resulted from rent-seeking by politically powerful industrial, professional, or ideological minorities. *Id.* at 1806 n.82. For the seminal critique of this omission, see Bruce Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985).

284 *See* OLSON, *supra* note 34, at 142–45.

285 Stout, *supra* note 283, at 1807.

Association and its university-trained members lobbied during the late nineteenth century.[286]

This is not an argument that *Roe* was correctly decided. It only illustrates the kind of tension that can arise between enumerated-rights theory and legislative-failure theory. In view of this tension, it is unsurprising that enumerated-rights theory was jettisoned and replaced with a "fundamental-rights" theory long before *Roe*. Fundamental-rights theory preserved heightened scrutiny for a set of preferred "personal" rights—including rights to marry,[287] use contraceptives,[288] associate with others for lawful purposes,[289] and live together with members of one's family[290]—by implicitly repudiating one of the theories upon which Footnote Four rested: that enumerated rights were necessarily more important than unenumerated rights.

Footnote Four served to mitigate escalating and certain decision costs associated with all-things-considered reasonableness review and to satisfy the increased demand for a predictable rule of law to guide lower courts. It did so by formalizing a structured approach to judicial review that saved heightened judicial scrutiny for cases involving legislative-process-related failures that judges might have an easier time identifying and which, being remedied, might lower the costs associated with judicial evaluation of the outputs of the legislative process in future cases.[291] But it was an effort to "serve two masters," and the fate of enumerated-rights theory demonstrates the enduring wisdom of the biblical admonition against such efforts.[292]

c. *The Political-Judgment Rule*

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

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286 *See* KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 31 (1984) ("By becoming visible activists on an issue such as abortion, [physicians] could claim both *moral stature* (as a high-minded, self-regulating group of professionals) and *technical expertise* (derived from their superior training)."); LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 82 (1997) (detailing how "nineteenth-century Regulars had fought abortion as part of a larger campaign to wrest control over medical practice from competing sects.").

287 *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

288 *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

289 NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958).

290 Moore v. City of E. Cleveland, 431 U.S. 494, 499–500 (1977).

291 *See* Komesar, *supra* note 268, at 699–700 ("A judiciary severely constrained by its limited resources as well as doubts about its abilities must leave vast areas of decisionmaking unattended, and struggle with whatever it does handle. If political malfunction can be reduced, fewer resources need be expended on review of the output of the corrected process. Similarly, if a malfunction can be corrected, an area of political activity can be ignored with less regret.").

292 *See Matthew* 6:24 (King James).

elsewhere. Why not cut costs in a context in which the Court considered itself particularly incompetent to evaluate legislative decision-making?

That is one way to understand the Supreme Court's 1955 decision in *Williamson v. Lee Optical of Oklahoma, Inc.*,[293] in which the Court upheld a nasty piece of economic protectionism that forbade anyone but a licensed optometrist or ophthalmologist to "fit, adjust, adapt, or to in any manner apply lenses, frames, prisms, or any other optical appliances to the face of a person" or to replace any lenses without a written prescription from an Oklahoma-licensed ophthalmologist or optometrist.[294] A three-judge panel of the Western District of Oklahoma, applying the rational-basis standard familiar from *Carolene Products*, determined after careful scrutiny of the record evidence that the legislation served only to "place within the exclusive control of optometrists and ophthalmologists the power to choose just what individual opticians will be permitted to pursue their calling."[295] The Court reversed, in an opinion by Justice William Douglas that articulated a default rule governing judicial review of nonfundamental rights that is less like a standard of review than an abstention doctrine—it effectively cuts off judicial review whenever it applies.[296] Justice Douglas made plain that the Court would henceforth uphold legislation touching nonfundamental rights if the Court could conceive of any reason why the legislature *might* have enacted that legislation:

> The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.[297]

If (1) logical consistency between legislative means and avowed ends is not essential; (2) the fact that it "might be thought" that legislation is directed at an "evil at hand" is sufficient for legislation to pass constitutional muster, even absent any evidence that it is in fact so directed; and (3) judges cannot inquire into what legislation is actually designed to achieve, then it would seem to be impossible for constitutional challengers to prevail.

The essence of this non-review was distilled by Justice Thomas in an otherwise obscure case, *FCC v. Beach Communications, Inc.*[298] Writing for the Court, Justice Thomas stated that judges must uphold legislation under

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293 348 U.S. 483 (1955).

294 OKLA. STAT. ANN. tit. 59, § 942 (West 2019); *Williamson*, 348 U.S. at 487–88.

295 Lee Optical of Okla., Inc. v. Williamson, 120 F. Supp. 128, 137 n.20 (W.D. Okla. 1954).

296 *Williamson*, 348 U.S. at 488.

297 *Id.* at 487–88.

298 508 U.S. 307 (1993) (internal quotation marks omitted).

rational-basis review "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification"; that those challenging legislation must "negative every conceivable basis which might support it"; and that the government need not justify legislation with "evidence or empirical data."[299] As Justice John Paul Stevens ruefully observed in concurrence, this conceivable-basis approach is "tantamount to no review at all."[300] Indeed, if the *Carolene Products* Court was correct in assuming that it would deny due process to "preclude[] the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of life, liberty or property had a rational basis,"[301] the conceivable-basis approach might well be unconstitutional.

Assuming that the conceivable-basis approach *is* constitutional, one might defend it as a kind of *political-judgment rule*, analogous to the business judgment rule in corporate law. It might be argued that making good legislative policy is hard, just as making good business decisions is hard; that judges are informationally limited and fallible in their assessments of both legislative policy and business decisions; and that policymakers can be removed from office if they support arbitrary legislative policy, just as directors and managers can be removed for poor business decisions.

This defense fails. True, making good legislative policy is hard. True, judges are informationally limited and fallible. But whereas well-functioning capital markets composed of diversified shareholders can swiftly punish badly behaving corporate directors and managers, nonjudicial constraints on legislative agency costs are less substantial.[302] The costs associated with identifying arbitrary legislation in the first instance, to say nothing of the costs of organizing to "vote the bums out" after the fact of enactment, are generally higher than any benefits that members of the public stand to gain from acquiring it.[303] Judicial review, with all its flaws and foibles, is often the only effective means of redress available for those burdened by arbitrary legislation.

Moreover, whatever cost savings the political-judgment rule might have been designed to capture have been compromised by its inconsistent application. The business judgment rule is nothing if not consistently

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299 *Id.* at 313–15.

300 *Id.* at 323 n.3 (Stevens, J., concurring).

301 United States v. Carolene Products Co., 304 U.S. 144, 152 (1938).

302 *See* Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 492 (1988) ("Unlike the corporate sphere, with its public market for shares, nothing in the political realm provides outside observers (i.e., the electorate) with a low-cost mechanism for observing and evaluating the performance of the relevant participants (i.e., elected officials).").

303 *See* Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 147 (1957) (articulating theory of the "rationally ignorant" voter). "Ignorant" is not a pejorative in this context—public-choice theory posits that everyone is rationally ignorant of certain things and not other things, due to the positive costs of acquiring information.

deferential.[304] By contrast, it is generally acknowledged that the political-judgment rule shares doctrinal space with a less deferential rule that more closely resembles old-school rational-basis review—sometimes referred to as "rational basis with bite."[305] Accordingly, judges applying rational-basis review have the discretion to choose whether to apply one of two fundamentally different rules—a choice that invites judges to have recourse to their own normative convictions.

The significance of the latter choice can be perceived in lower courts' treatment of cases involving occupational licensing regimes that are alleged to be exercises in intrastate protectionism. In *Niang v. Carroll*,[306] a panel of the United States Court of Appeals for the Eighth Circuit upheld a Missouri licensing regime that required African-style hair braiders to be licensed as barbers or cosmetologists.[307] It did so because the state alleged it was "protecting consumers and ensuring public health and safety," and "offered evidence of health risks associated with braiding."[308] The district court conceived of two additional legitimate ends: "stimulating more education on African-style braiding and incentivizing braiders to offer more comprehensive hair care."[309] The panel rejected arguments that the legislative means poorly fit the purported ends and declined to follow the reasoning of other district court decisions[310] holding similar braiding restrictions unconstitutional because the latter did not "appropriately defer to legislative choices."[311]

Let's take a closer look at one of those district court decisions. In *Brantley v. Kuntz*,[312] Judge Sam Sparks of the Western District of Arizona evaluated a "specialty" occupational license that Texas had created for African hair-braiders in 2007, and which required would-be hair-braiding instructors to create fully equipped barber colleges with at least 2 thousand square feet of floor space, ten barber workstations, and five sinks.[313] Judge Sparks evaluated each of the government's proffered justifications for these minimums on the basis of the "facts before the court" and concluded that the minimums, as applied to duly licensed hair-braider Isis Brantley, "[did] not advance

304 *See* Kelli A. Alces, *Debunking the Corporate Fiduciary Myth*, 35 J. CORP. L. 239, 251 (2009) (explaining that the business-judgment rule "blocks many, if not all, attempts to hold directors liable for bad business decisions"); Siegel, *supra* note 232, at 605 ("With rare exceptions, the rule precludes both plaintiffs and courts from attacking the board's decision itself.").

305 *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 20–22 (1972); Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987).

306 879 F.3d 870 (8th Cir. 2018).

307 *Id.* at 873.

308 *Id.*

309 *Id.*

310 The decisions were *Cornwell v. Hamilton*, 80 F. Supp. 2d 1101 (S.D. Cal. 1999), *Brantley v. Kuntz*, 98 F. Supp. 3d 884 (W.D. Tex. 2015), and *Clayton v. Steinagel*, 885 F. Supp. 2d 1212 (D. Utah 2012).

311 *Niang*, 879 F.3d at 875 n.3.

312 98 F. Supp. 3d 884 (W.D. Tex. 2015).

313 *Id.* at 888.

public health, public safety, or any other legitimate government interest."[314] For instance, Judge Sparks rejected the argument that the ten-chair minimum had a rational basis—that it "ensure[d] that each student has an adequate space in which to work and maintain a clean environment"—because barber schools that offered only hair-braiding were *exempted* from the requirement that they have one barber chair available for each student.[315] That exemption fatally undermined the government's claim that braiding students "actually needed barber chairs to have adequate workspace or to maintain a clean environment."[316]

Fundamentally different understandings of what is nominally the same standard of review were obviously at work in *Niang* and *Brantley*. The political-judgment rule thus generates high legislative *and* judicial agency costs. It generates high legislative agency costs by affording lawmakers a degree of deference that is arguably appropriate in the context of judicial review of corporate board decisions, because of alternative mechanisms for keeping agency costs down, but which *is not* appropriate in the absence of those mechanisms. It generates high judicial agency costs because no neutral principle instructs judges when to apply it.

2. Optimizing Substantive Due Process

Given the judiciary's limited resources and institutional competence, the optimal level of arbitrary legislation that escapes judicial invalidation is probably not zero. When the marginal benefits captured through an additional increment of arbitrariness review exceed the marginal costs, the case for "purchasing" an additional increment becomes weak.

This Section synthesizes a framework for implementing due process of law that improves upon prior heuristics in two respects. First, it rests upon a realistic model of legislative decision-making. Second, it rests upon an explicit theory of what makes legislative deprivations of life, liberty, or property constitutionally legitimate.

a. *Positioning Presumptions*

As discussed above, in *Carolene Products*, the Court applied two soft, rebuttable presumptions: first, a presumption that facts existed which supported the rationality of any challenged legislation;[317] and second, a

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314 *Id.* at 894.

315 *Id.* at 891.

316 *Id.*

317 United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) ("[T]he existence of facts supporting the legislative judgment is to be presumed . . . .").

presumption that any challenged legislation was constitutionally valid.[318] Challengers thus had the burdens of producing evidence of irrationality *and* of persuading the court on the merits of the constitutional argument.

Alternative regimes are possible. The government might be required to carry the burden of producing evidence but retain the benefit of a presumption of constitutionality. That is, the government might lose if it produced no evidence, but win if the evidence produced left the question of constitutionality in near equipoise. Or the government might be required to bear the burden of producing evidence *and* of demonstrating the constitutionality of its actions—the constitutional tie might go to the challenger.

The question of which set of presumptions is optimal is both an empirical and institutional one. Here, as elsewhere, goal choice alone—thwarting arbitrary legislation—does not dictate an answer. Imagine that a legislature regularly churns out arbitrary statutes, such that six of ten that are challenged are unconstitutional. A presumption of unconstitutionality at first seems sensible—all things being equal, a challenged piece of legislation is more likely than not unconstitutional. But all things might not be equal, courts may be more likely to produce false positives (i.e., erroneous holdings of unconstitutionality) than false negatives (i.e., erroneous holdings of constitutionality). If so, a presumption of unconstitutionality may yield a higher judicial error rate than a presumption of constitutionality.

Of course, no one knows the relevant error rates, and anyone could generate an infinite set of optimal presumptions through arbitrarily positing different rates.[319] Accordingly, it is necessary to rely upon generalizations about the institutional capacities of legislatures and courts and upon rough, qualitative estimates of the benefits and costs associated with different presumptions. It is also necessary to keep track of the outcomes generated by any chosen presumptions, and to consider revising those presumptions if we encounter evidence suggesting that they are maladaptive.[320]

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

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318 *Id.* ("[R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis . . . .").

319 The questions are empirical ones, but as a practical matter, unanswerable ones. They are "trans-scientific" in that no one is ever likely to conduct a study that yields answers about judicial error rates in which we can place much epistemic confidence. *See* Alvin M. Weinberg, *Science and Trans-Science*, 10 MINERVA 209, 209 (1972) (defining trans-scientific questions as questions that are "epistemologically speaking, questions of fact and can be stated in the language of science" but which are "unanswerable by science").

320 As the costs of revision will of course be positive, one cannot assume that discarding a given maladaptive heuristic will yield net benefits.

available.[321] Placing the burden of production on the government in turn provides judges with more information that can be used to determine whether legislation is constitutional.

Allocating the burden of persuasion concerning constitutionality is more complicated. One cannot assume that the legislative process generally produces nonarbitrary statutes. If the reelection-maximizing model of legislative behavior is generally valid—and there is more evidence supporting its validity than there is supporting the public-interest models[322] that it has largely replaced[323]—legislative choice under majority rule will neither generally produce legislation that is designed to promote social welfare, nor even reliably reflect majoritarian preferences. Legislation that is designed to confer concentrated benefits upon some while imposing diffuse costs on others will, in many cases, be the order of the day; the precise alternative chosen will be determined by agendas set by legislative leaders, not by whether that alternative would command a majority.[324] No presumption of constitutionality can rest comfortably on the assumption that the enactment of arbitrary legislation designed to effectuate only naked preferences, economic or otherwise, which no legislative majority prefers, is an unusual occurrence.

The question thus arises whether judges are more likely to err by identifying false positives than by identifying false negatives, or to impose greater constitutional costs on the public through invalidation, even if the number of false positives and false negatives is the same. There is no obvious reason why judges might be more inclined to err as a result of eagerness to correct coordinate branches' perceived errors than to err as a result of undue deference. The immediate constitutional costs of wrongful invalidation and wrongful affirmation are identical: depriving the community of a perfectly constitutional measure is no less constitutionally costly than imposing an unconstitutional measure. The costs of constitutional-error correction are, however, probably higher in the context of invalidation. The damage resulting from wrongful affirmation can be addressed through ordinary legislation,

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

322 For a seminal formulation of the public-interest model, see generally A. C. PIGOU, THE ECONOMICS OF WELFARE (3d ed. 1932).

323 *See* Jonathan R. Macey, *Public Choice and the Legal Academy*, 86 GEO. L.J. 1075, 1077 (1998) (reviewing JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997)) ("[T]he reason public choice is such an attractive approach for so many people is not because it explains everything, but because it explains more than any of the other available approaches to the study of democracy and public institutions.").

324 The seminal work on how voting procedures can be used to determine legislative outcomes is KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963). For nontechnical summaries of Arrow's work, see Saul Levmore, *Public Choice Defended*, 72 U. CHI. L. REV. 777, 779–83 (2005) (reviewing GERRY MACKIE, DEMOCRACY DEFENDED (2003)); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 YALE L.J. 1219, 1247–52 (1994).

whereas wrongful invalidations can be corrected only at the cost of either further litigation that brings about judicial self-reversal or constitutional amendment.[325] Accordingly, there is an uneasy case for a presumption of constitutionality—uneasy because the costs of correcting either wrongful invalidations or wrongful affirmations are both very high. Remember that amendments or repeals of unconstitutional legislation that courts have upheld need to be purchased in the same political market that produced that legislation in the first place.

The political-judgment rule should be discarded altogether. Even if it conserves judicial resources, it has intolerably high agency costs that political market forces are unlikely to keep under control. Although allocating the burden of production to the government would be desirable, the Court largely struck the right balance in *Carolene Products* and should return to it.

b. *Theorizing About Legitimacy*

Neither in *Carolene Products* nor since has the Court expressly articulated a theory of what makes deprivations of life, liberty, or property constitutionally proper. In a thoughtful article, Professor Thomas Nachbar contends that the Court has, since abandoning the police-power heuristic, gradually "developed ad hoc a conception of the proper role of government that has become almost entirely utilitarian in nature" and deployed means-ends analysis to determine whether legislation "contribute[s] to social welfare."[326] On Professor Nachbar's account, the conception that has emerged rests upon "Justices' intuitive understanding of social wealth maximization."[327]

As Nachbar acknowledges, however, nineteenth-century treatise writers like Thomas Cooley and Christopher Tiedeman conceptualized the police power in terms that evinced a concern with "limiting the reach of the police power to vices that affect social wealth, not merely moral values."[328] It would be more precise to say not that modern constitutional law is distinctively concerned with social welfare, but that it is distinctively *unconcerned* with ensuring that legislatures attempt to increase social welfare when enacting a particular kind of legislation—namely, legislation affecting "ordinary commercial transactions."[329] The submission here is that legislative deprivations

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325 *See* Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169, 196 (2015) (observing that "[j]udicial errors are just as difficult to correct today as they have ever been").

326 *See* Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1627, 1661 (2016).

327 *Id.* at 1662.

328 *Id.* at 1667.

329 Albeit not entirely unconcerned. The Court's "Dormant Commerce Clause" jurisprudence is explicitly concerned with thwarting economic protectionism. *See* Dep't of Revenue v. Davis, 553 U.S. 328, 337–38 (2008) ("The modern law of what has come to be called the dormant Commerce Clause is driven

of life, liberty, or property must *always* be designed to increase social welfare by reducing negative externalities, regardless of the subject matter of that legislation.

Judges cannot be expected to determine on a case-by-case basis whether legislation *actually* increases social welfare. Most judges are not trained welfare economists any more than they are trained historians or moral philosophers. What they may be able to do is make it marginally less likely that legislation that is not even designed to increase aggregate social welfare will be enacted in the first instance, and marginally more likely that, even if such arbitrary legislation is enacted, it will be detected and judicially invalidated. They could do this by (1) allocating the burden of production to the government; (2) allocating the burden of persuasion to constitutional challengers; and (3) insisting upon a reasonable fit between a legislative act and the reduction of negative externalities that is grounded in empirical evidence.

Where does this leave the controversial field of *private* morals legislation—affecting, for instance, consensual sexual intimacy—which is defended not as a means of reducing negative externalities,[330] but as a means of promoting virtuous behavior? Professor Nachbar notes that the Court's pre–*Carolene Products* police-power jurisprudence did little to address the legitimacy of legislation governing private moral conduct, but that such legislation would have been in tension with an externality-based understanding of the police power.[331] Much legislation in the early republic and throughout the Antebellum period that seems at first to rest entirely upon moral preferences was defended in terms of the protection and facilitation of the exercise of individual, pre-political[332] rights. Professor Thomas West has detailed how

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by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273–74 (1988))).

330 It might be objected that certain private activities may impose costs on third parties who consider those activities immoral and who know that they are taking place, and that the government could properly act to reduce such negative moral externalities. For reasons that will become clear, there is little evidence that the police power was understood at the time of the Fourteenth Amendment's enactment to encompass the reduction of such moral externalities, and that the judicial recognition of a power to reduce negative moral externalities would prove pernicious today. For a useful distinction between "physical" externalities which affect the enjoyment of scarce rights that "cannot be granted to everyone because of natural limitations caused by physical incompatibilities" and "value" externalities which affect the enjoyment of non-scarce rights that "can be granted to everyone," see Aristides N. Hatzis, *The Negative Externalities of Immorality: The Case of Same-Sex Marriage*, 17 SKEPSIS 52, 60 (2006). In Hatzis's terms, the externality-based understanding of states' reserved powers that is advocated here encompasses only physical externalities.

331 Nachbar, *supra* note 326, at 1646.

332 As used here, "pre-political" means that these rights were understood to be (1) derived from features of human nature that are present absent political organization; and (2) essential to human flourishing, everywhere and always. This Article does not dispute the institutionalist–realist insight that *all* rights are "positive" in the sense that securing them requires costly enforcement machinery. *See* Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 149–51 (1935) (elaborating this insight).

prohibitions on various kinds of sex outside of marriage rested on the belief that doing so was "indispensably necessary for the securing of natural rights,"[333] rather than the belief that states enjoyed plenary power to maximize the satisfaction of moral preferences, and that there was a stark contrast between strict adultery, anti-sodomy, and obscenity laws (in those places where such measures existed) and lax enforcement of those laws.[334]

Judicial recognition of any private morals power today would be inconsistent with the spirit of due process of law. The same public-choice dynamics that enable organized industrial and professional groups to extract economic rents through the legislative process can enable other organized groups to extract ideological rents by hampering the pursuit of competing visions of the *good life*—visions that citizens might embrace in a perfectly competitive ideological marketplace and which generate no negative externalities. One need not doubt the existence of objective moral truths to recognize how unlikely it is that those dynamics will reliably generate legislation that tracks moral reality. Nor need one be a moral relativist to recognize the severe institutional difficulties associated with tasking judges with determining whether legislation is designed to track moral reality on a case-by-case basis.

How would judges do so? Take testimony from community leaders to gauge whether the government's proffered moral theory is widely held by the voting public? Invite briefs from philosophers, theologians, and ethicists to determine whether legislation is well-tailored to implement whatever moral theory is said to justify it? Invite testimony from the latter experts concerning the likely correspondence of the contested moral theory with moral reality? It seems more likely that judges would either fall back on their own moral convictions, on the one hand, or take any moral claims advanced by the government at face value, on the other. The former approach seems an unreliable means of distinguishing legislation that is designed to track either moral reality or the moral convictions of the community from legislation that is not; the latter approach would make it easy for legislatures to escape any meaningful arbitrariness review, so long as those defending legislation are willing to "repeat the word morality."[335]

c. *Criticisms*

The proposed return to a modified version of the rational-basis test applied in *Carolene Products* and abandonment of the political-judgment rule might be criticized on two grounds. First, one might argue that *Carolene*

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333 *See* THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDING 219 (2017).

334 *Id.* at 230 (finding that this contrast "characterized all [the Founders'] sex and marriage policies").

335 *See* Oral Argument at 47:11, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), https://www.oyez.org/cases/2002/02-102 (highlighting when Justice Breyer opined that counsel for the State of Texas had provided no basis for its ban on same-sex sodomy other than "repeat[ing] the word morality").

Products–style rational-basis review is inadequate to thwart naked preferences today. Second, one might argue that discarding the political-judgment rule would dramatically increase judicial decision costs without yielding compensating benefits.

The first objection is easily disposed of: *Carolene Products*–style rational-basis review can and *does* thwart naked preferences, both economic and otherwise.[336] Compared to the political-judgment rule, it is a bulwark against legislative opportunism.

The second objection is more troublesome. The demand for constitutional adjudication has steadily increased over the years as the Court has supplied more constitutionally enforceable rights. Were the Court to discard the political-judgment rule, perhaps litigants would bring more and diverse claims as the expected benefits of doing so rise. There would be transition costs as lower courts adjusted to the new demand, and those costs would—as they always do—fall hardest on unsophisticated parties with limited

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336 Successful rational-basis challenges include, for example, *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (holding unconstitutional a provision of the federal Defense of Marriage Act that excluded same-sex partners from the definition of "spouse" in federal statutes); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (holding unconstitutional a state constitutional provision that made it impermissible to extend certain protections against discrimination to homosexuals); *Allegheny Pittsburgh Coal Co. v. Cty. Comm'n of Webster Cty.*, 488 U.S. 336, 345 (1989) (holding unconstitutional an unequal application of a land assessment provision); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447–50 (1985) (denying a special use permit to a group home for the developmentally disabled); *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 623 (1985) (holding unconstitutional a tax exemption plan that favored old residents and excluded new residents); *Williams v. Vermont*, 472 U.S. 14, 24–27 (1985) (holding unconstitutional a vehicle use tax that treated some citizens differently based on the point at which they became residents); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (noting that withholding of funds from school districts that provided public education to children of undocumented immigrants is unconstitutional); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (holding unconstitutional a food stamp provision that required all members of the receiving household to be related); *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (holding unconstitutional a statute that criminalized the distribution of contraceptives to unmarried persons); *Schware v. Board of Bar Examiners of N.M.*, 353 U.S. 232, 246–47 (1957) (holding unconstitutional a denial of license to practice law to a former member of the Communist Party). For comprehensive overviews of rational-basis challenges, see, for example, Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL'Y 373 (2016); Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018); Robert C. Farrell, *Equal Protection Rational Basis Cases in the Supreme Court Since* Romer v. Evans, 14 GEO. J.L. & PUB. POL'Y 441 (2016); Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357 (1999).

Of course, rational-basis review did not thwart what in retrospect appears an obvious concentrated-benefits, diffuse-costs wealth-transferring scheme in *Carolene Products* itself. For the story behind the Filled Milk Act, see Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397. For an account of the anticompetitive, customer-unfriendly machinations of the dairy industry more generally, see R. ALTON LEE, A HISTORY OF REGULATORY TAXATION 12–27 (1973). This Article does not argue that consistent application of rational-basis review will thwart *all* arbitrary legislation, but that the benefits of thwarting *some* of it will exceed the costs.

resources.[337] And for what? Why wouldn't we see a repeat of the above-discussed minimum wage mess, or circuit splits over the constitutional legitimacy of rent control?

Concerns about the (re)escalating costs of judicial review are unwarranted, given that rational-basis review can be modified without changing the operation of the other tiers of scrutiny. Recall that costs were particularly high during the *Lochner* era because all-things-considered reasonableness review was the rule for *all* legislation. Strict scrutiny, and to a lesser extent intermediate scrutiny, economizes on judicial decision costs. First, heightened scrutiny raises the expected cost of legislation touching particular subject areas to legislators and thereby discourages it ex ante, enabling judges to allocate scarce time and effort to other matters. Second, heightened scrutiny makes it easier for judges to determine whether legislation is unconstitutional. True, strict scrutiny may not always be "fatal in fact,"[338] and intermediate scrutiny leaves room for interest-balancing, but both create strong presumptions that the government can only overcome with difficulty and which have discernible contours, departure from which triggers criticism.[339] Eliminating the political-judgment rule can be expected to slightly increase judicial decision costs, but the domain of rational-basis review would remain limited and other means of controlling costs would remain in place.

Further, the same institutional considerations that counseled in favor of Footnote Four make the prospect of judges wrongly striking down inefficient legislation left and right under *Carolene Products* review sufficiently implausible as to be unworthy of any serious concern. The decision costs associated with such error correction would be prohibitive. The discretionary certiorari scheme which governs the Court's docket makes it impossible for the Court to provide sufficient guidance to lower courts on the wide range of federal questions that come before them, while simultaneously policing the reasonableness of every lower court's determination of the reasonableness of legislation. Any individual judge who attempted to indulge his preference for laissez-faire would have to reckon with the possibility that other judges might

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

338 *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795–97 (2006) (finding that approximately "30 percent of all applications of strict scrutiny . . . result in the challenged law being upheld" and discussing context-sensitivity of courts applying strict scrutiny).

339 *See, e.g.*, Silvester v. Beccera, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of certiorari) (criticizing the lower court's deferential intermediate-scrutiny analysis as "indistinguishable from rational-basis review"); Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1677 (2015) (Scalia, J., dissenting) (criticizing the majority for applying "the appearance of strict scrutiny" rather than the reality).

respond by seeking to instantiate preferences for much bigger government.[340] It is far more plausible that, were rational-basis review to be made uniform and the political-judgment rule to be discarded, a handful of more naked preferences would be thwarted by the courts every year, and a handful of fewer naked preferences would be enacted in the first place—results that few would find objectionable. The benefits should exceed the modest increase in judicial decision costs.

CONCLUSION

All good things are scarce, and judicial review of state legislation is no exception. Legislative agency costs cannot be reduced to zero, and any concerted judicial effort to eliminate them might be met with a political response that reminded the judiciary of its lack of either purse or sword.[341] Still, the Fourteenth Amendment's Due Process of Law Clause does prohibit arbitrary legislation, and federal judges must enforce that prohibition. The question they must confront is not *whether* they ought to thwart arbitrary legislation, but *how* they can best do so given scarce time, limited cognitive resources, and institutional constraints.

This Article has shown that the Court can—by adjusting the default standard of constitutional review and adopting an externality-based understanding of states' reserved powers over life, liberty, and property—modestly reduce legislative agency costs without sending the judiciary down an institutionally dangerous path from which it cannot retreat. The prospect of the Court's doing, so should not be troubling. Substantive due process is constitutionally sound, and it can and should be optimized with the aid of good-faith construction and the original spirit of due process of law.

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340 Stout, *supra* note 283, at 1832 (observing that "any individual judge is likely to decide only a minute fraction of the cases processed by the legal system" and that "a judge contemplating whether to adopt a legal rule that encourages judicial intervention in legislative decisions can foresee that *other* judges will employ that rule as precedent to themselves overturn legislative judgments").

341 *See* THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).