

The Origins of Substantive Due Process

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In the antebellum nineteenth century, courts often voided legislative acts for substantive unreasonableness or for exceeding the scope of legitimate police powers. Contrary to the assertions of a number of modern scholars, however, this tradition does not support the concept of economic substantive due process. Courts voided municipal acts exceeding the scope of legitimate police powers on two grounds—the law of delegation and the law of municipal corporations—that did not apply to acts of state legislatures. The states themselves were limited to reasonable exercises of the police power only when their asserted authority came into potential collision with federal constitutional requirements, most prominently the Commerce and Contracts Clauses.

It was only late in the century, after the adoption of the Fourteenth Amendment, that a police-power version of substantive due process emerged as a limitation on state legislatures as courts began conflating, under the guise of “due process of law,” earlier doctrines that had used a similar vocabulary but for distinct purposes. Police-power limitations on state legislatures regulating purely internal matters therefore probably cannot be justified by any antebellum legal conception of due process of law. A police-power analysis might, however, play some role in a Privileges or Immunities Clause challenge by analogy to antebellum Commerce Clause and Contracts Clause jurisprudence.

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INTRODUCTION

There has been renewed interest in recent years in the original understanding of “due process of law.” In a recent article, Professors Nathan Chapman and Michael McConnell argue that historically, due process meant only that an individual could not be deprived of life, liberty, or property without a general and prospective standing law, the violation of which had been adjudicated according to a certain minimum of common-law judicial procedures.¹ The state and federal due process and law of the land clauses imposed no substantive limitations on Congress’s or a state’s ability to legislate, except that they could not abrogate this minimum of procedural protection. Professor Ryan Williams, on the other hand, has argued that although before 1789 there was no substantive component to due process, antebellum courts developed a body of substantive due process law prior to the adoption of the Fourteenth Amendment by which courts would guarantee unenumerated rights deemed fundamental from

¹ Nathan S. Chapman and Michael W. McConnell, *Due Process as Separation of Powers*, 121 *Yale L J* 1672, 1679 (2012). For an earlier textual analysis of the clause that arrives at similar conclusions, see John Harrison, *Substantive Due Process and the Constitutional Text*, 83 *Va L Rev* 493, 504–34, 552–55 (1997).

infringement by the state or federal governments.² Several scholars have pointed to cases in which courts invalidated legislative acts in excess of the police powers to regulate health, safety, and morals.³ Last year, another scholar claimed that the framers of

² Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 Yale L J 408, 454–70 (2010).

³ Professor Howard Gillman argues in his book on the subject that a police-powers jurisprudence “had been elaborated, clarified, and transformed into a workable set of doctrines by state court judges in the second quarter of the nineteenth century.” Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 20 (Duke 1993). See also *id.* at 10 (claiming that nineteenth-century judges would “uphold legislation that (from their perspective) advanced the well-being of the community as a whole or promoted a true ‘public purpose,’” while they would “strike down legislation that (from their perspective) was designed to advance the special or partial interests of particular groups or classes”). Professor David Mayer argues that “[i]n protecting liberty of contract,” the Supreme Court was recognizing “the validity of the police power in its traditional scope, as a protection of public health, safety, and morals,” and basing its jurisprudence “on well-established principles of American constitutional law: the use of the due process clauses, substantively, to protect property and liberty in all its dimensions, by enforcing certain recognized limits on the states’ police power, limits that had become federalized with the addition of the Fourteenth Amendment to the Constitution.” David N. Mayer, *The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract During the Lochner Era*, 36 Hastings Const L Q 217, 284 (2009). See also David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 Mercer L Rev 563, 571 (2009) (claiming there was a “long history of substantive due process protections for liberty and property rights—a body of law concerning constitutional limits on government police powers that was well-established by the late nineteenth century,” and that the *Lochner*-era Court “was merely enforcing these traditional constitutional limits on the scope of the police power”); *id.* at 585 (“American courts began applying the doctrine of substantive due process much earlier, not long after adoption of the Constitution itself.”).

Professor David Bernstein argues that “the idea that the guarantee of ‘due process of law’ regulates the substance of legislation . . . arose from the long-standing Anglo-American principle that the government has inherently limited powers,” and from “long-standing American intellectual traditions that held that the government had no authority to enforce arbitrary ‘class legislation’ or to violate the fundamental natural rights of the American people.” David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights Against Progressive Reform* 9 (Chicago 2011). A few decades earlier, Professor Bernard Siegan wrote that “[t]he evidence is very persuasive that *Lochner* was a legitimate interpretation of original meaning,” and that “[s]ubstantive due process was a very viable concept among Justices of the US Supreme Court at the time the fourteenth amendment was framed and ratified,” pointing to a federal circuit court case in 1865 in which the court “held that a Pennsylvania statute repealing a railroad corporation charter violated the due course of law provision of the state constitution.” Bernard H. Siegan, *Rehabilitating Lochner*, 22 San Diego L Rev 453, 454, 488 (1985), citing *Baltimore v Pittsburgh & Connellsville Railroad Co.*, 2 F Cases 570 (CC WD Pa 1865). Other scholars have found the seeds of the police-power limitations on state governments in Justice Thomas Cooley’s 1868 treatise, contemporaneous with the adoption of the Fourteenth Amendment, which summarized antebellum state-court cases. See generally Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* (Little, Brown 1868). See, for example, James W. Ely Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const Comm 315, 342–44 (1999); Timothy Sandefur, *Privileges, Immunities, and Substantive Due*

the Fourteenth Amendment understood due process to protect unwritten fundamental rights, including the right to contract and acquire and possess property.⁴

Most recently, Professors Randy Barnett and Evan Bernick have claimed that under an originalist interpretation of the federal Due Process Clauses, taking into account both their letter and “spirit,” due process of law requires courts to examine state legislative acts to determine whether they were enacted in a good-faith pursuit of the legitimate ends of free government.⁵ This is so because the purpose of due process was “barring ‘arbitrary’ power,”⁶ where “arbitrary” is defined “with reference to *the ends* for which legitimate governments are established among men” as well as “*the means* which the Constitution authorizes to effectuate those ends.”⁷ Thus, courts must develop some kind of police-powers doctrine that takes into account the legitimate ends of government and ensures that legislatures only enact laws in pursuit of those legitimate powers. They claim that “antebellum courts repeatedly affirmed that legislative power was inherently limited by the ends for which legitimate governments are established.”⁸

Process, 5 NYU J L & Liberty 115, 154 (2010) (claiming that Cooley’s “famous treatise” concluded that “the Due Process Clause protected substantive rights against unprincipled or arbitrary legislation”); Williams, 120 Yale L J at 493–94 (cited in note 2). See also note 35.

⁴ Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 Georgetown L J 1389, 1459–60, 1466–67 (2018).

⁵ Randy E. Barnett and Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 Wm & Mary L Rev 1599, 1638 (2019) (“[I]mplementing the Fourteenth Amendment does require a conception of the legitimate ends of government that is consistent with the original function—the spirit—of the Due Process of Law Clause in the Fourteenth Amendment; and it requires a doctrinal approach to give the text legal effect today.”) See also *id* at 1661 (“In the case of states,” the “particular substantive limitations” are “to be found both in the texts of state constitutions and in the inherent limits on all legislative power, whether or not such limits are expressly acknowledged in a state constitution.”); *id* at 1662 (“[T]he substantive protection from arbitrary power provided by the Fourteenth Amendment’s Due Process of Law Clause would be empty without an implementing construction of the appropriate ends of state power, against which an act of the legislature can be evaluated.”) (citation omitted).

⁶ *Id* at 1643.

⁷ *Id* at 1644–45.

⁸ *Id* at 1636. In this regard, they follow in the footsteps of those who have argued that the Founders expected unwritten fundamental principles to be sources of constitutional authority in addition to the Constitution’s written text. See generally, for example, Suzanna Sherry, *The Founders’ Unwritten Constitution*, 54 U Chi L Rev 1127 (1987). The difference is that Barnett and Bernick seek to root those fundamental principles in the written text itself.

In the nineteenth century, courts often invalidated legislative acts in excess of what became known as the police powers. But none of the cases regularly cited by scholars supports the substantive due process thesis. Instead, closer examination of the cases reveals that antebellum courts applied a series of sometimes overlapping but distinct doctrines involving the police powers of legislative bodies. These were principally three in number.

First, state courts routinely invalidated *municipal* bylaws for being “unreasonable” or in excess of the police powers to regulate for the health, safety, and morals of the local citizenry.⁹ They did so because municipalities exercised only those police powers expressly delegated by the state, and their powers were thus strictly construed and impliedly limited to those that genuinely advanced the health, safety, and morals of the local population. Additionally, these towns and cities were municipal *corporations*, and the courts subjected them to the common law of corporations. According to this common law, courts could void corporate acts if they were unreasonable, contrary to the general good of the corporation, or in restraint of trade. Neither rationale applied, nor did courts apply them, to acts of the state legislatures themselves, at least not in any of the cases that have been generally cited.

Second, federal courts sometimes invalidated state legislative acts affecting interstate or foreign commerce if they were not genuinely for a police-power purpose and thereby impermissibly interfered with such commerce.¹⁰ Such legislative acts not genuinely for police-power purposes were deemed to contravene the federal commerce power, not any substantive rights guaranteed by the Due Process Clause, which of course did not apply to the states. This rationale for limiting the exercise of state power therefore did not apply to acts of state legislatures regulating solely internal commerce or local matters.

Third, courts invalidated both state and municipal acts that impaired the obligations of contract. States and localities could, however, reasonably regulate existing contractual obligations if genuinely for police-power purposes.¹¹ As with the negative Commerce Clause doctrine, this contracts doctrine was a court-created accommodation between the imperatives of the federal Constitution, which prohibited states from impairing contractual obligations, and the need for the states to be able to regulate their

⁹ See Part I.A.

¹⁰ See Part I.B.

¹¹ See Part I.C.

internal police, which by necessity reached both property and contract rights.

If no impairment of existing contractual obligations was at issue and no regulation of interstate commerce was attempted, there appears to have been no doctrine known to the law by which courts could prevent a state legislature from enacting legislation contrary to natural principles of justice or to fundamental rights but that violated no state constitutional provision. At most, “substantive due process” in the sense of limiting the reach of state power even over purely internal matters appears to have been deployed by some courts as a rule of statutory construction, by which they would presume the legislature intended to depart from fundamental maxims of free government as little as possible.¹² It was not until after the adoption of the Fourteenth Amendment that courts in the 1870s began inferring and imposing substantive due process limitations upon the state legislatures.¹³

There are many reasons why the courts may have begun to do so in this era. The courts may have become familiar with judicial enforceability of the public use requirement in the takings context,¹⁴ and they may have believed that the Privileges or Immunities Clause would itself have imposed such limits had it not been written out of the Constitution by the *Slaughter-House Cases*.¹⁵ (Indeed, as I suggest in Part IV, some such limits may be justified by that clause.¹⁶) The intellectual environment of the 1870s through the first decade of the 1900s, marked by classical liberalism and “laissez faire capitalism,” also surely contributed.¹⁷

¹² See Part II.C.

¹³ See Part III.

¹⁴ Professor Harry Scheiber claimed that the “confluence of [the] legal concepts” of “vested rights, eminent domain and police powers of the state . . . would occur repeatedly in nineteenth-century cases.” Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in Donald Fleming and Bernard Bailyn, eds, 5 *Perspectives in American History* 329, 339 (Warren Center 1971); id at 374–76, 381–82 (commenting on the overlap between eminent domain and police powers).

¹⁵ 83 US (16 Wall) 36 (1872). See Stephen F. Williams, “Liberty” in the *Due Process Clauses of the Fifth and Fourteenth Amendments: The Framers’ Intentions*, 53 U Colo L Rev 117, 118–19 (1981).

¹⁶ See Part IV.

¹⁷ As Professor Clyde Jacobs observed:

The development of the liberty of contract as a limitation upon the powers of both the state and the national governments was a judicial answer to the demands of industrialists in the period of business expansion following the Civil War. It constituted judicial acceptance of the economic theory of laissez faire and of the philosophic ideal of individualism.

It is the contention here that at least one important cause of the emergence of a police-powers version of substantive due process in the 1870s was nothing other than a mistaken understanding of its historical antecedents—the conflation of a number of doctrines that all spoke in the vocabulary of the police powers, but which had distinct purposes. As recently as 2016, one substantive due process scholar observed that “no one has yet well explained how police powers, an un-enumerated powers doctrine, came to play such a large role in American constitutional jurisprudence.”¹⁸ The history traced here suggests one possible explanation.

Some important clarifications are in order. Many proponents of substantive due process cite cases for a very narrow understanding that the clause prohibited legislatures from enacting insufficiently general laws or from directly depriving someone of vested liberty or property rights.¹⁹ As Chapman and McConnell explain, these cases are consistent with the view that due process is fundamentally a separation of powers provision requiring a prospective and general law, the violation of which has been properly adjudicated, before an individual can be deprived of life, liberty, or property.²⁰ Similarly, some scholars describe the Due Process Clause as “substantive” because it limits legislative power as well as judicial power—as it assuredly does by prohibiting the legislature from reducing the procedural minimum.²¹ The dispute today is not over these concepts. Whether they are aptly described as “substantive” as opposed to “procedural” is of little

Clyde E. Jacobs, *Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon upon American Constitutional Law* 24 (California 1954). See also Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 L & Hist Rev 293, 293–98 (1985) (describing the conventional wisdom about this period, although challenging it); Mayer, 36 Hastings Const L Q at 217–22 (cited in note 3) (same).

¹⁸ David E. Bernstein, *The History of “Substantive” Due Process: It’s Complicated*, 95 Tex L Rev See Also 1, 3 (2016).

¹⁹ See, for example, James W. Ely Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 79 (Oxford 3d ed 2008) (describing as a “substantive interpretation[] of due process” the invalidation of “legislative attempts to transfer private property from one party to another”); Williams, 120 Yale L J at 423–27 (cited in note 2) (providing a taxonomy of different versions of substantive due process); id at 460–77 (analyzing cases supporting the general law and vested rights reading of due process).

²⁰ Chapman and McConnell, 121 Yale L J at 1726–73 (cited in note 1).

²¹ Mayer describes any restriction imposed by due process and law of the land clauses on legislation to be “substantive.” Mayer, 60 Mercer L Rev at 586–87 (cited in note 3). See also, for example, Siegan, 22 San Diego L Rev at 488–89 (cited in note 3) (suggesting that by operating “directly in limitation and restraint of the legislative powers conferred by the Constitution,” the Due Process Clause was substantive), quoting *Hepburn v Griswold*, 75 US (8 Wall) 603, 624 (1869).

concern. The question rather is whether the guarantee of due process of law allowed courts to strike down legislative acts inconsistent with unwritten fundamental rights.

One might think that none of this history matters for modern law. Yet at a minimum it matters to the debates over interpretive methodology—both those internal to originalism, the idea that the Constitution ought to be interpreted with its original meaning,²² and those external to it. Barnett and Bernick’s recent work, for example, demonstrates significant disagreement among originalists themselves over methodology. Do originalists merely look to the original public meaning of the words—do they stop at “interpretation”—or must they resort to “construction” if the constitutional provisions prove to be too open-ended? And if the latter, are the historical constructions of prior generations relevant to the question of what constructions to adopt in modern times?²³ The historical evidence here suggests that the distinction between interpretation and construction may not do much work in the context of due process because the due process concept was not as broad and open-ended as the substantive due process thesis suggests.

This history may also matter to modern law more directly. The cases suggest that, historically, states were limited to good-faith and legitimate exercises of their police powers when state power ran up against potential federal constitutional prohibitions. After the Fourteenth Amendment was adopted, the states became subject to new federal constitutional prohibitions, namely

²² For some summaries of originalism and the current state of the debate, see Ilan Wurman, *A Debt Against the Living: An Introduction to Originalism* 11–21, 25–44, 84–96 (Cambridge 2017). See also generally Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *Fordham L Rev* 375 (2013). For a summary of the debates internal to originalism, which arguably weaken originalism’s claim to legitimacy, see generally Thomas B. Colby and Peter J. Smith, *Living Originalism*, 59 *Duke L J* 239 (2009).

²³ Barnett and Bernick look not only to the letter, but also to the “spirit” of the constitutional provisions. See Barnett and Bernick, 60 *Wm & Mary L Rev* at 1605 (cited in note 5). They explain that nineteenth-century courts “constructed” the police-powers doctrine because due process of law had come to be “understood to impose limits on the ends which *state* legislatures could pursue.” *Id.* at 1631 (emphasis in original). They conclude that the Fourteenth Amendment does not “compel[]” this precise police-power doctrine—because it is a construction—but that the Amendment requires some “conception of the legitimate ends of government that is consistent with the original function—the spirit—of the Due Process of Law Clause in the Fourteenth Amendment.” *Id.* at 1638. In contrast, Professors John McGinnis and Michael Rappaport claim that the legal methods in use at the Founding saw no distinction between interpretation and construction. See John O. McGinnis and Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 *Nw U L Rev* 751, 772–80 (2009).

the Privileges or Immunities Clause and a variety of incorporated rights. Although police powers may not be relevant to due process (or so I argue), they very well may be relevant to a proper analysis of these new federal constitutional prohibitions. The Privileges or Immunities Clause, for example, provides that no state shall “abridge” the privileges or immunities of citizenship.²⁴ This provision thus directly limits the states, just as do the Contracts and Commerce Clauses. Whatever the clause forbids—whether abridgement of fundamental rights generally, or only unequal state legislation—a defense against a Privileges or Immunities Clause claim could be that the state was not “abridging” such privileges or immunities but was rather acting pursuant to its proper police powers. This argument would work by analogy to the antebellum Commerce Clause and Contracts Clause jurisprudence.²⁵

The same kind of analysis might apply to incorporated rights, too, and in fact appears to have been the Supreme Court’s framework in First Amendment cases in the first few decades after that amendment was incorporated. And, now that the Supreme Court has heard a Second Amendment case²⁶ for the first time since that amendment was incorporated,²⁷ the police-powers framework could supply the Court with a framework for such cases, too.

This Article unfolds as follows. Part I traces the history of police-power limitations on municipal corporations and states, surveying the municipal corporations, commerce, and contracts cases. It ends with a brief discussion of the provenance and implications of the two famous (or infamous) historical exceptions to my claim of which I am aware, *Dred Scott v Sandford*²⁸ and *Wynehamer v People*.²⁹

Part II examines Michigan Supreme Court Justice Thomas Cooley’s *Constitutional Limitations*³⁰ treatise to support these conclusions. Cooley’s textbook is particularly important because it was published contemporaneously with the adoption of the

²⁴ US Const Amend XIV, § 1, cl 2.

²⁵ See Part IV.

²⁶ *New York State Rifle & Pistol Association, Inc v City of New York*, 883 F3d 45 (2d Cir 2018), cert granted, 139 S Ct 939 (2019).

²⁷ See *McDonald v City of Chicago*, 561 US 742, 791 (2010) (Alito) (plurality) (“[T]he Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

²⁸ 60 US (19 How) 393 (1857).

²⁹ 13 NY 378 (1856).

³⁰ See generally Cooley, *Treatise on Constitutional Limitations* (cited in note 3).

Fourteenth Amendment,³¹ and his treatise was well known and well received³² because no one had previously compiled such a thorough set of state constitutional cases.³³ As we shall see, the Supreme Court and litigants before it relied on Cooley after the adoption of the Fourteenth Amendment.³⁴ Cooley's text is also important because almost all proponents of substantive due process rely heavily on statements from Cooley as supporting the existence of antebellum substantive due process.³⁵ Yet,

³¹ Originalists generally look to evidence nearest in time to the enactment of a particular constitutional provision. Consider, for example, Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409, 1513 (1990) ("None of these decisions was handed down within twenty years of the first amendment, and they are therefore weak indicators of the original understanding.").

³² See, for example, Ely, 16 Const Commen at 342 (cited in note 3) (describing Cooley as "the most influential constitutional writer of the late nineteenth century"); Mayer, 36 Hastings Const L Q at 233 n 71 (cited in note 3) (describing Cooley's treatise as "the most influential constitutional law treatise in the nineteenth century"); Williams, 120 Yale L J at 493 (cited in note 2) (describing Cooley 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").

³³ See Jacobs, *Law Writers and the Courts* at 29–30 (cited in note 17):

Why did Cooley's treatise surpass even those of Kent and Story in prestige and authority? . . . First, [it] was the first systematic work of merit in the field of state constitutional law. It served, as no previous work had done, to bring order out of the confusion inherent in having a large number of separate, although basically similar, constitutional systems. It soon became the ready-made reference work, the hand-book, of lawyers and judges. Second, the fact that the treatise, as its title indicates, emphasized limitations upon power rather than power itself made it readily compatible with prevailing economic and political ideas of the time.

³⁴ See Part III.

³⁵ Professor James Ely argues that Cooley "embraced a substantive understanding of due process in his landmark work," explaining that due process "was intended to safeguard individuals from the arbitrary exercise of governmental power." Ely, 16 Const Commen at 342 (cited in note 3). Williams argues that "Cooley's focus on the legitimacy of the legislature's objectives and the means pursued to attain those objectives corresponds closely with the police powers version of due process that predominated during the *Lochner* era," and that "Cooley is frequently credited as one of the principal intellectual forerunners of *Lochner*-era substantive due process jurisprudence." Williams, 120 Yale L J at 494 (cited in note 2). Mayer cites Cooley for the proposition that "state courts in the nineteenth century understood the general regulatory power of the states known as the 'police power' to be broad but certainly not unlimited." Mayer, 36 Hastings Const L Q at 233 & n 71 (cited in note 3). He also argues that Cooley's treatise defined the police power as the general regulatory power of the state to "insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of the rights by others." *Id.* at n 71, quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 704 (Little, Brown 6th ed 1890). And Gillman extensively discusses Cooley for the proposition that states could only interfere with property rights if genuinely for police-power purposes. See Gillman, *The Constitution Besieged* at 56–59 (cited in note 3). See also, for example, Sandefur, 5 NYU J L & Liberty at 154 (cited in note 3) (claiming that Cooley's "famous

quite the opposite is true. Part II, in short, seeks to rehabilitate Cooley.³⁶

Part III will trace the emergence of substantive due process in the conflation of these distinct strands of legal doctrine in the federal cases interpreting the Fourteenth Amendment after the *Slaughter-House Cases*, culminating in *Lochner v New York*.³⁷ It concludes that economic substantive due process cannot be supported on the basis of the antebellum antecedents on which the Supreme Court purported to rely.

Part IV suggests, however, that the police powers could be relevant to a proper analysis of the Privileges or Immunities Clause and also of incorporated rights. Whether one adopts the fundamental rights reading or the equality reading of the Privileges or Immunities Clause, a state may, by analogy to Contracts and Commerce Clause jurisprudence, be able to defend against a claim of “abridgement” on the ground that it was pursuing a legitimate police-power interest. The same kind of defense could also be made by a state defending against a claim that it has violated an incorporated right. This Part illustrates these possibilities through a reexamination of the *Slaughter-House Cases* and early post-incorporation First Amendment cases.

I. THE ANTEBELLUM LEGAL DOCTRINES

The police powers featured in three antebellum doctrines: municipal corporations were limited to reasonable regulations for genuine police-power purposes, states were limited to genuine police-power regulations that affected interstate commerce, and both state and local governments could not impair existing contractual obligations except for genuine police-power reasons. The police-power cases generally cited by scholars fall into one of these three categories, none of which appears to support substantive due process of the kind advanced by the Supreme Court after the adoption of the Fourteenth Amendment or by some modern scholars.

treatise” concluded that “the Due Process Clause protected substantive rights against unprincipled or arbitrary legislation”).

³⁶ The title of this Part is inspired by Siegan’s “*Rehabilitating Lochner*” article, as well as Bernstein’s *Rehabilitating Lochner*. See generally Siegan, 22 San Diego L Rev 453 (cited in note 3); Bernstein, *Rehabilitating Lochner* (cited in note 3).

³⁷ 198 US 45 (1905). See also Part III.A. *Lochner*, of course, is the most infamous case of the bunch—the case striking down a state law limiting the number of hours that bakers could work. *Lochner*, 198 US at 45–46, 57–58.

A. The Police Powers of Municipal Corporations

In the antebellum period, most legislation regulating the health, safety, welfare, and morals of the people was made at the local level by cities, towns, and boroughs. By the time of the Civil War, a large body of law had developed governing the appropriate use of local legislation and the judicial review of such legislation. The treatises and cases focus on two general principles. First, municipalities could exercise only those powers expressly delegated to them by the state legislatures, or those necessarily implied or incidental. Second, courts could review municipal acts for reasonableness, to ensure they were not in restraint of trade, and to ensure they were genuinely intended to advance the purposes of the municipal corporation—that is, their police-power purposes—just as courts reviewed the acts of private corporations.

Notably, many of the cases involved matters that to this day create controversy. One example is the regulation of interment practices, which was recently at issue in a case from Louisiana.³⁸ Another is the regulation of slaughterhouses, including the creation of monopolies—the very issue at the heart of the *Slaughter-House Cases*.³⁹ Courts reviewed these regulations to determine if they were reasonable, consistent with the police powers, and not in restraint of trade. But if a state permitted a municipal corporation to create any particular regulation or even monopoly expressly—or if the state did so itself—there does not appear to have been any doctrine courts could employ to ensure the reasonableness of such laws or ordinances, nor their consistency with a proper use of the police power.

1. State-court cases.

One of the most lucid and thorough cases from the antebellum period is *City of St. Paul v Laidler*⁴⁰ out of Minnesota. The city enacted an ordinance prohibiting the sale or exposure for sale of fresh meat at any time and place except in the public market.⁴¹ The city would rent out stalls in the public market to the highest

³⁸ *St. Joseph Abbey v Castille*, 712 F3d 215, 217 (5th Cir 2013). In one of the few successful economic substantive due process challenges since the New Deal, the Fifth Circuit struck down a Louisiana licensing scheme creating exclusive privileges for funeral homes to create and sell caskets. *Id.* at 217.

³⁹ See Part IV.B.

⁴⁰ 2 Minn 190 (1858).

⁴¹ *Id.* at 201–02.

bidder, with a minimum rent established by the ordinance.⁴² The city's charter expressly granted it the power to "establish a public market," to "make rules and regulations for the government of the same," and to "license and regulate butcher stall shops."⁴³

The state supreme court first explained that municipal corporations were bodies of specifically delegated powers:

The City of Saint Paul is a municipal corporation, organized and established to accomplish certain purposes and objects particularly specified in its charter. The city government derives its power and authority to make and enforce laws for the government of the city solely from the legislature. It is entirely a creature of the Statute and in the exercise of its authority cannot exceed the limits therein prescribed. It is a body of special and limited jurisdiction; its powers cannot be extended by intendment or implication, but must be confined within the express grant of the legislature.⁴⁴

Municipal corporations are organized and established for "certain purposes and objects," usually defined expressly in the corporate charter.⁴⁵ Moreover, the court went on, such power must be exercised reasonably:

[N]ot only so, but this power must be *exercised reasonably and in sound discretion*, and strictly within the limits of the Charter, and in perfect subordination to the Constitution and general laws of the land, and the rights dependent thereon and where the Charter enables a company or corporation to make by-laws (or ordinances) in certain cases and for certain purposes, its power of legislation is limited to the cases and objects specified; all others being excluded by implication.⁴⁶

The court explained that "[i]ncidental to the ordinary powers of a public municipal corporation" is the "power of enacting sanitary regulations for the preservation of the lives and health of those residing within its corporate limits," but that the corporation must "exercise no power further than may be necessary to attain it."⁴⁷ In particular, all sides agreed that if the ordinance

⁴² Id at 201–03.

⁴³ Id at 203, quoting St. Paul City Charter §§ 18–19 (1858).

⁴⁴ *Laidler*, 2 Minn at 203.

⁴⁵ Id.

⁴⁶ Id at 204 (emphasis added) (citation omitted).

⁴⁷ Id.

were a restraint of trade rather than a mere regulation of trade, it would be void.⁴⁸

The court concluded that the ordinance was void for being in restraint of trade, unreasonable, and contrary to the purposes of the corporation.⁴⁹ The ordinance could not be sustained as necessary for sanitation because no such necessity justified granting a public monopoly to certain sellers only.⁵⁰ Further, there were no rules confining the discretion of the public officials who granted the licenses to sell; they “might be granted only to political partizans, or personal friends.”⁵¹ Thus, the power to license could be exercised “arbitrarily or unreasonably.”⁵²

The court also concluded that the ordinance was not for the common benefit of the people, noting that it was “difficult to see how such an ordinance can operate for the common benefit, or the benefit of any one save the corporation; for its legitimate effect must be, to increase the price of the commodity sold in proportion to the restrictions imposed upon those engaged in the trade,” and thus the ordinance “must operate not only to the prejudice of the butchers but also to that of the citizens in general.”⁵³ The court, in its penultimate paragraph, thus found that the ordinance was “in restraint of trade,” “unreasonable,” not genuinely for police-power purposes, and in violation of the state’s delegation of power to the corporation:

[T]he ordinance . . . cannot be sustained upon principle or authority. And, while the right is conceded to municipal corporations to adopt such regulations as may be necessary and reasonable, to protect the lives, health, property or morals of its citizens, the exercise of this right should be carefully guarded, and limited within the clear intent of the grant of power for such purpose; and, where a question arises as to any particular ordinance which it is claimed interferes with the rights of individuals as enjoyed under the common law or by statute, the burden of proof should be on the corporation to show that it has not exceeded its authority in framing such ordinance.⁵⁴

⁴⁸ *Laidler*, 2 Minn at 203–05.

⁴⁹ *Id* at 209.

⁵⁰ *Id* at 205.

⁵¹ *Id* at 206.

⁵² *Laidler*, 2 Minn at 209.

⁵³ *Id* at 209.

⁵⁴ *Id*.

Numerous cases from the antebellum period hold similarly. The rationale, as appears from the above case, is partly a theory of delegation from the state. One justice in North Carolina explained, “To this [corporate] body a portion of the power of the legislature is delegated to be exercised for the public good, and subject at all times to be modified, changed, or annulled.”⁵⁵ Another rationale was the applicability of the common law of corporations. Chief Justice John Savage of New York’s Supreme Court of Judicature explained, “At common law corporations have power to make by-laws for the general good of the corporation. They must be reasonable and for the common benefit; they must not be in restraint of trade, nor impose a burden without an apparent benefit.”⁵⁶ The only question in that case, which involved a municipal bylaw, was therefore whether that bylaw was valid pursuant to those principles.⁵⁷ “The authority of the corporation is a limited one,” an earlier New York case explained.⁵⁸ “The trustees cannot arbitrarily pass what laws they please. Their laws are to be *prudential*; and aimed at the correction of some probable evil. This is also conformable to the general law of corporations, which demands that their by-laws should be reasonable.”⁵⁹

Perhaps Chief Justice John Marshall best gave expression to both of these grounds, with his usual clarity and concision: “Being the mere creature of law, [a corporation] possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.”⁶⁰ Judge John F. Dillon’s 1872 treatise on municipal corporations—which we shall discuss in more detail presently—explained that these principles were applicable to “private as well as public or municipal” corporations.⁶¹ Thus, in 1854 one corporations treatise writer wrote that the bylaws of municipal corporations must be “reasonable and adapted to the purposes of the corporation.”⁶²

⁵⁵ *Mills v Williams*, 33 NC (11 Ired) 558, 561 (1850).

⁵⁶ *Village of Buffalo v Webster*, 10 Wend 100, 102 (NY 1833).

⁵⁷ *Id.*

⁵⁸ *Dunham v Trustees of the Village of Rochester*, 5 Cow 462, 465 (NY 1826).

⁵⁹ *Id.* (emphasis added).

⁶⁰ *Trustees of Dartmouth College v Woodward*, 17 US (4 Wheat) 518, 636 (1819).

⁶¹ John F. Dillon, *Treatise on the Law of Municipal Corporations* 27–28 (Cockcroft & Co 1872).

⁶² James Grant, *A Practical Treatise on the Law of Corporations in General, as Well Aggregate as Sole* 86 (T. & J.W. Johnson 1854).

These principles were applied by the Supreme Judicial Court of Massachusetts in 1834 to invalidate a bylaw in Charlestown that entirely prohibited the bringing of dead bodies into the town without the approval of a majority of the selectmen, and further prohibited them from burying any dead body in the town without the approval of the same.⁶³ The first ordinance was struck down for being outside the scope of the corporation's delegated power because "[t]here is nothing in the language of the statute, from which it can be inferred, that it was the intention of the legislature to delegate to the selectmen and town of Charlestown the power of imposing upon the citizens of the Commonwealth such an unreasonable restraint."⁶⁴

The second ordinance respecting the burial of the dead, however, was struck down on other grounds. The statute authorized the municipal corporation "to make and establish rules, orders, and regulations for the interment of the dead in said town, to establish the police of the burying-grounds, to make regulations for funerals, and to appoint all necessary officers to carry the same into effect."⁶⁵ The court first held that the bylaw was not merely a regulation, but a complete prohibition. Indeed, it appears to have been the intent of the town to prohibit all Catholic burials.⁶⁶

The court also held that *even if* such a bylaw were a regulation and not a complete prohibition, it would still be void because it was unreasonable and not genuinely for a police-power purpose. "A by-law, to be valid, must be reasonable; it must be *legi, fidei, rationi consona*," the court observed.⁶⁷ Thus, if this "regulation or prohibition had been limited to the populous part of the town, *and were made in good faith for the purpose of preserving the health of the inhabitants*," who may be exposed to disease as a result of interments in densely populated areas, then "it would have been a very reasonable regulation."⁶⁸ But because the "restraints extend

⁶³ *Austin v Murray*, 33 Mass (16 Pick) 121, 124 (1834).

⁶⁴ *Id.* Here, the court adds: "[N]or had the legislature any right or authority to delegate any such power." *Id.* There are no citations for this proposition, and it appears to have been a minority view. Indeed, numerous cases held that a state could ratify unreasonable ordinances or explicitly delegate the power to enact unreasonable ordinances. See notes 83–85, 98, and accompanying text. Even if it were true that the legislature had no power to delegate to municipalities the authority to enact unreasonable regulations, that does not support the proposition that the state itself could not have enacted the unreasonable regulation.

⁶⁵ *Austin*, 33 Mass (16 Pick) at 124.

⁶⁶ *Id.* at 124–25.

⁶⁷ *Id.* at 125.

⁶⁸ *Id.* (emphasis added).

many miles into the country, to the utmost limits of the town,” it could not “be pretended that this by-law was made for the preservation of the health of the inhabitants.”⁶⁹ “[S]uch an unnecessary restraint upon the right of interring the dead,” the justices concluded, “we think essentially unreasonable.”⁷⁰

Here we see a hint of the kind of language that would become a staple of police-power limitations against the states in the 1870s and after. It was the duty of courts, at least when reviewing municipal acts, to ensure that they were “made in good faith for the purpose of” genuinely advancing the health, safety, welfare, or morals of the people.⁷¹ Numerous other cases from the period, from numerous states, adopted these same principles.⁷²

2. Dillon on municipal corporations.

The earliest synthesis of the antebellum cases appears to be Judge Dillon’s *Treatise on the Law of Municipal Corporations*, published in 1872. Dillon was a judge of the US Court of Appeals for the Eighth Circuit at the time he published the treatise, and had been a justice of the Iowa Supreme Court for half a decade in the 1860s.⁷³ His treatise is of particular interest not only because

⁶⁹ *Austin*, 33 Mass (16 Pick) at 125.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See, for example, *Waters v Leech*, 3 Ark 110, 114–15 (1840):

The corporation of the city of Little Rock possesses only such legislative powers as are prescribed by the charter from which it derives its existence. It exercises a delegated power only; and must in all its acts, confine itself strictly within the limits of its authority. . . . The power to make by-laws is given to corporate bodies to enable them to fulfil the purposes of the institution, and must necessarily be confined to such objects and persons as are specially defined in the charter. The corporate powers are not only limited, but must be reasonably exercised in sound discretion, and not only strictly within the limits of the charter, but in perfect subordination to the constitution and the general law of the land, and the rights dependent thereon; and that power, if properly exercised, may be enforced by just and competent penalties.

See also *Borough of Greensburg v Young*, 53 Pa 280, 283 (1866):

There is nothing therefore to restrain the authorities in regard to these rules, regulations and ordinances which they make on the subject of the streets, but the constitution and laws of the Commonwealth, and the common law, which requires the by-laws of the corporation to be reasonable and not a burden, without some fair equivalent.

For an account of the broad police powers exercised by municipalities, see generally William J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* (UNC 3d ed 1996).

⁷³ Harry Hubbard, *John F. Dillon: Fourteenth President of Association*, 14 ABA J 77 (1928).

it supports the above analysis on a wider scale, but also for two further reasons. First, as we shall see presently, his treatise teems with suggestions that state legislatures were not limited by the police powers the same way municipal corporations were limited. Second, notwithstanding these suggestions, litigants before the Supreme Court cited Dillon's treatise in the 1870s and afterward for the proposition that states themselves were limited by the police powers, an argument that appears to have persuaded some of the justices.

Dillon's focus is primarily on the limited nature of a municipal corporation's delegated powers. "The courts," he wrote, have the most important duty "to require these [municipal] corporations, in all cases, to show a plain and clear grant for the authority they assume to exercise."⁷⁴ Municipal corporations "possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them, or other statutes applicable to them."⁷⁵

In addition to acting only pursuant to their delegated powers, municipal corporations also had to act solely for the public benefit. "Municipal corporations are created and exist for the public advantage, and not for the benefit of their officers or of particular individuals or classes."⁷⁶ Many general state laws explicitly directed for this reason that any municipal act must be "necessary" for the attainment of only certain enumerated objects.⁷⁷ Dillon cites numerous cases for this proposition. To take but one example, he cites Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court for the proposition "that corporations can only exercise their powers over their respective members, for the accomplishment of limited and defined objects."⁷⁸ Thus, municipal

⁷⁴ Dillon, *Treatise on the Law of Municipal Corporations* at 25 (cited in note 61).

⁷⁵ *Id.* at 29. See also *id.* at 40 (when it comes to entering into municipal contracts, "[t]he power of the majority is wisely limited by law to the objects and cases which are clearly provided for and defined by statute"); *id.* at 101–02 (asserting that it is a "general and undisputed proposition" that a municipal corporation can exercise only powers that are (1) "granted in *express words*," (2) "*necessarily or fairly implied* in, or *incident* to, the powers expressly granted," or (3) "*essential* to the declared objects and purposes of the corporation—not simply convenient, but indispensable").

⁷⁶ *Id.* at 29.

⁷⁷ See, for example, *id.* at 34–35 n 1 (observing that Massachusetts's general law permitted cities to make only those bylaws "necessary . . . for directing and managing the prudential affairs, preserving the peace and good order, and maintaining the internal police").

⁷⁸ Dillon, *Treatise on the Law of Municipal Corporations* at 102 (cited in note 61), quoting *Spaulding v Lowell*, 40 Mass (23 Pick) 71, 74 (1839).

bylaws and ordinances enacted pursuant to a general or implied grant of power “must be reasonable” and “consonant with the general powers and purposes of the corporation.”⁷⁹ Satisfaction of this criterion is for the courts to judge: “Whether an ordinance be reasonable and consistent with the law or not, is a question for the court”; “[a]n unreasonable by-law is void.”⁸⁰ Courts, however, must “cautiously” exercise this power because “city authorities, it is to be presumed, can judge better than the court.”⁸¹

Judge Dillon’s synthesis thus supports the proposition that courts could void municipal acts that were unreasonable, in restraint of trade, contrary to a delegation of power, or inconsistent with the purposes of such a delegation. But, crucially, no such doctrines would prevent a state legislature from exercising its own powers unreasonably or in restraint of trade. Indeed, Judge Dillon lamented that “[e]xtraordinary and extra-municipal powers have been too often incautiously or unwisely granted” by the state legislatures to cities, and exhorted his readers that “[t]he powers granted to such corporations, and especially the power to levy taxes, *should* be more carefully defined and limited, and *should* embrace such objects only as are necessary for the health, welfare, safety, and convenience of the inhabitants.”⁸² This suggests his understanding that states ultimately could authorize local governments to act contrary to the genuine health, welfare, safety, and convenience of citizens—even if the courts would invalidate an improper municipal act made pursuant to more general grants of authority.

Judge Dillon elsewhere makes this understanding explicit. Under the heading, “Legislative Authority to Adopt Unreasonable Ordinances,” he writes:

Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of

⁷⁹ Dillon, *Treatise on the Law of Municipal Corporations* at 278 (cited in note 61).

⁸⁰ *Id.* at 283.

⁸¹ *Id.* at 283–84 n 3, citing *Commonwealth v Robertson*, 59 Mass (5 Cush) 438, 442 (1850).

⁸² Dillon, *Treatise on the Law of Municipal Corporations* at 23 (emphasis added) (cited in note 61).

power general in its nature. *In other words, what the legislature distinctly says may be done cannot be set aside by the courts because they may deem it unreasonable.*⁸³

Only “where the power to legislate on a given subject is conferred, but the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid.”⁸⁴ Put simply, if the legislature explicitly granted a municipal corporation the power to do an unreasonable act, it was not for the courts to question it.⁸⁵

One illustrative case involving slaughterhouses—a case with very similar facts to those in the *Slaughter-House Cases*, and cited there by counsel and the dissenters⁸⁶—was *City of Chicago v Rumpff*,⁸⁷ decided the year before the adoption of the Fourteenth Amendment. Chicago granted a ten-year monopoly starting in

⁸³ Id at 284 (emphasis added).

⁸⁴ Id.

⁸⁵ The two cases Judge Dillon cited for this proposition do not make the point quite so explicitly, but they do support it. See id at 284. In *City of Peoria v Calhoun*, 29 Ill 317 (1862), the Illinois Supreme Court held to be erroneous an instruction to the jury that seemed to suggest that a restraint of trade was unlawful even if the municipal corporation had been granted the power to enact such a restraint. Id at 320. “This was virtually telling the jury,” the court observed, “that although the city had the right to pass the ordinance, yet if they believed it was in restraint of lawful trade, it was not binding. If the city had power to pass the ordinance, then no trade in violation of it could be lawful.” Id.

The Minnesota Supreme Court in *City of St. Paul v Colter*, 12 Minn 41 (1866), was more explicit. The state legislature authorized the city to regulate the sale of meat and to require a license to be purchased at a price anywhere from \$5 to \$500. Id at 46–47. The defendant argued that an ordinance imposing a \$200 license fee was “unauthorized and void, and oppressive and in restraint of trade”; that the corporation’s powers “are confined to sanitary and police regulations”; and, most importantly, that “[t]he legislature of the State cannot authorize a corporation to pass by-laws, save only such as are reasonable.” Id at 43–44. The court had no trouble rejecting the argument: “What limits should be imposed upon the licensing power, was a matter for the legislature to determine,—a matter dependent upon the judgment and discretion of the legislature. In such case we do not think it proper to question the exercise of legislative discretion.” Id at 48. The court emphasized that the ordinance in that case was “authorized by the legislature,” and “not being forbidden by the constitution, it is therefore not void, but has the force of law; and if it be oppressive, the remedy, as in many other cases, lies with the legislature or common council.” Id at 49 (emphasis in original). Because the ordinance was within the corporation’s explicitly delegated power, the ordinance was presumed valid, and the presumption could not be overcome “by any thing going to show that the imposition of the license [was] . . . not warranted by . . . the legitimate purposes for which such charters may be granted.” Id. An authorization by the state legislature insulated a municipal act that might otherwise have been invalid under the police-powers analysis.

⁸⁶ *Slaughter-House Cases*, 83 US (16 Wall) at 48; id at 106–07 (Field dissenting). See also Part IV.B.2.

⁸⁷ 45 Ill 90 (1867).

1866 to one particular company over all slaughtering in the city pursuant to a grant of power in its charter to “direct the location, management and construction of, and to regulate, license, restrain, abate and prohibit [slaughtering establishments] within the city.”⁸⁸ The state legislature attempted to ratify the contract in 1867 by amending the charter to provide the city with “power and authority to regulate and control the slaughtering of all animals in the city, or within four miles thereof, intended for consumption or exposed for sale in the city, and to enforce, by additional ordinances, any regulation, contract or law heretofore made on the subject.”⁸⁹

The Illinois Supreme Court struck down the ordinance.⁹⁰ “Municipal corporations are only created for the better government and protection of local communities in the enjoyment of their rights, than can be afforded by general laws,” the court observed.⁹¹ “Such bodies are never created to enable them to confer pecuniary benefits, or to grant monopolies to any portion of community, or to individual members thereof.”⁹² They are created “for the regulation of the local police; to adopt and enforce all needful sanitary regulations; to establish and control markets; to repair highways, and perform the various other duties necessary to promote the comfort and well being of such densely crowded communities as constitute large cities.”⁹³ But, the court went on to say,

it is no part of the design, in organizing such bodies, that the corporate authorities shall enter into competition with its inhabitants in business or trade, or to sell, or even grant, special immunities to any portion of the inhabitants for their individual benefit or gain. The corporate authorities must exercise their franchises solely for the benefit of the community embraced within their limits.⁹⁴

Here the court clearly stated both the evils of monopoly and the limitations upon a municipal corporation’s exercise of its police powers. Such powers must be exercised for the benefit of the whole and not for the private advantage of a select few. The ends pursued must be legitimately for the safety and health of the

⁸⁸ *Id.* at 92–95.

⁸⁹ *Id.* at 95, quoting Chicago City Charter, ch v, § 24 (1867).

⁹⁰ *Rumpff*, 45 Ill at 97–98.

⁹¹ *Id.* at 96.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Rumpff*, 45 Ill at 96.

community. “Hence their by-laws must be reasonable, and such as are vexatious, unequal or oppressive, or are manifestly injurious to the interest of the corporation, are void, and of the same character are all by-laws in restraint of trade, or which necessarily tend to create a monopoly.”⁹⁵

The court also rejected the state legislature’s attempt to ratify this unreasonable ordinance because the legislature had not done so expressly. “[I]nasmuch as this contract is not specifically named,” the court held, “we cannot presume that the legislature intended to ratify an unreasonable and oppressive contract, but only such as was in accordance with the purposes for which the charter had been granted, and not those which were opposed to the design of creating such bodies.”⁹⁶

This holding implies two important points. First, it appears that the court was prepared to *presume* the legislature did not act unreasonably or contrary to legitimate police-power purposes. As we shall see, this was consistent with other courts using a version of what we might today call substantive due process as a rule of statutory construction.⁹⁷ But, second, it seems that the court would not have struck down an express ratification of the unreasonable ordinance.⁹⁸ In sum, Dillon and the antebellum cases uniformly maintained that, absent an express authorization to the contrary, municipal corporations were limited to reasonable exercises of the police powers under the law of delegation and the law of corporations. State legislatures, however, do not appear to have been limited in this same way.

⁹⁵ Id at 97. The court articulated what would have made such an ordinance a valid exercise of the police power: “Where that body have made the necessary regulations required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have the opportunity of conforming to such regulations, otherwise the ordinance would be unreasonable and tend to oppression.” Id. In other words, a regulation of slaughterhouses would have been legitimate so long as anyone in the occupation had a fair chance of conforming to the regulations. “We regard it neither as a regulation nor a license of the business,” on the other hand, “to confine it to one building, or to give it to one individual. Such action is oppressive, and creates a monopoly that never could have been contemplated by the general assembly.” Id at 98. It cuts others “off from a share in not only a legal but a necessary business.” Id. Thus, whether the court considered the city’s act to be an ordinance or a contract (which was at issue in the case), “it is equally unauthorized, as being opposed to the rules governing the adoption of municipal by-laws.” Id.

⁹⁶ Id at 98–99.

⁹⁷ See Part II.C.

⁹⁸ Dillon elsewhere states that when “an ordinance is unreasonable, [it] can only be passed when clearly authorized.” Dillon, *Treatise on the Law of Municipal Corporations* at 333 (cited in note 61), citing *Waters v Leech*, 3 Ark 110 (1840).

B. Police Powers and State Regulations of Commerce

The state legislatures may not have been limited to reasonable exercises of their police powers as a general matter, but they were so limited when their exercise of power came into potential collision with specific federal constitutional provisions.

One such provision was the prohibition on state regulations of interstate commerce under the exclusive reading of the Commerce Clause. One of the pressing constitutional questions of the era was whether the commerce power was exclusive and prohibited state regulations of interstate commerce and, if it was exclusive, whether that also prohibited state health and safety regulations that affected interstate commerce. In these cases, the police powers did serve as a limitation on the states. The Court allowed states to regulate articles of interstate commerce *only if* their regulations were genuinely for police-power purposes.⁹⁹

1. *Gibbons v Ogden* (1824).

Our story begins with a prominent case of early constitutional law, *Gibbons v Ogden*.¹⁰⁰ The facts are familiar. Ogden was the assignee of exclusive licenses to navigate state waters by steamboat granted by the state legislature of New York, and Gibbons was licensed under an act of Congress to engage in the “coasting trade.”¹⁰¹ Ogden sued Gibbons for violating Ogden’s exclusive state license. The question was whether the federal government had the power under the Commerce Clause to regulate the coasting trade and, if so, whether that power was exclusive of state legislation on the same subject.¹⁰²

The attorneys argued about the nature of the state’s police powers and their relationship to the Commerce Clause. All agreed on the principle. Daniel Webster, arguing for Gibbons, made the case for the exclusivity of the federal commerce power, but argued that an exclusive power was not inconsistent with the state’s recognized power over “pilot laws, the health laws, or quarantine

⁹⁹ Professor David Currie argued that the Court never provided explicit and clear answers to the exclusivity question. See, for example, David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888* 168–76, 204–06, 222–34, 330–42 (Chicago 1985). However, this Article’s examination of the cases suggests that there was much more unanimity on the question than has been traditionally believed.

¹⁰⁰ 22 US (9 Wheat) 1 (1824).

¹⁰¹ *Id.* at 1–2.

¹⁰² *Id.* at 196–97, 199–200.

laws; and various regulations of that class.”¹⁰³ Webster thought that “all these things were, in their general character, rather regulations of police than of commerce, in the constitutional understanding of that term.”¹⁰⁴

Webster recognized that such police regulations could affect commerce, but argued that this effect did not make them by nature commercial regulations. “[G]enerally speaking,” he explained, “roads, and bridges, and ferries, though, of course, they affect commerce and intercourse, do not obtain that importance and elevation, as to be deemed *commercial regulations*. . . . Quarantine laws, for example, may be considered as affecting commerce; yet they are, in their nature, *health laws*.”¹⁰⁵

How does one reconcile the exercise of these two powers, which can sometimes touch on the same subjects? Webster argued that it depended on the genuineness of the purpose for which the state was regulating: “While a health law is reasonable, it is a health law; but if, under colour of it, enactments should be made for other purposes, such enactments might be void.”¹⁰⁶

Thomas Oakley, arguing for Ogden, agreed that internal state regulations might “indirectly affect the right of commercial intercourse between the States,” but so do “quarantine laws, inspection laws, duties on auctions, licenses to sell goods, &c,” all of which “are acknowledged to be valid.”¹⁰⁷ It is the *purpose* for which they are enacted that makes them valid: “They are passed, not with a view or design to regulate commerce, but to promote some great object of public interest, within the acknowledged scope of State legislation: such as the public health, agriculture, revenue, or the encouragement of some public improvement.”¹⁰⁸ Thus, “[b]eing *passed for these legitimate objects*, they are valid as internal regulations, though they may incidentally restrict or regulate foreign trade, or that between the States.”¹⁰⁹

William Wirt, Attorney General of the United States, replied for Gibbons. Importantly, the case was also litigated under the Patent Clause, which grants Congress the power “[t]o promote the

¹⁰³ Id at 3, 18.

¹⁰⁴ *Gibbons*, 22 US (9 Wheat) at 19.

¹⁰⁵ Id at 20 (emphasis in original).

¹⁰⁶ Id.

¹⁰⁷ Id at 71–72.

¹⁰⁸ *Gibbons*, 22 US (9 Wheat) at 72.

¹⁰⁹ Id (emphasis added). Thomas Emmett, also arguing for Ogden, made the less persuasive argument that these police powers were also regulations of commerce and thus the power over interstate commerce must be concurrent. Id at 112–13.

Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹¹⁰ New York claimed that its grant of a monopoly was like a patent, intended to protect and benefit the inventor of a novel and useful method of transportation, the steam engine.¹¹¹ The same arguments about exclusivity were made about the Patent Clause. The Attorney General argued:

It might be admitted, that the State had authority to prohibit the use of a patented machine on that ground, or of a book, the copy-right of which had been secured, on the ground of its impiety or immorality. But the laws which are now in judgment were not passed upon any such ground. The question raised by them is, can the States obstruct the operation of an act of Congress, by taking the power from the National Legislature into their own hands? Can they prohibit the publication of an immoral book, licensed by Congress, *on the pretext of its immorality*, and then give an exclusive right to publish the same book themselves?¹¹²

Wirt thus implied that if the state regulation were genuinely for the purpose of suppressing immorality, within the traditional police power, then it could have been valid even if it affected Congress’s power over discoveries and inventions. Although he did not make the point explicitly in the context of the commerce power, there, too, he argued that “quarantine laws, and other regulations of police, respecting the public health in the several States,” are not truly commercial regulations, suggesting again that so long as the intent is not to regulate commerce under pretext of such regulation, it would be valid.¹¹³

Chief Justice Marshall’s opinion for the Court makes good sense in light of these arguments. After finding that the power over commerce includes navigation and that Congress had exercised its power by providing for the licensing of the coasting trade,¹¹⁴ he addressed the power of states to regulate on similar subjects. Marshall did not deny that inspection laws had a considerable impact on commerce, but their “object” was not commerce; their object was “to improve the quality of articles

¹¹⁰ US Const Art I, § 8, cl 8.

¹¹¹ *Gibbons*, 22 US (9 Wheat) at 5–6.

¹¹² *Id* at 176 (emphasis added).

¹¹³ *Id* at 178.

¹¹⁴ *Id* at 189–97.

produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use”; such regulations “act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose.”¹¹⁵ Quarantine laws and “health laws of every description” were similar.¹¹⁶

Marshall agreed that so long as the state laws were passed for those noncommercial purposes, they could not be considered impermissible regulations of commerce. “So, if a State, in passing laws on subjects acknowledged to be within its control, *and with a view to those subjects*, shall adopt a measure of the same character with one which Congress may adopt,” Marshall explained, “it does not derive its authority from the particular power which has been granted [the commerce power], but from some other [the police power], which remains with the State, and may be executed by the same means.”¹¹⁷ It was the purpose for which the laws were enacted that determined the source of the power. Marshall, to be sure, never quite answered whether the commerce power was exclusive because even if the state had a concurrent power, Congress’s own law directly conflicted with, and thus preempted, the state regulation.¹¹⁸

Justice William Johnson concurred and argued that the Commerce Clause was exclusive. He, too, explained that the distinction between proper and improper state regulations touching on the same subjects of the commerce power was the purpose for which those state regulations were enacted:

It is no objection to the existence of distinct, substantive powers, that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease.¹¹⁹

Thus “the health laws that require them to be stopped and ventilated, are no more intended as regulations on commerce, than the laws which permit their importation, are intended to inoculate the community with disease.”¹²⁰ It is the purpose and frank exercise of power that marks a valid police regulation: “Their different

¹¹⁵ *Gibbons*, 22 US (9 Wheat) at 203.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 204 (emphasis added).

¹¹⁸ *Id.* at 209–10 (holding that the exclusive license was in direct conflict with, and thus preempted by, Congress’s legislation).

¹¹⁹ *Gibbons*, 22 US (9 Wheat) at 235 (Johnson concurring).

¹²⁰ *Id.*

purposes mark the distinction between the powers brought into action; and *while frankly exercised*, they can produce no serious collision.”¹²¹

By 1824, in summary, the Court was monitoring the boundaries of a state’s exercise of its legitimate police powers when that power acted on the same subjects as the federal commerce power. The states were not generally limited to reasonable police regulations, but they were specifically limited to such reasonable regulations if those regulations also affected interstate commerce. Considering the reasonableness of the regulation, and the genuineness of the state’s purpose, was how the Court ensured that the states were not improperly trying to regulate interstate commerce—a power that the Court at least assumed might belong exclusively to Congress.

2. *Willson v Black Bird Creek Marsh Co* (1829).

Willson v Black Bird Creek Marsh Co,¹²² decided only five years after *Gibbons*, also suggested that the federal commerce power was exclusive but that the states could make reasonable police regulations that happened to affect interstate commerce.¹²³ In *Willson*, the state of Delaware had authorized the construction of a dam in a navigable stream. The owners of a sloop licensed under the federal navigation laws damaged the dam in order to pass it. When the corporation that had constructed the dam sued for damages, the owners of the sloop defended on the grounds that the dam had been unlawfully constructed because Delaware’s law was an unconstitutional regulation of interstate commerce.¹²⁴

US Attorney General Wirt defended the state law, arguing that the dam was constructed upon “one of those sluggish reptile streams, that do not run but creep, and which, wherever it passes, spreads its venom, and destroys the health of all those who inhabit its marshes.”¹²⁵ He therefore rejected the assertion “that a law authorising the erection of a dam, and the formation of banks which will draw off the pestilence, and give to those who have before suffered from disease, health and vigour, is unconstitutional.”¹²⁶ Chief Justice Marshall agreed that “[t]he value of the

¹²¹ *Id.* (emphasis added).

¹²² 27 US (2 Pet) 245 (1829).

¹²³ *Id.* at 251–52.

¹²⁴ *Id.* at 245–46.

¹²⁵ *Id.* at 249.

¹²⁶ *Willson*, 27 US (2 Pet) at 249.

property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved.”¹²⁷ Focusing on the legitimate purpose for which the state had exercised its police powers, Marshall upheld the statute: “*Measures calculated to produce these objects*, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the states.”¹²⁸ Marshall thus again implied that measures calculated to interfere with commerce as opposed to those calculated to advance a genuine police-power purpose might be invalid.

The difference between *Willson* and *Gibbons* was that in *Willson* there was no federal statute involved at all. Marshall thus observed that the authorization to construct the dam could not “be considered as repugnant to the power to regulate commerce in its *dormant* state.”¹²⁹ This holding—and Justice Johnson’s agreement with the opinion, as he did not write separately—suggests further movement in the direction of federal exclusivity over commerce. But so long as the state’s action was for a genuine police-power purpose, and so long as it was genuinely “calculated to produce” the legitimate ends of the police power, it was valid. Thus, it might be said that by 1829 state regulations affecting interstate commerce, irrespective of whether Congress had also regulated on the subject, were required to be genuinely for police-power purposes. Federal law overrode such proper state laws only in the event of a direct conflict, such as was found in *Gibbons*.¹³⁰

¹²⁷ Id at 251.

¹²⁸ Id (emphasis added).

¹²⁹ Id at 252 (emphasis added).

¹³⁰ In Justice Joseph Story’s 1833 *Commentaries*, he summarized the general consensus on the Commerce Clause. The power is “exclusive” because what Congress chooses not to regulate is as much part of its system as that which it chooses to regulate: “Regulation is designed to indicate the entire result, applying to those parts, which remain as they were, as well as to those, which are altered”; the power to regulate “produces a uniform whole, which is as much disturbed and deranged by changing, what the regulating power designs to have unbounded, as that, on which it has operated.” Joseph Story, 2 *Commentaries on the Constitution of the United States* 513 (Hilliard, Gray 1833). As for the states’ powers over “certain subjects, having a connexion with commerce,” such powers “are entirely distinct in their nature from that to regulate commerce.” Id at 514–15. Health, inspection, and pilotage laws “are not so much regulations of commerce, as of police.” Id at 515.

3. Other cases through 1867.

At issue in the 1837 case of *Mayor, Aldermen, and Commonalty of the City of New York v Miln*¹³¹ was a state law requiring ship captains to provide lists of their passengers, with the ostensible purpose of helping the state keep immigrants from becoming public charges.¹³² The majority opinion—only Justice Joseph Story dissented and Justice Smith Thompson concurred—held that whether or not the commerce power was exclusive, the state’s law was a legitimate exercise of the police power.¹³³

Critically, the Court examined the purpose of the statute and the ends sought to attain that purpose. “To decide” whether the regulation was “not of commerce, but police,” Justice Philip Barbour wrote, “let us examine its purpose, the end to be attained, and the means of its attainment.”¹³⁴ The Court thought it “apparent” that the “object” of the legislature was “to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries, or from any other of the states,” and “to prevent them from becoming chargeable as paupers.”¹³⁵ The Court held “that both the end and the means here used, are within the competency of the states,”¹³⁶ that the purpose of the legislature was in fact to secure the protection of those residing in New York and to provide for their welfare, and that the means were appropriate for those ends.¹³⁷

The Court then summed up the existing state of the doctrine:

From this it appears, that whilst a state is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by congress acting under a different power: subject,

¹³¹ 36 US (11 Pet) 102 (1837).

¹³² *Id* at 130–31, 133.

¹³³ *Id* at 132:

We shall not enter into any examination of the question whether the power to regulate commerce, be or be not exclusive of the states, because the opinion which we have formed renders it unnecessary: in other words, we are of opinion that the act is not a regulation of commerce, but of police; and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the states.

¹³⁴ *Id* at 132–33.

¹³⁵ *Miln*, 36 US (11 Pet) at 133.

¹³⁶ *Id*.

¹³⁷ *Id* at 133–34.

only, say the Court, to this limitation, that in the event of collision, the law of the state must yield to the law of congress.¹³⁸

In sum, whether or not the commerce power was exclusive, the states had a different source of power—the police power—that could act on the same subjects as Congress’s power over commerce. Such acts “within the legitimate scope of [state] power” were valid unless in direct conflict with a congressional regulation of commerce.

The debate over the exclusivity of the commerce power flared up again in the *License Cases*¹³⁹ and the *Passenger Cases*¹⁴⁰ in the late 1840s. The former involved the power of states to prohibit entirely the sale of liquor within their borders notwithstanding a congressional law authorizing their importation from abroad.¹⁴¹ The power of the states was affirmed, but there was a series of different opinions. Although Chief Justice Roger Taney seemed to believe that states had plenary power to regulate commerce until Congress acted, at least four of the justices argued that state laws for the protection of health or morals were valid exercises of police powers rather than regulations of commerce.¹⁴²

The *Passenger Cases* involved state laws charging ship captains a fee per passenger, and these laws were struck down by a vote of 5–4.¹⁴³ The three-justice plurality argued that the commerce power was exclusive, but that states could make police regulations affecting commerce. Even though “[a] State cannot regulate foreign commerce,” Justice John McLean explained, “it may do many things which more or less affect it.”¹⁴⁴ Whether a regulation was a police or commercial one depended on its objective. In this case, the law in question was “called a health law,” but to so call it “would seem to be a misapplication of the term.”¹⁴⁵ Indeed, some of the funds went to a juvenile reform society.¹⁴⁶ Justice McLean thus inquired into the “objects and means” of the law and

¹³⁸ Id at 137.

¹³⁹ 46 US (5 How) 504 (1847).

¹⁴⁰ 48 US (7 How) 283 (1849).

¹⁴¹ *License Cases*, 46 US (5 How) at 574 (Taney).

¹⁴² See id at 581 (Taney); id at 595 (McLean); id at 630 (Woodbury); id at 631–32 (Grier). For a brief summary of the various opinions, see Currie, *The Constitution in the Supreme Court* at 225–26 (cited in note 99).

¹⁴³ *Passenger Cases*, 48 US (7 How) at 392–93, 409.

¹⁴⁴ Id at 402.

¹⁴⁵ Id at 403.

¹⁴⁶ Id.

found them wanting.¹⁴⁷ He concluded: “The police power of the State cannot draw within its jurisdiction objects which lie beyond it. It meets the commercial power of the Union in dealing with subjects under the protection of that power, yet it can only be exerted under peculiar emergencies and to a limited extent.”¹⁴⁸ “In guarding the safety, the health, and morals of its citizens, a State is restricted to appropriate and constitutional means.”¹⁴⁹

The legitimate scope of the police power continued to play a role up through the adoption of the Fourteenth Amendment. Although the doctrine was in a state of evolution, as late as 1867 in *Steamship Co v Portwardens*,¹⁵⁰ the Court unanimously recognized that “some [state] powers, the exercise of which may, in various degrees, affect commerce, have always been held not to be within the grant to Congress,” and “[t]o this class it is settled belong quarantine and other health laws, laws concerning the domestic police, and laws regulating the internal trade of a State.”¹⁵¹ The Court concluded in that case that a direct tax imposed by Louisiana upon every entering ship could not be sustained on any of these grounds and was therefore an invalid direct regulation of commerce.¹⁵²

C. Obligations of Contract

In the antebellum period there was another prominent legal doctrine requiring courts occasionally to inquire into the legitimate police-power purposes of legislative acts. This doctrine prevented states from impairing the obligations of existing contracts, stemming from the federal Constitution’s Contracts Clause¹⁵³ or similar prohibitions in state constitutions. The context of these disputes usually arose when a state granted a private corporation a charter and subsequently sought to make regulations that might affect the private corporation’s existing rights under the charter. The doctrine maintained that so long as an exercise of state power was genuinely for a police-power purpose, the state

¹⁴⁷ *Passenger Cases*, 48 US (7 How) at 404.

¹⁴⁸ *Id.* at 408.

¹⁴⁹ *Id.*

¹⁵⁰ 73 US (6 Wall) 31 (1867).

¹⁵¹ *Id.* at 33.

¹⁵² *Id.* at 33–34.

¹⁵³ US Const Art I, § 10, cl 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”).

could modify the rights and privileges of a corporation notwithstanding any existing charter.

Such was the prominent case of *Thorpe v Rutland & Burlington Railroad Co*,¹⁵⁴ decided by Vermont's highest court. The case "involve[d] the question of the right of the legislature to require existing railways to respond in damages for all cattle killed or injured by their trains until they erect suitable cattle-guards at farm-crossings."¹⁵⁵ There would have been no serious doubt as to the state's power to enact such a law if the requirement had already existed in the corporation's charter or by virtue of the "general laws of the state at the date of the charter."¹⁵⁶

The court analyzed the case under a police-powers framework. "We think the power of the legislature to control existing railways in this respect, may be found in the general control over the police of the country, which resides in the law-making power in all free states."¹⁵⁷ "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state."¹⁵⁸ It is "within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others" according "to the maxim, *Sic utere tuo ut alienum non laedas*."¹⁵⁹ Thus, the court concluded that "the authority of the legislature to make the requirement of existing railways may be vindicated, because it comes fairly within the police of the state."¹⁶⁰ Other courts took a similar approach to the issue,¹⁶¹ as

¹⁵⁴ 27 Vt 140 (1855).

¹⁵⁵ *Id.* at 142.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 149.

¹⁵⁸ *Thorpe*, 27 Vt at 149.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 156.

¹⁶¹ See, for example, *Galena & Chicago Union Railroad Co v Loomis*, 13 Ill 548, 550 (1852):

That the legislature has the power, by the enactment of general laws, from time to time, as the public exigencies may require, to regulate corporations in the exercise of their franchises, so as to provide for the public safety, admits of no doubt. The provision in question is a mere police regulation, enacted for the protection and safety of the citizens of the country, and in no manner interferes with or impairs the powers conferred on the defendants in their act of incorporation.

See also, for example, *Inhabitants of Veazie v Mayo*, 45 Me 560, 564 (1858) ("[I]ndependent of and aside from all charter provisions, it is only the exercise of that police power which is always necessarily retained by the people in their sovereign capacity, for the security of the public safety, and of which they cannot be divested by legislative enactment or chartered immunities.").

did the US Supreme Court in *Charles River Bridge v Warren Bridge*.¹⁶²

Then-attorney Oliver Wendell Holmes Jr provided a succinct summary of these contract and commerce doctrines in a footnote to the 1873 edition of Chancellor James Kent's *Commentaries*, which he edited.¹⁶³ After Kent's discussion of the power of states to regulate nuisances, slaughterhouses, and the like, Holmes provides the following comment:

This power of the government is now called the police power But acts which can only be justified on the ground that they are police regulations, must be so clearly necessary to the safety, comfort, or well-being of society, or so imperatively required by the public necessity, that they must be taken to be impliedly excepted from the words of the constitutional prohibition.¹⁶⁴

Holmes then described the contract and commerce cases.¹⁶⁵

Thus, Holmes, who dissented in *Lochner*,¹⁶⁶ agreed that legislative acts requiring a police-power justification “must be so clearly necessary” to those powers.¹⁶⁷ But this requirement only existed when those acts otherwise might run into conflict with constitutional prohibitions, namely the Contracts Clause or Commerce Clause. The states were not limited to reasonable exercises of the police powers when their exercise of power did not come into potential collision with federal constitutional rights.

¹⁶² 36 US (11 Pet) 420 (1837). In that case, the Court held that Massachusetts could authorize the construction of the Warren Bridge between Boston and Charlestown, even though it had previously granted a charter to the Charles River Bridge Company to construct a bridge between the two towns. See *id* at 536–38, 548–53. The Court held there was no impairment of contractual obligations, even though the new bridge would significantly diminish the value of the previous charter, because “by legal intendments and mere technical reasoning,” the corporation cannot take away from the state “any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity.” *Id* at 552.

¹⁶³ James Kent, 2 *Commentaries on American Law* 441 n 2 (Little, Brown 12th ed 1873) (Oliver Wendell Holmes Jr, ed).

¹⁶⁴ *Id*, citing Cooley, *Treatise on Constitutional Limitations* at 572–97 (cited in note 3) and *Thorpe*, 27 Vt 140.

¹⁶⁵ Kent, 2 *Commentaries on American Law* at 441 n 2 (cited in note 164).

¹⁶⁶ *Lochner*, 198 US at 74 (Holmes dissenting).

¹⁶⁷ Kent, 2 *Commentaries on American Law* at 441 n 2 (cited in note 164).

D. Vested Rights and Pro- and Antislavery Constitutionalism

There are two cases that are often believed to be exceptions to the claim of the preceding sections, in which antebellum courts appear to have adopted a substantive version of due process of law. In *Wynehamer*, the New York Court of Appeals invalidated a state prohibition on liquor as applied to liquor that existed before the statute's enactment.¹⁶⁸ Professor James Ely described this case as "the first time that a court determined that the concept of due process prevented the legislature from regulating the beneficial enjoyment of property in such a manner as to destroy its value."¹⁶⁹ The other case is infamous for advancing a vision of substantive due process at the federal level: *Dred Scott*, in which the Court held that Congress could not, without violating due process of law, prohibit slave owners from carrying their slave property into the federal territories.¹⁷⁰

Several points distinguish these two cases from the other cases on which scholars have relied for antebellum support for economic substantive due process. First, even if these two cases were valid exceptions, they would only apply in an incredibly small subset of cases involving the total prohibition on possessing a species of property that had been obtained lawfully under previously existing laws. Most of the police-power cases involving regulations on butchering, selling in the market, and freedom of contract simply do not invoke this issue.

Second, these two cases seem to have misunderstood the "vested rights" doctrine on which they were based. This doctrine prohibited legislatures from taking away a particular person's

¹⁶⁸ *Wynehamer*, 13 NY at 392–93, 395–96, 405–06. But even here the court was at least arguably trying to apply the standard vested rights doctrine. See, for example, *id.* at 393:

The true interpretation of these constitutional phrases is, that where rights are acquired by the citizen under the existing law, there is no power in any branch of the government to take them away; but where they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the legislature, but in the due administration of the law itself, before the judicial tribunals of the state. The cause or occasion for depriving the citizen of his supposed rights must be found in the law as it is, or, at least it cannot be *created* by a legislative act which aims at their destruction.

¹⁶⁹ Ely, *Guardian of Every Other Right* at 80 (cited in note 19).

¹⁷⁰ *Dred Scott*, 60 US (19 How) at 450:

[A]n act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.

property that had already “vested.” As Professors Chapman and McConnell explain, that is perfectly consistent with the procedural understanding of due process: a legislature cannot take property that has vested in *A* and give it to *B*. Property rights can only be arranged prospectively by general, standing laws.¹⁷¹ To be sure, sometimes the vested rights doctrine was invoked to overturn even apparently prospective legislation. Perhaps the most famous example is *Hoke v Henderson*.¹⁷² North Carolina had previously had a statute granting court clerks tenure during “good behaviour,” and the petitioner had held his office pursuant to that statute.¹⁷³ At issue in *Hoke* was a new statute requiring elections for court clerks. The North Carolina Supreme Court held the statute unconstitutional, observing that it could “operate prospectively” as a regulation “for future appointments and future enjoyment”; but “[a]s to those to whom the grant was made for life, an estate, a property vested; which cannot be divested without default or crime.”¹⁷⁴ Therefore, even in *Hoke*, although the court may have gotten the lower-order result wrong, it at least believed that it was simply applying the traditional vested rights doctrine.

Wynehamer and *Dred Scott* were the first cases to hold that there were some *types* of property that could not be prohibited by legislation at all. These courts simply got the vested rights doctrine wrong. As Justice Cooley explained in his treatise, many liquor prohibitions had been sustained by state courts. As a result of this legislation, “the merchant of yesterday becomes the criminal of to-day, and the very building in which he lives and conducts the business which to that moment was lawful becomes perhaps a nuisance, if the statute shall so declare, and liable to be proceeded against for a forfeiture.”¹⁷⁵ Legislatures *were* allowed to prohibit certain species of property, though perhaps there had to be a legitimate police-power purpose for doing so.¹⁷⁶

¹⁷¹ See, for example, Chapman and McConnell, 121 *Yale L J* at 1712 (cited in note 1) (“The contours of this argument suggest that ‘general law’ interpretations of state law-of-the-land and due process clauses are not as different in basic rationale from the ‘procedural’ or ‘vested rights’ interpretations as some commentators have suggested.”); *id.* at 1726 (arguing that “courts applied due process to . . . [legislative] acts that operated to deprive specific persons of liberty or vested property rights”).

¹⁷² 15 NC (4 Dev) 1 (1833).

¹⁷³ *Id.* at 11.

¹⁷⁴ *Id.* at 21.

¹⁷⁵ Cooley, *Treatise on Constitutional Limitations* at 584 (cited in note 3).

¹⁷⁶ As Cooley wrote, vested rights were those “which it is equitable the government should recognize, and of which the individual cannot be deprived without injustice.” *Id.* at 358. See also John Harrison, *Legislative Power and Judicial Power*, 31 *Const Comm*

Third, these two cases were widely condemned at the time. Professor John Hart Ely argued that “*Wynehamer* and the *Dred Scott* reference were aberrations, neither precedented nor destined to become precedents themselves,” and that “[o]ther courts on which they were urged were quite acid in the judgment that they had misused the constitutional language by giving it a substantive reading.”¹⁷⁷

To be sure, some scholars have argued that these cases reflected a changed public understanding of due process as a result of antislavery ideology.¹⁷⁸ This began when the *proponents* of slavery argued that depriving masters of their slave property by law would be to deprive them of property without due process of law.¹⁷⁹ They made this argument in support of their agenda to deny Congress any power to prohibit slavery in the territories or the District of Columbia, notwithstanding Congress’s clear power to make all “needful”¹⁸⁰ regulations for the territories and to exercise “exclusive”¹⁸¹ legislation over the District.

The antislavery advocates struck back. If anything, slavery itself violates due process because it deprives the slave of liberty and their property in their own labor, with no process at all. Professor Barnett has catalogued many antislavery constitutionalists making such arguments.¹⁸² For example, Theodore Dwight Weld argued in 1838, “All the slaves in the District have been ‘deprived of liberty’ by legislative acts. Now, these legislative acts

295, 297 (2016) (arguing that under the nineteenth-century doctrine of vested rights, “courts held that some legal interests were immune from change by legislation enacted after the interest was created,” but this doctrine “protected only some legal interests, interests that were identified on grounds of justice and the public good”).

¹⁷⁷ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 16 (Harvard 1980).

¹⁷⁸ See, for example, Jacobus tenBroek, *Equal Under Law* 50–51, 121–22 (Collier 1965). See also Howard Jay Graham, *The Early Antislavery Backgrounds of the Fourteenth Amendment*, in *Everyman’s Constitution: Historical Essays on the Fourteenth Amendment, the “Conspiracy Theory”, and American Constitutionalism* 152–241 (Heffernan 1968). Professor Robert Cover, on the other hand, has argued that the scholars who have claimed the Fourteenth Amendment was an affirmation of antislavery constitutional thought rely on a minority of antislavery thinkers whose constitutional views were not widely shared. Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* 154–55 (Yale 1975).

¹⁷⁹ See tenBroek, *Equal Under Law* at 42 (cited in note 178).

¹⁸⁰ US Const Art IV, § 3, cl 2.

¹⁸¹ US Const Art I, § 8, cl 17.

¹⁸² Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 *J Legal Analysis* 165, 174–246 (2011).

‘depriving’ them ‘of liberty,’ were either ‘due process of law,’ or they were *not*.”¹⁸³ Alvan Stewart wrote in 1837:

[T]he true and only meaning of the phrase, “due process of law,” is an indictment or presentment by a grand jury, of not less than twelve, nor more than twenty-three men; a trial by a petit jury of twelve men, and a judgment pronounced on the finding of the jury, by a court;

and, of course, “there is not a slave at this moment, in the United States” who had become a slave according to these procedures.¹⁸⁴

William Goodell similarly argued that any person “deprived of liberty *without* indictment, jury trial, and judgment of Court, is therefore UNCONSTITUTIONALLY deprived of liberty.”¹⁸⁵ In the context of the fugitive slave laws, Salmon P. Chase argued, “Now, unless it can be shewn that no process of law at all, is the same thing as due process of law, it must be admitted that the act which authorizes seizure without process, is repugnant to a constitution which expressly forbids it.”¹⁸⁶ The Republican Party platform of 1860 summed this all up: because the Founding Fathers “ordained that ‘no persons should 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.”¹⁸⁷

These abolitionist arguments about the meaning of due process do not seem to support substantive due process at all. Every single statement from these famous abolitionists relies entirely on the *procedural* understanding of due process. Indeed, slaves became slaves by no order of any court. More still, they violated no preexisting law. They became slaves simply because the law directed that the mere *existence* of these individuals was sufficient to render them subject to the forced violence of slavery. But

¹⁸³ Theodore Dwight Weld, *The Power of Congress over the District of Columbia* 40 (Trow 1838).

¹⁸⁴ Alvan Stewart, *A Constitutional Argument, on the Subject of Slavery* (originally published 1837), in Howard L. Lubert, Kevin R. Hardwick, and Scott J. Hammond, eds, *The American Debate over Slavery, 1760–1865: An Anthology of Sources* 159, 160–61 (Hackett 2016).

¹⁸⁵ William Goodell, *Views of American Constitutional Law, in Its Bearing upon American Slavery* 61 (Lawson & Chaplin 2d ed 1845).

¹⁸⁶ Salmon P. Chase, *An Argument for the Defendant, Submitted to the Supreme Court of the United States, at the December Term, 1846, in the Case of Wharton Jones v John Vanzandt* 89 (R.P. Donogh 1847).

¹⁸⁷ *Republican Party Platform of 1860*, Declaration 8 (American Presidency Project, 2019), archived at <https://perma.cc/24PM-KYH6>.

surely the requirement of a general law means that someone must have it within his power not to violate that law at all and thus to avoid the punishment. Otherwise the requirement for preexisting, established law is a mockery. Put another way, a law that punishes for an immutable characteristic is not “law” within the procedural meaning of due process of law.

In sum, in the antebellum period, it would appear that state legislatures were not generally limited to reasonable exercises of the police power. They were only so limited when their exercise of power came into potential conflict with express constitutional prohibitions, most prominently against regulating interstate commerce or impairing the obligations of contract. At most, two cases were widely understood to adopt a version of substantive due process. Yet these two cases applied to a narrow set of circumstances (the total abolition of certain types of property), rested on a misunderstanding of the vested rights doctrine, and were generally disapproved. Further, the arguments rooted in antislavery constitutionalism were consistent with the procedural understanding of due process even if they were thought to be radical at the time.

II. REHABILITATING COOLEY

The preceding Part examined three prominent legal doctrines involving police powers in the antebellum period. First, state courts could invalidate municipal laws if they were unreasonable, in restraint of trade, not for genuine police-power purposes, or beyond the powers delegated to them by the state.¹⁸⁸ Second, federal courts could invalidate state laws affecting interstate commerce if they were not genuinely for police-power purposes.¹⁸⁹ Third, courts could inquire into the purposes of state legislation affecting existing contracts.¹⁹⁰ Yet no court seems to have invalidated *state* legislative acts for being unreasonable, in restraint of trade, or in excess of legitimate police powers when they involved only internal matters or internal commerce and affected no existing contractual obligations.¹⁹¹ Indeed, the few cases we have seen on point suggested that state courts would not have invalidated such

¹⁸⁸ See Part I.A.

¹⁸⁹ See Part I.B.

¹⁹⁰ See Part I.C.

¹⁹¹ See Part I.D.

state legislation even if they believed them to be unreasonable or improper exercises of the police power.¹⁹²

This Part examines Justice Cooley's renowned 1868 *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*. Examining Cooley's treatise is useful because it was the most wide-ranging and influential treatise on American law in the year of the Fourteenth Amendment's adoption.¹⁹³ It is thus good evidence of what doctrines of American law may have informed the language of that amendment.

Additionally, many proponents of substantive due process of the police-power variety rely on Cooley's treatise as evidence that the concept existed in American law prior to the adoption of the Fourteenth Amendment.¹⁹⁴ For example, Professor James Ely describes Cooley as "the most influential constitutional writer of the late nineteenth century," and argues he "embraced a substantive understanding of due process in his landmark work," namely that due process "was intended to safeguard individuals from the arbitrary exercise of governmental power."¹⁹⁵ Professor Williams describes Cooley similarly 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."¹⁹⁶ He contends that "Cooley's focus on the legitimacy of the legislature's objectives and the means pursued to attain those objectives corresponds closely with the police powers version of due process that predominated during the *Lochner* era," and that "Cooley is frequently credited as one of the principal intellectual forerunners of *Lochner*-era substantive due process jurisprudence."¹⁹⁷ Professor Mayer cites Cooley for the proposition that "state courts in the nineteenth century understood the general regulatory power of the states known as the 'police power' to be broad but certainly not unlimited."¹⁹⁸

¹⁹² See Part I.A.2.

¹⁹³ See note 32. Additionally, Professor Alan Jones has explained that the treatise "went through six editions, and had a broader circulation, greater sale, and was more frequently cited than any other book on American law published in the last half of the nineteenth century." Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J Am Hist 751, 759 (1967).

¹⁹⁴ For a fuller citation to such scholars than what is provided below, see note 32.

¹⁹⁵ Ely, 16 Const Commen at 342 (cited in note 3).

¹⁹⁶ Williams, 120 Yale L J at 493 (cited in note 2).

¹⁹⁷ Id at 494.

¹⁹⁸ Mayer, 36 Hastings Const L Q at 233 & n 71 (cited in note 3).

Even Professor David Currie, who was by no means sympathetic to this version of substantive due process, claimed that Cooley “further propagated” in his “influential treatise in 1868” the proposition that the Due Process Clause could be used to “strike down federal statutes on the ground that they were substantively objectionable.”¹⁹⁹ “If it were necessary to name the principal contributor to the cause of constitutional laissez faire in the era following the Civil War,” wrote Professor Clyde Jacobs, “Thomas M. Cooley would deserve such designation.”²⁰⁰ Perhaps the most sustained commentary of this sort comes from Professor Harry Scheiber’s entry on state police power in *The Encyclopedia of the American Constitution*:

Of basic importance to Cooley’s view of the limitations that ought to confine the power of state legislatures was his premise that the “due bounds of legislative power” were not set alone by “express constitutional provisions.” The implied limitations that he believed ought to apply all hinged on a generalized “due process” concept. Due process, he contended, forbade enactment of what he termed “class legislation” (laws imposing burdens or granting privileges to specific groups or interests that were arbitrarily singled out instead of being “reasonably” classified). Moreover, his generous definition of due process would forbid laws that were “arbitrary and unusual [in] nature,” and as such “unknown to the law of the land.”²⁰¹

Cooley has been misunderstood. It is the burden of this Part to rehabilitate him.²⁰² Although isolated sentences from Cooley’s

¹⁹⁹ Currie, *The Constitution in the Supreme Court* at 365 & n 11 (cited in note 99).

²⁰⁰ Jacobs, *Law Writers and the Courts* at 27 (cited in note 17).

²⁰¹ Harry N. Scheiber, *State Police Power*, in Leonard W. Levy and Kenneth L. Karst, eds, 5 *Encyclopedia of the American Constitution* 2505, 2508 (Macmillan 2d ed 2000) (alteration in original).

²⁰² As far as I have been able to discover, the last serious attempt at reinterpreting Cooley along less laissez-faire lines was Jones’s 1967 article. See Jones, 53 *J Am Hist* at 751 (cited in note 193). He observed that Cooley “showed considerable respect for legislative discretion,” and that he may have anticipated Professor James Bradley Thayer as a leading nineteenth-century defender of judicial restraint. *Id.* at 762–63. Even Jones, however, argued that Cooley did propound a kind of substantive due process. *Id.* at 761:

Cooley was settling the general rule that any action so arbitrary in its effect upon individuals as to stand apart from the established usages of Anglo-American law could not be dignified as “due process of law” or as the “law of the land” in any government claiming to be constitutional. . . . By making this substantive meaning of due process Cooley provided an authoritative definition by

treatise might seem to support a police-power version of substantive due process, his treatise tracks the legal doctrines described in Part I. More still, Cooley elsewhere in his treatise expressly disavows the power of courts to strike down legislation for substantive unreasonableness absent some explicit constitutional provision. At most, Cooley suggests that antebellum courts used a version of substantive due process as a rule of statutory construction, much like the Illinois court did in *Rumpff*.²⁰³

A. The Police Powers

1. Municipal governments.

Cooley's treatise contains an entire chapter on the limitations on municipal governments.²⁰⁴ The powers of such governments are to be strictly construed according to the delegations of power from the states.²⁰⁵ And municipal bylaws must be reasonable; "[w]henever they appear not to be so, the court must, as a matter of law, declare them void."²⁰⁶ Critically, to be reasonable they must genuinely tend toward the accomplishment of the purposes for which the municipal corporation exists: "To render them reasonable, they should tend in some degree to the accomplishment of the objects for which the corporation was created and its powers conferred."²⁰⁷ Thus, if a bylaw

assumes to be a police regulation, but deprives a party of the use of his property without regard to the public good, under the pretence of the preservation of health, when it is manifest that such is not the object and purpose of the regulation, it will be set aside as a clear and direct infringement of the right of property without any compensating advantages.²⁰⁸

which judges could find a written constitutional limitation to various types of legislative action.

See also *id.* at 760 (similar).

²⁰³ See notes 87–96 and accompanying text.

²⁰⁴ Cooley, *Treatise on Constitutional Limitations* at 189–255 (cited in note 3).

²⁰⁵ See *id.* at 195 ("And the general disposition of the courts in this country has been to confine municipalities within the limits that a strict construction of the grants of powers in their charters will assign to them; thus applying substantially the same rule that is applied to charters of private incorporation.").

²⁰⁶ *Id.* at 200.

²⁰⁷ *Id.* at 200–01.

²⁰⁸ Cooley, *Treatise on Constitutional Limitations* at 203 (cited in note 3).

Under these principles, municipalities have the power to prohibit the carrying on of dangerous occupations, but if they permit such activities they must be equally available to all who desire to participate in them.²⁰⁹ Their bylaws cannot be in restraint of trade.²¹⁰ When they have authority to order the cleansing or abatement of slaughterhouses, they cannot entirely prohibit slaughterhouses from particular sections of the town.²¹¹

2. State governments.

Much later in his work, Cooley provides a chapter on the “police powers of the states” themselves.²¹² It is here we encounter the other two prevailing antebellum doctrines. Cooley’s chapter deals with two questions: the first arising from the “conflict between national and State authority,” and the second involving “whether the State exceeds its just powers in dealing with the property and restraining the actions of individuals.”²¹³

Cooley defines the police power of a state as “its system of internal regulation, by which it is sought not only to preserve the public order and to prevent offences against the State, but also”—and here is the key passage—

to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others.²¹⁴

This is a statement of general principle. State power exists only for the benefit, and not the oppression, of the subjects. But Cooley

²⁰⁹ *Id.* at 201:

And if a corporation has power to prohibit the carrying on of dangerous occupations within its limits, a by-law which should permit one person to carry on such an occupation and prohibit another, who had an equal right, from pursuing the same business, or which should allow the business to be carried on in existing buildings, but prohibit the erection of others for it, would be unreasonable.

²¹⁰ *Id.* at 202:

So a by-law to be reasonable should be in harmony with the common law. If it is in general restraint of trade,—as a by-law that no person shall exercise the art of painter in the city of London, not being free of the company of painters,—it will be void on this ground.

²¹¹ *Id.* at 204 n 2.

²¹² Cooley, *Treatise on Constitutional Limitations* at 572–97 (cited in note 3).

²¹³ *Id.* at 572.

²¹⁴ *Id.*

here says nothing about a court's power to enforce these principles of free government as the court happens to see them. Indeed, the only authority Cooley quotes that bears on that question suggests the opposite:

The power we allude to is rather the police power; the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, *as they shall judge* to be for the good and welfare of the Commonwealth, and of the subjects of the same.²¹⁵

Here there is little to suggest a judicial authority to enforce the reasonableness of a state's exercise of its police powers.

Cooley next discusses the relationship of the police powers to the commerce power. "One of the most important questions respecting this power, in a constitutional point of view, concerns those cases over which jurisdiction is vested in the national government, whereby, it is sometimes claimed, that the police jurisdiction of the State is necessarily excluded."²¹⁶ Here Cooley encapsulates the doctrine described in Part I: "It is plain, however, from a statement of the theory upon which the police power rests, that *any proper exercise of it* by the State cannot come in conflict with the provisions of the Constitution of the United States."²¹⁷ Cooley subsequently refers to the *License Cases* and explains that the complete prohibition on liquor has sometimes been argued to "conflict with the Federal Constitution" (that is, the commerce power), but that such regulations "are but the ordinary police regulations, such as the State may make in respect to all classes of trade or employment."²¹⁸ Most of Cooley's chapter is devoted to the relationship of the police powers to the commerce power.²¹⁹

In between two separate discussions of the commerce power, Cooley mentions the relationship of the police powers to the obligations of contract. "[I]t has been invariably held that [the Contracts Clause] does not so far remove from State control the rights and properties which depend for their existence or enforcement

²¹⁵ Id at 573 (emphasis added), quoting *Commonwealth v Alger*, 61 Mass (7 Cush) 53, 84–85 (1851).

²¹⁶ Cooley, *Treatise on Constitutional Limitations* at 574 (cited in note 3).

²¹⁷ Id (emphasis added).

²¹⁸ Id at 581.

²¹⁹ See id at 584–94.

upon contracts,” Cooley explains, “as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important.”²²⁰ Thus, the rights conferred on private corporations “are subject to such new regulations as from time to time may be made by the State with a view to the public protection, health, and safety, and to properly guard the rights of other individuals and corporations.”²²¹

“The limit to the exercise of the police power in these [contract] cases must be this,” Cooley summarizes: “[T]he regulations must have reference to the comfort, safety, or welfare of society” and “must not, under pretence of regulation, take from the corporation any of the essential rights and privileges which the charter confers.”²²² “In short,” Cooley adds, “they must be police regulations *in fact*, and not amendments of the charter in curtailment of the corporate franchise.”²²³

In a particularly important passage, already mentioned above, Cooley discusses police regulations like those involved in the *License Cases* and *Wynehamer* that entirely destroy the value of property or employment. Cooley explains the harm such regulations can do to individuals. The sale of liquor being lawful, and the “capital employed in it being fully protected by law, the legislature then steps in, and, by an enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand.”²²⁴ Thus, “the merchant of yesterday becomes the criminal of to-day,” and where he lives or works “becomes perhaps a nuisance.”²²⁵ Cooley then maintains the following: “A statute which can do this must be justified upon the highest reasons of public benefit; *but, whether satisfactory or not, they rest exclusively in the legislative wisdom.*”²²⁶

Here is a clear statement of a court’s power when a state legislative act does not interfere with interstate commerce and does not impair any contractual obligations. Cooley’s synthesis is directly opposed to the New York court’s conclusion in

²²⁰ Cooley, *Treatise on Constitutional Limitations* at 574 (cited in note 3).

²²¹ *Id.* at 576.

²²² *Id.* at 577.

²²³ *Id.* (emphasis added).

²²⁴ Cooley, *Treatise on Constitutional Limitations* at 583–84 (cited in note 3).

²²⁵ *Id.* at 584.

²²⁶ *Id.* (emphasis added).

Wynehamer and contradicts the substantive due process thesis. Such matters are not for the courts to examine; they are matters of legislative wisdom. The legislature may even entirely eliminate traffic in and destroy the value of particular commodities.

In the last few pages of Cooley's chapter, he observes that "[i]t would be quite impossible to enumerate all the instances in which this [police] power is or may be exercised" because of the infinite number of ways an individual's exercise of rights "may conflict with a similar exercise by others, or may be detrimental to the public order or safety."²²⁷ Cooley then mentions the destruction of property for public purposes, the abatement of public nuisances, the "preservation of the public morals," and the regulations of markets.²²⁸ What are the rules governing the exercise of this police power? "[W]e need not weary the reader with further enumeration," Cooley writes, because many of these regulations "have been previously referred to under the head of municipal by-laws."²²⁹

In sum, Cooley's extended discussion of the police powers in his treatise is consistent with the three antebellum legal doctrines described in Part I. None appears to support the concept of substantive due process that has often been attributed to him.

B. Due Process of Law and Arbitrary Power

Elsewhere in his treatise, Cooley discusses the scope and nature of legislative power, judicial power, and due process of law. These discussions are further evidence that Cooley did not advance a substantive due process concept. In particular, Cooley writes, consistently with Professors Chapman and McConnell, that legislatures violate due process when they "assume to dispose of disputed rights," in other words, when their acts are "in the nature of a judicial decree" or are "plainly an attempted adjudication upon the rights of the parties concerned" to a particular dispute.²³⁰ Legislative acts that "deprive parties of vested rights" are "obnoxious."²³¹ The "chief restriction" imposed by the due process and law of the land clauses upon state governments is that "vested rights must not be disturbed."²³²

²²⁷ *Id.* at 594.

²²⁸ Cooley, *Treatise on Constitutional Limitations* at 594–96 (cited in note 3).

²²⁹ *Id.* at 596.

²³⁰ *Id.* at ix, 104, 105.

²³¹ *Id.* at 355.

²³² Cooley, *Treatise on Constitutional Limitations* at 357–58 (cited in note 3).

Nor can legislatures abrogate a fundamental minimum of procedure: “[I]t would not be competent for the legislature to authorize a court to proceed and adjudicate upon the rights of parties, without giving them an opportunity to be heard before it,” writes Cooley, “and, for the same reason, it would be incompetent for it, by retrospective legislation, to make valid proceedings which had been had in the courts, but which were void for want of jurisdiction over the parties.”²³³ Judicial process may change from time to time, “but only with due regard to the old landmarks established for the protection of the citizen.”²³⁴ These prohibitions are only “substantive” in the rather uninteresting sense that they apply to the legislature, which of course they must if the particular process required by “due process of law” cannot be abridged by legislative enactments.²³⁵

Cooley does have a tantalizing paragraph about arbitrary power. Cooley writes that “the whole community is also entitled at all times to demand the protection of the ancient principles which shield private rights against *arbitrary interference*, even though such interference may be under a rule impartial in its application.”²³⁶ Cooley relies on *Bank of Columbia v Okely*²³⁷ for this proposition—the same case on which Professors Barnett and

²³³ Id at 107.

²³⁴ Id at 356.

²³⁵ The passage quoted by Currie for the proposition that Cooley supported judicial review of the substantive reasonableness of legislation, Currie, *The Constitution and the Supreme Court* at 365 & n 11 (cited in note 99), also does not seem to substantiate that proposition. Cooley states:

When the government, through its established agencies, interferes with the title to one’s property, or with his independent enjoyment of it, and its act is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional defence which have become established in our system of law, and not by any rules that pertain to forms of procedure merely.

Cooley, *Treatise on Constitutional Limitations* at 356 (cited in note 3). This passage, standing alone, says nothing at all about judicial review of the substantive reasonableness of legislation. What principles of civil liberty and constitutional defense are established in our system of law is exactly the question Cooley was examining. At the end of that same paragraph, Cooley reiterates that due process of law “in each particular case means, such an exertion of the powers of government as the settled maxims of law sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs”—without stating what those maxims or safeguards are. Id.

²³⁶ Cooley, *Treatise on Constitutional Limitations* at 355 (emphasis added) (cited in note 3).

²³⁷ 17 US (4 Wheat) 235 (1819); Cooley, *Treatise on Constitutional Limitations* at 355 n 3 (cited in note 3).

Bernick rely for the proposition that “in America the due process of law came to be understood as a guarantee against *all* arbitrary government action.”²³⁸

Yet this case is consistent with a procedural understanding of due process. The reference to arbitrary power means only that the clause was “intended to secure the individual from the arbitrary exercise of the powers of government, *unrestrained by the established principles* of private rights and distributive justice.”²³⁹ That is, rule by mere *will*, as opposed to rule by *established laws*, is arbitrary power. That was also John Locke’s definition of arbitrary power: “Absolute arbitrary Power” was “governing without *settled standing laws*.”²⁴⁰ Men enter society to “preserve their lives, liberties, and fortunes” and “to secure their peace and quiet” by “*stated rules* of right and Property.”²⁴¹ Locke opposed “*absolute arbitrary power* over [men’s] persons and estates,” and thus “the ruling power ought to govern by *declared and received laws*, and not by extemporary dictates and undetermined resolutions.”²⁴² Government power “ought not to be *arbitrary* and at pleasure, [but rather] exercised by *established and promulgated laws*.”²⁴³

Due process of law, simply put, prohibits arbitrary *power*—arbitrary *acts* of the legislature that affect life, liberty, or property contrary to the existing standing laws.

C. Substantive Due Process as a Rule of Statutory Construction

Cooley’s separate discussion of unequal and partial legislation does suggest that what we understand by “substantive due process” may have played some kind of role in antebellum law: it may have been a kind of rule of statutory construction, by which courts presumed, when possible, that legislatures did not intend to infringe the fundamental principles of free government. Cooley

²³⁸ Barnett and Bernick, 60 Wm & Mary L Rev at 1643 & n 261 (cited in note 5).

²³⁹ Cooley, *Treatise on Constitutional Limitations* at 355 (emphasis added) (cited in note 3), quoting *Okely*, 17 US (4 Wheat) at 244.

²⁴⁰ John Locke, *The Second Treatise of Government* in John Locke, *Two Treatises of Government and A Letter Concerning Toleration* 160 (Yale 2003) (Ian Shapiro, ed) (originally published 1690) (emphasis added).

²⁴¹ *Id.* at 161.

²⁴² *Id.*

²⁴³ *Id.* See also *id.* at 160 (“The *legislative*, or supreme authority cannot assume to itself a power to rule by extemporary, arbitrary decrees; but is *bound to dispense justice*, and decide the rights of the subject, *by promulgated, standing laws, and known authorized judges.*”).

was particularly concerned with class legislation.²⁴⁴ In that context, he used the term “arbitrary” more expansively: “The doubt might also arise whether a regulation made for any one class of citizens, *entirely arbitrary in its character*, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained, notwithstanding its generality.”²⁴⁵

Unreasonable distinctions, Justice Cooley says, would transcend the proper exercise of legislative power even if there were no express constitutional prohibition:

²⁴⁴ Cooley, *Treatise on Constitutional Limitations* at 391–92 (cited in note 3):

[E]very one has a right to demand that he be governed by general rules, and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government.

Here again Cooley seems to use the term “arbitrary” in the sense in which Locke did, and he in fact immediately cites Locke for the proposition that legislators “are to govern by promulgated, established laws, not to be varied in particular cases.” *Id.* at 392, quoting Locke, *Second Treatise of Government* at 163 (cited in note 240). The two principal cases that Cooley cites in support of these statements also stand for the proposition that courts cannot divest individuals of vested rights by special and partial legislation. Cooley quotes *Wally’s Heirs v Kennedy*, 10 Tenn (2 Yer) 554, 555 (1831):

The rights of every individual must stand or fall by the same rule or *law*, that governs every other member of the body politic, or land, under similar circumstances; and every partial, or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void.

Cooley, *Treatise on Constitutional Limitations* at 392 n 2 (cited in note 3). He also quotes *Lewis v Webb*, 3 Me 326, 336 (1825), for the proposition that

it can never be within the bounds of legitimate legislation, to enact a special law, or pass a resolve dispensing with the general law, in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation and effect of such general law, leaving all other persons under its operation.

Cooley, *Treatise on Constitutional Limitations* at 392 n 2 (cited in note 3). But this case, too, involved a direct legislative interference with vested rights. An individual liable to another party by the decree of a probate court, from which appeal was only allowed within a short period of time, persuaded the state legislature to enact a special law permitting him to appeal the decree five years after it issued and the rights to the parties had vested. *Lewis*, 3 Me at 326–27. This was held to be a violation of the other parties’ right to have their interests adjudicated according to the “due course of law.” *Id.* at 335. “If by such a legislative act as the resolve in question, an existing absolute decree or judgment could be vacated, and persons interested therein be deprived of their rights in this summary manner,” the court asked, “what security does the citizen enjoy in virtue of the section of the declaration of rights before cited, viz.: ‘Every person for an injury done him in his person, reputation, property or immunities, shall have remedy by due course of law?’” *Id.*, quoting Me Const Art I, § 19 (1819).

²⁴⁵ Cooley, *Treatise on Constitutional Limitations* at 393 (emphasis added) (cited in note 3).

[B]ut if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act *would transcend the due bounds of legislative power, even if it did not come in conflict with express constitutional provisions*. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of *liberty* in particulars of primary importance to his or their “pursuit of happiness.”²⁴⁶

This may come close to substantive due process, and this chapter has often been cited in support of it.²⁴⁷ But Cooley goes on to say that at most courts must charitably interpret such legislative acts. Because “[e]quality of rights, privileges, and capacities unquestionably should be the aim of the law,” when “special privileges are granted, or special burdens or restrictions imposed in any case,” it then

must be *presumed* that the legislature designed to depart as little as possible from this fundamental maxim of government. The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are obnoxious, and discriminations against persons or classes are still more so, and *as a rule of construction* are always to be leaned against as probably not contemplated or designed.²⁴⁸

There can be no question that Cooley believed that an arbitrary governmental restriction would be contrary to the “fundamental maxim” of free government, and “transcend the due bounds of legislative power.” But all courts could do in the face of such arbitrary and unreasonable legislation was to presume that the legislature intended minimal deviations from that maxim and, if possible, strictly construe the legislation.²⁴⁹ As explained

²⁴⁶ *Id.* (first emphasis added).

²⁴⁷ See, for example, Gillman, *The Constitution Besieged* at 58 (cited in note 3) (quoting from the passages described here).

²⁴⁸ Cooley, *Treatise on Constitutional Limitations* at 393 (emphases added) (cited in note 3).

²⁴⁹ In one case that Cooley cites in his text, the author of the Pennsylvania Supreme Court’s opinion explicitly states, “If the legislature should pass a law in plain, unequivocal, and explicit terms, within the general scope of their constitutional power,” there is no

by one court Cooley cites: “All the Courts can do with odious statutes which are constitutional, is, to chasten their harshness by construction.”²⁵⁰ Cooley’s comments on judicial review assert even more explicitly that it is not for courts to second-guess legislative judgments when such judgments are not in violation of any express constitutional provision.²⁵¹

governmental authority “to pronounce such an act void, merely because, in the opinion of the judicial tribunals, it was contrary to the principles of natural justice.” Id at 168 n 1, quoting *Commonwealth v McCloskey*, 2 Rawle 369, 373 (Pa 1830).

²⁵⁰ Cooley, *Treatise on Constitutional Limitations* at 168 n 1 (cited in note 3), quoting *Beebe v State*, 6 Ind 501, 528 (1855).

²⁵¹ In passages rarely quoted in the relevant literature, Cooley expressly declares that a court cannot hold “a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution.” Id at 164. It is true, he acknowledges, that some judges “have been understood to intimate a doctrine different from what is here asserted,” but Cooley asserts that their statements in such cases are made “rather by way of argument and illustration, . . . to induce a more cautious and patient examination of the statute, with a view to discover in it, if possible, some more just and reasonable legislative intent.” Id at 164–65. Such statements were not made for the purpose of “laying down a rule by which courts would be at liberty to limit, according to their own judgment and sense of justice and propriety, the extent of legislative power in directions in which the constitution had imposed no restraint.” Id at 165.

Cooley then summarizes:

[T]here would, as it seems to us [Cooley], be very great probability of unpleasant and dangerous conflict of authority if the courts were to deny validity to legislative action on subjects within their control, on the assumption that the legislature had disregarded justice or sound policy. The moment a court ventures to substitute its own judgment for that of the legislature, in any case where the constitution has vested the legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority.

Id at 167–68. Cooley immediately supports this proposition with further discussion also worth quoting at length:

The rule of law upon this subject appears to be, that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the State, unless those rights are secured by some constitutional provision which comes within the judicial cognizance. The remedy for unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being *prima facie* valid, must be enforced, unless restrictions upon the legislative power can be pointed out in the constitution, and the case shown to come within them.

Id at 168 (citations omitted).

III. SUBSTANTIVE DUE PROCESS AND THE POLICE POWERS

Soon after the Fourteenth Amendment's adoption, the Supreme Court began to conflate the three antebellum doctrines. With citations to contracts, commerce, and municipal cases, all of the justices assumed that state legislatures were generally limited to legitimate exercises of their police powers. This conflation occurred in all of the opinions in the *Slaughter-House Cases* and also in *Mugler v Kansas*.²⁵² By the time of *Lochner*, a general police-powers limitation on state legislatures had become firmly rooted in constitutional jurisprudence.

This Part tables the *Slaughter-House Cases* because they were litigated largely under the Privileges or Immunities Clause. As I shall subsequently claim, a police-powers analysis may very well be relevant to this clause, and therefore the police powers may have been appropriately deployed in those cases. This Part thus begins with post-*Slaughter-House* cases under the Due Process Clause to show how the Supreme Court conflated the antebellum doctrines under the guise of "due process of law." It concludes by returning to some modern scholars who may also be misinterpreting these antebellum cases.

A. *Barbier*, *Mugler*, and *Lochner*

Police powers featured in the due process context in Justice Stephen Field's brief opinion in *Barbier v Connolly*.²⁵³ The Court held that the Due Process and Equal Protection Clauses "undoubtedly intended . . . [to guarantee] that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property," and, among other guarantees, "that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances."²⁵⁴ But the Fourteenth Amendment was not "designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals,

²⁵² 123 US 623, 8 S Ct 273 (1887).

²⁵³ 113 US 27 (1885). The case involved a municipal prohibition on "carry[ing] on the washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock on the morning of the following day." *Id.* at 30. The Court held that the "provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies." *Id.*

²⁵⁴ *Id.* at 31.

education, and good order of the people.”²⁵⁵ Here we see the Court begin to deploy a concept of substantive due process—legislatures may only act consistently with the police powers.

The Court’s next comprehensive examination of due process and the police powers did not occur until *Mugler*. In *Mugler*, a state constitutional provision prohibited the sale of all liquor in the state unless the seller was licensed and such sale was for scientific or medical purposes.²⁵⁶ *Mugler* had built and owned a brewery before the state’s constitution was amended, and the question was whether such a prohibition on sale violated the Fourteenth Amendment’s guarantees of due process and equal protection.²⁵⁷ Counsel for the state argued first. The right to use alcohol was specifically “limited by the police power of the state.”²⁵⁸ In support of that proposition, the attorney cited to Commerce Clause cases prior to the adoption of the Fourteenth Amendment.²⁵⁹ “All rights are held subject to the police power,” he went on to argue, which “extends to the right to regulate, prohibit, and suppress the liquor traffic.”²⁶⁰ For this proposition counsel cited the *License Cases* and Judge Dillon’s treatise, as well as cases involving contractual obligations.²⁶¹

Mugler’s counsel also responded in the language of police powers. He claimed that “[t]he right of the state to prohibit unwholesome trades, etc., is based on the general principle that every person ought to so use his own as not to injure his neighbors,” and that this was “the police power.”²⁶² He then cited to the *License Cases*, to *Corfield v Coryell*,²⁶³ and finally to Cooley’s passage that due process of law “means such an exertion of the power of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights

²⁵⁵ *Id.*

²⁵⁶ *Mugler*, 123 US at 654–56.

²⁵⁷ *Id.* at 625, 656–57.

²⁵⁸ *Mugler*, 8 S Ct at 285.

²⁵⁹ *Id.* at 286, citing, for example, *License Cases*, 5 How at 631.

²⁶⁰ *Mugler*, 8 S Ct at 287.

²⁶¹ *Id.*, citing *People v Hawley*, 3 Mich 330 (1854), and *Commonwealth v Tewksbury*, 52 Mass (11 Met) 55 (1846).

²⁶² *Mugler*, 8 S Ct at 288.

²⁶³ 6 F Cases 546, 551–52 (CC ED Pa 1825). *Corfield* was a widely cited case decided by Justice Bushrod Washington riding circuit that elaborated upon the meaning of the Privileges and Immunities Clause of Article IV of the original US Constitution.

as those maxims prescribe.”²⁶⁴ He also cited to vested-rights due process cases.²⁶⁵

Thus, Mugler’s counsel argued that the state cannot use its power to regulate to “deprive the citizen of the lawful use of his property, if it does not injuriously affect or endanger others. . . . Nor can it, in the exercise of the police power, enact laws that are unnecessary, and that will be oppressive to the citizen.”²⁶⁶ “The state could only restrain this right by virtue of the police power, which could only be exercised to the extent reasonable and necessary for the preservation and promotion of the morals and health of the people of Kansas.”²⁶⁷ Counsel made several similar observations,²⁶⁸ for one of which he cited to Cooley’s treatise.²⁶⁹

Justice John Marshall Harlan wrote for the Court. That the prohibition “does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States, is made clear by the decisions of this court, rendered before and since the adoption of the Fourteenth Amendment,” Harlan wrote.²⁷⁰ He then proceeded to discuss the scope of the police powers under the Commerce Clause cases.²⁷¹ After citing to the earlier Fourteenth Amendment case of *Munn v Illinois*,²⁷² Harlan asked:

²⁶⁴ *Mugler*, 8 S Ct at 288–89, citing *License Cases*, 5 How at 583, *Corfield*, 6 F Cases at 546, and Cooley, *Treatise on Constitutional Limitations* at 356 (cited in note 3).

²⁶⁵ *Mugler*, 8 S Ct at 289, citing *Wynehamer*, 13 NY at 432, and *Hoke*, 15 NC (4 Dev) at 15.

²⁶⁶ *Mugler*, 8 S Ct at 289.

²⁶⁷ *Id* at 291.

²⁶⁸ See *id*:

The police power cannot go beyond the limit of what is necessary and reasonable for guarding against the evil which injures or threatens the public welfare in the given case, and the legislature, under the guise of that power, cannot strike down innocent occupations and destroy private property, the destruction of which is not reasonably necessary to accomplish the needed reform.

Id at 292 (citations and emphasis omitted):

The state cannot enact laws, not necessary to the preservation of the health and safety of the community, that will be oppressive and burdensome to the citizen. The constitutional guaranty of life, liberty, and pursuit of happiness is not limited by the temporary caprice of a present majority, and can be limited only by the absolute necessities of the public. No proposition is more firmly established than that the citizen has the right to adopt and follow such lawful and industrial pursuit, not injurious to the community, as he may see fit.

²⁶⁹ *Id* at 292, citing Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 110, 445, 446 (Little, Brown 5th ed 1883).

²⁷⁰ *Mugler*, 123 US at 657.

²⁷¹ *Id* at 657–59, discussing the *License Cases*, 46 US (5 How) at 504.

²⁷² 94 US (4 Otto) 113 (1876).

“But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public?”²⁷³ Harlan at first said this was a matter for the legislative branch.²⁷⁴ Yet, he added:

It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. . . . If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.²⁷⁵

Harlan relies on *Barbier* for support,²⁷⁶ discusses a series of obligations of contract cases,²⁷⁷ and then quotes *Patterson v Kentucky*²⁷⁸ for the proposition that state legislation “strictly and legitimately for police purposes, does not, in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the national government.”²⁷⁹ *Patterson* was a case about the Patent Clause, addressing the question reserved by the Court in *Gibbons*,²⁸⁰ and the Court relied on the Commerce Clause precedents.²⁸¹ In *Mugler*, the Court ultimately held that no statute can “come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the

²⁷³ *Mugler*, 123 US at 660.

²⁷⁴ *Id.* at 661:

Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 663, citing *Barbier*, 113 US at 31.

²⁷⁷ *Mugler*, 123 US at 664–65, discussing *Butchers' Union Slaughter-House and Live-Stock Landing Co v Crescent City Live-Stock Landing and Slaughter-House Co*, 111 US 746, 751 (1884), *Stone v Mississippi*, 101 US 814, 816 (1879), and *New Orleans Gas-Light Co v Louisiana Light & Heat Manufacturing Co*, 115 US 650, 672 (1885).

²⁷⁸ 97 US 501 (1878).

²⁷⁹ *Mugler*, 123 US at 665–66, quoting *Patterson*, 97 US at 504.

²⁸⁰ See notes 100–121 and accompanying text.

²⁸¹ *Patterson*, 97 US at 501–04.

general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law.”²⁸²

By the time of *Lochner*, the police-powers doctrine was well entrenched. It was no surprise, then, that Justice Rufus Peckham observed that “there is a limit to the valid exercise of the police power by the State.”²⁸³ It was incumbent upon the Court to ascertain whether a legislative act was “a fair, reasonable and appropriate exercise of the police power of the State,” or rather “an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family.”²⁸⁴

In sum, after the *Slaughter-House Cases*, the Supreme Court, under the Due Process Clause, conflated the antebellum legal doctrines to conclude that the states themselves were limited to legitimate exercises of the police power.

B. Modern Revisionists

It now bears a brief mention that many of the substantive due process scholars with which this Article began²⁸⁵ may also be conflating these antebellum doctrines. Professor Howard Gillman maintains that antebellum state courts would “uphold legislation that (from their perspective) advanced the well-being of the community as a whole or promoted a true ‘public purpose,’” while they would “strike down legislation that (from their perspective) was designed to advance the special or partial interests of particular groups or classes.”²⁸⁶ For this proposition he cites a variety of contracts cases, municipal cases, and vested rights cases, in addition to extensively citing *Cooley*.²⁸⁷

Professor Mayer similarly cites a combination of these kinds of cases for the proposition that there was a “long history of substantive due process protections for liberty and property rights—a body of law concerning constitutional limits on government

²⁸² *Mugler*, 123 US at 669.

²⁸³ *Lochner*, 198 US at 56.

²⁸⁴ *Id.*

²⁸⁵ See note 3.

²⁸⁶ Gillman, *The Constitution Besieged* at 10 (cited in note 3).

²⁸⁷ See *id.* at 45–60. Specifically, see *id.* at 47–48, discussing *Charles River Bridge* (contract case); *id.* at 51–52, discussing *Vadine’s Case*, 23 Mass (6 Pick) 187 (1828) (municipal bylaw case); *id.* at 53, discussing *Wally’s Heirs v Kennedy*, 10 Tenn 554 (1831) (vested rights case); *id.* at 55–59, discussing Justice *Cooley*.

police powers that was well-established by the late nineteenth century.”²⁸⁸ According to Mayer, the *Lochner*-era Court “was merely enforcing these traditional constitutional limits on the scope of the police power.”²⁸⁹ For the more specific proposition that “[i]n a series of decisions from the 1790s to the 1850s, the highest courts of several states held that the law of the land clause in their state constitutions prohibited the legislature from passing laws that deprived citizens of their property,” Mayer cites to a municipal corporations case, a takings case, and two vested rights cases.²⁹⁰

Most recently, Professors Barnett and Bernick also rely on these same kinds of cases, and particularly municipal corporations cases. In their paper, they argue that antebellum courts protected not only vested rights but also developed a kind of police-powers version of due process. They write that “courts became more willing to look beyond the face of enactments to discern and evaluate the propriety of legislative ends” after the enactment of the Fourteenth Amendment, but that “there was continuity as well.”²⁹¹ “Long before the *Lochner* era, antebellum courts repeatedly affirmed that legislative power was inherently limited by the ends for which legitimate governments are established” and that legislatures could only put constraints on life, liberty, or property to “protect the community, or to promote the general well-being.”²⁹² The police power, in other words, “was understood to be limited by its functions—the protection of health, safety, and morals of the public.”²⁹³ For this proposition they cite to *Austin v Murray*,²⁹⁴ which we encountered above and which involved the invalidation of Charlestown’s bylaw prohibiting the bringing of the dead into the town.²⁹⁵ And for the proposition that class distinctions or deprivations needed to be “reasonably calculated to

²⁸⁸ Mayer, 60 Mercer L Rev at 571, 586–89, 594, 603 (cited in note 3).

²⁸⁹ Id at 571.

²⁹⁰ Id at 587 & n 104, citing *Zylstra v Corporation of Charleston*, 1 SCL (1 Bay) 382 (SC Com Pl 1794) (municipal corporations case); *Lindsay v Commissioners*, 2 SCL (2 Bay) 38 (SC Const App 1796) (takings case), *Trustees of the University of North Carolina v Foy*, 5 NC (1 Mur) 58 (1805) (vested rights case), and *Bowman v Middleton*, 1 SCL (1 Bay) 252 (SC Com Pl 1792) (vested rights case).

²⁹¹ Barnett and Bernick, 60 Wm & Mary L Rev at 1636 (cited in note 5).

²⁹² Id, quoting *Mugler*, 123 US at 669.

²⁹³ Barnett and Bernick, 60 Wm & Mary L Rev at 1637 (cited in note 5).

²⁹⁴ 33 Mass (16 Pick) 121 (1834).

²⁹⁵ See notes 63–71 and accompanying text.

serve proper ends,”²⁹⁶ they cite what appears to be a Commerce Clause case and a vested rights case.²⁹⁷

In short, many modern scholars appear to make the same move the Court made in the 1870s and after. Citing a host of municipal corporations, negative commerce, and contracts cases—as well as Cooley’s treatise—they conclude that states were generally limited to reasonable exercises of the police power.

IV. PRIVILEGES OR IMMUNITIES AND INCORPORATED RIGHTS

The antebellum doctrines call into question claims of substantive due process scholars who contend that the seeds of a police-power version of substantive due process were sown by the time of, and aided by, Justice Cooley’s well-known treatise. The doctrines demonstrate that, quite instead of being rooted in antebellum cases or Cooley’s treatise, the concept arose as the Supreme Court conflated the three antebellum doctrines after the adoption of the Fourteenth Amendment.

There may, of course, be other reasons to adopt substantive due process today of the kind that limits the acts of state governments. For example, state legislatures today engage in much the same kinds of activities in which local governments used to engage. Much economic legislation now originates at the state level. Because of the implications for liberty and property, this transference of activity from the local to the state level may supply a normative reason for why courts ought to police this kind of legislation for substantive unreasonableness. However, this rationale would not have jurisprudential support in the history. What mattered to the early courts was the unit of government doing the legislating, not the nature of the legislation; hence a state legislature could ratify the unreasonable act of a municipal corporation.²⁹⁸

²⁹⁶ Barnett and Bernick, 60 Wm & Mary L Rev at 1637 & n 227 (cited in note 5).

²⁹⁷ *Vanderbilt v Adams*, 7 Cow 349, 351 (NY 1827) (upholding a statute allowing municipal authorities to regulate river traffic only because it was an exercise of police power “calculated for the benefit of all”); *Baggs’s Appeal*, 43 Pa 512, 515 (1862):

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 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.

²⁹⁸ See notes 82–85 and accompanying text.

Although the antebellum cases probably do not support substantive due process, the police powers could play a new and important role as a result of the adoption of the Fourteenth Amendment. Prior to that amendment, the only two regularly litigated federal constitutional prohibitions on the states were the Commerce and Contracts Clauses. After the amendment, the federal Constitution imposed new prohibitions on the states, most pertinently the Privileges or Immunities Clause and incorporated rights. This Part considers how a police-powers analysis might function in cases involving these new federal constitutional prohibitions, by analogy to the Commerce and Contracts Clause jurisprudence. Part IV.A examines how the police powers could affect a Privileges or Immunities Clause analysis, whether under a fundamental-rights reading or an antidiscrimination reading of the clause. It suggests that, on either reading, a genuine and reasonable exercise of the police power might serve as a defense to a claim of abridgement, as it served as a defense to a claim that the state had improperly regulated interstate commerce or impaired existing contractual obligations. Part IV.B then shows how the *Slaughter-House Cases* can be—and ought to be—reimagined along these lines. Part IV.C then aims to show how the police powers could also be used as a defense against claims of abridging or infringing incorporated rights; indeed, the Supreme Court adopted just this kind of an analysis in First Amendment cases in the first few decades after that right was incorporated.

A. Two Views of Privileges or Immunities

The Privileges or Immunities Clause of the Fourteenth Amendment declares: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”²⁹⁹ There is a debate in the literature about whether the privileges and immunities of citizens protected by this clause include only federal rights, or also state-defined civil rights like contract and property rights. Most scholars agree that the clause referred at a minimum to state-defined rights and that Justice Samuel Miller was incorrect in the *Slaughter-House Cases* to limit the clause only to the privileges of national citizenship.³⁰⁰

²⁹⁹ US Const Amend XIV, § 1, cl 2.

³⁰⁰ See *Slaughter-House Cases*, 83 US (16 Wall) at 74. For scholarship criticizing Justice Miller’s approach, consider Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 199 (Princeton 2004); Currie, *The Constitution in the Supreme Court* at 344–51 (cited in note 99); John Harrison, *Reconstructing the Privileges or*

Assuming that the clause includes state-defined privileges like the right to contract and acquire property, there are then at least two possible readings of the clause. Professors David Currie,³⁰¹ John Harrison,³⁰² and Christopher Green³⁰³ have advanced the view that the Privileges or Immunities Clause principally required *nondiscrimination* in the provision of privileges or immunities defined by state law. According to this view, it is entirely up to the states to define what privileges or immunities they wish to give their citizens. But whatever such privileges they *do* give, they must do so equally to all citizens.³⁰⁴ In contrast, the fundamental rights view of the clause maintains that the privileges or immunities of state citizenship are fundamental and cannot be defined by the state at all in any way that diminishes them.³⁰⁵

Under either reading of the clause, the police-powers analysis could be relevant. This clause was now a limitation on the states just as were the Contracts and Commerce Clauses. Therefore, if the clause prohibits the states from acting in a certain manner, the states might, by analogy, defend their actions on the grounds that they are not abridging privileges or immunities but rather acting in legitimate pursuit of their police powers. Thus, under the fundamental rights reading, just as states cannot regulate commerce or impair contractual obligations, they cannot abridge fundamental rights; but, as in the other two contexts, the states can make legitimate police regulations. With the addition of the Privileges or Immunities Clause to the Constitution, courts easily could have said that states could not abridge the privileges or immunities of citizens, but that legitimate police regulations are not abridgements.

Immunities Clause, 101 Yale L J 1385, 1414–16 (1992). For scholarship defending Miller's approach, see Kurt T. Lash, *The Fourteenth Amendment and the Privileges and Immunities of American Citizenship* 47–66, 252–65 (Cambridge 2014) (arguing that antebellum law distinguished between privileges of citizens of states and those privileges of national citizenship, and defending the *Slaughter-House* majority opinion on that ground).

³⁰¹ See Currie, *The Constitution in the Supreme Court* at 347 (cited in note 99).

³⁰² See Harrison, 101 Yale L J at 1422–24 (cited in note 300).

³⁰³ See Christopher R. Green, *Equal Citizenship, Civil Rights, and the Constitution: The Original Sense of the Privileges or Immunities Clause* 4–8, 97–102, 117–19 (Routledge 2015).

³⁰⁴ See *id.* at 43, 85, 97–102; Harrison, 101 Yale L J at 1416–24 (cited in note 300). Professor Philip Hamburger is less explicit about whether states could define the content of those privileges, but agrees that the thrust of the clause was to ensure that whatever rights were guaranteed to white citizens under Article IV's Privileges or Immunities Clause would now be guaranteed to black citizens, too, under the Fourteenth Amendment. Philip Hamburger, *Privileges or Immunities*, 105 Nw U L Rev 61, 113–15, 133–34, 143 (2011).

³⁰⁵ See, for example, Barnett, *Restoring the Lost Constitution* at 60–68 (cited in note 300); Lash, 106 Georgetown L J at 1459–60, 1464–66 (cited in note 4).

The police powers could work similarly under the antidiscrimination reading. An antidiscrimination reading would prohibit *arbitrary*, but not all, discriminations. That is why a child may not be permitted to drink alcohol or drive a car: such discriminations are genuinely connected to a legitimate police-power purpose. A legitimate police regulation would militate against a finding of discrimination, and vice versa. In this context, the police powers would play a more restrained role than they would under the fundamental rights reading because there would have to be inequality for the clause to be triggered at all.

Importantly, under either reading the police-powers framework would be significantly narrower than under a general rule limiting states to proper exercises of the police power. By analogy to the commerce or contracts cases, the state would only be limited if the privileges or immunities of citizenship were involved, and only if there was a potential for an abridgement of them. Thus, the analysis would be limited to situations involving fundamental rights or discrimination. If neither condition obtained, the states would likely not be limited to proper exercises of the police power.

B. The *Slaughter-House Cases*

The *Slaughter-House Cases* may now be seen in a new light. In those cases, all the litigants and justices relied on commerce, contract, and municipal corporations cases for the proposition that the states themselves were generally limited to genuine exercises of the police power. Although the justices appear to have simply conflated the various doctrines, their reasoning could be supported by analogy to Contracts and Commerce Clause jurisprudence.

In the *Slaughter-House Cases*, the state legislature of Louisiana granted a monopoly to one particular company for a period of twenty-five years for both the landing of all animals in the city and areas surrounding New Orleans, and also for the slaughtering of animals.³⁰⁶ This law effectively required one hundred butchers who had previously pursued slaughtering as their occupation to close their businesses and slaughter only on the premises of the favored company, to which they had to pay some amount of rent and tribute.³⁰⁷ These provisions were challenged by counsel as

³⁰⁶ *Slaughter-House Cases*, 83 US (16 Wall) at 36.

³⁰⁷ *Id.* at 42, 48. See also *id.* at 86 (Field dissenting) (suggesting as many as four hundred butchers may have been affected).

creating a monopoly in violation of common law; as violating the Thirteenth Amendment's prohibition on involuntary servitude; and as violating the Privileges or Immunities Clause, the Due Process Clause, and the Equal Protection Clause of the Fourteenth Amendment.³⁰⁸

Although the majority of the Court upheld that statute, both the majority opinion and each of the dissenting opinions relied on the police powers.

1. The majority opinion.

The attorney for the butchers of New Orleans asked: “[W]hat are ‘privileges and immunities’ in the sense of the Constitution? They are undoubtedly the personal and civil rights which usage, tradition, the habits of society, written law, and the common sentiments of people have recognized as forming the basis of the institutions of the country.”³⁰⁹ But it will surely be objected, he went on to say, that such a law could be justified “as an exercise of the police power; a matter confessedly, in its general scope, within the jurisdiction of the States.”³¹⁰ There was no doubt that “the subject of sanitary laws belong to the exercise of the power set up; but it does not follow there is no restraint on State power of legislation in police matters.”³¹¹ In support of the limitation of police powers on the states, counsel cited to *Gibbons* and the *Passenger Cases*.³¹²

In response to these arguments, Justice Miller for the Court argued that “[t]he wisdom of the monopoly granted by the legislature may be open to question,” but “[t]he power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may *now* be questioned in some of its details.”³¹³ He then discussed the general nature of the police powers of the states, observing that they extend “to the protection of the lives, limbs,

³⁰⁸ *Id.* at 43–44, 48–49 (majority).

³⁰⁹ *Id.* at 55.

³¹⁰ *Slaughter-House Cases*, 83 US (16 Wall) at 56.

³¹¹ *Id.*

³¹² *Id.* at 56–57.

³¹³ *Id.* at 61–62 (emphasis in original).

health, comfort, and quiet of all persons”—a quotation from *Thorpe*, the contracts case out of Vermont.³¹⁴

Miller stated that because regulations of slaughterhouses were “among the most necessary and frequent exercises of this power,” it was not necessary to seek “a comprehensive definition” of the police power, “but rather look for the proper source of its exercise.”³¹⁵ He then launched into an extended discussion of *Gibbons*, *Miln*, and other commerce cases.³¹⁶ He concluded that “the statute under consideration is aptly framed to remove from the more densely populated part of the city, the noxious slaughter-houses, . . . and to locate them where the convenience, health, and comfort of the people require they shall be located.”³¹⁷ In language reminiscent of *Miln*, he wrote that “the means adopted by the act for this purpose are appropriate, are stringent, and effectual.”³¹⁸

It is hardly clear that any of this analysis was necessary for the disposition of the case. After all, Miller went on to state that there was no violation of the Thirteenth Amendment,³¹⁹ no violation of due process of law or equal protection,³²⁰ and that the Privileges or Immunities Clause only guarantees the privileges of national as opposed to state citizenship (and no one could claim that the privilege of pursuing a particular occupation derived from the federal government).³²¹ Nevertheless, the police-powers analogy seems sound. If the Privileges or Immunities Clause does require equality in the provision of privileges and immunities defined by state law, then surely a legitimate exercise of the police power militates against a finding of impermissible discrimination.

2. Justice Field’s dissent.

Justice Field’s dissent also relied on a police-powers analysis and the antebellum doctrines. “It is contended in justification for the act in question,” Field wrote,

³¹⁴ *Slaughter-House Cases*, 83 US (16 Wall) at 62, quoting *Thorpe*, 27 Vt at 149. See also Part I.C.

³¹⁵ *Slaughter-House Cases*, 83 US (16 Wall) at 63.

³¹⁶ *Id* at 63–64.

³¹⁷ *Id* at 64.

³¹⁸ Compare *id*, with *Miln*, 36 US at 137 (“[W]ilst a state is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit.”).

³¹⁹ *Slaughter-House Cases*, 83 US (16 Wall) at 69.

³²⁰ *Id* at 80–81.

³²¹ *Id* at 77–79.

that it was adopted in the interest of the city, to promote its cleanliness and protect its health, and was the legitimate exercise of what is termed the police power of the State. That power undoubtedly extends to all regulations affecting the health, good order, morals, peace, and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways. . . . But under the pretence of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of the citizen, which the Constitution intended to secure against abridgment.³²²

Field agreed that the provisions requiring the landing and slaughtering of animals *below* the city of New Orleans, and the inspection of animals, were legitimate police regulations, but “it would not endanger the public health if other persons were also permitted to carry on the same business within the same district under similar conditions as to the inspection of the animals.”³²³

Such a deprivation, Field wrote, was a violation of the Privileges or Immunities Clause. That clause “assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation.”³²⁴ It “refers to the natural and inalienable rights which belong to all citizens.”³²⁵ Field then proceeded to enumerate some of these rights, first with a reference to the Civil Rights Act of 1866³²⁶ and then to Justice Bushrod Washington’s circuit opinion in *Corfield*.³²⁷ “Clearly among these” privileges and immunities, Field wrote, “must be placed the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.”³²⁸

Field contended that in so few instances had such fundamental privileges been so flagrantly violated, but whenever this had

³²² *Id.* at 87 (Field dissenting).

³²³ *Slaughter-House Cases*, 83 US (16 Wall) at 87 (Field dissenting).

³²⁴ *Id.* at 96.

³²⁵ *Id.*

³²⁶ Civil Rights Act of 1866, 14 Stat 27, codified as amended at 42 USC § 1981 et seq.

³²⁷ *Slaughter-House Cases*, 83 US (16 Wall) at 97 (Field dissenting) (explaining that the privileges and immunities covered by Article IV are those that are “in their nature, fundamental; which belong of right to citizens of all free governments,” and include “protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole”), quoting *Corfield*, 6 F Cases at 551–52.

³²⁸ *Slaughter-House Cases*, 83 US (16 Wall) at 97 (Field dissenting).

occurred, “the enactment interfering with the privilege of the citizen has been pronounced illegal and void.”³²⁹ For this proposition, Field cited *Rumpff*—which we encountered previously³³⁰—and two other municipal corporations cases,³³¹ and he quoted one of them for the proposition that bylaws must be reasonable.³³² “In all these cases there is a recognition of the equality of right among citizens in the pursuit of the ordinary avocations of life, and a declaration that all grants of exclusive privileges, in contravention of this equality, are against common right, and void.”³³³ Thus, the states may only “prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society.”³³⁴

After raising *Rumpff*, Justice Field made the following remark: “It is true that the court in this opinion was speaking of a municipal ordinance and not of an act of the legislature of a State.”³³⁵ Field observed, however, that “a legislative body is no more entitled to destroy the equality of rights of citizens, nor to fetter the industry of a city, than a municipal government. These rights are protected from invasion by the fundamental law.”³³⁶

Field does not analogize to the Contracts and Commerce Clauses explicitly and, indeed, his reliance on the municipal cases appears to be misplaced. But his reasoning may nevertheless be valid. Now that the states themselves are prohibited from abridging the privileges of citizens, perhaps the police-power limitation *now* applies to the states as well. A legitimate exercise of the police power may now be a defense to a claim of abridgement.³³⁷

³²⁹ *Id.* at 106.

³³⁰ See notes 87–96 and accompanying text.

³³¹ *Slaughter-House Cases*, 83 US (16 Wall) at 106–09 (Field dissenting), discussing *Rumpff*, *Mayor of the City of Hudson v Thorne*, 7 Paige Ch 261, 263 (NY Ch 1838), and *Norwich Gas Light Co v Norwich City Gas Co*, 25 Conn 19 (1856).

³³² *Slaughter-House Cases*, 83 US (16 Wall) at 109 (Field dissenting), quoting *Thorne*, 7 Paige at 263.

³³³ *Slaughter-House Cases*, 83 US (16 Wall) at 109 (Field dissenting).

³³⁴ *Id.* at 110.

³³⁵ *Id.* at 108.

³³⁶ *Id.*

³³⁷ Justices Joseph Bradley’s and Noah Swayne’s dissents also adopted the police-powers framework. The Louisiana legislation was enacted “under pretence of making a police regulation for the promotion of the public health,” wrote Justice Bradley. *Slaughter-House Cases*, 83 US (16 Wall) at 111 (Bradley dissenting). The Privileges or Immunities Clause guarantees every citizen the right to pursue employment “subject to such reasonable regulations as may be prescribed by law.” *Id.* at 112–14. “The right of a State to regulate the conduct of its citizens is undoubtedly a very broad and extensive one, and not to be lightly restricted. But there are certain fundamental rights which this right of

C. Incorporated Rights

The Fourteenth Amendment has also been interpreted as incorporating most of the Bill of Rights against the states. Whether or not incorporation is correct as a matter of the amendment's original meaning is beyond the scope of this Article. But, taking incorporation as given, the federal Bill of Rights now serves as a source of new federal constitutional prohibitions against the states. By analogy to the antebellum cases, the states ought to be able to defend against claims of abridgement or infringement by invoking their police powers.

Indeed, this framework for analyzing incorporated rights appears to have been the Court's preferred approach in First Amendment cases in the first few decades after that amendment was incorporated. In *Gitlow v New York*,³³⁸ the 1925 case incorporating the First Amendment against the states, the Supreme Court explicitly held that a proper exercise of the police powers would insulate a state from challenge, and upheld the state statute precisely on that ground:

That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question. . . .

By enacting the present statute the State has determined, through its legislative body, that utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power. That determination must be given great weight. . . . And the case is to be considered "in the light of the principle that the State is primarily the judge of regulations required in the interest of public safety and welfare;" and that its police "statutes may only be declared unconstitutional where they are arbitrary or

regulation cannot infringe." Id at 114. The test to determine validity was whether the act was a legitimate exercise of the police power. If "[i]t is onerous, unreasonable, arbitrary, and unjust," then "[i]t has none of the qualities of a police regulation," but "[i]f it were really a police regulation, it would undoubtedly be within the power of the legislature." Id at 119–20. Swayne's analysis is less thorough, but his views are clear: "Liberty is freedom from all restraints but such as are *justly* imposed by law." Id at 127 (Swayne dissenting) (emphasis added).

³³⁸ 268 US 652 (1925).

unreasonable attempts to exercise authority vested in the State in the public interest.”

We cannot hold that the present statute is an arbitrary or unreasonable exercise of the police power of the State unwarrantably infringing the freedom of speech or press; and we must and do sustain its constitutionality.³³⁹

This police-powers framework, which the Court deployed in subsequent cases,³⁴⁰ is quite different from modern First Amendment doctrine, which limits state regulations to certain “categorical” exceptions from the First Amendment orbit.³⁴¹ At least historically, states would be able to attempt to justify any regulation of speech or press on the grounds of the police power; the courts would then ensure that their exercise of this power was genuine and reasonable. On this reading, for example, prohibitions on viewing animal crush videos or the sale of violent video games to minors seem easy to sustain.³⁴² And now that the Second Amendment has been incorporated against the states, this framework could apply to such cases, too.

CONCLUSION

In recent years, scholars have debated the meaning of the term “due process of law,” and whether it included a substantive as well as procedural component. This Article has contributed to this debate by approaching it from the other direction: Whence did the postbellum concept of substantive due process derive? This Article has shown that this concept does not appear to have much direct support in the antebellum legal cases. Rather, substantive due process arose as the Court combined distinct doctrines—the common law of corporations as applied to municipal governments and the Contracts and negative Commerce Clause

³³⁹ Id at 667–70 (internal citations omitted).

³⁴⁰ See, for example, *Herndon v Georgia*, 295 US 441, 445–46 (1935); *Near v Minnesota*, 283 US 697, 707–08 (1931); *Stromberg v California*, 283 US 359, 368–69 (1931); *Whitney v California*, 274 US 357, 371–72 (1927).

³⁴¹ See, for example, Jud Campbell, *Natural Rights and the First Amendment*, 127 Yale L.J 246, 263–64 (2017) (describing this approach and expressing doubt as to its consistency with original meaning); *United States v Stevens*, 559 US 460, 482 (2010) (striking down a ban on viewing animal “crush videos”); id at 471 (observing that the First Amendment tiers of scrutiny analysis applies except to certain historical “categories of speech” that are “fully outside the protection of the First Amendment”).

³⁴² See *Stevens*, 559 US at 460; *Brown v Entertainment Merchants Association*, 564 US 786, 805 (2011) (striking down state legislation prohibiting the sale of violent video games to minors).

doctrines—under the general guise of due process of law after the adoption of the Fourteenth Amendment.

For legal support, the proponents of substantive due process must turn away from the Due Process Clause and toward the Privileges or Immunities Clause. Depending on one's reading of that clause, limiting state power to legitimate exercises of police powers may be enforceable as a matter of federal constitutional law; at least, an improper exercise of the police powers would be some evidence of an abridgement of the privileges or immunities of citizenship, whatever those may be. But any such limitation on state power would not derive from due process of law.