

January 2013

Substantive Due Process in Exile: The Supreme Court's Original Interpretation of the Due Process Clause of the Fourteenth Amendment

Natalie M. Banta

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlr>

Recommended Citation

Banta, Natalie M. (2013) "Substantive Due Process in Exile: The Supreme Court's Original Interpretation of the Due Process Clause of the Fourteenth Amendment," *Wyoming Law Review*: Vol. 13: No. 1, Article 5. Available at: <https://scholarship.law.uwyo.edu/wlr/vol13/iss1/5>

This Article is brought to you for free and open access by the UW College of Law Reviews at Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

WYOMING LAW REVIEW

VOLUME 13

2013

NUMBER 1

SUBSTANTIVE DUE PROCESS IN EXILE: THE SUPREME COURT'S ORIGINAL INTERPRETATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

*Natalie M. Banta**

I. INTRODUCTION	151
II. THE EARLY UNDERSTANDING OF THE DUE PROCESS CLAUSE.....	157
A. <i>Due Process Clause Shortly After the Ratification of the 14th Amendment</i>	157
B. <i>Due Process in Slaughter-House: Original Substantive Meaning</i>	161
III. THE COURT'S CIRCUITOUS PATH TO SUBSTANTIVE DUE PROCESS.....	166
A. <i>The Early Understanding of the Application of the Due Process Clause to the States</i>	166
B. <i>The Exile of Due Process Procedural Protections</i>	168
C. <i>The Exile of Due Process Substantive Protections</i>	173
D. <i>Other Suggestions of the Due Process Clause Applying the Bill of Rights to the States</i>	176
IV. UNDERSTANDING THE COURT'S MOTIVATIONS.....	178
A. <i>Racism and Reconstruction</i>	178
B. <i>The Court's Due Process Reticence in the Face of Turmoil</i>	181
C. <i>Administrative Burdens</i>	184
D. <i>The Court and Corporate Interests</i>	185
V. CONCLUSION.....	187

I. INTRODUCTION

Substantive due process is one of the most controversial yet enduring principles of constitutional law. Despite criticism over the years, it continues to shape current developments of individual rights and limits on governmental power. One

* Associate at Covington & Burling LLP; Law Clerk to the Honorable Jay S. Bybee, Ninth Circuit Court of Appeals, 2009–2010; J.D., J. Reuben Clark Law School, 2009. The author thanks Professor Frederick Gedicks for his helpful feedback and encouragement.

of the most traditional manifestations of substantive due process is the doctrine of incorporation—the doctrine by which a court determines whether an enumerated or unenumerated right is incorporated into the concept of due process and thereby enforced against the states under the Fourteenth Amendment.¹

According to conventional accounts of the Fourteenth Amendment, incorporation was meant to be accomplished through the Privileges or Immunities Clause, not the Due Process Clause.² The Due Process Clause, as the story goes, obtained a substantive interpretation only because the *Slaughter-House Cases* (*Slaughter-House*) foreclosed use of the Privileges or Immunities Clause to protect substantive rights, both enumerated and unenumerated, by holding that the clause only referred to rights of national citizenship.³ Because the Court refused to interpret the Privileges or Immunities Clause as giving any substantive protection of rights, scholars argue that the doctrine of due process evolved far beyond its original meaning.⁴ Many scholars argue that the *Slaughter-House* interpretation of the Privileges or Immunities Clause was just plain wrong.⁵

¹ See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

² See JUDITH A. BAER, EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT 107 (1983); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 57–91 (1986); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 110–47 (1988). See generally Akhil Reed Amar, *Did the Fourteenth Amendment Incorporate the Bill of Rights Against States?*, 19 HARV. J. L. & PUB. POL'Y 443 (1996); Richard L. Aynes, *Constricting the Law of Freedom, Justice Miller, The Fourteenth Amendment and the Slaughter-House Cases*, 70 CHI-KENT L. REV. 627 (1994); Micahel Anthony Lawrence, *Second Amendment Incorporation Through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 MO. L. REV. 1 (2007); Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of the Slaughter-House Cases*, 109 YALE L. J. 643 (2000); Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051 (2000). But see RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1989) (arguing intensely against incorporation under the Fourteenth Amendment Privileges or Immunities Clause); ERWIN CHEMRINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 481 (2d ed. 2002) (“In all likelihood, there were members of the Congress that passed the Fourteenth Amendment and of the state legislatures that ratified it who believed that it applied the Bill of Rights to the states and others who rejected this view. . . there is not a single discernable intent on the issue of incorporation.”).

³ *Slaughter-House Cases*, 83 U.S. 36, 79–80 (1873).

⁴ RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 207–08 (2004) (“A judicial assessment of the necessity and propriety of state laws is entirely consistent with the original meaning of the Privileges or Immunities Clause. For this reason, a doctrine of ‘substantive due process’ restores rather than violates the original historical meaning of Section 1 of the Fourteenth Amendment taken as a whole from the damage done by *Slaughter-House*.”); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 489 (15th ed. 2004) (“The *Slaughter-House* Cases temporarily blocked the utilization of the Fourteenth Amendment privileges or immunities clause as a substantive restraint on state legislation. But a generation later, a new majority embraced substantive due process and a novel ‘liberty of contract’ argument.”).

⁵ See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3029–30 (2010) (collecting authority).

In 2010, the history and validity of substantive due process stood before the Supreme Court once more as the Court considered whether the Second Amendment applied to the states in *McDonald v. City of Chicago*.⁶ The petitioners in *McDonald* argued that the right to keep and bear arms is among the privileges or immunities of citizenship protected by the Fourteenth Amendment and gave the modern Court an opportunity to overturn the maligned *Slaughter-House* opinion and to limit the reach of substantive due process by shifting the analysis of incorporation to the Privileges or Immunities Clause, where many believed the analysis should have been rooted originally.⁷ The Court, however, declined to revisit the correctness of the *Slaughter-House* opinion and determined that because the Due Process Clause had been used for decades to determine whether rights were protected against state infringement under the Fourteenth Amendment, it remained the operative theory.⁸

In doing so, and perhaps without recognizing it, the Court remained true to an original interpretation of the Due Process Clause applied in the first several decades after the *Slaughter-House* opinion. The modern Court employed the doctrine of substantive due process that had been preserved and protected through years of disuse. After the Court decided *Slaughter-House* in 1873, it failed to invoke the Due Process Clause to protect substantive rights—especially enumerated protections guaranteed in the Bill of Rights—for the next twenty-five years.⁹ Nevertheless, the Court never denied its power to invoke due process

⁶ *Id.* at 3020.

⁷ See *id.* at 3028; Saenz v. Roe, 526 U.S. 489, 521–28 (1999) (Thomas, J., dissenting); BARNETT, *supra* note 4; Lawrence, *supra* note 2; Newsom, *supra* note 2.

⁸ *McDonald*, 130 S. Ct. at 3030.

⁹ See JEROME BARRON ET AL., CONSTITUTIONAL LAW PRINCIPLES AND POLICY: CASES AND MATERIALS 459–60 (LexisNexis 7th ed. 2006) (stating that the “Slaughter-House Cases could be described as a triumph of positivism over natural laws” and that after *Slaughter-House* the “courts would not independently fashion individual rights.”); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 412 (Aspen Publishers 5th ed. 2006). (“After the Slaughterhouse Cases, corporations could not expect aid from the privileges or immunities clause of the Fourteenth Amendment. Although Justice Miller’s opinion gave even shorter shrift to the Due Process Clause, the natural law tradition clinging to that clause and its inviting references to ‘property’ and ‘liberty’ led corporate lawyers to seize on it.”); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 438–40 (Thomson West 7th ed. 2004) (“The Supreme Court’s reluctance to give an expansive reading to the Constitution was exemplified dramatically in its first major attempt to interpret and apply the provision of the new Fourteenth Amendment. . . . The Court decided that the due process provision only guaranteed that states would enact laws according to the dictates of procedural due process. . . . In short the Due Process Clause of the Fourteenth Amendment did not guarantee the substantive fairness of laws passed by state legislatures. . . . A majority of the immediate post-Civil War Supreme Court, however, was not willing to read into the Fourteenth Amendment any substantive due process guarantee.”); SULLIVAN & GUNTHER, *supra* note 4, at 485 (“In its first interpretation of the [Fourteenth] Amendment, in the Slaughter-House Cases, the majority rejected any notion of substantive due process. But the dissenters’ plea for the protection of fundamental values prevailed by the end of the [nineteenth] century.”); Aynes, *supra* note 2, at 686; Joseph Fred Benson, *A Brief Legal History of Impeachment in Missouri*, 75 UMKC

to protect substantive rights. Ironically, the Court avoided invoking substantive due process by upholding the theory of substantive due process. Repeatedly, the Court determined that the Due Process Clause could protect substantive rights against state infringement but declined to provide such protection in the cases before it, waiting for another day when the violation was too egregious, too arbitrary, or too capricious to allow.¹⁰ Not until 1897 did the Court employ the Due Process Clause to protect a right guaranteed in the Bill of Rights against state infringement.¹¹ That year, in *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago* (*Chicago, Burlington & Quincy*), the Court upheld a substantive property right by holding that the Due Process Clause of the Fourteenth Amendment required states to provide just compensation for any taking of private property.¹²

In determining the original meaning of the Due Process Clause of the Fourteenth Amendment, scholars focus on historical evidence from the years before the

L. REV. 333, 342 n.54 (2006) (“Until the adoption of the [F]ourteenth [A]mendment in 1868, and the decision in the *Slaughter-House Cases*, 83 U.S. 36 (1872), the concept of substantive due process remained a limited theory in our law.”); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493 *passim* (1997); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1414 n.10 (1974) (“In essence, the father of substantive due process was Mr. Justice Bradley in the *Slaughter-House Cases*. . . . Contrary to the majority in that case, both he and Mr. Justice Field found inalienable rights in the Fourteenth Amendment.”); Nelson Lund & John. O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1562 (2004) (“In the early years after *Slaughter-House*, however, a minority of the Court also made efforts to bend the Due Process Clause into a general tool for banning statutes found to be oppressive, or unjustified by the public good.”); Laurence H. Tribe, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110 *passim* (1999); James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 542 n.488 (1999) (“Early on, the Court summarily rejected the idea of substantive due process in the *Slaughter-House Cases*.”); G. Edward White, *Revisiting Substantive Due Process and Holmes’s Lochner Dissent*, 63 BROOK. L. REV. 87, 107–28 (1997); David Wille, *Personal Jurisdiction and the Internet-Proposed Limits on State Jurisdiction Over Data Communication in Tort Cases*, 87 KY. L. J. 95, 146 (1999) (describing the Court’s rejection of substantive due process in the *Slaughter-House Cases*).

¹⁰ Such avoidance tactics are not uncommon in the Court’s past or present. In the widely anticipated health care decision, for example, Chief Justice Roberts employed a similar approach regarding the limits of the taxing power. Roberts found that the individual mandate was not a tax, but affirmed that “Congress’s ability to use its taxing power to influence conduct is not without limits. . . . Because the tax at hand is within even those strict limits, we need not here decide the precise point at which exaction becomes so punitive that the taxing power does not authorize it.” *Nat’l Federation of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2599–2600 (2012). Of course, Roberts was discussing limits on an enumerated power granted to Congress by the Constitution and not the protection of rights against state infringement under the Due Process Clause, but the approach is similar—in both situations, the court maintained its ability to define the contours of a right or power but declined to do so at that time.

¹¹ *Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

¹² *Id.* at 241.

Fourteenth Amendment's ratification and from the colonial era.¹³ Those scholars who have traced the development of substantive due process during the thirty years after the ratification of the Fourteenth Amendment have analyzed several rate regulation cases, arguing that these cases paved the way for the Court to strike down economic legislation in the early twentieth century.¹⁴ In *Munn v. Illinois*, for example, the Court indicated that the Due Process Clause required police regulations to be "clothed with a public interest" in order to be constitutionally valid.¹⁵ The Court determined, in a later rate-making case, that if states deprived the railroad companies of the power to set reasonable rates, it would constitute "in substance and effect" a deprivation of property without due process of law.¹⁶ The Court's willingness to apply the Due Process Clause to strike down economic legislation culminated in *Allgeyer v. Louisiana*¹⁷ and was exemplified by *Lochner v. New York*.¹⁸ In both cases, the Court found that an unenumerated "liberty of contract" was encompassed in notions of due process and struck down police power infringements on that right as unreasonable.

This exclusive focus on the post-ratification development of substantive due process through economic rate regulation cases, however, has caused scholars to overlook an interesting pattern in substantive due process cases in which the Court refused to grant due process protections against state infringement but maintained its ability to do so. In the intervening years between *Slaughter-House* and *Chicago, Burlington & Quincy*, the Court repeatedly declined to apply the Due Process Clause to protect rights enumerated in the Bill of Rights against state infringement.¹⁹ The Court denied individuals procedural protections in trials,

¹³ See generally Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585 (2009); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010).

¹⁴ BARRON ET AL., *supra* note 9, at 459–60; SULLIVAN & GUNTHER, *supra* note 4, at 485 (citing *Chi., M. & St. P. Ry. Co. v. Minnesota*, 134 U.S. 418 (1890); *Santa Clara Cnty. v. Southern Pac. R. Co.*, 118 U.S. 394 (1886); *The Railroad Comm'n Cases*, 116 U.S. 307 (1886); *Davidson v. New Orleans*, 96 U.S. 97 (1877); *Budd v. New York*, 143 U.S. 517 (1892) (Brewer, J., dissenting); *Munn v. Illinois*, 94 U.S. 113 (1876)).

¹⁵ *Munn*, 94 U.S. at 139.

¹⁶ *Chi., M. & St. P. Ry. Co.*, 134 U.S. at 458.

¹⁷ 165 U.S. 578 (1897) (holding that a prohibition on doing business with out-of-state companies was a violation of right to contract protected by the Fourteenth Amendment's Due Process Clause).

¹⁸ 198 U.S. 45 (1905) (holding that a statute prohibited employers from working more than sixty hours per week was a violation of the right to contract protected by the Fourteenth Amendment's Due Process Clause).

¹⁹ The doctrine of "incorporation" has a mid-twentieth century resonance due to the Court's decisions in the 1950s and 1960s describing "selective incorporation" and "total incorporation." Because it is somewhat anachronistic to discuss "incorporation" in the 1870s to 1900, this article uses the parlance of the 1800s: whether the Due Process Clause *applies* the Bill of Rights to the states or *limits* state power.

such as the rights to a civil jury trial²⁰ and an impartial jury,²¹ as well as substantive protections, such as prohibitions of unreasonable searches or seizures²² and cruel or unusual punishments.²³ These initial failures to apply the Bill of Rights to the states as part of due process led some to argue that despite the framers' original expectations for the Due Process Clause, the Court's original understanding of the clause did not include protection for substantive rights.²⁴ Even though the Court failed to protect substantive rights enumerated in the Bill of Rights through the Due Process Clause, it used ambiguous and broad language to describe what the Due Process Clause protected. In doing so, the Court's description of due process preserved the option of protecting substantive rights through the Due Process Clause. While declining to immediately apply the doctrine, the Court prepared the path for the Due Process Clause to protect substantive rights in the future.

Part II of this article uses lower court decisions decided immediately after the ratification of the Fourteenth Amendment in 1868 and the Supreme Court decision in *Slaughter-House* in 1873 to argue that courts' original interpretation of the Due Process Clause was expansive and substantive. These early courts, while primarily focusing on the Privileges or Immunities Clause, understood the Due Process Clause to be a fallback provision to protect liberty, a broader description of both procedural and substantive protections of life, liberty, and property. Part III argues that the Court's treatment of the Due Process Clause from *Slaughter-House* to *Chicago, Burlington & Quincy* maintained this broad understanding of the meaning of due process and preserved the notion of substantive due process. Again and again, the Court refused to apply protections enumerated in the Bill of Rights to the states but nevertheless indicated that the Due Process Clause protected fundamental rights and that the Court might use the Due Process Clause to strike down unreasonable or arbitrary legislation in the future. In other words, the Court in the late nineteenth century chose not to use the Due Process Clause expansively but preserved the conceptual option of substantive due process. Part IV points to the possible social, economic, and political factors that shaped the Court's curious treatment of due process. In light of the turmoil at the end of the nineteenth century, the Court's ambivalent treatment of substantive due process before the *Lochner* era demonstrates a more complex doctrinal development than the traditional *Slaughter-House* and rate regulation stories suggest.

²⁰ See *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532 (1874); *Walker v. Sauvinet*, 92 U.S. 90 (1876).

²¹ See *Ex Parte Spies*, 123 U.S. 131 (1887).

²² See *id.*

²³ See *In re Kemmler*, 136 U.S. 436 (1890).

²⁴ See generally BERGER, *supra* note 2; HERMINE HERTA MEYER, *THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT: JUDICIAL EROSION OF THE CONSTITUTION THROUGH THE MISUSE OF THE FOURTEENTH AMENDMENT* 203 (1977); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding*, 2 STAN. L. REV. 5, 132 (1949); Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Judicial Interpretation*, 2 STAN. L. REV. 140, 162–70 (1949).

II. THE EARLY UNDERSTANDING OF THE DUE PROCESS CLAUSE

The Fourteenth Amendment provides, in pertinent part, that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law.”²⁵ The early interpretation of the Fourteenth Amendment Due Process Clause was enmeshed with that of the Privileges or Immunities Clause. After ratification, a pressing constitutional issue was whether these clauses would apply the protections enumerated in the Bill of Rights to the states. Many scholars argue the Privileges or Immunities Clause, not the Due Process Clause, was intended to apply the Bill of Rights to the states.²⁶ Scholars argue the Court eventually used the Due Process Clause only because Justice Miller’s *Slaughter-House* opinion so narrowly defined the rights protected by the Privileges or Immunities Clause that it was rendered useless as a vehicle to limit state police power.²⁷

While contemporary scholarship continues to focus on the Privileges or Immunities Clause as the proper vehicle to apply the Bill of Rights to the states, it has not generally explored the original meaning of the Due Process Clause in this regard.²⁸ A closer look at lower court decisions decided shortly after the ratification of the Fourteenth Amendment and before the *Slaughter-House* opinion reveals that the original meaning of the Due Process Clause encompassed more than bare procedural protections. Because these courts interpreted the Privileges or Immunities and Due Process Clauses together and rarely distinguished between the two clauses, it is possible that those who believed the Privileges or Immunities Clause applied the Bill of Rights to the states also contemplated that the Due Process Clause carried some sort of substantive, residual protection to accomplish the same result.

A. *Due Process Clause Shortly After the Ratification of the 14th Amendment*

The Due Process Clause received little immediate attention after the ratification of the Fourteenth Amendment in 1868. Lower federal courts were the first to interpret the newly minted Fourteenth Amendment. These lower federal courts usually did not distinguish between the Due Process Clause and the

²⁵ U.S. CONST. amend. XIV, § 1.

²⁶ See CURTIS, *supra* note 2, at 57–91; Aynes, *supra* note 2, at 629–32; Lawrence, *supra* note 2, at 41–50; Newsom, *supra* note 2, at 686; Wildenthal, *supra* note 2, at 1051, 1055–60.

²⁷ See BARNETT *supra* note 4, at 207–08.

²⁸ Scholars have argued that the Court should take the opportunity to apply the Bill of Rights through the Privileges or Immunities Clause. See Lawrence, *supra* note 2, at 41–50; Wildenthal, *supra* note 2, at 1051, 1055–60.

Privileges or Immunities Clause, and to the extent that they did, these courts usually identified the Privileges or Immunities Clause as the primary vehicle to apply rights enumerated in the Bill of Rights as limits upon the states.²⁹

Many of these cases were brought under the Enforcement Act, which Congress passed in 1870. The Enforcement Act of 1870 re-enacted the Civil Rights Acts of 1866, enabling citizens to enforce their constitutional rights in federal court. Among other things, the Enforcement Act protected blacks' rights to vote, serve on juries, hold office, and receive equal protection of the laws.³⁰ Even though the Enforcement Act protected rights "secured" by the Constitution from state infringement, the lower courts found it challenging to determine which rights were actually protected against state regulation under the Fourteenth Amendment and the Enforcement Act.³¹ While some courts ruled broadly that all enumerated rights in the Constitution and Bill of Rights were granted protection,³² others found certain enumerated rights were not "secured" by the Constitution and, thus, not protected by the Enforcement Act.³³

The earliest case to indicate that the Fourteenth Amendment applied the substantive protections of the Bill of Rights to the states through the Fourteenth Amendment was the lower federal court decision of *United States v. Hall*.³⁴ In *Hall*, the defendants challenged their indictment for obstructing others' freedoms of speech and assembly. Judge (and future Supreme Court Justice) Woods³⁵ ruled the indictment was valid, that Congress had the power to pass the Enforcement Act against state legislation, and the "right of freedom of speech, and the other rights enumerated in the first eight articles of the amendment to the constitution" were privileges and immunities of citizenship protected against state and federal infringement.³⁶ Woods made little reference to the Due Process Clause of the Fourteenth Amendment and skipped over this clause in his analysis of

²⁹ See generally *United States v. Hall*, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282); *United States v. Mall*, 26 F. Cas. 1147 (C.C.S.D. Ala. 1871) (No. 15,712); *United States v. Crosby*, 25 F. Cas. 701 (C.C.D.S.C. 1871) (No. 14,893).

³⁰ Enforcement Act of 1870, ch. 114, § 16, 16 Stat. 140, 144.

³¹ See ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876* 128-32 (Oceana Publ'ns 1985); Darrel A. H. Miller, *White Cartels, the Civil Rights Act of 1866, and the History of Jones v. Alfred H. Mayer Co.*, 77 *FORDHAM L. REV.* 999, 1011-12 (2008).

³² *Hall*, 26 F. Cas. at 81; *Mall*, 26 F. Cas. at 1147.

³³ *Crosby*, 25 F. Cas. at 704; *United States v. Avery*, 80 U.S. 251 (1871).

³⁴ 26 F. Cas. at 79.

³⁵ Justice Woods joined the Supreme Court on December 15, 1880. He was nominated by Rutherford B. Hayes and served until his death in 1887. MELVIN I. UROFSKY, *THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 539 (1994).

³⁶ *Hall*, 26 F. Cas. at 82.

the Fourteenth Amendment.³⁷ Woods argued that the right not to be deprived of life, liberty, or property without due process of law and other “privileges and immunities of citizens of the United States” are not only protected from congressional impairment, but also that “the states are forbidden to impair them by the fourteenth amendment.”³⁸ Woods’s analytical neglect of the Due Process Clause suggests he saw little difference between the Due Process Clause and the Privileges or Immunities Clause.

A similar case decided in the same district, *United States v. Mall*, held that Congress could not abridge the freedom of speech by virtue of the First Amendment, and the states could not abridge this freedom by virtue of the Fourteenth Amendment.³⁹ The court’s verbiage demonstrates that the early courts did not automatically apply the Bill of Rights to the states as modern parlance characterizes it but, rather, determined enumerated rights were privileges or immunities of citizenship “secured by the constitution” against state impairment by the Fourteenth Amendment and, thus, subject to enforcement in federal court under the Enforcement Act.⁴⁰

An Ohio Supreme Court decision made explicit what *Hall* and *Mall* suggested about the Privileges or Immunities Clause, holding that it only covered enumerated rights. When confronted with the constitutional validity of school segregation, the Ohio Supreme Court found that even though the scope of the Fourteenth Amendment was not “judicially settled,” the language of the amendment “includes only such privileges or immunities as are derived from, or recognized by, the constitution of the United States. A broader interpretation . . . [was] never contemplated . . .”⁴¹ The Ohio court drew a distinction between the rights enumerated in the federal Constitution and the right to attend a public school, which was “derived solely from the constitution and laws of the State.”⁴² Arguing that a series of enumerated constitutional rights were protected from state infringement, the Ohio court determined the Fourteenth Amendment did not apply to state restrictions segregating education.⁴³ The court made no mention of how the Due Process Clause differed from the Privileges or Immunities Clause.

³⁷ *Id.* at 81.

³⁸ *Id.* at 80–81. Woods continued: “Before the fourteenth amendment, congress could not impair [the privileges and immunities of citizens of the United States], but the states might. Since the fourteenth amendment, the bulwarks about these rights have been strengthened, and now the states are positively inhibited from impairing or abridging them . . .” *Id.* at 81.

³⁹ 26 F. Cas. 1147 (C.C.S.D. Ala. 1871) (No. 15,712).

⁴⁰ *Id.*

⁴¹ *State ex rel. Garnes v. McCann*, 21 Ohio St. 198, 209–10 (1871).

⁴² *Id.* at 210.

⁴³ *Id.* at 209–11.

It is possible, given the prevailing notion that the Fourteenth Amendment as a whole protected rights enumerated in the Constitution, that the state court did not see a need to distinguish between the two clauses.

Lower federal judges and prosecutors were also unsure how far the Fourteenth Amendment reached.⁴⁴ In an interesting work, Robert Kaczorowski demonstrates that prosecutors and judges sometimes read the Fourteenth Amendment as applying the Bill of Rights to the states.⁴⁵ For example, in 1871, the U.S. Attorney General brought two enforcement actions in federal court that turned on rights protected by the Bill of Rights. In the first, *United States v. Crosby*, the right at issue was the Fourth Amendment right to be protected from an unreasonable search.⁴⁶ The court avoided the issue of whether the right was covered by the Enforcement Act and protected against state infringement. To escape holding that the right was secured by the Constitution, the court curiously reasoned that the right to be secure in one's own house was not derived from the Constitution because it existed before the Constitution.⁴⁷ Because the Constitution declared but did not grant this pre-existing right, the Court found the right was not "secured" under the Constitution and thus neither the Enforcement Act nor the Fourteenth Amendment bound the states to the Fourth Amendment.⁴⁸ Shortly after *Crosby*, in *United States v. Mitchel*, the Attorney General again argued to the court that the Fourteenth Amendment applied the Bill of Rights to the states.⁴⁹ Following the court's strange reasoning in *Crosby*, the Attorney General argued the Second Amendment should be considered secured by the Constitution because the right to bear arms did not exist at common law and only existed through its enumeration in the Constitution.⁵⁰ The court decided the Second Amendment violation could be enforced through the Enforcement Act, but because another judge disagreed, the case was certified for review in the Supreme Court.⁵¹ The Supreme Court did not overturn the decision but dismissed the case on jurisdictional grounds.⁵² Kaczorowski concludes that despite uncertainty about whether the Bill of Rights

⁴⁴ CURTIS, *supra* note 2, at 172; KACZOROWSKI, *supra* note 31, at 128.

⁴⁵ KACZOROWSKI, *supra* note 31, at 128–32.

⁴⁶ See 25 F. Cas. 701, 704 (C.C.D.S.C. 1871) (No. 14,893).

⁴⁷ *Id.* at 704.

⁴⁸ *Id.* ("The article in the constitution of the United States, to enforce which this court is supposed to be drawn, has long been decided to be a mere restriction upon the United States itself. The right to be secure in one's house is not a right derived from the constitution, but it existed long before the adoption of the constitution, at common law, and cannot be said to come within the meaning of the words of the act 'right, privilege, or immunity granted or secured by the constitution of the United States.'").

⁴⁹ KACZOROWSKI, *supra* note 31, at 129.

⁵⁰ *Id.* at 129 (discussing *United States v. Avery*, 80 U.S. 251, 252 (1871)).

⁵¹ *Id.* at 129–30.

⁵² *Avery*, 80 U.S. at 253.

limited the states, “federal legal officers and judges consistently upheld broad civil rights enforcement authority through 1872. Up through that year, only two District Judges had declared any of the civil rights acts unconstitutional.”⁵³

Although these cases consistently show the Privileges or Immunities Clause was generally understood as the most obvious clause through which to apply enumerated rights to the states, none of the lower court opinions divested the Due Process Clause of substantive protections. Rather, the arguments presented in the lower courts and the decisions rendered by these courts centered on the Fourteenth Amendment as a whole.⁵⁴ This failure to distinguish the Due Process Clause from the Privileges or Immunities Clause suggests the early courts believed the clauses worked in tandem to apply enumerated rights in the federal Constitution to the states. There was no reason to separate the meanings of the clauses because judges and prosecutors thought each afforded the same protections.⁵⁵ Judge Woods’s analysis in *Hall* demonstrates that he believed due process was in and of itself a privilege or immunity of citizenship and, because of this belief, the significant overlap between the Due Process and Privileges or Immunities Clauses did not concern him. The application of the Bill of Rights to the states simply seemed a natural and logical outcome of the Fourteenth Amendment.

B. Due Process in Slaughter-House: Original Substantive Meaning

The Supreme Court first interpreted the Fourteenth Amendment in the notorious *Slaughter-House Cases* in 1873.⁵⁶ In *Slaughter-House*, the state of Louisiana had granted a specific slaughterhouse company a monopoly to slaughter animals in the city of New Orleans.⁵⁷ The state-granted monopoly ensured no other slaughterhouse could operate in another location in the city.⁵⁸ Louisiana claimed the monopoly was a health and safety measure, but the other slaughterhouse companies filed suit in state court arguing the law violated the newly enacted Fourteenth Amendment by divesting them of their right to labor as a privilege or immunity of citizenship.⁵⁹ In a five-to-four decision, the Court ruled

⁵³ KACZOROWSKI, *supra* note 31, at 131.

⁵⁴ In describing these early cases, both Kaczorowski and Curtis (a renowned scholar on Fourteenth Amendment history) also fail to distinguish between the Privilege or Immunities or Due Process Clauses of the Fourteenth Amendment. See CURTIS, *supra* note 2 *passim*; KACZOROWSKI, *supra* note 31 *passim*.

⁵⁵ See *United States v. Hall*, 26 F. Cas. 79, 82 (C.C.S.D. Ala. 1871) (No. 15,282); CURTIS, *supra* note 2 *passim*.

⁵⁶ 83 U.S. 36 (1873).

⁵⁷ *Id.* at 59–60.

⁵⁸ *Id.*

⁵⁹ *Id.* at 57–59, 61–62.

that the law did not violate the Privileges or Immunities Clause because it dealt with a right of state citizenship rather than national citizenship and the clause protected only the rights of national citizenship.⁶⁰

The *Slaughter-House Cases* are conventionally known for eviscerating the Privileges or Immunities Clause of the Fourteenth Amendment.⁶¹ Little attention, however, is given to the Supreme Court's first treatment of the Due Process Clause and its role in limiting state powers. This treatment is significant because Justice Miller's majority opinion and the dissenting opinions of Justices Swayne, Field, and Bradley illustrate more clearly the subtle distinction between the two clauses, which the earlier lower court cases largely ignored. The *Slaughter-House* opinions imply that while the Privileges or Immunities Clause was thought to be the main vehicle for protecting individual rights, the Due Process Clause was thought to offer a residual protection for these rights, perhaps the last line of defense against improper state infringement.

Justice Swayne's dissenting opinion, although often overlooked, offers the most explicit characterization of due process as a residual protection distinct from the Privileges or Immunities Clause. In the Due Process Clause, Swayne explained, "to prevent, as far may be, the possibility of misinterpretation . . . the phrases 'citizens of the United States' and 'privileges and immunities' are dropped, and more simple and comprehensive terms are substituted."⁶² Swayne conceptualized due process as a second line of defense to protect against misinterpretations of the Privileges or Immunities Clause by adding the more comprehensive terms of "life," "liberty," and "property." To Swayne, the question of whether the act abridged the privileges or immunities of citizenship and the question of whether the act deprived persons of liberty or property without due process of law were distinct.⁶³ Swayne's astute distinction implies that if the Privileges or Immunities Clause were misinterpreted and did not protect a fundamental right from state infringement, then the Due Process Clause could serve that function through its comprehensive protection of life, liberty, and property.

Justice Miller's majority opinion also treated the Privileges or Immunities and Due Process Clauses as separate protections, perhaps implying the residual protection of the Due Process Clause, which Swayne made explicit (although, unlike Swayne, Miller found neither clause invalidated the state-created monopoly).⁶⁴ After explaining away the Privileges or Immunities Clause as only

⁶⁰ *Id.* at 78–79.

⁶¹ *See supra* note 2 (collecting sources).

⁶² *Slaughter-House*, 83 U.S. at 127 (Swayne, J., dissenting).

⁶³ *Id.* at 128.

⁶⁴ *Id.* at 64–66 (majority opinion).

protecting rights of national citizenship from state infringement, Miller turned to the residual protection of the Due Process Clause. He summarily rejected the idea that due process had been infringed, stating:

The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. . . . And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.⁶⁵

Because Miller rejected the plaintiffs' argument that the monopoly deprived them of their property without due process of law with little explanation, some scholars have concluded Miller regarded due process as "exclusively procedural"⁶⁶ and argued Miller did not intend due process to play a role in applying the enumerated rights in the Constitution to the states.⁶⁷ This misreads Miller's opinion. Miller found the monopoly was not a deprivation of property because it was a valid exercise of state police power.⁶⁸ But by holding that the police power was a reasonable exercise of legislative power, Miller implicitly recognized the power of the Supreme Court to review police power regulations for reasonableness under the due process clause. Whereas the majority found the monopoly to be a reasonable exercise of state power, the dissenters, especially Field, argued that the monopoly was unreasonable.⁶⁹ The distinction is important for our purposes because the majority did not indicate that the Court lacked the power to strike down the legislation; the Court merely held the legislation was a reasonable exercise of the police power and thus found no need to strike it down.

Miller did not characterize the Due Process Clause as exclusively procedural. He suggested the concept of due process was important in both the federal and state settings, giving weight to the Due Process Clause by explaining that the

⁶⁵ *Id.* at 80–81.

⁶⁶ CHESTER JAMES ANTIEAU, *MODERN CONSTITUTIONAL LAW* 99–100 (West Group 2d ed. 1997) ("Thus the majority apparently assumed due process meant due procedure, that it was a guarantee of a fair trial, not an inclusive guarantee of the substantive right to hold and enjoy property.").

⁶⁷ For interesting argument that Miller saw "national rights" as the Bill of Rights, see Newsom, *supra* note 2.

⁶⁸ *Slaughter-House*, 83 U.S. at 63 ("The regulation of the place and manner of conducting the slaughtering of animals . . . and the inspection of the animals to be killed for meat. . . are among the most necessary and frequent exercises of this power.").

⁶⁹ *Id.* at 101–02 (Field, J., dissenting).

Fifth Amendment had been a restraint on federal power since the adoption of the Constitution and noting that nearly all of the states had a due process clause in their constitutions.⁷⁰ Miller's concern that both the state and federal governments had due process provisions indicates the value the Court and the states saw in due process generally. Miller acknowledged the Fourteenth Amendment Due Process Clause "has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal Government."⁷¹ Thus, Miller reiterated the Supreme Court has judicial power to define the meaning of the Due Process Clause and the limitations it places on the states.⁷² Miller's treatment of the Due Process Clause, unlike his treatment of the Privileges or Immunities Clause, left open the question whether the Due Process Clause imposed substantive limits on state power.

Justice Field's dissenting opinion dwelled on neither the Due Process Clause nor the issue of whether the Bill of Rights applied to the states. Rather, Field used broad language that implied a substantive due process analysis, finding the monopoly was unreasonable because monopolies "encroach upon the liberty of citizens to acquire property and pursue happiness, and were held void at common law."⁷³ Field's opinion deviated from the suggestion of the lower federal court cases that the only rights protected by the Fourteenth Amendment were rights enumerated in the Constitution. Field did not rely on positive law but, rather, on the natural liberty interest of the people to engage in the "sacred right of labor" which is a characteristic of "all free governments."⁷⁴ Field's characteristics of "all free governments" included, presumably, the Bill of Rights and anything else that is necessary to liberty. Field recognized that no enumerated right protects against monopolies:

[Monopolies are] opposed to the whole theory of free government, and it requires no aid from any bill of rights to render them void. That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal, and impartial laws.⁷⁵

⁷⁰ *Id.* at 80 (majority opinion).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 101–102 (Field, J., dissenting).

⁷⁴ *See id.* at 106.

⁷⁵ *Id.* at 111.

This language is strikingly similar to the text of the Due Process and Equal Protection Clauses.⁷⁶ To Field, no Bill of Rights was needed to protect these liberty interests because they inhered in the American concept of freedom. Although not explicitly, Field suggests the concept of due process acted as the ultimate restraint on improper infringement of liberty.

Justice Bradley echoed Justice Field but implied a textual basis for a substantive due process right against monopoly. Bradley boldly proclaimed the “rights to life, liberty and property . . . are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with . . . by lawful regulations necessary or proper for the mutual good of all.”⁷⁷ According to Bradley, fundamental rights are thus protected by “due process of law” and by a reasonable application of “lawful regulations.” In other words, if a police power regulation is beyond the authority of the state to enact (that is, if it is unlawful) or is unreasonable or arbitrary (that is, if it is not necessary or proper) then it does not accord with the protections of “due process of law.” Because Bradley found the state-created monopoly improperly deprived people of both liberty and property, he believed the Court had the power to strike it down.⁷⁸ Like Field, Bradley acknowledged, “even if the Constitution were silent, the fundamental privileges and immunities of citizens . . . would be no less real and no less inviolable than they now are.”⁷⁹ Bradley’s interpretation of the Due Process Clause presupposed a broad power of federal oversight protecting both enumerated and unenumerated rights that are elements of liberty. Under his interpretation, the Due Process Clause worked with the Privileges or Immunities Clause to ensure no right, immunity, privilege, liberty, property, or life is taken by the states improperly, unreasonably, or arbitrarily.

Thus, while the earliest lower court decisions failed to distinguish the Privileges or Immunities Clause from the Due Process Clause, the Supreme Court Justices, to varying degrees, distinguished the two clauses from the outset. Justice Miller applied a different analysis to each of the clauses, reserving a broad judicial power to continue to define due process even as he limited judicial power to define privileges or immunities. The dissenters argued for a Due Process Clause that would apply more than just the enumerated rights in the Bill of Rights to

⁷⁶ U.S. CONST. amend XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

⁷⁷ *Slaughter-House*, 83 U.S. at 116 (Bradley, J., dissenting).

⁷⁸ See *id.* at 122.

⁷⁹ *Id.* at 119.

the states.⁸⁰ The lower courts, the *Slaughter-House* majority, and the *Slaughter-House* dissenters left open the possibility of using the Due Process Clause to define unenumerated substantive rights in later cases.

III. THE COURT'S CIRCUITOUS PATH TO SUBSTANTIVE DUE PROCESS

Although *Slaughter-House* left the door open for the Court to apply protections of the Bill of Rights against the states through the Due Process Clause, for twenty years the Court did not wield the power of the Due Process Clause. After *Slaughter-House*, the question became whether the rights listed in the Bill of Rights would be applicable to the states as elements of due process, since they were not privileges or immunities of national citizenship. The early cases gave a resoundingly negative answer. Again and again, the Supreme Court declined to interpret the rights and other protections listed in the Bill of Rights as elements of due process. In doing so, however, the Court consistently used language pointing to a broad substantive conception of due process, a conception the Court would eventually use to apply both enumerated and unenumerated rights against the states. Thus, while substantive due process remained in exile throughout the late nineteenth century, the Court continually paved the way for its return. In 1897, the Court invited this return by applying the takings clause of the Fifth Amendment to a state regulation through the Due Process Clause of the Fourteenth Amendment.

A. *The Early Understanding of the Application of the Due Process Clause to the States*

For several years after the ratification of the Fourteenth Amendment, the Court did not consider whether the Fourteenth Amendment or the Due Process Clause changed the longstanding precedent articulated in *Barron* that the Bill of Rights did not apply to the states.⁸¹ Despite evidence from the ratification debates that the framers intended to overrule *Barron* and evidence that many lower courts believed the Fourteenth Amendment overruled *Barron*, the Court ignored other courts' nascent understanding of the change in law and reverted to the antebellum understanding.⁸²

⁸⁰ For an interesting originalist argument, see Wildenthal, *supra* note 2, at 1112 (“The primary difficulty with total incorporation from the standpoint of the original understanding lies not in supporting it, but in limiting it to the Bill of Rights.”).

⁸¹ See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (holding unanimously that the first ten amendments “contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them”).

⁸² CURTIS, *supra* note 2, at 145–53.

In *Twitchel v. Pennsylvania*, decided just five months after ratification of the Fourteenth Amendment, the plaintiff argued that he was convicted of murder and sentenced to hanging in violation of the Fifth and Sixth Amendments.⁸³ The Pennsylvania statute at issue allowed an indictment of murder to be issued without a description of “the manner in which, or the means by which the death of the deceased was caused.”⁸⁴ The plaintiff argued the statute directly conflicted with the Sixth Amendment, which required the accused to be “informed of the nature and cause of the accusation against him.”⁸⁵ Although the Fourteenth Amendment had been ratified several months earlier, expressly stating that “[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens . . . nor . . . deprive any person of life, liberty, or property, without due process of law,”⁸⁶ the Court remarkably held that application of the Bill of Rights to the states was not an open question.⁸⁷ Even more remarkable, the Court expressed its dissatisfaction with the precedent and stated it would at least be compelled to hear argument on the issue if *Barron* did not apply:

We are by no means prepared to say, that if it were an open question whether the 5th and 6th Amendments of the Constitution apply to the state governments, it would not be our duty to allow the writ applied for and hear argument on the question of repugnancy. We think, indeed, that it would. But the scope and application of these amendments are no longer subjects of discussion here.⁸⁸

The Court’s rather drastic oversight on this issue, however, might be explained by the fact that counsel did not argue that the Fourteenth Amendment changed the holding of *Barron*.⁸⁹

Similarly, in *Edwards v. Elliott* the Court summarily dismissed an argument that a state law denying a right to a trial by jury was in conflict with the federal Constitution without engaging in any Fourteenth Amendment analysis.⁹⁰ The Court, without further explanation, cited *Barron* and other antebellum cases for the proposition, finding “[the Seventh Amendment] does not apply to trials in State courts.”⁹¹

⁸³ 74 U.S. (7 Wall.) 321, 321 (1868).

⁸⁴ *Id.* at 325.

⁸⁵ *Id.*

⁸⁶ U.S. CONST. amend. XIV, § 1.

⁸⁷ *Twitchell*, 74 U.S. (7 Wall.) at 325.

⁸⁸ *Id.*

⁸⁹ CURTIS, *supra* note 2, at 174.

⁹⁰ 88 U.S. (21 Wall.) 532 (1874).

⁹¹ *Id.* at 557.

Although it might be argued that the Court's decisions in *Twitchell* and *Edwards* demonstrate the original understanding of the Fourteenth Amendment or the Due Process Clause did not encompass the power to apply rights enumerated in the Bill of Rights or unenumerated rights to the States, there are two factors cutting against that conclusion. First, the Court never expressly held the Fourteenth Amendment did not overrule *Barron*; the Court simply ignored the Fourteenth Amendment's potential impact on *Barron*. *Twitchell* and *Edwards* alone do not foreclose the argument that the Fourteenth Amendment, and especially the Due Process Clause, applied enumerated or unenumerated rights to the states. Second, later cases demonstrate the issue of whether due process applied protections enumerated in the Bill of Rights to the states was continuously presented to the Court. Petitioners to the Court, at least, did not believe the issue resolved.

B. The Exile of Due Process Procedural Protections

From the ratification of the Fourteenth Amendment to 1897, the Court declined to apply procedural protections in the Bill of Rights to the states through the Due Process Clause. The Court maintained each state had the authority to determine procedural protections for its criminals. Yet, even as the Court refused to define specific procedures making up due process guaranteed in the Fourteenth Amendment, the Court used broad language to reserve its power to determine whether state procedures accorded with the Constitution. In cases questioning whether the procedural protections of the Bill of Rights applied to the states, the Court consistently issued the same amorphous holdings; the Court distinguished between the states' power to determine specific procedures that due process supplies and the Court's power to ultimately determine whether such procedures conflicted with the Constitution. The Court's refusal to define specific procedures protected by the Due Process Clause allowed the Court to preserve broad power to determine, in later years, whether a state procedure was constitutional under the Due Process Clause.

For example, in *Walker v. Sauvinet*, the Court rejected the argument that the Seventh Amendment right to a jury trial is a component of due process applicable to the states under the Fourteenth Amendment.⁹² The Court found the requirement of due process of law is met if "the trial is had according to the settled course of judicial proceedings."⁹³ In other words, laws of the state controlled what process was afforded to defendants. But the Court also recognized its own power under the Due Process Clause: "Our power over that law is only to determine whether it is in conflict with the supreme law of the land, that is to say, with the

⁹² See 92 U.S. 90, 92–93 (1876).

⁹³ *Id.* at 93.

Constitution and laws of the United States.”⁹⁴ Even though the Court denied itself the power to define the specifics of due process, it left open a significant power to determine whether state law accords with the Constitution and laws of the United States. The ambiguity of this distinction suggests the Court reserved some power under the Due Process Clause to determine whether the procedural law of the state violated the Constitution.

Likewise, in *Kennard v. Louisiana*, the Court refused to correct errors in the state proceeding or to find that the errors violated due process.⁹⁵ The Court held, “[i]rregularities and mere errors in the proceedings can only be corrected in the State courts.”⁹⁶ The Court again declined to dictate specific elements of due process. Rather, the Court framed the issue as whether the law of the state was consistent with a broader conception of federal constitutional protection: “[T]he question before us is, not whether the courts below . . . have followed the law, but whether the law, if followed, would have furnished Kennard the protections guaranteed by the Constitution.”⁹⁷ The Court’s refusal to define the specifics of due process does not negate the other expression of broad authority for the Court to determine whether the law, if followed, ultimately accorded with the Constitution.

In *Walker* and *Kennard*, the Court affirmed its power under the Due Process Clause to strike down state laws that infringed on certain protections guaranteed by the Constitution. The Court seemingly relied on its earlier holdings in *Barron*, *Twitchel*, and *Edwards* to maintain that the “Constitution” in this sense did not include the Bill of Rights. Thus, in *Walker*, the Court declined to apply the Seventh Amendment to the states via the Due Process Clause. But *Walker* and *Kennard* left an obvious question unanswered: what rights did the Court consider protected by the Due Process Clause? By leaving this question unanswered, the Court prevented the Due Process Clause from suffering the same fate as the Privileges or Immunities Clause. In *Slaughter-House*, Justice Miller enumerated the privileges and immunities of national (as opposed to state) citizenship as the protections of the Constitution: the right to habeas corpus, the right to be protected on the high seas, and the right to go to the seat of government.⁹⁸ Of course, states almost never infringe these specific national rights, and the Court has not needed to consider whether the Due Process Clause would allow the Court to strike down state infringements of these national rights because they are already protected by the Privileges or Immunities Clause. Notice, however, that

⁹⁴ *Id.*

⁹⁵ *See* 92 U.S. 480, 481 (1875).

⁹⁶ *Id.* at 481.

⁹⁷ *Id.* at 481.

⁹⁸ *Slaughter-House Cases*, 83 U.S. 36, 79–81 (1873).

these specific enumerations of national rights under the Privileges or Immunities Clause have limited the effect of the clause in later cases. By not defining specific procedures protected by the Due Process Clause, the Court preserved the clause's jurisprudential power. The Due Process Clause gave the Court the substantive power to apply provisions of the Constitution to the states, but the Court withheld the protections in the Bill of Rights from that power because it felt bound to follow *Barron*. Yet, even under this positivist interpretation, the Court had the ultimate power over the law of the state, if not the specifics of the proceeding.

The Court's reference to whether state law accords with the Constitution in *Walker* and *Kennard* could also trace back to common law precedents that protected against unjust or arbitrary actions because such an act could not be considered a law. This distinction between a state's power over the judicial proceedings and the Supreme Court's power over the law of the state echoes Justice Chase's opinion in *Calder v. Bull*, where he explained: "An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."⁹⁹ The Court's insistence in *Walker* and *Kennard* that it had power to determine whether the state law accorded with the Constitution may have referred to a general grant of power under the Due Process Clause to protect against any state action, whether there is an enumerated right or not, that violates the ultimate protections of law.¹⁰⁰ Yet, as cases continued to come before the Supreme Court with plaintiffs claiming procedural protections guaranteed in the Bill of Rights, the Court became more and more adamant about its circular reasoning that the state must determine proper procedure and the federal courts could not interfere unless the state law violated due process of law under the Constitution. From the ratification of the Fourteenth Amendment to 1897, the Court never found that a state law deprived a person of due process of law, and it seemed the Court granted the states a strong presumption that their judicial proceedings would meet the constitutional standard of due process.

In emptying the Due Process Clause of its procedural content by refusing to use it to protect basic procedures enumerated in the Bill of Rights against state infringement, the Court reaffirmed an amorphous substantive content to due process. For example in *Missouri v. Lewis*, Justice Bradley (a champion of the substantive interpretation of due process in *Slaughter-House*) avoided discussing due process when a plaintiff challenged specific procedural elements in the state's administration of appeals.¹⁰¹ The court system in Missouri allowed direct

⁹⁹ 3 U.S. (3 Dall.) 386, 386–87 (1798).

¹⁰⁰ See Gedicks, *supra* note 13, at 661 (arguing that the terms "law," "due process of law," and "law of the land" in the Fifth Amendment context were used during the revolutionary period to be "general, 'catch-all' phrases, prohibiting arbitrary or otherwise unjust legislation designed to protect the residuum of liberty exemplified by natural and customary fundamental rights").

¹⁰¹ 101 U.S. 22, 31–32 (1880).

claims to the highest court in some counties and a special court of appeals in other counties.¹⁰² The plaintiff claimed a violation of the equal protection of law guaranteed in the Fourteenth Amendment. Mimicking Judge Taney's analysis in *Dred Scott*¹⁰³ but reaching the opposite conclusion, Bradley stated, "[g]reat diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding."¹⁰⁴

While in his *Slaughter-House* dissent Bradley had extolled the virtues of the Due Process Clause in protecting liberty and property, in *Lewis* he found the Due Process Clause did not prevent denial of a jury trial in one place as opposed to another within the same state on the sole justification of a jurisdictional line. This does not indicate, however, that Bradley or the Court thought the Due Process Clause was empty of meaning; rather, the Due Process Clause protected more than merely the procedure as defined in the Bill of Rights. Bradley stated:

It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter, and amount, and the finality and effect of their decisions, provided it does . . . not deprive any person of his rights without due process of law . . .¹⁰⁵

In other words, the Court determined that due process of law limited the states but again declined to define due process of law. The Court simultaneously held that a jury trial is not an element of due process and that the states could not deprive any person of due process of law, indicating that due process of law apparently encompassed unenumerated, unnamed protections beyond the Seventh Amendment.

Four years later, the Court in *Hurtado v. California* explicitly held that a grand jury proceeding was not a necessary element of due process.¹⁰⁶ The Court followed a familiar pattern. In declaring that this right was not mandated by the Due Process Clause, the Court gave an expansive view of due process, describing

¹⁰² *Id.* at 29.

¹⁰³ See generally *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

¹⁰⁴ *Lewis*, 101 U.S. at 31. Justice Taney had used the following idea to support the substantive nature of the Due Process Clause in *Dred Scott*:

The fifth amendment to the constitution . . . provides that no person shall be deprived of life, liberty, and property without due process of law. And an act of Congress which deprives a citizen of the United States 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 offense against the laws, could hardly be dignified with the name of due process of law.

Dred Scott, 60 U.S. at 450.

¹⁰⁵ *Lewis*, 101 U.S. at 30.

¹⁰⁶ See 110 U.S. 516, 538 (1884).

the history of due process in English and American law and concluding that such protections served as “bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guaranty, not particular forms of procedure, but the *very substance of individual rights to life, liberty, and property*.”¹⁰⁷ The Court acknowledged the substance of individual rights would change with time, and that evolving notions of what constituted the public good could become part of due process. It stated:

It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.¹⁰⁸

Even though the Court did not use this expansive view to invalidate the legislation before it, it kept the option open to use the Due Process Clause to protect substantive rights.

The Court’s expansive definition of due process in theory, but its narrow application of due process in practice, came with a high price. Hiding behind the more substantive but amorphous definition of due process while denying procedural rights, the Court abdicated a fundamental and obvious protection of the Due Process Clause: impartial judicial process. In *Ex Parte Spies*,¹⁰⁹ the Court was confronted once again with the argument that the Privileges or Immunities Clause and the Due Process Clause applied the protections of the Bill of Rights to the states.¹¹⁰ The defendants were charged with conspiracy to commit murder after someone threw a bomb into a large crowd of protestors in a public square.¹¹¹ Although there was little evidence the defendants were involved in any conspiracy to murder, the defendants were convicted by a biased jury and irrelevant evidence.¹¹²

The defendants claimed numerous violations of protections in the Bill of Rights, most importantly their Sixth Amendment right to trial by an impartial

¹⁰⁷ *Id.* at 532 (emphasis added).

¹⁰⁸ *Id.* at 537.

¹⁰⁹ 123 U.S. 131 (1887).

¹¹⁰ *Id.*

¹¹¹ See *infra* Part IV.B (further explaining this event, known as the “Haymarket Affair”). See also Wildenthal, *supra* note 2, at 1484.

¹¹² Wildenthal, *supra* note 2, at 1485.

jury.¹¹³ The Court again avoided deciding whether the Fourteenth Amendment applied the Bill of Rights to the states, and instead held that even if it did, the state had not violated Bill of Rights guarantees in the defendants' trial.¹¹⁴ The defendants were executed.¹¹⁵ It is significant that the Court found the state had granted the defendants an impartial jury instead of holding that an impartial jury was not an element of due process. In doing so, the Court suggested an impartial jury could be an element of due process but held there was no need to decide this because the state's process was impartial. This case is one of the most blatant displays of the Supreme Court refusing to give the Due Process Clause any real meaning in the face of an unfair and biased proceeding, but the Court nevertheless managed to preserve the theoretical protection of the Due Process Clause by not explicitly ruling on its substantive content.

C. *The Exile of Due Process Substantive Protections*

In denying multiple procedural aspects of due process, the Court reserved a concept of due process that had the potential to be a much more powerful guarantor of fundamental rights in the Bill of Rights. Unfortunately, the Court also declined to protect the more substantive rights in the Bill of Rights in *United States v. Cruikshank*.¹¹⁶ Just as the Court preserved the power of the Due Process Clause in denying procedural protections, it preserved the power of the clause in denying substantive protections. The Court articulated the broad stroke of the Due Process Clause in finding that it could void state legislation if such legislation was arbitrary or capricious. The power to void state legislation under the due process standard of arbitrary or capricious would later be used by a more prepared Court to prevent state infringement of the Bill of Rights.

Shortly after the *Slaughter-House* decision, in *Cruikshank*, the Court was confronted by the question of whether the right to peaceably assemble and the right to bear arms, both protected in the Bill of Rights, applied to the states. The Court did not mention the impact of the Fourteenth Amendment on these rights but assumed, following the *Slaughter-House* decision, that these rights were privileges and immunities protected only against infringement by the

¹¹³ *Ex Parte Spies*, 123 U.S. at 133–40. They claimed they were denied the right to trial by an impartial jury, the privilege against self-incrimination, the right to be free from unreasonable search and seizures, the right to peaceable assembly, and the right to be informed of the nature of the accusations.

¹¹⁴ *Id.* at 167–82. See also Wildenthal, *supra* note 2, at 1491.

¹¹⁵ Wildenthal, *supra* note 2, at 1485.

¹¹⁶ 92 U.S. 542 (1875).

national government.¹¹⁷ Instead of finding that the Due Process Clause added rights, the Court found the clause “furnish[ed] an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society”¹¹⁸ and “secur[ed] the individual from the arbitrary exercise of the powers of government.”¹¹⁹ The Court, however, did not find the First Amendment or the Second Amendment were guaranteed against state power.¹²⁰ And it did not reach the question of whether the legislation was “an arbitrary exercise of the powers of government.”¹²¹ Instead, the Court found that the massacre had been committed by private individuals and held the Fourteenth Amendment only protected against state action. Thus, the private violation of another’s First or Second Amendment rights was not a proper Fourteenth Amendment claim and needed to be addressed by the state.¹²²

Having defined due process as protection against arbitrary legislation, the Court was hesitant to limit the power of the states under the standard of arbitrariness. It also continued to avoid explicitly holding that the Bill of Rights did not apply in any way to the states and, in fact, suggested the opposite.

The Court’s first concrete articulation that the Bill of Rights could limit a state’s power occurred in *In re Kemmler*, in which the Court indicated the Due Process Clause provided a substantive limit on a state’s ability to determine punishments for state crimes.¹²³ *In re Kemmler* involved a challenge to legislation that allowed electrocution as a method of capital punishment.¹²⁴ Similar to the avoidance

¹¹⁷ *Id.* at 552–553 (“The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. . . . The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.”).

¹¹⁸ *Id.* at 554. This also mimics the language in *Slaughter-House* indicating the view that the Due Process Clause was a residual protection of rights.

¹¹⁹ *Id.* at 554 (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat) 235, 244 (1819)) (internal quotation marks omitted).

¹²⁰ *See id.* at 552–53 (“The first amendment . . . was not intended to limit the powers of the State governments . . . , but to operate upon the National government alone. . . . The second amendment . . . means no more than that [the right to bear arms for a lawful purpose] shall not be infringed by Congress.”).

¹²¹ *Id.*

¹²² *Id.* at 552–56 (“The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another.”).

¹²³ 136 U.S. 436, 446–47 (1890).

¹²⁴ *See id.* at 438–44.

tactics the Court used in *Cruikshank*, the Court determined electrocution was not cruel and unusual and thus did not decide whether the Eighth Amendment applied to the states. It suggested, however, that in some form the principle of the Eighth Amendment could apply to the states as it did to Congress. The Court found:

If the punishment prescribed for an offense against the laws of the state were manifestly cruel and unusual as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think this equally true to the eighth amendment, in its application to Congress.¹²⁵

The Court further elaborated on the Fourteenth Amendment, repeating the doctrines established in previous cases: the protection of fundamental rights is the responsibility of states; the Due Process Clause forbids arbitrary deprivations of life, liberty, or property; and states have the power to protect the health, peace, morals, education, and good order of society.¹²⁶ Finally, the Court held the execution legislation was “within the legitimate sphere of the legislative power of the State, and in observance of those general rules prescribed by our systems of jurisprudence We cannot perceive that the state has thereby . . . deprived him of due process of law.”¹²⁷

The Court’s focus on determining whether the state law was within the legislative sphere of state power indicates the substantive reach of the Due Process Clause. In *In re Kemmler*, if the enactment had not been within the legislative sphere of the state (meaning it was not a valid police power regulation because it was arbitrary and did not contribute to the peace or good of society) then the Court apparently believed it would have had the power to strike the legislation down and apply the Eighth Amendment protection to the states under the Due Process Clause. In addition, *In re Kemmler* shows the Court saw substantive limits in the Due Process Clause: If the punishment were too cruel, the Court could strike it down whether it was state or congressional action.

On the whole, in regard to the Bill of Rights protections that are not exclusively procedural, the Court continued to reaffirm the 1830 rule from *Barron* that the Bill of Rights only restrained congressional power. Yet the cases discussing the issue make the Court’s interpretation clear: the Due Process Clause could apply as a substantive limit to state infringement of these rights. When substantive

¹²⁵ *Id.* at 446–47.

¹²⁶ *Id.* at 448–49.

¹²⁷ *Id.* at 449.

rights were at issue, the Court affirmed the state legislation if the Court found the legislation was reasonable and promoted the public welfare under the Due Process Clause.

The fact that the Court avoided determining whether a specific substantive protection in the Bill of Rights was a component of due process under the Fourteenth Amendment is significant. While denying its ability to define specific procedural requirements, the Court affirmed its ability to protect substantive rights against arbitrary legislation. Even though the Court always found the legislation at issue reasonable in these cases, the Court did not foreclose its opportunity of finding some other piece of legislation unreasonable in the future. This open-ended analysis laid the groundwork for the Court to start finding state infringements of the Bill of Rights unreasonable exercises of state legislative power at the end of the nineteenth century.

D. Other Suggestions of the Due Process Clause Applying the Bill of Rights to the States

After the cases denying procedural and substantive guarantees of the Bill of Rights as part of due process, it seemed the Due Process Clause did not protect much. The Court consistently affirmed a broad, if elusive, theory that the Due Process Clause protected “due process,”¹²⁸ “fundamental rights,”¹²⁹ or “the Constitution,”¹³⁰ but the Court never exercised this power, leaving the Clause apparently empty of practical meaning. Decision after decision either invoked the blanket rule from *Barron* that the Bill of Rights did not apply to the states or avoided the argument that the Fourteenth Amendment changed this by ruling there was no infringement on the Bill of Rights even assuming these rights applied to the states. The Court’s repeated suggestion of a broad, flexible, substantive conception of the Due Process Clause, however, sowed the seeds for *Chicago, Burlington & Quincy* in 1897, the first explicit application of a provision of the Bill of Rights against the states.¹³¹

Even though the Court’s decisions in cases like *Ex Parte Spies* and *Cruikshank* were unanimous and seemed to deprive the Due Process Clause of any procedural or substantive force in regards to provisions of the Bill of Rights, the original dissenters in *Slaughter-House* maintained their strong substantive interpretations of due process throughout the nineteenth century. In 1884, when an issue similar to the state-created monopolies of *Slaughter-House* returned to the Court,

¹²⁸ *Missouri v. Lewis*, 101 U.S. 22, 30 (1880).

¹²⁹ *United States v. Cruikshank*, 92 U.S. 542, 554 (1875).

¹³⁰ *Walker v. Sauvinet*, 92 U.S. 90, 92 (1876).

¹³¹ *See Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

Justices Bradley and Field concurred with the Court's decision to uphold the state legislation striking down the monopoly. Bradley and Field argued, however, that repeal of the state monopoly did not deprive its beneficiaries of fundamental rights because the monopoly originally deprived persons of property and liberty without due process of law and was an unreasonable exercise of police power.¹³² Indeed, as late as 1892, Field issued a dissenting opinion in *O'Neil v. Vermont*, in which the Court found the Eighth Amendment did not apply to the states and failed to decide whether a fine of six-thousand dollars or a jail sentence of almost fifty-four years was cruel and unusual for violating liquor laws.¹³³ Field argued: "[S]o far as [the first ten amendments] declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment . . . places a limit upon state power."¹³⁴ Field, however, used the Privileges or Immunities Clause in his analysis and was silent about the role of the Due Process Clause. Nevertheless, Field showed in *O'Neil* that his views about the original meaning of the Fourteenth Amendment and the federal protection of fundamental rights had remained consistent since *Slaughter-House*.

Another interesting innuendo from this period is the treatment of the Fourteenth Amendment in state courts. In 1891, the Supreme Court of Appeals of West Virginia found the issue of the Fourteenth Amendment and the Bill of Rights to be unclear.¹³⁵ Referencing the Second Amendment declaration of the right to bear arms, the court explained: "Supposing this to be a restriction upon legislation by the several states, as well as by the congress (a question upon which authorities differ) we may still conclude that by law to regulate a conceded right is not necessarily to infringe the same."¹³⁶ The West Virginia state court upheld the regulation without further discussion regarding the Fourteenth Amendment's application to the states.

Then, in 1897, the Supreme Court used the Due Process Clause to apply the Fifth Amendment takings prohibition against the states in *Chicago, Burlington & Quincy*. Chicago, Burlington & Quincy Railroad had established a fixed railroad compensation scheme that the Court found violated the takings clause, which it

¹³² *Butchers' Union Slaughter-House & Livestock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 111 U.S. 746, 759 (1884) (Bradley, J., dissenting) (describing the monopoly as an "arbitrary invasion by state authority of the rights of person and property"); *id.* at 757–58 (Field, J., dissenting) ("In this country it has seldom been held, and never in so odious a form as is here claimed, that an entire trade and business could be taken from citizens and vested in a single corporation. Such legislation has been regarded everywhere else as inconsistent with civil liberty.").

¹³³ 144 U.S. 323, 325–27 (1892).

¹³⁴ *Id.* at 363 (Field, J., dissenting).

¹³⁵ *State v. Workman*, 35 W. Va. 367 (1891).

¹³⁶ *Id.* at 372.

held was applicable to the states through the Due Process Clause.¹³⁷ While some scholars call this decision an aberration or a “dramatic departure”¹³⁸ from the Court’s established jurisprudence at the time, it can also be seen as the first instance where the Court actually used the reservoir of substantive power under the Due Process Clause to which it consistently alluded in its previous cases. Ironically, the Court used the Due Process Clause not to protect the fundamental rights of all persons (whether procedural or substantive) as it was arguably intended to do, but rather the property rights of a railroad corporation. Nonetheless, the 1897 case is a culmination of the rhetoric the Court had preserved for itself in *Cruikshank*, *Hurtado*, *In re Kemmler*, *Ex Parte Spies*, and various other cases in which it refused to invoke the Due Process Clause to protect select rights but reaffirmed the power to do so if something more flagrantly arbitrary came along.

IV. UNDERSTANDING THE COURT’S MOTIVATIONS

What social, political, or theoretical motives the Court had for repeatedly denying any protection under the Due Process Clause while simultaneously encouraging the theory of substantive due process is a question equally interesting as how the doctrine developed shortly after the ratification of the Fourteenth Amendment. There are several possible explanations for the Court’s exile of due process. First, racism and the desire to end Reconstruction might have made the Court less willing to apply due process protections to the plight of blacks but still inclined to preserve due process for other purposes. Second, the Court might have been reticent to enact bold social or political changes through the Due Process Clause due to a pervading belief that the political and economic struggles of the day posed a danger to the stability of the nation. Third, the Court struggled with huge administrative burdens which could have influenced its desire to avoid creating new causes of action under the Constitution while still preserving those causes of action for the future. And lastly, emerging corporate interests co-opting the political branches of the day might have given the Court the political support necessary to use the reservoir of power preserved in the Court’s due process jurisprudence.

A. *Racism and Reconstruction*

Ten years of Reconstruction followed the Civil War, during which Northern troops occupied the vanquished South and the nation ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution. The Reconstruction

¹³⁷ Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897) (“In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is upon principle and authority, wanting in the due process of law required by the fourteenth amendment of the constitution of the United States . . .”).

¹³⁸ Wildenthal, *supra* note 2, at 1502.

period was a difficult time for both the North and the South, and the nation desired to restore normalcy.¹³⁹ When the Court decided *Slaughter-House* in 1873, the nation was rapidly losing interest in the Reconstruction policies.¹⁴⁰ The nation's focus had turned to solving economic problems. From 1873 to 1877, land speculation and bank failures caused an economic crisis; three million workers lost their jobs and thousands of farmers lost their farms.¹⁴¹ With President Hayes's promise to remove federal troops from the South, Reconstruction ended.¹⁴² As *Cruikshank* signaled in 1876, the Court intended to end Reconstruction by denying federal protection through the Fourteenth Amendment and the Due Process Clause to blacks attempting to exercise their rights to peaceably assemble and bear arms.¹⁴³ The Court's language in *Cruikshank* broadly conceptualized due process, but the Court avoided asserting the protections of due process by characterizing the violation as private rather than state action.¹⁴⁴

Racism was undoubtedly a factor in cases where the defendants were white and the victims were black. The Court reflected the national apathy of the political and economic cost of enforcing federal protections in the South and demonstrated hostility towards blacks in *Cruikshank*. Without a general consensus, the Court was unwilling to protect blacks through the Fourteenth Amendment.¹⁴⁵ Despite the fact that the Fourteenth Amendment was intended to address the rights of newly emancipated slaves—even under *Slaughter-House*—the racist sentiment was too much for the amendment to surmount. Curtis briefly mentions the curious retreat by many Republican judges from their protection of black liberties in the 1870s. He argues that while one reason could have been concerns about federalism, another reason “may have been the conclusion that the protection of blacks was not worth the enormous effort it required and the conflict it produced.”¹⁴⁶

¹³⁹ See JOHN HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR 189–211* (2d ed. 1994).

¹⁴⁰ PETER IRONS, *A PEOPLE'S HISTORY OF THE SUPREME COURT* 201 (Penguin Books 1999).

¹⁴¹ *Id.* See also THOMAS J. SCHLERETH, *VICTORIAN AMERICA: TRANSFORMATIONS IN EVERYDAY LIFE 1876-1915* xiv (Richard Balkin ed., HarperPerennial 1991).

¹⁴² The Election of 1876 deadlocked between Tilden and Hayes. When the Senate and House met together to settle the election, the Republican Party agreed to remove federal troops from the South in exchange for Hayes' election to the presidency. This political agreement was called the Compromise of 1877. See DAVID M. KENNEDY, LIZABETH COHEN & THOMAS A. BAILEY, *THE AMERICAN PAGEANT: A HISTORY OF THE REPUBLIC* 511 (Houghton Mifflin Co. 13th ed. 2006).

¹⁴³ See generally *United States v. Cruikshank*, 92 U.S. 542 (1875). Peter Irons suggests that the Court ignored the social repercussions of the *Cruikshank* decision because it was determined to end Reconstruction. Even if the Court would have decided the case differently, Irons argues that “legal recourse could not have prevailed in the climate of hostility toward blacks.” IRONS, *supra* note 140, at 204.

¹⁴⁴ *Cruikshank*, 92 U.S. at 532.

¹⁴⁵ See IRONS, *supra* note 140, at 205 (“By 1876, the Supreme Court—and most northern whites—had tired of Reconstruction battles and were ready to surrender to the former Confederates. The reaction of southern whites to Waite's opinion reflected their sense of impending victory.”).

¹⁴⁶ CURTIS, *supra* note 2, at 179.

Protecting blacks was not a popular policy in the late 1800s. With the economic disasters that plagued the time period, politicians and judges were unwilling to make advancements under the Fourteenth Amendment. The Court, however, most likely had no desire to limit its theoretical power under the Fourteenth Amendment. Ruling in favor of blacks could have cost the Court its credibility, so it compromised. It ruled against blacks by side-stepping the real issue of Fourteenth Amendment protection. In doing so, the Court exiled substantive due process, reserving the protections for more sympathetic defendants, which turned out to be corporations and businesses.¹⁴⁷

The irony is that the Court expanded its power during Reconstruction but failed to use its expanded power to apply the protections of the Fourteenth Amendment to the states. While the Court repeatedly limited the Due Process Clause by not applying it in actual holdings, the Court nevertheless expanded its power and reach of judicial review during this time period, much like it expanded its power under the Due Process Clause but failed to actually invoke the power. All agreed after the Civil War that the Court had the power to review the constitutionality of statutes; although the *Dred Scott* decision was heavily criticized, scholars did not argue that the Court lacked the power of judicial review.¹⁴⁸ The Court had exercised the power of judicial review since *Marbury v. Madison* in 1803, of course, but it began to use it more frequently after the Civil War and began aggressively striking down congressional legislation. From 1865 to 1873, the Court voided ten congressional acts after invalidating only two during the preceding sixty-six years.¹⁴⁹ Most of these decisions, however, had no practical effect on Reconstruction or the nation.¹⁵⁰ Thus, even though the Court was expanding its practical power through judicial review, its decisions changed little constitutional jurisprudence and demonstrated its reticence to make bold constitutional statements. Much like its articulation of the power under the Due Process Clause, the Court demonstrated its power without applying it to a significant degree and certainly without applying it to protect the rights of blacks in the nation.

¹⁴⁷ See generally *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

¹⁴⁸ BERNARD SCHWARTZ, *A HISTORY OF THE SUPREME COURT* 154 (1993).

¹⁴⁹ STANLEY KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 6 (Univ. Chi. Press 1968). The two before the Civil War were *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

¹⁵⁰ SCHWARTZ, *supra* note 148, at 155. Schwartz argues that the only two cases to have any practical effect on Reconstruction were *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870), which was overruled a year later, and *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), which limited an unknown statute. The other cases to strike down congressional action were *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865); *Reichart v. Felps*, 73 U.S. (6 Wall.) 160 (1868); *The Alicia*, 74 U.S. (7 Wall.) 571 (1869); *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1869); and *United States v. Railroad Co.*, 84 U.S. (17 Wall.) 322 (1873).

B. The Court's Due Process Reticence in the Face of Turmoil

Although racism and a desire to end Reconstruction were factors in the denial of due process in early cases after ratification of the Fourteenth Amendment, this explanation is incomplete. As we have seen, the Court routinely denied due process in a whole array of cases regardless of the race or national origin of the parties. Another explanation of the Court's treatment of due process stems from the Court's reticence to impose social change during times of political and economic upheaval. Many legal historical narratives jump from the end of Reconstruction to the turn of the century and ignore the crucial events that occurred in the last thirty years of the 1800s. These thirty years witnessed all kinds of political and economic unrest. The Court's due process reticence may well have been a result of the turmoil that American society faced during this time. In the face of political and economic upheavals, the Court apparently lacked the political will and support to give application to the Due Process Clause. Perhaps it feared inciting more turmoil during the difficult transition from an agrarian to a manufacturing economy and chose not to be an instrument of social progress.

Known as the Gilded Age,¹⁵¹ the decades from 1870 to 1900 were a time of rapid change that brought numerous growing pains. Between 1870 and 1900, the nation's population grew from thirty-eight to seventy-six million.¹⁵² The Transcontinental Railroad connected the east and west coasts in 1869, and railways throughout the nation transformed the U.S. economy into a truly national one.¹⁵³ Racial conflict continued to be a problem. And with a million people immigrating to America each year, new national origin conflicts began to occur.¹⁵⁴ Many of these immigrants were from countries other than English-speaking Britain. Italians, Greeks, Slovaks, Poles, Chinese, Japanese, and Russians increasingly entered the country. Many were poorer and less educated than immigrants who had come before.¹⁵⁵ The language barriers and fear of rising poverty levels resulted in a rise of nativism. Anti-immigrant sentiment spread through the nation and violent conflicts occurred over national origin and race.¹⁵⁶

¹⁵¹ The Gilded Age received its name from Mark Twain in *A Gilded Age: A Tale of Today*. It was intended as a sarcastic name for the three decades after the Civil War. KENNEDY, COHEN & BAILEY, *supra* note 142, at 509.

¹⁵² Compare U.S. CENSUS BUREAU, DEP'T OF COM., REPORT OF THE SUPERINTENDENT OF THE NINTH CENSUS, at ix (1872), available at <http://www2.census.gov/prod2/decennial/documents/1870a-02.pdf>, with U.S. CENSUS BUREAU, DEP'T OF COM., TWELFTH CENSUS OF THE UNITED STATES, TAKEN IN THE YEAR 1900, vol. 1, ch. 1, at xviii (1901), available at <http://www2.census.gov/prod2/decennial/documents/33405927v1ch01.pdf>.

¹⁵³ IRONS, *supra* note 140, at 217.

¹⁵⁴ SCHLERETH, *supra* note 141, at 8–10.

¹⁵⁵ *Id.* at 8–9.

¹⁵⁶ *Id.* at 11. The Chinese Exclusion Acts are prime examples.

Although racial and ethnic conflicts were a problem in national politics, the struggles of the economy took center stage. The rapid growth of the economy as America moved to an industrial economy had several drawbacks. The period was marked by panics and depressions that triggered severe unemployment. From 1873–1879, 1882–1885, and 1893–1897, economic difficulties resulted in twenty-three to thirty percent of industrial workers being unemployed for some time during these years.¹⁵⁷ Workers grew dissatisfied with long hours and low wages.¹⁵⁸ Harsh conditions and worker dissatisfaction led to periods in which workers and employers engaged in violent conflicts.¹⁵⁹ Riots and strikes were common as political support for socialism increased and challenged the political support for capitalism.¹⁶⁰

During this transitional era, the Supreme Court displayed distinct reticence in due process decisions that touched on racial, political, and economic issues. With the economy in turmoil and troubling racial and labor conflicts around the nation, the Court declined to use the Due Process Clause in a way that would substantively shape national policy.

Ex Parte Spies is an excellent example. In one of the bloodiest labor conflicts during this time, the “Haymarket Affair,” a bomb thrown into a crowd killed seven police officers.¹⁶¹ Many workers demonstrating for eight-hour workdays were also wounded or killed.¹⁶² Leaders of the demonstration were arrested and tried for murder with little, if any, evidence of their connection to the bombing or to a conspiracy to murder. The defendants appealed the conviction, arguing that they were denied the right to trial by an impartial jury, the right against self-incrimination, and the right against illegal searches and seizures.¹⁶³ The defendants argued that these rights were protected against state infringement by the Fourteenth Amendment. When the case was brought before the Supreme Court, the Court held that the state did not violate the Bill of Rights guarantees in the defendants’ trials and dismissed the case for lack of jurisdiction.¹⁶⁴ This ruling exemplified the Court’s fear of substantive due process rulings during this tumultuous period, even in the face of obvious violations of procedural and substantive rights. The Court apparently had no desire to appear as if it supported anarchy. A swift ruling denying the protections of due process signaled that the Court did not condone labor riots or strikes.

¹⁵⁷ *Id.* at 34.

¹⁵⁸ In 1889, for example, 22,000 railroad workers were injured or killed. IRONS, *supra* note 140, at 217.

¹⁵⁹ SCHLERETH, *supra* note 141, at xiv.

¹⁶⁰ *Id.*

¹⁶¹ See Wildenthal, *supra* note 111, at 1484.

¹⁶² IRONS, *supra* note 140, at 240.

¹⁶³ See *Ex Parte Spies*, 123 U.S. 131, 165 (1887).

¹⁶⁴ See *id.* at 167–82.

Constant labor disputes in an emerging industrial economy generated widespread fear of a second civil war and general anarchy.¹⁶⁵ With the memory of the Civil War still fresh, the fear of renewed armed conflict prompted an expansion of national and state power to keep social peace and order. After a series of particularly bloody railroad strikes in 1877, cities built armories and formed standing home guards. Police forces and local militias expanded and asserted their presence in the communities.¹⁶⁶ Irons argues, “It is no exaggeration to describe the battles of workers and employers of the 1870s and 1880s as class warfare, a struggle waged both in the streets and voting booths.”¹⁶⁷ The Court, apparently fearful of anarchy caused by violent labor disputes, may have also doubted its practical power to deploy the Due Process Clause in a substantive or even procedural way.

Instead of using the Due Process Clause in a practical way, the Court repeatedly explained that due process could properly be used in certain situations to limit a state from infringing on fundamental rights, but that the situations at bar did not qualify.¹⁶⁸ The Court may have doubted its power for another reason, namely, the bitter legacy of the *Dred Scott* decision. In describing the general jurisprudence of the Court during this time, Robert Fridlington observes: “The Court was still haunted by the ghost of the disastrous *Dred Scott* decision, which had severely damaged its influence and credibility. Chief Justice Taney’s blatantly political opinion in the case had . . . tragically misjudged the limits of the Court’s power to determine public policy.”¹⁶⁹ Many agree that the infamous and highly controversial *Dred Scott* decision had weakened and subdued the Supreme Court in the years after the Civil War.¹⁷⁰ Thus, along with the mass population changes, labor disputes, and economic difficulties, the memory of *Dred Scott* likely weakened the Court’s perception of its own power. The Court knew that the Due Process Clause of the Fourteenth Amendment had constitutional meaning, and defined due process protections in abstract terms, but refused to apply those protections. By doing so, the Court avoided conflict with the political and economic policies of the day. Through its due process reticence, the Court underwrote national stability by following social and economic forces instead of changing or re-directing them.

Even Justice Miller, who authored the majority opinion in the *Slaughter-House Cases*, implied that the fear of national pressures influenced the Court. In an address given at the University of Michigan on June 29, 1887, Miller declared

¹⁶⁵ SCHLERETH, *supra* note 141, at 59.

¹⁶⁶ *Id.*; SCHWARTZ, *supra* note 148, at 171 (arguing “more people dreaded an armed conflict than had anticipated a like outcome to the secession movement of 1860-1861”).

¹⁶⁷ IRONS, *supra* note 140, at 240.

¹⁶⁸ See *supra* Part III.

¹⁶⁹ ROBERT FRIDLINGTON, *THE RECONSTRUCTION COURT 1864-1888* x (Associated Faculty Press 1987).

¹⁷⁰ SCHWARTZ, *supra* note 148, at 154.

that the Court “is, then, so far as the ordinary forms of power concerned, by far the feeblest branch or department of Government. It must rely upon the confidence and respect of the public for its just weight and influence.”¹⁷¹ Miller explained that because the Court lacked the power to enforce its rulings, to appropriate funds for its maintenance, or to campaign for any kind of political constituency, the Court’s true power came from the confidence of the American people. If the people did not accept the Court’s opinions, it would lose its credibility and ultimately its power to authoritatively interpret the Constitution. In this time of labor and racial conflict, perhaps it was not realistic to expect the judiciary to impose reform through application of the Due Process Clause. By using language suggesting a powerful substantive interpretation of the Due Process Clause, the Court attempted to preserve a reservoir of power for when the American people would more readily accept the substantive meaning of due process defined by the Court.¹⁷² Ultimately, the Court would first use this substantive power to protect corporate interests at the turn of the century, suggesting the Court did not use the power until it had outside political support for its decisions.¹⁷³

C. *Administrative Burdens*

The Court’s exile of substantive due process also could have stemmed from the Court’s heavy administrative burdens in the late 1800s. At that time, no intermediate federal courts of appeals existed. The Supreme Court faced a full docket, and the Justices continued to fulfill their circuit obligations.¹⁷⁴ Thus, the Court may have shied away from extending due process in specific instances to avoid creating new constitutional claims and increasing an already over-burdened docket, preserving substantive due process for the future without having to handle the immediate consequences.¹⁷⁵

¹⁷¹ FRIDLINGTON, *supra* note 169, at 72.

¹⁷² For an interesting discussion of the Court’s jurisdictional shift during this time period, see Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263, 1316 (2000). Professor Collins has argued that substantive due process emerged from “as much a jurisdictional event as a substantive event.” Professor Collins would explain the advent of substantive due process through the shift in the Court’s understanding of its own jurisdiction. In diversity suits, the Court routinely applied state law encompassing natural law considerations. In federal question cases, however, the Court was much narrower in its interpretation of the Constitution. The advent of substantive due process occurred when the Court began to federalize the general common law that had been expounded in diversity cases under state law. It is possible that the Court did not believe that the Fourteenth Amendment’s Due Process Clause added much to the Constitution that was not part of the natural law the Court had been applying from the beginning in diversity cases.

¹⁷³ See *infra* Part IV.D.

¹⁷⁴ SCHWARTZ, *supra* note 148, at 177.

¹⁷⁵ As Collins argued: “It was not as though the Court—while fending off litigants’ arguments to give a substantial scope to the Due Process Clause—had ever missed an opportunity to drop unobtrusive hints that the substantive axe might someday fall, next time perhaps as a matter of federal law.” Collins, *supra* note 172, at 1319–20.

The Court had petitioned Congress for relief as early as 1872, but nothing was done to alleviate the Court's heavy workload until 1891, when Congress created an intermediate court of appeals, determining that the Supreme Court Justices no longer would ride circuit.¹⁷⁶ Administrative changes to the Court could have prompted the Court to use substantive power under the Due Process Clause. Congress also enacted limitations on federal jurisdiction by raising the amount in controversy and eliminating jurisdiction for certain corporations.¹⁷⁷ The newly established federal appellate courts took much of the workload off of the justices. In response to a decreased workload and a decreased ability to define general constitutional law, the Court invoked its ultimate authority to define federal law through the Due Process Clause, authority it had preserved in dicta from 1870 to 1897.

D. The Court and Corporate Interests

As we have seen, the Court preserved the idea of due process while repeatedly refusing to apply it in its cases. Most scholars attribute the rise of substantive due process to emerging economic concerns and the liberty of contract.¹⁷⁸ For example, Professors Nowak and Rotunda have suggested that the emerging economic concerns forced the Court to accept the dissenting Justices' opinions from *Slaughter-House* on substantive due process in the early twentieth century.¹⁷⁹ But this broad idea of due process was not only present in the dissenting opinions; as discussed above, majority opinions also referenced broad power under the Due Process Clause. After preserving substantive due process in dicta, the Court's use of it in 1897 may partly be explained by emerging corporate political power in an unstable, fledgling economy.

As discussed above, the labor disputes in the late 1800s caused fear and unrest in American society. Farmers were especially active in trying to obtain political relief from corporations charging high rates to ship farmed goods. Powerful corporations involved in running the railroads and grain elevators enjoyed monopolies and in many cases bribed state legislators to allow monopoly pricing to continue.¹⁸⁰ Railroad and grain elevator corporations forced farmers to pay exorbitant prices to store and ship their products.¹⁸¹ In response, farmers joined together in the Granger Movement to petition the state legislatures to set

¹⁷⁶ *Id.* at 1317.

¹⁷⁷ *Id.*

¹⁷⁸ BARRON ET AL., *supra* note 9, at 459–60; BREST ET AL., *supra* note 9, at 412; NOWAK & ROTUNDA, *supra* note 9, at 440; SULLIVAN & GUNTHER, *supra* note 4, at 485.

¹⁷⁹ NOWAK & ROTUNDA, *supra* note 9, at 440.

¹⁸⁰ IRONS, *supra* note 140, at 235–36.

¹⁸¹ *Id.* at 235.

maximum rates for rail shipping and grain elevator storage.¹⁸² Railroads and grain storage corporations were accustomed to protection from state legislatures, but with this counter lobbying, the corporations turned to the courts for protection, arguing that these pricing laws violated their property rights.¹⁸³ When the Court first upheld a state regulation of prices in *Munn v. Illinois*,¹⁸⁴ railroad strikes ensued as railroads decreased workers' already low wages to compensate for the price regulations.¹⁸⁵ The corporations changed their tactics when the states began to pass legislation contrary to their interests—corporations stopped investing money in those states.¹⁸⁶ Charles Warren described this phenomenon:

[A] more powerful force than that of the Courts was working to protect the railroads—the investors and the public. . . . [T]he farmers found themselves compelled to allow the railroads a fair profit. Consequently, the very men who had been most active in passing rate laws . . . were the readiest to repeal them.¹⁸⁷

For years, scholars have postulated that the Court was influenced by the dominant intellectual theory of the day—laissez faire. Scholars have argued that the popularity of Social Darwinism encouraged courts to invalidate legislation that improved conditions for the working class.¹⁸⁸ Recently, scholars have begun to revisit the claim that Social Darwinism influenced the *Lochner* Court.¹⁸⁹ The degree to which the Court was influenced by laissez-faire and Social Darwinism is beyond the scope of this Article. For our purposes, it is enough to understand that powerful corporate interests were a dominant factor in American politics at the time. The nation was divided on the issues of labor and the economy: While

¹⁸² SCHWARTZ, *supra* note 148, at 164.

¹⁸³ IRONS, *supra* note 140, at 236.

¹⁸⁴ 94 U.S. (4 Otto) 113 (1876).

¹⁸⁵ IRONS, *supra* note 140, at 238–39.

¹⁸⁶ CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY VOLUME III: 1856-1918* 311 (Little, Brown & Co. 1924).

¹⁸⁷ *Id.*

¹⁸⁸ IRONS, *supra* note 140, at 237 (quoting Sidney Fine: “It was in the court that the idea of laissez faire won its greatest victory.”); SCHWARTZ, *supra* note 148, at 174 (“The Court’s decisions reflected the Spencerean laissez faire that had become dominant in the society as a whole at the time. However, the Court also helped to mold the society and economy in the Spencerean image. It furnished the legal tools to further the period’s galloping industrialism and ensure that public power would give free play to the unrestrained capitalism of the era.”).

¹⁸⁹ David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 83 WASH. U. L.Q. 1469, 1526 (2005) (“The academic community should be ashamed that for so many years scholarly works routinely stated that Lochnerian jurisprudence had its origins in ‘Social Darwinism’ without any meaningful supporting evidence beyond a misinterpreted line from Holmes’s *Lochner* dissent. Moreover, the more general notion that pre-New Deal due process jurisprudence was rooted in radical laissez-faire ideology should have been self-refuting to anyone familiar with the relevant cases.”).

Republicans touted the economic value of corporations, Democrats celebrated the populist movement against corporate control. In the election of 1896, Republican William McKinley defeated Democrat William Jennings Bryan, and corporate interests triumphed over labor interests.¹⁹⁰ McKinley's victory marked the emergence of a powerful corporate presence in American politics. At the same time, the Court began to support corporate interests as well. A banker characterized the Court in 1895 as the "guardian of the dollar, defender of private property, enemy of spoliation, sheer anchor of the Republic."¹⁹¹ Protection of corporate interests through the Due Process Clause, unlike protection of workers or racial minorities, had firm political support at the turn of the century, as manifested by McKinley's victory.

The political environment at the turn of the century allowed the Court to define economic liberties as part of the protection of due process. Protection of economic liberties, however, was not a sudden emergence.¹⁹² Hovenkamp argues that the Fourteenth Amendment was "economic by design" and that Congress "intended to provide certain substantive rights, protecting freedmen from some kinds of governmental activity."¹⁹³ He continues: "That these absolute rights should be identified with economic liberties was uncontroversial. But economic liberties had to be defined. That was the province of political economy."¹⁹⁴ In 1897, the political and economic climate allowed the Court to define these economic liberties under the Due Process Clause in a way favorable to corporate interests.

V. CONCLUSION

The historical role of the Due Process Clause and its substantive and procedural meanings are more complicated than is traditionally understood. The Due Process Clause was understood as a residual protection of liberty and had an expansive and substantive interpretation to protect rights enumerated in the Bill of Rights, as well as those protected by the Privileges or Immunities Clause. As we have seen, the Court did not invoke the Fourteenth Amendment conception of due process to defend the procedural protections of the Bill of Rights from state infringement, and states had great latitude to formulate their own procedures. The Court, however, maintained its authority to strike down legislation if it was arbitrary or violated a fundamental right of due process, although it did not

¹⁹⁰ IRONS, *supra* note 140, at 221.

¹⁹¹ *Id.* at 221–22.

¹⁹² HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW, 1836–1937* 94 (1991).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 94–95.

invoke this authority until 1897. The Court thus ensured that the Due Process Clause did not lose its meaning in theory, even if it had little meaning in practice.

This curious treatment of due process cannot easily be explained. A variety of social, political, and economic factors influenced the Court's jurisprudence. Racism, economic instability, lack of political support, and administrative burdens all may have contributed to the Court's practice of declining to expansively apply the due process protections while still preserving the concept of due process for a time when these barriers would no longer play such a significant role. When the Court obtained the political backing of powerful corporations, it used the Due Process Clause to protect corporations from "unreasonable" state legislation.

For a variety of reasons, the Court declined to apply substantive due process in individual cases. But contrary to conventional discourse on the development of the doctrine, the Court did not completely relinquish the substantive power of the Due Process Clause. In exiling substantive due process, the Court continued to invite its eventual return. Still today, we see that substantive due process remains a key doctrine limiting state power and protecting individual rights.