

The Substance of *Dred Scott* and *Roe v. Wade*

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ABSTRACT

Conservative critics of the doctrine of substantive due process often point to Dred Scott v. Sandford and Roe v. Wade to illustrate the danger of giving a substantive interpretation to the due process clauses in the Fifth and Fourteenth Amendments. This Article takes a closer look at Dred Scott and Roe to draw out the unavoidable substantive issues that were at stake in those cases.

During one of the 2004 presidential debates, George W. Bush told an audience at Washington University in St. Louis that he would not appoint a justice to the Supreme Court who would support *Dred Scott v. Sandford*.¹ Although the President's use of the notorious antebellum slavery case to demonstrate the "kind of person" he would not appoint to the Court left some viewers scratching their heads, left-leaning pundits quickly warned that Bush's comment was a subtle nod to pro-lifers, who had long drawn comparisons between *Dred Scott* and *Roe v. Wade*. "*Dred Scott* turns out to be a code word for *Roe v. Wade*," Timothy Noah explained in *Slate*.² The title of Katha Pollitt's piece for *The Nation* declared simply "Roe = Dred."³ In his analysis for the *Los Angeles Times*, Peter Wallsten concluded that the "*Dred Scott* reference was an attempt" to covertly attack abortion rights "without alienating moderates."⁴

Of course, there is a long history here. Many people have compared the issues of slavery and abortion generally and the cases of *Dred Scott* and *Roe v. Wade* specifically.⁵ One of the most prominent lines of comparison, at least among conservative lawyers and politicians, has centered on the legal doctrine of substantive due process. During Ruth Bader Ginsburg's confirmation hearings in 1992, for

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1. Transcript of Second Presidential Debate, Washington University, St. Louis, Missouri (October 8, 2004), http://washingtonpost.com/wp-srv/politics/debatereferree/debate_1008.html [<https://perma.cc/ZH8N-DT4L>].

2. Timothy Noah, *Why Bush Opposes Dred Scott: It's Code for Roe v. Wade*, *SLATE* (Oct. 11, 2004), http://www.slate.com/articles/news_and_politics/chatterbox/2004/10/why_bush_opposes_dred_scott.html [<https://perma.cc/4BGN-2LT9>].

3. Katha Pollitt, *Roe = Dred*, *THE NATION* (Nov. 1, 2004), <http://thenation.com/article/roe-dred> [<https://perma.cc/Q3BE-SKVW>].

4. Peter Wallsten, *Abortion Foes Call Bush's Dred Scott Reference Perfectly Clear*, *LOS ANGELES TIMES* (Oct. 13, 2004), <http://articles.latimes.com/2004/oct/13/nation/na-dred13> [<https://perma.cc/S8RA-FFLG>].

5. See generally JUSTIN BUCKLEY DYER, *SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING* (2013).

example, Senator Orrin Hatch asserted that it was “impossible to distinguish *Dred Scott v. Sandford* . . . from the Court’s substantive due process/privacy cases like *Roe v. Wade*.”⁶ A decade later in a speech to Congress, Representative Mike Pence insisted that “the reasoning in *Dred Scott* is historically and intellectually almost identical to the reasoning that would be employed in 1973 in a decision known as *Roe v. Wade*.”⁷ Sitting in the background of both Hatch’s and Pence’s remarks was the standard conservative criticism of substantive due process as an illegitimate interpretive frame that moves from clear procedural safeguards for those accused of a crime to the judicial creation of faux substantive constitutional rights that are used arbitrarily to invalidate general, prospective laws that clash with (mainly progressive) policy goals.

We could lump *Lochner v. New York* in here, as well, as an unpopular case that conservative detractors of substantive due process jurisprudence criticize on the same grounds that they criticize *Dred Scott*. *Dred Scott* and *Lochner*, then, have become historical proxies for *Roe*—a smart rhetorical tactic, since *Lochner* has very few enthusiastic defenders and *Dred Scott* has next to none.⁸ Robert Bork was one prominent legal mind who gave intellectual credibility to these comparisons between *Dred Scott*, *Lochner*, and *Roe*. Quoting Professor David Currie, Bork insisted that

Dred Scott “was at least possibly the first application of substantive due process in the Supreme Court, the original precedent for *Lochner v. New York* and *Roe v. Wade*.” *Lochner* employed substantive due process to strike down a state law limiting the hours of work by bakery employees. *Roe* used substantive due process to create a constitutional right to abortion. *Lochner* and *Roe*, therefore, have a very ugly common ancestor. But once it is conceded that a judge may give the due process clause substantive content, *Dred Scott*, *Lochner*, and *Roe* are equally valid examples of constitutional law.⁹

The conclusion, of course, does not flow logically from the one-premise syllogism. That a judge may give the due process clause a substantive interpretation does not necessitate the conclusion that all substantive interpretations are equally valid. Bork’s second, unstated premise is that there are no right or wrong substantive interpretations, because substantive interpretations take us into the realm of

6. Senate Committee on the Judiciary, *Nomination of Ruth Bader Ginsburg to be Associate Justice of the United States*, 103rd Cong., 1st Sess. (July 22, 1993), S-HRG 103–482, 270.

7. Rep. Mike Pence (R-IN), 108th Cong., 1st Sess., *Congressional Record* (October 8, 2003), H.9366.

8. Although not an enthusiastic defender, Mark Graber does offer a nuanced and qualified defense of *Dred Scott* as a centrist decision that “fostered sectional moderation by replacing the original Constitution’s failing political protections for slavery with legally enforceable protections acceptable to Jacksonians in free and slave states.” See MARK GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 13 (2006).

9. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 32 (1990).

hopelessly subjective values and personal predilections—in which case all interpretations would be equally valid, or, perhaps more accurately, equally invalid.¹⁰

This, then, I take to be the standard conservative critique of substantive due process: there are no jurisprudential guideposts or rationally objective limiting principles that could possibly guide a substantive interpretation of the due process clause. For some originalists, this critique is not unique to the due process clause and could apply with equal force to every clause in the Constitution. Once we venture into the world of substantive judgments, the argument goes, we are in the realm of subjective values. A jurisprudence of substantive due process, therefore, cannot be done better or worse, because it cannot be done at all as a legitimate form of jurisprudence. Rather, it is an exercise of will and not judgment.

I hope to complicate this picture a bit, but let me begin with a few concessions. From one angle, the phrase substantive due process *is* oxymoronic. (It would be far better if we focused on due process of *law*, or emphasized the unavoidable substantive questions about what constitutes life, liberty, or property.) And progressive judges have, by and large, treated the doctrine of substantive due process as a vehicle by which to impose their policy preferences in some pretty big areas of constitutional law. Additionally, we arrived at our contemporary Fourteenth Amendment jurisprudence by a circuitous route, and much of our historical trajectory owes to the Supreme Court's narrow interpretation of the Fourteenth Amendment's Privileges or Immunities Clause in the 1870s.¹¹ Yet there is no putting the genie back in the bottle, and our attempt to de-legitimize the entire enterprise of substantive due process analysis comes at the cost of not engaging with the substantive issues on the table.

To challenge, or at least add some nuance to, the standard criticism of substantive due process, I offer three relatively modest claims. The first two are simply assertions that (I think) the work of recent scholarship substantiates. For the third I will provide some more in-depth examples drawn from the cases of *Dred Scott v. Sandford* and *Roe v. Wade*.

First, judges in the United States historically have not limited themselves simply to procedural norms under due process provisions. In fact, many of the early commentators traced the due process clause back to chapter 39 of Magna Carta, which bound the King to obey the law of the land.¹² (In context, the “law of the land” meant common law in the sense of law held in common and long established by custom and/or nature, since Magna Carta predates modern legislative

10. For a discussion of Robert Bork's deeper moral and epistemological skepticism, see GRAHAM WALKER, *THE MORAL FOUNDATIONS OF CONSTITUTIONAL THOUGHT* 14–15, 20 (1990).

11. See generally Walter Murphy, *Slaughter-House, Civil Rights, and Limits on Constitutional Change*, 32 AM. J. JURIS. 1–31 (1987).

12. See, e.g., 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 13 (Oliver Wendell Holmes Jr. ed., 12th ed. 1896); 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 573 (Boston: Little, Brown & Company, 4th ed. 1873). See also *Murray v. Hoboken Land Co.*, 59 U.S. 272, 276 (1855) (“The words ‘due process of law’ were undoubtedly intended to convey the same meaning as the words ‘by the law of the land’ in Magna Carta.”).

bodies.) Judges in the United States, especially but not exclusively after the Civil War, did not interpret “due process” or “law of the land” provisions to simply mean “whatever the legislature and executive happen to do as long as they follow some agreed upon procedures.” Indeed, as Louise Weinberg, Frederick Mark Gedicks, and others have argued, there was an established tradition of substantive due process jurisprudence in the American antebellum period.¹³ Yet even if we demonstrated that the recent scholarly studies purporting to uncover a tradition of substantive due process in American jurisprudence before the Civil War were all incorrect in their conclusions (something Matthew Franck argued recently in the journal *American Political Thought*¹⁴), there is widespread agreement that some version of substantive due process jurisprudence is at least very nearly contemporaneous with the Fourteenth Amendment itself.¹⁵

Second, the original scholarly criticism of substantive due process emerged in the early twentieth century from the political left and was leveled at the pre-New Deal Supreme Court. As Keith Whittington has summarized: “Progressive scholars such as Princeton political scientist Edward Corwin worked hard to identify the ‘substantive aspect’ of due process as a recent and misguided judicial innovation, foisted onto the constitutional corpus by a group of policy-oriented judicial activists concerned with defending corporate interests.”¹⁶ The doctrine of substantive due process has thus not always had the same partisan hue that it does today.

Third, and lastly, it is impossible to fully separate substantive moral and philosophical issues from clear procedural issues, and we inevitably bring basic moral propositions to bear in constitutional interpretation, including in interpretations of the due process clause. In the cases of *Dred Scott* and *Roe*—both regarded in some quarters as paragons of everything that is wrong with substantive due process—basic moral and philosophical issues were unavoidable.

13. See, e.g., James W. Ely, *The Oxymoron Revisited*, 16 CONST. COMMENT. 315–45 (1999); JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* (2003); MARK GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* (2006); 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); Louise Weinberg, *An Almost Archeological Dig: Finding a Surprisingly Rich Early Theory of Substantive Due Process*, 27 CONST. COMMENT. 163–75 (2010).

14. Matthew J. Franck, *What Happened to the Due Process Clause in the Dred Scott Case? The Continuing Confusion over ‘Substance’ versus ‘Process’*, 4 AM. POL. THOUGHT 120–48 (2015); see also Nathan S. Chapman and Michael S. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672–1807 (2012).

15. For an argument that the doctrine of substantive due process is part of the original public meaning of the Fourteenth Amendment (but not the Fifth Amendment), see Ryan Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408–512 (2010). Yet even originalists who are not persuaded by Williams’ argument do recognize the very early historical development of substantive due process in the jurisprudence of late nineteenth-century justices such as Stephen Field. See Franck, *supra* note 13 at 142–44.

16. Keith Whittington, *The Troublesome Case of Lochner*, LIBRARY OF LAW AND LIBERTY (Mar. 1, 2012), <http://libertylawsite.org/post/keith-whittington-the-troublesome-case-of-lochner/> [https://perma.cc/LF5Y-9946].

The case of *Dred Scott v. Sandford* developed out of a series of events beginning in the 1830s, when Dred Scott moved with his master from Missouri to the free state of Illinois and later the federal Wisconsin Territory, where slavery had been “forever prohibited” by the terms of the Missouri Compromise. When Scott returned to Missouri, he sued for his own freedom under the principle in *Somerset v. Stewart*, an English case in which Lord Mansfield famously said the

state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons, occasions, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law.¹⁷

Slavery, in other words, was contrary to natural law. In the absence of a statute creating and regulating an unnatural positive-law property right in another human being, the common law therefore did not recognize property in slaves.

Note that slavery was distinct among other species of property because enslaving a person violated the natural law. Owning a horse or hog, by contrast, was *not* so odious to nature that nothing could be suffered to support it but positive law. If someone traveled from Virginia to England with another form of property, e.g., a horse, ownership was presumed to be legitimate unless such ownership contravened an established law regulating or limiting property rights for the common good. The assumption was exactly the reverse with slavery. This is relevant to the *Dred Scott* case, because American jurisprudence both in the north and south had long recognized the principle from *Somerset* as being relevant to cases of enslaved human beings who made their residence in jurisdictions that did not sanction or regulate unnatural slave property by positive legislation. In the absence of such legislation, these individuals were free under the law of nature. As free men and women, they then could not be put back into a state of slavery—to have their liberty deprived—without due process of law.

When Scott sued for his freedom in Missouri court, there was a line of state-level precedents that acknowledged the extra-textual point that slavery is against natural law, and recognized for this reason the freedom of others in substantially similar circumstances to Scott’s. On these grounds the St. Louis Circuit Court recognized Scott’s freedom as well.¹⁸ When Scott’s case went to the Missouri Supreme Court on appeal, however, the Court discarded the *Somerset* principle. The old saying after *Somerset* was “once free, always free”; instead, the Missouri Court held that Scott’s status as a slave re-attached upon his return to Missouri.¹⁹

17. *Somerset v. Stewart* (1772) 98 Eng. Rep. 499, 1 Lofft Rep. 17, 19.

18. *Scott v. Emerson*, ST. LOUIS CIRCUIT COURT HISTORICAL RECORDS PROJECT, <http://www.stlcourtrecords.wustl.edu/display-case-images.php?caseid=7150&page=1> [https://perma.cc/R7NG-PBEP]. For a general history, see DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978).

19. *Scott v. Emerson*, 15 Mo. 576, 579 (1852).

He might have been legally entitled to freedom in Illinois or the Wisconsin Territory, according to the decision, but he was not in Missouri. Even presuming the constitutionality of the Missouri Compromise, with its prohibition of slavery in the territories north and west of Missouri,²⁰ the fact remained that Scott lived in the Wisconsin Territory without the federal authorities in that jurisdiction ever recognizing his freedom. He then returned to Missouri where he had been legally enslaved before he left. The *only* reason why Missouri judges might grant Scott his freedom is because of the long-standing background assumption about slavery's contravention of natural law. Consider a hypothetical scenario the majority opinion presented: Suppose Congress passed a law forever prohibiting the ownership of horses in the Utah Territory. Now suppose a citizen of Missouri traveled to the Utah Territory with his horse, resided there for a period of years without any authority in that federal jurisdiction challenging his right to maintain property in a horse, and then returned to Missouri with his horse as his property. Would that man forfeit his property right in his horse under the laws of Missouri? The court presumed the answer is *no*—and offered the illustration about horses in the Utah Territory as a “case in point” proving that Scott remains a slave under Missouri law.²¹ The analogy only works, however, if there is no moral difference between property in horses and human beings, or if the moral difference between horses and human beings makes no difference in the day-to-day business of courts.

When Scott's case finally wound its way to the United States Supreme Court, Chief Justice Roger Taney took a different tack in the case. He argued that the prohibition of slavery in the Missouri Compromise was an unconstitutional violation of the Fifth Amendment. His argument rested on four premises: (1) the Constitution distinctly and expressly affirms the right of citizens to own property in slaves;²² (2) the Fifth Amendment prohibits the federal government from depriving persons of their property without due process of law;²³ (3) and “an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offense against the laws, could hardly be dignified with the name due process of law.”²⁴ An additional premise, for Taney, is that (4) African slaves and their descendants are not, and cannot become, members of the political community for whom the Constitution is written—an argument the Chief Justice makes to deny that African-Americans could themselves claim federal, constitutional due process rights in federal courts.²⁵

20. Missouri Compromise (1820), transcript available at <https://www.ourdocuments.gov/doc.php?flash=false&doc=22&page=transcript> [<https://perma.cc/9A7K-BSCX>].

21. *Scott*, 15 Mo. at 581. The opinion specified in its hypothetical a prohibition on owning *black* horses, though the gratuitous classification based on color is tangential to the point being made.

22. *Scott v. Sandford*, 60 U.S. 393, 451 (1857).

23. *Id.* at 450.

24. *Id.* at 450.

25. *Id.* at 403.

Just about everything that Taney said in his opinion was wrong, but that shouldn't prevent us from seeing that the case was intertwined with deeper moral and philosophical issues. Working backward, Taney saw that Scott's claim to sue in federal court depended on his status as a citizen. Whether he was a citizen depended on whether he was free. And whether he was free depended on a claim involving natural law, which was bound up with the question of rightful property. The dissenters in the case challenged Taney's interpretation at each turn, including his contention that the Missouri Compromise was a violation of due process. It is important to note, however, that the dissenters did *not* contend that Congress had authority to ban all property from the federal territories so long as the ban took the form of a general and prospective statute. Rather, as Taney noted about his own critics, "[i]t seems . . . to be supposed that there is a difference between property in a slave and other property, and that different rules may be applied to it in expounding the Constitution of the United States."²⁶ On this point, at least, Taney was correct. In his dissent, Benjamin Curtis argued that it

is necessary, first, to have a clear view of the nature and incidents of that peculiar species of property which is now in question. It is not only plain in itself, and agreed by all writers on the subject, but is inferable from the Constitution that [slavery] is contrary to natural right.²⁷

John McLean, as well, in his less celebrated dissent, noted that "a majority of the court have said that a slave may be taken by his master into a Territory of the United States, the same as a horse, or any other kind of property."²⁸ But McLean asserted that slaves were not a species of property held rightfully because the "slave is not mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence."²⁹

Republicans who were politically energized by their opposition to the *Dred Scott* ruling also emphasized the moral difference between slave property and other forms of property. Debating Stephen Douglas in Quincy, Illinois, for example, Abraham Lincoln observed:

When [Douglas] says that slave property and horse and hog property are alike to be allowed to go into the territories, upon the principles of equality, he is reasoning truly, if there is no difference between them as property; but if the one is property, held rightfully, and the other is wrong, then there is no equality between the right and the wrong.³⁰

26. *Id.* at 452.

27. *Id.* at 625.

28. *Id.* at 550.

29. *Id.* at 550.

30. Sixth Debate with Stephen A. Douglas, at Quincy, Illinois (Oct. 13, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 257 (Roy P. Basler ed., 1953).

It is true that Lincoln thought the Missouri Compromise was legitimate on procedural grounds—that it was a general and prospective statute that announced in advance the prohibition on slavery in the territories, and, therefore, did not violate the due process rights of slave owners.³¹ Lincoln thought Congress had the constitutional power to ban slavery from the territories and did in fact do so through positive legislation, but we should not conclude that Lincoln was therefore simply a legal positivist, or one who thought the positive law could be fully comprehended and applied without inquiring into the underlying substantive issues that found their grounding ultimately in nature.

What Lincoln—following Curtis and McLean—claimed is that the entire enterprise of constitutional law and constitutional politics rests on the reality of a deeper moral foundation.³² What is *property*, rightfully understood?³³ What does it mean to be *law*? What is a *person*? We bring answers to these questions to bear on the more technical issues in dispute in the case, and they matter for how we think about jurisdictional issues, the question of Supreme Court authority, federalism, citizenship, due process, and a host of other thorny, difficult questions in the *Dred Scott* case.

The Supreme Court's ruling did not settle these issues, of course. As Lincoln noted in his 1858 "House Divided" speech in Springfield, "th[e] agitation has not only, *not ceased*, but has *constantly augmented*. In *my* opinion, it *will* not cease, until a *crisis* shall have been reached, and passed."³⁴ That crisis was reached, and passed, in the U.S. Civil War and its aftermath. A decade after Lincoln's speech—and three years after the formal abolition of slavery by the Thirteenth Amendment—the states ratified the Fourteenth Amendment to the U.S. Constitution, specifically addressing various aspects of the *Dred Scott* decision. According to the terms of that amendment, all persons born in the United States are citizens both of the nation and the state where they reside. States are now explicitly prohibited from making or enforcing laws that abridge the privileges or immunities of citizens; depriving persons of life, liberty, or property without due process of law; or denying persons the equal protection of the laws. To this the drafters added a new enumerated congressional power to "enforce, by appropriate legislation, the provisions of this article."³⁵

31. See, for example, Lincoln's debate prep notes from September 15, 1858, noting the Republican position that "if there be a law of Congress or territorial legislature telling the slaveholder in advance that he shall not bring his slave into the Territory upon pain of forfeiture, and he still will bring him, he will be deprived of his property in such slave by 'due process of law.'" *Id.* at 101.

32. See Justin Buckley Dyer, *Lincolnian Natural Right, Dred Scott, and the Jurisprudence of John McLean*, 41 POLITY 63–85 (2009).

33. To say that property has a basis in reality is not to deny that there is a range of ways that the government may legitimately regulate and limit property rights. It is only to say that property is not merely conventional, and that the structure of moral reality provides the foundation for law. For a related discussion, see ADAM MACLEOD, PROPERTY AND PRACTICAL REASON (2015).

34. "A House Divided": Speech at Springfield, Illinois (June 16, 1858), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 461, 461 (Roy P. Basler ed., 1953).

35. U.S. Const. amend. XIV, § 5.

Fast forward 100 years to the case of *Roe v. Wade*. Philosophical changes over the preceding century tilled the cultural soil and made the time ripe for Jane Roe's challenge to Texas's restrictive abortion statute. Some of these changes were lucidly captured by a 1970 article in the journal *California Medicine*—published the same year Roe initially filed her suit against Dallas District Attorney Henry Wade. Supportive of what it called the “clearly . . . changing attitudes toward human abortion” among elite classes of society, the article framed the debate as one between the “traditional Western ethic” that had long emphasized the “intrinsic worth and equal value of every human life regardless of its stage or condition” and the new social ethic of “relative rather than absolute values on such things as human lives.”³⁶ Yet because the old ethic had

not yet been fully displaced [in society] it ha[d] been necessary to separate the idea of abortion from the idea of killing The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous whether intra- or extra-uterine until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because while a new ethic is being accepted the old one has not yet been rejected.³⁷

That old ethic had animated the Fourteenth Amendment, and the legacy of slavery provided the immediate backdrop for debates in the Thirty-Ninth Congress about the most prudent way to secure individual natural rights in a federal and republican constitutional regime.³⁸

Although it is sometimes suggested that people just were not thinking about abortion in the 1860s—that the issue would not have crossed the minds of the men who drafted and ratified the Fourteenth Amendment—it is not true. The 1860s was a period of intense reform efforts led by the American Medical Association, and many states—both before and after the Civil War—had begun strengthening old common law rules about abortion and putting them into statutes. Consider, for example, the Ohio Committee on Criminal Abortion, a legislative committee tasked with making recommendations for an anti-abortion statute in Ohio.³⁹ The committee did its work during the same session that the Ohio legislature voted to ratify the Fourteenth Amendment.⁴⁰ In the committee's report, reprinted in the appendix to the Ohio Legislative Journal, they describe

36. *A New Ethic for Medicine and Society*, 113 CALIF. MED. 67–68 (1970).

37. *Id.* at 68.

38. For a recent account of the work of the Thirty-Ninth Congress, see FORREST NABORS, *FROM OLIGARCHY TO REPUBLICANISM: THE GREAT TASK OF RECONSTRUCTION* (Univ. of Mo. Press, 2017).

39. THE JOURNAL OF THE SENATE OF THE STATE OF OHIO, FIFTY-SEVENTH GENERAL ASSEMBLY, App. 233–34. (Columbus, OH: L.D. Myers & Bro., 1867).

40. *Id.*

abortion as “child-murder” and note that the best available scientific evidence suggests that a “foetus [sic] in utero is alive from the very moment of conception.”⁴¹ “To extinguish the first spark of life,” the committee continued, quoting Thomas Percival’s 1803 *Medical Ethics*, “is a crime of the same nature, both against our Maker and society, as to destroy an infant, a child, or a man.”⁴² Appealing to a prize-winning American Medical Association essay, they conclude that the “willful killing of a human being, at any stage of its existence, is murder.”⁴³

In this session, legislators in Ohio voted to ratify the Fourteenth Amendment *and* pass a statute banning abortion unless necessary to preserve a woman’s life.⁴⁴ That statute stayed on the books in Ohio until the Supreme Court declared it unconstitutional, by implication, in *Roe v. Wade*.⁴⁵ A question, then: how could the Court declare unconstitutional a statutory regime in place in 1868 and left undisturbed for over a century? What theory or new social reality would countenance such a drastic departure from past precedent? The answer, at least in part, comes from the deliberately falsified history of abortion that the Court relied on in *Roe*.⁴⁶ Briefly, the new history of abortion spun off by abortion advocates such as the lead counsel for the National Association for the Repeal of Abortion Laws, Cyril Means, put forth two novel theses. First, that the reason for the mid-century state-level abortion statutes was to protect women from dangerous surgeries and abortifacient drugs and *not* to protect unborn human beings, whom the law always considered non-persons.⁴⁷ Second, that at the time of the American founding “women enjoyed a common-law liberty to terminate at will an unwanted pregnancy.”⁴⁸ Finally, that because medical technology had improved, abortion was now safer for women.⁴⁹ Taken together, the implication of Means’ articles

41. *Id.* at 233.

42. *Id.* at 233–34.

43. *Id.* at 234 (internal quotation marks omitted).

44. See GENERAL AND LOCAL LAWS AND JOINT RESOLUTIONS PASSED BY THE FIFTY-SEVENTH GENERAL ASSEMBLY OF THE STATE OF OHIO 202–03 (Columbus, OH: L.D. Myers & Bro., 1867).

45. See OHIO REV. CODE ANN. § 2901.16 (West 1970).

46. For a comprehensive account of this history, see JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006).

47. See generally Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968). Means later described the “original contribution” of this article as “the revelation of a truth that had been long forgotten: that the sole historically demonstrable legislative purpose behind these statutes was the protection of pregnant women from the danger to their lives imposed by surgical or potional abortion, under medical conditions then obtaining, that was several times as great as the risk to their lives posed by childbirth at term, and that concern for the life of the conceptus was foreign to the secular thinking of the Protestant legislators who passed these laws.” See Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbra Right or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335, 336 (1971).

48. Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbra Right or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335, 336 (1971).

49. See *id.* at 396.

was that a decision overturning these statutes would restore a common-law liberty and still remain within the spirit of those mid-century statutes.

These claims were false, and Jane Roe's legal team evidently knew they were false when putting together briefs for the Court. David Tundermann, a Yale law student and intern working on Roe's case, circulated a memo in 1971 that pointed out flaws in Means' historical research, but nonetheless bluntly laid out the team's strategy:

Where the important thing to do is to win the case no matter how, however, I suppose I agree with Means' technique: begin with a scholarly attempt at historical research; if it doesn't work out, fudge it as necessary; write a piece so long that others will read only your introduction and conclusion; then keep citing it until the courts begin picking it up. This preserves the guise of impartial scholarship while advancing the proper ideological goals.⁵⁰

The claims Means advanced in his research have been repeated as though they are true by elite lawyers, journalists, historians, and judges, including Justice Harry Blackmun in his opinion in *Roe v. Wade*.⁵¹ In that case, Blackmun and the Court argued that the due process clause of the Fourteenth Amendment protects an individual liberty right that invalidates these century-old state abortion statutes. The Court did this, in part, by serenely refusing to wrestle with the biological, ontological, and moral status of unborn human beings, satisfied that their cursory historical analysis had demonstrated that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."⁵²

It is here, principally, where the substantive parallels between *Dred Scott* and *Roe* come into focus. Yes, both cases involved controversial substantive readings of the due process clause, and both are in this sense examples of "substantive due process." But on closer examination, each case highlights how textual interpretation depends, implicitly or explicitly, on substantive moral premises—whether about property or personhood or even rules of interpretation and judicial authority. Just as some of the Court's detractors in *Dred Scott* emphasized the substantive distinction between legitimate property and property in human beings, attorneys for the state of Texas drew out a substantive distinction between legitimate medical procedures and abortion. "The attack on the Texas statute," the brief asserts, "assumes this discredited scientific concept [that the unborn human being is not an independent person] and argues that abortions should be considered no differently than any medical measure taken to protect maternal health thus completely ignoring the developing human being in the mother's womb."⁵³

50. Memo from David Tundermann to Roy Lucas, "Legislative Purpose et al.," 5 August 1971, Lucas Box 13, Wesleyan University Library.

51. For a more detailed account of elite reliance on this history, see JUSTIN BUCKLEY DYER, *SLAVERY, ABORTION, AND THE POLITICS OF CONSTITUTIONAL MEANING* 105–32 (2013).

52. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

53. Brief for Appellee at 31, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128048.

Yet, as they note, their task was to “show how clearly and conclusively modern science—embryology, fetology, genetics, perinatology, all of biology—establishes the humanity of the unborn child.”⁵⁴ This they did with detailed descriptions and pictures of embryological development. The Court simply sidestepped all of this by feigning neutrality on the question of when life begins and insisting, at any rate, that *constitutional* personhood begins at birth.

The claims of the natural-law tradition, of course, are not a panacea that settles every dispute. Beginning with the premise that slavery is unjust according to the natural law, or that human beings in the womb are real human beings with intrinsic dignity, does not settle any particular case. We still must wrestle with questions about jurisdiction and authority, original understandings and developed precedent, political calculations and prudential compromises. This entire enterprise of constitutional law, however, is a moral enterprise. The lawyer or judge who says he is doing constitutional law without engaging substantive moral questions is like the man who sings a song with the lyrics “I am not singing.” It is a self-refuting endeavor.⁵⁵ Better to be explicit about our moral premises and analyses. In this vein, *Dred Scott* and *Roe v. Wade* do stand out among our cases, but not for the reason Robert Bork and other originalists have alleged. Let us at least acknowledge that the issues and contemporaneous histories of those cases are more complex than the simple dichotomy between amoral procedure and moral substance. At a minimum, we must dive in and ask hard questions about who or what counts as legitimate property, what it means to be a person, what distinguishes liberty from license, what it means to be law, what moral understandings guided those who wrote and amended our Constitution, and whether and why those moral understandings should continue to guide us today.

54. *Id.*

55. For a more formal argument that procedural conventionalism is self-referentially incoherent, see PAUL R. DEHART, UNCOVERING THE CONSTITUTION’S MORAL DESIGN 126–28 (2007).